

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 March 2022

Public Authority: Bristol City Council
Address: The Council House
College Green
Bristol
BS1 5TR

Decision (including any steps ordered)

1. The complainant requested a copy of a report submitted to the council by a campaign group regarding its Sex Entertainment Venue (SEV) policy. The council applied section 41 (information provided in confidence) and 40(2) (personal data of third parties) to withhold the report. In its internal review the council changed its opinion to find that it held no information falling within the scope of the request.
2. The Commissioner has decided that the council did not initially comply with the requirements of section 16 of the FOIA (advice and assistance) in aiding the complainant to reformulate her request for information to encompass the information which it did hold. The Commissioner's decision regarding the application of the exemptions to the information which it did hold is that the council was correct to apply section 41 to withhold this information from disclosure. It has not been necessary to also consider the application of section 40(2) to the information.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 8 April 2021, the complainant wrote to the council and requested information in the following terms:

'Would you please send me all the evidence and reports that have been submitted to the council by the Fawcett Society, that show the negative impact that SEV's have and justify a nil cap policy'.

5. A nil cap policy would prevent the renewal of licences for SEV's within the area served by the council. The Commissioner understands that there are currently two premises which are covered by these licences.
6. The council responded on 22 April 2021 and withheld all of the information falling within the scope of the request under the exemption in section 40(2) of the Act (personal data).
7. On 14 May 2021 the complainant asked the council to carry out an internal review of its decision. Following its internal review, the council wrote to the complainant on 4 June 2021. It amended its position and said that no information was held falling within the scope of the request.

Scope of the case

8. The complainant contacted the Commissioner on 9 June 2021 to complain about the way her request for information had been handled.
9. She considers that the council was not correct to withhold the information from disclosure under the exemptions applied. She also questioned why it suddenly changed its view, that the information was exempt, to suggest that no information was held. She argued that she has been told separately that relevant information is held.
10. The council subsequently clarified to the Commissioner why it changed its position, but accepted that under the circumstances it should have explained to the complainant why it had reached that conclusion, and offered the complainant the opportunity to amend her request accordingly. This is considered in the analysis of section 16 below. The council also accepted that as the difference between the information requested and that held is marginal it would consider the information it did hold. This was accepted and agreed by the complainant.
11. The first question for the Commissioner is therefore whether the council failed to comply with the requirements of section 16 of FOIA in that it failed to provide advice and assistance to the complainant in order to aid her in reformulating her request.

12. Secondly, the Commissioner must consider whether the exemptions which were applied by the council were applied correctly.

Reasons for decision

Section 16 – Duty to provide advice and assistance

13. Section 16(1) of the FOIA provides that public authorities have a duty to provide advice and assistance to any person making, or intending to make, an information request.
14. The council explained why it had changed its position to state that no information was held in its internal review. It said that the complainant's request was for the "evidence and reports that have been submitted to the council by the Fawcett Society". The council, however, holds information supplied it by Bristol Fawcett. It said that this was a completely separate body, but clarified that Bristol Fawcett no longer exists.
15. The withheld information is different to the requested information. The council's initial response did not recognise this, however in its internal review it amended its position to state that no information is held falling within the scope of the complainant's request for information. It did not, however, explain why it had reached that conclusion, and failed to provide assistance to the complainant by explaining the distinction it had identified, and ask her if she would like the Bristol Fawcett report to be considered in place of the information actually requested.
16. In its response to the Commissioner, however, the council recognised that, as the information is so closely related to that requested, it should have sought to clarify with the complainant whether the information it does hold is information she wished to request access to. It recognised that it should have done this under its obligations under section 16 of FOIA. It clarified, however, that it still considers that the exemptions apply in order to withhold the information it holds.
17. The Commissioner contacted the complainant and asked her whether she was happy for the council to consider the information it held from Bristol Fawcett rather than the Fawcett Society as her request had stipulated. The complainant agreed that she wanted it to do so.
18. The Commissioner agrees with the council that it should have sought to clarify with the complainant whether she wished to access information relating to Bristol Fawcett, rather than to the Fawcett Society. He is also of the view that it was unhelpful and in breach of its obligation under

section 16(1) of the FOIA for the council to state at internal review stage that it held no information falling within the scope of the request, without giving any explanation for this change in position.

19. The Commissioner has considered the technical implications of the withheld information discussed later in this notice not being within the specific scope of the complainant's request of 8 April 2021. He has chosen to take a pragmatic approach to this point, and to consider whether the information held by the council, that would have been within the scope of the request had the request made reference to Bristol Fawcett, is subject to the exemptions cited by the council.

Section 41 – Information provided in confidence

20. The Commissioner has considered the application of this exemption first as, if the exemption is applicable to the information as a whole, then he does not need to consider the application of section 40(2) to the parts of the information which constitute personal data.

21. Section 41 of FOIA provides that:

“Information is exempt information 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.”

