

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 30 November 2020

**Public Authority:** Kirby Muxloe Parish Council

**Address:** The Parish Office  
Station Road  
Kirby Muxloe  
Leicestershire  
LE9 2EN

#### **Decision (including any steps ordered)**

---

1. The complainant has requested information regarding objections raised with the authority's external auditor.
2. The Commissioner's decision is that Kirby Muxloe Parish Council has appropriately relied upon section 41 to withhold the requested information. However, it breached section 10 and section 16 in its handling of the request.
3. The Commissioner does not require any steps.

## Request and response

---

4. The complainant originally started a dialogue with Kirby Muxloe Parish Council ('the council') with an enquiry into why audit details for recent years hadn't been published on the council's website. The council explained that they hadn't been signed off yet by the external auditor ('the Auditor'). This was because a number of objections had been raised by a local resident directly to the Auditor, who was investigating the matters.
5. The complainant enquired further regarding the length of time to investigate the issues. The council advised that *"Sadly the number of objections raised for each financial year, which for 2016/17 accounts totalled just short of 40 A4 typed pages, takes considerable time to investigate"*
6. On 10 April 2020, the complainant wrote to the council and requested information in the following terms:  
  
*"Thanks again for a prompt and helpful response to my enquiry. I agree that 40 pages of objections seems rather considerable; I'm quite intrigued. I'm wondering if it would be possible to ask you for a pdf copy, so I can read about what's actually going on for myself."*
7. The council responded on 14 April 2020 and stated it could not provide a copy of the requested documentation which is marked *"Strictly Private & Confidential."*
8. The complainant responded on 17 April 2020 and confirmed that the council should deal with the request formally in terms of the FOIA.
9. The council replied on 17 April 2020 stating that the objector had stipulated that the documentation could not be passed to any third party without their prior consent.
10. The complainant responded on 18 April 2020 and disputed the reason given by the council, stating that it doesn't override the FOIA. The complainant also suggested that their contact details could be given directly such that direct contact could be made to agree a way forward.
11. The council responded on 4 May 2020 and stated that they had consulted with the Auditor who had provided the documentation to the council. The council advised that as the requester was not registered as a resident of the parish council it would not be proper to provide the information.

12. The complainant responded on 15 May 2020 and advised the council that it had still not stated what exemptions were engaged to withhold the information, and that the statutory period of 20 working days to respond to the request had passed. The complainant requested an internal review.
13. On 20 May 2020, the council responded and stated that if the complainant was dissatisfied with the response of 4 May 2020 then they should complain to the Information Commissioner.
14. The Information Commissioner wrote to the council on 10 July 2020 and advised that the response to the request had not fully complied with the provisions of the FOIA because it did not either supply the applicant with a copy of the information, or issue a refusal notice which complies with the legislation.
15. On 24 July 2020 the council wrote to the complainant and provided a refusal notice which advised that the information was withheld on the basis of section 40(2) and section 41.
16. During the course of the investigation, the council wrote to the complainant on 5 October 2020 with an updated refusal notice which advised that the information was withheld on the basis of sections 12, 33, 36, 40(2), 41, and 43. With regard to section 16, the duty to provide advice and assistance, the council advised the complainant (in reference to the '40' pages stated in the request) "*... the number of pages you quote relates only to the Council Responses to Objections in year 2017/2018, at present with the External Auditors...*".
17. During the course of the investigation the council advised the Commissioner that it no longer wished to rely upon section 33, 36 or section 43 for withholding the information.

## **Scope of the case**

---

18. The complainant contacted the Commissioner initially on 30 June 2020 to complain that the council had not provided a proper response to his request. Following the refusal notices provided by the council the complainant advised that they remained dissatisfied with the way the request for information had been handled and the council's refusal to provide the requested information.
19. The complainant confirmed to the Commissioner that they are seeking a copy of the 40 page objection letter sent by an objector ('the Third Party') to the council.

20. During the course of the investigation it has become apparent that such a document does not exist. The council initially advised that the "*40 pages of objections*" referred to by the clerk was factually incorrect.
21. The council advised the complainant, in the refusal notice of 5 October 2020, that the clerk may have been making reference to a document the council had prepared for the Auditors giving its responses to the objections raised.
22. The Commissioner has reviewed the response document provided by the council for the Auditors and can confirm that it doesn't list the objections raised by the Third Party and therefore is not in scope of the request.
23. After further questions from the Commissioner, the council latterly advised that the clerk was referring to the objections raised by the Third Party but had made an incorrect assumption regarding the number of pages. The Commissioner is aware that this is a contradictory explanation in terms of its response of 5 October 2020 to the complainant.
24. The Commissioner therefore asked the council what information it holds which would answer the complainants request. The council advised it holds the individual objections raised by the Third Party. The Third Party sent the objections ('the Objections') to the Auditor and provided the council with a paper copy.
25. The Commissioner considers the scope of the case is to consider whether, the council has correctly engaged sections 40(2), 41, and 12 to withhold the requested information, being the Objections. Furthermore, she will consider whether any procedural breaches arose in the handling of the request.

