

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

### **Decision notice**

**Date:** 28 April 2022

**Public Authority:** Cheshire East Council

**Address:** [FOIEast@cheshireeast.gov.uk](mailto:FOIEast@cheshireeast.gov.uk)

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

---

1. The complainant requested various information in respect of Cheshire East Council's agreement with Stonewall in relation to its Diversity Champions. Cheshire East Council provided some information, but refused to provide its Workplace Equality Index (WEI) Feedback form from Stonewall citing sections 41 (information provided in confidence) and 43(2) (commercial interests). The Commissioner's decision is that Cheshire East Council was entitled to rely on section 41 FOIA to withhold the WEI Feedback form. The Commissioner does not require Cheshire East Council to take any steps.

### **Request and response**

---

2. On 4 February 2021, the complainant wrote to the Council requesting the following information:
  - "1. Any application you made in 2019 or 2020 to be a "Stonewall Diversity Champion" or to be included in Stonewall's "Workplace Equality Index," including any attachments or appendices to those applications. Please redact any personal details if necessary.
  2. Any feedback you received in 2019 or 2020 from Stonewall in relation to either application or programme.
  3. Any other communication you have received from Stonewall in 2019 or 2020 unless privileged or otherwise exempt from disclosure...
  4. Full details of any equality impact assessment you carried out connected with any of these applications (including any equality impact

assessment carried out prior to an earlier application of the same kind, if no further assessment was done).

5. Details of the total amount of money you paid to Stonewall (i) in 2019; (ii) in 2020, whether or not as payment for goods or services.

6. Whether you intend to continue your membership of any Stonewall scheme in the future and if so, which."

3. The Council responded on 3 March 2021. In response to question one, it confirmed that it joined the WEI in 2019 and decided not to renew for 2020. It refused to provide the information in respect of item two citing section 41 FOIA, and informed the complainant that it did not hold information in respect of items three and four. In relation to item five it confirmed the amount paid for membership to the WEI for 2019 and informed the complainant that no payment had been made for 2020 as it withdrew from the scheme. In respect of item six, the Council informed the complainant that a decision had not been made regarding whether it intended to continue its membership of any Stonewall scheme in future.
4. Following an internal review the Council wrote to the complainant on 23 March 2021. It confirmed that it was upholding its original decision to withhold the information in respect of item two (feedback form) on the basis of section 41 FOIA. It further informed the complainant that it was also now relying on section 43(2) in respect of this information.

## **Scope of the case**

---

5. The complainant contacted the Commissioner on 6 April 2021 to complain about the way their request for information had been handled. The complainant was not satisfied with the Council's reliance on the exemptions specified to withhold the information in respect of item two of the request, and he expressed concern that emails relevant to the request had been deleted.
6. The scope of the Commissioner's investigation is to consider the Council's reliance on the exemptions specified. As he has concluded that the Council was entitled to rely on section 41 FOIA, it was not necessary for him to also consider the Council's reliance on section 43(2).
7. In relation to the complainant's concerns regarding potentially relevant emails being deleted, this has been considered in the 'Other Matters' section.

## Reasons for decision

---

### Section 41 – Information provided in confidence

8. Section 41(1) of the FOIA states 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”*

9. The Commissioner’s guidance on section 41<sup>1</sup> 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

- 10. The withheld information in this case is the feedback form received from Stonewall for 2019.
- 11. The Council has confirmed that the withheld information was obtained from Stonewall, a third party organisation. The Commissioner is therefore satisfied that the information was obtained from a third party.

#### Would disclosure constitute an actionable breach of confidence?

12. 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;

---

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

- 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.

Does the information have the necessary quality of confidence?

13. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.
14. The Council has informed the Commissioner that although some information relating to the WEI is in the public domain, (on Stonewall's and various member's websites in formats such as case studies), the level of detail contained in the WEI feedback form, and the breadth of issues addressed would disclose significant information not currently in the public domain.
15. Both the Council and Stonewall consider that the information is worthy of protection as this type of in-depth feedback was provided to the Council as a membership benefit of the Diversity Champions programme.
16. The Commissioner accepts that the information in question is not otherwise accessible and that it is more than trivial, and is therefore satisfied that the information has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

17. An obligation of confidence may be expressed explicitly or implicitly.
18. The Council informed the Commissioner that the withheld information was provided subject to an explicit obligation of confidence. It added that when it approached Stonewall for its views on disclosure, Stonewall reminded the Council of the terms and conditions of membership which explicitly stated:

"CONFIDENTIALITY – Each member undertakes that it shall not at any time disclose to any person any information that it has received from Stonewall, by virtue of its Membership Benefits or otherwise, which may be of a confidential nature."