22. The Commissioner's guidance on the exemption¹ states that, in order for this particular exemption to apply, four criteria must be met:

- the authority must have obtained the information from another person,
- its disclosure must constitute a breach of confidence,
- a legal person must be able to bring an action for the breach of confidence to court, and
- that court action must be likely to succeed.

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

23. Section 41 is an absolute exemption. This means that the council does not need to apply the public interest test in section 2 of FOIA. However, the Commissioner does still need to consider the public interest in disclosure, because the law of confidence recognises that a breach of confidence may not be actionable when there is an overriding public interest in disclosure.
24. The withheld information is a report provided to the council by Bristol Fawcett in response to a consultation exercise on the council's policy re SEVs. As the report was provided to the council by members of a separate organisation in response to its consultation exercise, the Commissioner is satisfied that the council has received this information from another person for the purposes of the exemption.
25. In determining whether a breach of confidence would occur, the Commissioner applies the three-step test set out by Judge Megarry in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415:
 - 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.

(i) The quality of confidence

26. The council argues that the information has the necessary quality of confidence as it is an academic style report provided to the council as a response to a consultation on its policy regarding SEVs within its area. The topic of SEVs is controversial nationally, as well as locally within Bristol, and the council notes that there are extremely polarised views. It said that, locally, the atmosphere between those on each side of the topic has been volatile throughout the review which it has been undertaking since 2016. It also suggested that there have been claims of harassment from some parties (not the complainant), at times.
27. It considers therefore that the information is not trivial. The council also said that the report is not otherwise in the public domain, and that its disclosure would cause detriment to the confiders.

(ii) The obligation of confidence

28. The council argues that the information was provided under an implied duty of confidence. It said that the information was submitted to the council as part of a consultation response. It argued that the council has not previously published responses of this nature unless permission was

given by the provider. It said, therefore, that there would have been an implicit expectation that the response would be held in confidence unless otherwise stated.

29. It also said that it has been made clear to the Council on three occasions, by an individual speaking on behalf of disbanded Bristol Fawcett, that it does not give the council permission to disclose the report, and highlighting the intended confidentiality of the report. The individual states that the report was purely for the purposes of the consultation and to provide information to councillors highlighting Bristol Fawcett's evidence and opinions.

(iii) Would an unauthorised use of the information cause some detriment to the provider?

30. The council has demonstrated allegations of harassment of Bristol Fawcett members previously by individuals who know of their involvement. As stated, the council is not suggesting that the complainant was involved in this harassment at all.
31. It argues that a disclosure of the report could add to the risk of further harassment occurring due to the emotive and divided opinions over the issue.
32. The council also argues that there is a risk of legal action being taken.

The Commissioner's view

33. The Commissioner is satisfied that the three-step test set out in *Coco v A N Clark* has been met in this case.
34. The information concerned has the necessary quality of confidence; it is not otherwise in the public domain, and it is clearly not trivial. It deals with matters relating to a sensitive policy review.
35. The Commissioner also cannot ignore the allegations of harassment to former members of Bristol Fawcett given the previous history and the polarised views on the issue. The harassment allegations were conveyed to the council by the submitter of the information.
36. Secondly, in considering the obligation of confidence, the Commissioner accepts that in a consultation process involving such a sensitive issue, confidence would be expected if previous consultation responses were not generally disclosed without the permission of the submitter.
37. Thirdly, the Commissioner has seen evidence from the submitter of the information that it intended its submission to be held in confidence.

38. Finally, the Commissioner also recognises that disclosure of the withheld information would cause detriment to the former members of Bristol Fawcett who contributed to, and submitted its consultation response. He also notes that the report contains sensitive elements and transcripts from third parties who would not expect, and may be distressed to find, their comments disclosed more widely.

Would the breach be actionable?

39. The final criteria for section 41 to apply is that a breach of confidence must be an actionable breach. As Lord Falconer (the promoter of the FOIA as it was passing through Parliament) said during the debate on the FOIA:

"... the word "actionable" does not mean arguable ... It means something that would be upheld by the courts; for example, an action that is taken and won. Plainly, it would not be enough to say, 'I have an arguable breach of confidence claim at common law and, therefore, that is enough to prevent disclosure'. That is not the position. The word used in the Bill is "actionable" which means that one can take action and win."

40. The Commissioner therefore considers that it is not sufficient to merely claim that a breach of confidence might be brought. Any action must be likely to succeed.
41. To determine whether an action would be likely to succeed, the Commissioner must assess whether the council might be able to put forward a public interest defence.
42. The test is whether there is a public interest in disclosure which overrides the competing public interest in maintaining the duty of confidence.

The public interest in the information being disclosed

43. The complainant argues that the policy which the consultation refers to may have important consequences on people's jobs within the area. She argues that the withheld information may have influenced the council and pushed them to initiate a change in policy. She said that individuals will be affected by the change, and she would like access to the submission as she considers that it might be factually incorrect. She argues that the public should have all the information available to them when responding to the public consultation.