## **Reasons for decision**

---

### **Section 41(1) – Information provided in confidence**

26. Section 41(1) of the FOIA states that information is exempt from disclosure if –
  - (a) *It was obtained by the public authority from any other person (including another public authority), and*
  - (b) *The disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

27. The council has confirmed that it received the withheld information from the Third Party. Having read a sample of the information, the Commissioner acknowledges that it comprises of the objections raised by the Third Party to the Auditor and includes a statement that a paper copy will be supplied to the council. The Commissioner is therefore satisfied that the information meets the criteria (a), being obtained from another person.
28. The Commissioner's guidance on section 41<sup>1</sup> states that a public authority wishing to rely the exemption should consider the test of confidence set out in *Coco v A N Clark (Engineers) Limited [1968] FSR 415* in assessing whether a disclosure would constitute an actionable breach of confidence.
29. *Coco* suggested that three elements were usually required to bring an action for a breach of confidence:
  - the information must have the necessary quality of confidence,
  - it must have been imparted in circumstances importing an obligation of confidence, and
  - there must have been an unauthorised use of the information to the detriment of the confider.

#### Necessary quality of confidence

30. The council stated that the nature of the information speaks for itself and that it could not be considered trivial.
31. Whilst the council have not given a particularly robust response, the Commissioner has reviewed the withheld information and finds that it is not trivial. Written objections to the council's accounts, reported by a third party to the council's auditors are clearly important, no matter what the final decision or outcome is regarding the accounts.
32. The Commissioner notes that some of the information referenced or included as attachments to the Objections is publicly available, being evidence put forward to explain the issues raised. However, within the

---

<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

Objections, this information has been referenced in the context of making the case for the objections raised by the Third Party.

33. The Commissioner is therefore satisfied that the information contained within the Objections has the necessary quality of confidence because it is not trivial and is not information that would otherwise be available to the public.

#### Circumstances importing an obligation of confidence

34. The council advised that the Third Party indicated in writing that the documents are in strict confidence. The council considers this is an explicit notice of the Third Party's "*demands to any disclosures.*"
35. The Commissioner has reviewed the covering letter to the Objections sent by the Third Party. It states that the information is provided in confidence, that it must not be processed in whole or in part with any person without prior consent and that it should not be shared with any former employees or councillors without express permission.
36. The Commissioner is therefore satisfied that the information was imparted in circumstances importing an obligation of confidence.

#### Detriment to the confider

37. The council argues that any unauthorised disclosure would cause specific detriment "*in the eyes of those concerned.*" The Commissioner finds this statement vague and it does not provide any evidence for her to consider in terms of detriment from disclosure to the Third Party.
38. However, the Commissioner's guidance on section 41 sets out that established case law takes the view that any disclosure which intrudes on the privacy of an individual can be viewed as a form of detriment in its own right. This follows the Tribunal's finding in *Bluck v ICO and Epsom and St Helier University NHS Trust* (EA/2006/0090, 17 September 2007).
39. In practical terms, this means that, where the information relates to a personal or private information matter, the authority won't be required to demonstrate that the confider would suffer any tangible detriment from disclosure (such as financial loss).
40. However, authorities shouldn't interpret this to mean that they can completely disregard the third limb of Judge Megarry's test if the information is personal or private. This is because they will still have to show that disclosure would be an unauthorised use of the information.
41. The Commissioner has established the Objections provided to the council constitute information of a confidential nature. The

Commissioner considers that the objections raised are the personal views of the Third Party, that they serious in nature, and that the individuals involved can be easily ascertained within the local community. As such the Commissioner considers that disclosure may cause distress or embarrassment to the Third Party, due to their privately reported concerns being made public.

42. As it is not necessary for there to be any detriment to the confider in terms of tangible loss for this information to be protected by the law of confidence, the Commissioner therefore accepts the council's position.
43. The complainant contends that confidence could be maintained by redaction of any names or personal data. However, as laid out above, the Commissioner has established that the information was imparted with an obligation of confidence and that disclosure would be an unauthorised use of the information. The Commissioner does not consider that redaction of personal information would change this position.
44. Although section 41 is an absolute exemption, the law of confidence contains its own built in public interest test with one defence to an action being that disclosure is in the public interest. The Commissioner has therefore asked the council to explain why it was concluded that there was not a sufficient public interest in disclosure of the information in order to defend any actionable breach.
45. The council explained that the Objections were raised by the Third Party directly to the Auditors. The council considers that the issues of public concern are therefore being addressed through other means of scrutiny and regulation by the Auditors. The council considers that this therefore weakens the public interest in disclosure.
46. The complainant contends that scrutiny by the Auditors does not substitute the public interest in disclosure, stating rather that it increases the public interest.
47. There will always be a public interest in accountability and transparency, but the Commissioner notes that this is only a weak interest and is unlikely to override the rights of individuals on its own.
48. The complainant has provided no information to suggest that, in withholding the information, the council is concealing details of objections raised against its accounts. The Commissioner is satisfied that there is nothing contained within the withheld information which would give her cause to doubt that the Objections are being dealt with by the Auditors appropriately.

