

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 March 2022

Public Authority: Elmbridge Borough Council
Address: Civic Centre
High Street
Esher
Surrey
KT10 9SD

Decision (including any steps ordered)

1. The complainant requested a copy of advice received by the monitoring officer at the council relating to a complaint about parish councillors. The council refused the request under section 41(1) (information provided in confidence).
2. The Commissioner's decision is that the council was correct to apply section 41(1) to withhold the information.
3. The Commissioner does not require the council to take any steps

Request and response

4. On 12 February 2021 the complainant wrote to council and requested information in the following terms:

 'Information regarding my complaint about claygate parish council to the acting monitor [name of officer redacted by ICO] and who he sought advice from and what that advice was'.
5. The council responded on 22 February 2021. It refused the request on the basis that section 41 of the FOI Act applied (information provided in confidence).
6. The complainant wrote back requesting that the council carry out a review of its decision on 22 February 2021. She wrote to the council again on 16 March 2021, saying that she would accept the council redacting the name of the individual who provided the advice, but that she still wanted a copy of the advice itself.
7. Following an internal review, the council wrote to the complainant on 25 March 2021. It maintained its position that section 41 of the FOIA applied and withheld the information.

Scope of the case

8. The complainant contacted the Commissioner on 26 March 2021 to complain about the way the request for information had been handled.
9. The complainant considers that section 41 was not applied correctly by the council. The scope of the following analysis is whether section 41 was engaged in relation to the requested information.

Reasons for decision

Background to the case

10. The complainant submitted a formal complaint to the council about councillors at a parish council.

11. In such situations, under section 28(7) of the Localism Act 2011, the monitoring officer is required to consult with a designated independent person prior to reaching a decision on the complaint. It requires the monitoring officer to seek the views of the independent person, and to take those views into account before they make a decision on the complaint.
12. The monitoring officer did as required, and the information falling within the scope of the complainant's request is the advice provided by the designated independent person.

Section 41 – Information provided in confidence

13. Section 41(1) 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.”

14. The Commissioner's guidance on section 41¹ states that in order for the 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.

Was the information obtained from another person?

15. The in-scope information is the advice received by the council's monitoring officer from the independent person. The Commissioner is therefore satisfied that the information was obtained from another person.

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

Would disclosure constitute a breach of confidence?

16. 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.

The quality of confidence

17. The council must consider the request as if any member of the public had made it. It cannot take into account any separate interests or any personal knowledge which the complainant may have about details of the initial complaint made about the councillors.
18. The information is not otherwise in the public domain, and as it relates to a complaint about the actions of parish councillors it is not trivial in nature.
19. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence

20. The council argues that the circumstances are such that any reasonable person standing in the shoes of the acting monitoring officer would realise that the information was given in confidence.
21. It said that: "Although not expressed explicitly it was/is implicit that the information was confidential correspondence between the two persons. The Acting Monitoring Officer was in a sense seeking the Independent Person's views/advice on the matter as he is required to do under the Localism Act 2011 when there is a Member code of conduct complaint."
22. The advice was received from the designated independent person in their official capacity under section 28(7) of the Localism Act 2011. As part of the set process, it refers to a private code of conduct complaint made against councillors at another authority. This is therefore a sensitive issue.

23. The Commissioner considers that both parties would therefore have considered that the discussion they were involved in related to confidential matters and that they should hold that information in confidence.
24. The Commissioner accepts that the advice was therefore imparted under circumstances importing an obligation of confidence.

Would there be an unauthorised use of the information to the detriment of the confider.

25. The council argues that it goes beyond the objectives of the relevant statutory provisions for such correspondence to be subject to disclosure to the general public when the monitoring officer has not yet reached his decision.
26. The Commissioner recognises that the breach of the expected confidentiality of the advice may be detrimental to the privacy of the independent person. A disclosure may make it more difficult for them to perform their role as an independent person in the future. They may be known to at least some of the parties involved, and might face hostility if their advice was disclosed. They may also feel less free to be full and frank in providing their opinions if they consider that their correspondence may subsequently be disclosed.
27. It may also be detrimental to the original complainant and the relevant councillors to have the advice disclosed given FOI responses are considered to be to the whole world.
28. The council also argued that information relating to complaints about elected members would be detrimental to disclose as such complaints are by their very nature sensitive, and may at times be damaging to those elected Members even where no-fault is found.
29. The confider, in this instance, is the independent person. Their views on a sensitive issue, provided in a full and frank nature due to the expectation of confidentiality, would be disclosed.
30. The Commissioner is satisfied therefore that all of the tests set out in *Coco v Clark* have been met, and a duty of confidentiality exists.

Would the breach be actionable?

31. 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."

32. 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.
33. 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.
34. 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

35. 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 advice the information provides and yet its purpose is to guide and influence the decision to be taken. They are unaware of the details of the advice and are not able to question or counterargue against it as they do not know its contents.
36. If councils do not act transparently in such situations, there will sometimes be doubts about its final decisions, and concerns that the monitoring officer may have had a pre-determined view prior to the decision being made. Alternatively, the complainant may believe that inaccurate advice was relied upon, or relevant advice may have been ignored.
37. There is therefore public interest in disclosing the advice in order that the whole decision process, and the evidence relied upon to reach the decision, is open to scrutiny and question.

The public interest in the exemption being maintained

38. 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.

39. The Commissioner considers that the disclosure of information on a complaint made about identifiable councillors may lead to a worsening position between the councillors and the complainant.
40. The Commissioner also recognises that a disclosure would undermine the safe space which the monitoring officer and the independent person need in order to discuss details of often personal and sensitive issues in a free and frank way.
41. Disclosing information discussing the complaint made about councillors into the public domain may lead to complainants being reticent when making complaints about councillors in the future. 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.
42. 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 the initial complainant. This will generally 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 advice to be disclosed, although it will not entirely satisfy the public interest in full transparency over the decision.
43. The Commissioner also notes that monitoring officers need only take account of the advice provided. This weakens the public interest in the information being disclosed as there is no legal requirement for the monitoring officer's decision to follow the advice received, only to take account of it.

The Commissioner's conclusion

44. 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.
45. The Commissioner has outlined above that she considers that councils carrying out reviews and investigations of this nature should be as open and transparent as possible about the decisions they take, whilst taking into account the sensitivities surrounding the issues involved.

46. The Commissioner recognises that there are situations where a safe space is required to discuss and deliberate, and to seek and receive advice over issues of a sensitive nature. A complaint about the actions of councillors is a sensitive issue – it often brings into question the integrity of, or the abilities of, the individual councillor(s) involved. A subsequent disclosure of the advice would undermine the frankness of the discussions which take place, and the robustness of the decision which is therefore ultimately reached.
47. In conclusion, the Commissioner is not persuaded that a public interest defence would be likely to succeed in this case. Whilst there is a public interest in transparency over the decision-making process involved in investigating code of conduct complaints by members of the public, the Commissioner does not consider that a disclosure of the information requested in this case would be a proportionate method of achieving this aim.
48. 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 was engaged. The council was not, therefore, obliged to disclose the information in question.
49. 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

50. 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

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

51. 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.
52. 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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