44. The complainant argues that the council could:

"...help me refine my request or find the documents I was requesting and redact any personal information. I do not understand what could justify keeping these documents confidential when they are a key part of a potential change in policy that would be harmful to dozens of people".

45. The Commissioner considers that where an organisation submits its opinions with a view to swaying the decision of a council on an aspect of its policies which may result in establishments closing down and jobs lost, there is an onus for such submissions to be carried out as transparently as possible.
46. The council has a duty to be transparent in its decision making, and to be accountable for the decisions it takes. It is difficult to be fully transparent when submissions such as this are withheld from public view, and their contents unknown. The public are unaware of the evidence the information provides which seeks to influence the decision to be taken, and they are unable to question or counter that evidence with their own if they do not know its contents.
47. If councils do not act transparently in such situations there will always be doubts about its final decisions, and concerns that the council may have pre-determined its view prior to the consultation taking place, or that inaccurate information was relied upon. There may also be concerns that a factually incorrect submission has swayed the opinion of the council over more accurate views and contrary, but equally valid and thought through opinions.
48. Having viewed the withheld information, the Commissioner notes that the response is an academic study. The Commissioner considers that where a society or a body, rather than an individual, is submitting its views on an issue from a position of some knowledge and authority, there is a greater public interest in that information being disclosed than if a response were submitted by an individual who does not have a similar level of knowledge and authority. Similarly, where an authority such as an academic or academic institution provides their opinion on an issue, greater strength may be attributed to those arguments, and again, this places a stronger public interest on the submission being open and transparent about its contents. In this way, interested parties can have more informed information on the subject at hand when they are considering their own opinion on the proposals. They are also more likely to understand whether the council's ultimate decision has taken account of the evidence provided and ultimately reached an appropriate and fair decision.

49. The Commissioner also recognises that academics or authorities on a subject should have some understanding that their views will be persuasive, and that as a result, there will be a greater onus on these opinions being made public and open where possible.

The public interest in confidence being maintained

50. The Commissioner recognises that there is an inherent public interest in confidences being maintained, and that this should not be overturned lightly, particularly in cases where there may be a detriment to the confider if that information is disclosed.
51. The Commissioner considers it clear that the disclosure of such information on a polarised and emotive subject may lead contributors to fear unwanted repercussions. Some will choose not to submit their views if they are aware that these will subsequently be disclosed in full. This leads to council decisions being taken without all of the evidence, leaving decisions to be taken on a less informed basis. Decisions would then be less robust.
52. Additionally, the Commissioner recognises that this may also lead to submissions of less quality. Members of the public who would otherwise provide their reviews to researchers in order to create such submissions may refuse to be interviewed if they are left concerned that their views and opinions might be attributable, and their identities may somehow be ascertainable.
53. The Commissioner recognises that the council can, and will be expected to provide an explanation of the reasons why it ultimately makes the decisions it does. To an extent, this will partially meet the requirement for it to be transparent and accountable for its actions and decisions. The disclosure of explanatory information will lessen the impetus for the background, confidential submissions to be disclosed, although it will not entirely satisfy the public interest in full disclosure.
54. A summary of the report, with sensitive information removed, was also previously made public by Safe and Equal Britain. The council, however, had no input into this disclosure. It is not, therefore, the case that all of the information is unavailable to the public.

The Commissioner conclusions

55. As noted, the public interest test within the law of confidence is whether the public interest in disclosure overrides the competing public interest in maintaining the duty of confidence.

56. The Commissioner has outlined above that she considers that councils carrying out such reviews should be open and transparent about their decisions. Accepting submissions under a duty of confidence as part of a consultation on important issues should be avoided, where possible, as there will always be a public interest in those submissions being made public under FOIA at a later date.
57. However, the Commissioner also recognises that there are situations where failing to provide such security will undermine the frankness of the information provided, and the robustness of the decision which is therefore ultimately reached.
58. The complainant has raised some legitimate concerns about how consultation responses on a topic of public interest should be open and transparent.
59. The Commissioner must also, however, bear in mind the detriment which a disclosure of the information may cause. In this case the council has argued that there have been allegations of harassment over the issue, and a disclosure of identifiable individual's views may well lead to concerns about further harassment occurring. The potential of this occurring may ultimately dissuade individuals and organisation from being full and frank in their opinions.
60. In conclusion, the Commissioner is not persuaded that a public interest defence would be likely to succeed. Whilst there is a public interest in creating greater transparency over the issue, the Commissioner does not consider that disclosure would be a proportionate method of achieving this aim. Other avenues are available to scrutinise the council's decision.
61. As the Commissioner is satisfied that the council is unlikely to be able to rely on a public interest defence, it follows that a breach of confidence would be actionable and thus section 41 of the FOIA would be engaged.
62. As the Commissioner has decided that section 41 was applied correctly by the council, he has not found it necessary to also consider the application of section 40(2).

Right of appeal

63. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

64. 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.
65. 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

Ian Walley
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