19. The Commissioner is therefore satisfied that the information was imparted under an explicit obligation of confidence.

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

20. The Council has argued that disclosure of the withheld information could be damaging to Stonewall's competitive position as it would enable competitors to analyse information about the weighting and detailed categories of assessment that it has invested in developing and enhancing.
21. The Commissioner is also mindful of the Tribunal's decision in the case of *Bluck v ICO & Epsom and St Helier University Hospital NGHS Trust [EA/2006/0090] paragraph 15* that the loss of privacy can be a detriment in its own right. There is no need therefore for there to be any detriment to the confider in terms of tangible loss in order for it to be protected by the law of confidence other than the loss of privacy in its own right.
22. In this particular case, the Commissioner accepts the Council's reasoning as to why disclosure of the information into the public domain is likely to cause detriment to Stonewall.
23. The Commissioner is therefore satisfied that all the tests set out in *Coco v Clark* have been met, and a duty of confidentiality exists.

Would the breach be actionable

24. 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."
25. 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.
26. 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. The test is whether there is a public

interest in disclosure which overrides the competing public interest in maintaining the duty of confidence.

27. The Commissioner is mindful that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure of the requested information against both the wider public interest in preserving the principle of confidentiality and the impact disclosure of the information would have on the interests of the confider.
28. As the decisions taken by courts have shown, very significant public interest test factors must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns mis-conduct, illegality or gross immorality.
29. The Council accepts that there is a public interest in transparency around the work of Stonewall in respect of its assessment of an organisation's equality and diversity position. Disclosure of the WEI feedback may therefore support transparency in public understanding, accountability, and facilitate debate regarding Stonewall's work with public authorities.
30. The Commissioner acknowledges the above. However, in weighing this against the public interest in maintaining trust between confider and confidant, and the likely distress and possible detriment to the confider, the Commissioner considers that the Council would not have a public interest defence for breaching its duty of confidence.
31. Having considered all the circumstance of this case, and the information withheld under section 41 of the FOIA, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence. Therefore the Commissioner finds that the information was correctly withheld under section 41 of the FOIA.

## **Other matters**

---

### **Section 46 – Record keeping**

32. Although they do not form part of this notice, as the complainant expressed concern that potentially relevant emails from a former member of staff may have been deleted the Commissioner asked the Council questions around its record keeping.

33. Section 1.3.4 of the section 46 Record Keeping Code of Practice states:

“The Information Commissioner (the Commissioner) has a statutory duty to promote good practice and compliance with the Code”

34. The Commissioner asked the Council if it was possible whether its former officer responsible for dealing with Stonewall, may have saved information on other systems or locations or whether it might be retrievable from deleted folders.

35. The Council informed the Commissioner that it was difficult to respond definitively without knowledge of the content of these communications. However, it confirmed that it had no evidence to indicate that its record keeping procedures had not been complied with.

36. It added that if there had been a business need to retain any such communications, its standard procedures would be to store it in its Equality and Diversity SharePoint team site, in line with its standard record keeping procedures in relation to emails, which are as follows:

- Business emails include official records and information created, received and maintained as evidence of a process or procedure which have lasting value and are retained and managed as records. These emails are not stored in Outlook, but in a SharePoint team site, a Case Management System or central repository with relevant classification, structure and retention which enables appropriate information management to be applied.
- Transitory emails which are only required to complete a routine action are regularly deleted. The Councils email retention policy also means that emails which are more than two years old and stored in Outlook are automatically deleted.

37. Based on the above, the Commissioner has no reason to believe that the Council has not complied with its record keeping policies in this instance. For ease of reference, the Code may be accessed here:

[Code of Practice on the management of records issued under section 46 of the Freedom of Information Act 2000 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/429222/code-of-practice-on-the-management-of-records-issued-under-section-46-of-the-freedom-of-information-act-2000.pdf)

## Right of appeal

---

38. 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](mailto:grc@justice.gov.uk)

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

39. 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.
40. 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 .....**

**Catherine Dickenson**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**