49. The Commissioner cannot identify any substantial public interest which would justify the intrusion into the privacy of the Third Party. She is therefore satisfied that, in the event of a claim for a breach of confidence, the council would have only a very weak public interest defence and thus such a claim would be likely to succeed.
50. As disclosure outside of the FOIA would constitute an actionable breach of confidence, the Commissioner is satisfied that the council is entitled to rely on section 41 of the FOIA to withhold the requested information.
51. As the Commissioner has found that the council was correct to withhold the information on the basis of section 41, she has not needed to consider the other exemptions it has cited.

### **Section 10(1) of the FOIA – Time for compliance with request**

52. Section 10 (1) of the FOIA states that a public authority must respond to a request promptly and “no later than the twentieth working day following receipt”.
53. In this case the complainant requested the information on 10 April 2020. The council gave a number of responses, all of which were defective in terms of the section 17 requirements for a refusal notice.
54. However, following the Commissioner’s intervention, the council gave a refusal notice on 24 July 2020. The council also provided a revised refusal notice during the course of the investigation, in which it then withdrew a number of the exemptions previously cited.
55. In this case, the council issued its refusal notice for section 41(1) outside 20 working days, and therefore breached section 10(1).
56. As the refusal notice was latterly provided, no steps are required.

### **Section 16 – duty to provide advice and assistance**

57. Section 16 states:

*“(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it”*

58. In circumstances where a request is ambiguous section 16 requires a public authority to provide appropriate advice and assistance to the requestor so as to enable them to clarify their request.



59. In her guidance on section 16<sup>2</sup> the Commissioner sets out the responsibilities on a public authority to provide advice and assistance. It states that "*...it is important that the applicant is contacted as soon as possible, preferably by telephone, fax or e-mail, where more information is needed to clarify what is sought.*"
60. In this case there was clearly ambiguity in relation to the information requested and the information held.
61. The Commissioner notes that with regard to section 16, the council provided advice on 5 October in its final refusal notice, which was issued during the Commissioner's investigation. In this response the council advised the complainant, in reference to the '40' pages stated in the request, "*... the number of pages you quote relates only to the Council Responses to Objections in year 2017/2018, at present with the External Auditors...*".
62. As discussed earlier in this decision notice, the council had advised the Commissioner that the 40 pages relates to responses about the objections raised by the third party, but was mistakenly referred to originally as being entirely comprised of the Third Party's objections. This means that the advice provided to the complainant was factually incorrect.
63. The Commissioner considers that the council gave neither reasonable nor timely advice and assistance to the complainant. She therefore finds that the Council has breached section 16.
64. However, as the situation regarding the information held by the council has been addressed in this decision notice, no further action is required.

## **Other matters**

---

65. The complainant raised concerns that the council is being obstructive and that it persistently "*misdescribed*" a 40 page letter.
66. Furthermore, the complainant raised concerns that the council's responses were confused and referred to the DPA and the Human Rights Act.

---

<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1624140/duty-to-provide-advice-and-assistance-foia-section-16.pdf>

67. The Commissioner is sympathetic with the complainants view in this respect. She finds that the council's responses, both to the complainant and herself, to be confused and containing irrelevant information.
68. Although they do not form part of this decision notice the Commissioner highlights the following to the council:
- The Section 45 - Code of Practice<sup>3</sup>. In particular with regard to the clarification of a request.
  - The Commissioner's guidance on interpreting and clarifying a request<sup>4</sup>.
  - The Commissioner's guidance on writing a refusal notice<sup>5</sup>. Particularly paragraph 12 which outlines what is required in a refusal notice.
  - The Commissioner's request handling flowchart<sup>6</sup>

---

<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/1624144/section-45-code-of-practice-request-handling-foia.pdf>

<sup>4</sup> <https://ico.org.uk/media/for-organisations/documents/1162/interpreting-and-clarifying-a-request-foia-eir-guidance.pdf>

<sup>5</sup> [https://ico.org.uk/media/for-organisations/documents/1211/refusing\\_a\\_request\\_writing\\_a\\_refusal\\_notice\\_foi.pdf](https://ico.org.uk/media/for-organisations/documents/1211/refusing_a_request_writing_a_refusal_notice_foi.pdf)

<sup>6</sup> [https://ico.org.uk/media/for-organisations/documents/1167/flowchart\\_of\\_request\\_handling\\_under\\_foia.pdf](https://ico.org.uk/media/for-organisations/documents/1167/flowchart_of_request_handling_under_foia.pdf)

## Right of appeal

---

69. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

70. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
71. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Andrew White**  
**Head of FOI Casework and Appeals**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**