

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 June 2022

Public Authority: Cornwall County Council
Address: County Hall
Truro
TR1 3AY

Decision (including any steps ordered)

1. The complainant requested information from Cornwall County Council ("the Council") about a code of conduct enquiry following a complaint about two Parish Councillors.
 2. The Council confirmed they held some of the information but would not disclose the information held stating it was exempt under section 41 (information provided in confidence), section 40 (personal information) and section 31 (prevention or detection of a crime) of FOIA.
 3. The Commissioner's decision is that the Council was entitled to rely on section 41 of FOIA to withhold the information. As section 41 is engaged the Commissioner has not found it necessary to go on to consider section 40 or section 31 in this case.
 4. The Commissioner does not require the Council to take any steps in relation to this decision notice.
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Request and response

5. On 28 August 2021, the complainant wrote to the Council and requested from the Council:

“Copies of responses from the two “subjects,” the Parish Clerk and from the Independent Person together with comments doubtless received from my local county councillor.”
6. The Council responded on 17 September 2021 and confirmed that the information was held aside from information from the county councillor who was not involved. They advised the information requested would not be shared as it was provided confidentially. The Council cited section 41 of FOIA as the reason for exemption in the initial response.
7. On 17 September 2021, the complainant requested an internal review of the request.
8. On 29 September 2021, the Council provided its internal review and confirmed they continued to rely on section 41 as an exemption but also withheld the information under section 40 as it contained personal data.

Scope of the case

9. The complainant contacted the Commissioner on 8 October 2021, following the outcome of the internal review to complain about the way the request for information had been handled.
10. Following contact from the ICO, the Council subsequently also applied section 31(1) of FOIA to all the information and provided an updated response to the complainant on 10 June 2022.
11. The Commissioner considers that the scope of the case is to determine if the Council is correct to withhold the information based on section 41. The Commissioner considers that if this exemption is engaged to all the information, then it will not be necessary to consider whether section 40(2) or section 31 are also appropriately engaged.

Reason for decision

Section 41 – information provided in confidence

12. 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.

13. Section 1(1)(a) requires public authorities to provide confirmation or denial as to whether requested information is held. If it can rely on an exemption, it is not obliged to do so.

The Commissioner’s guidance on the exemption 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.

14. 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 (reference: IC-95205-V1W0) that a breach of confidence¹ may not be actionable when there is an overriding public interest in disclosure.

15. In this case, the withheld information consists of three statements provided to an independent person for the purpose of a code of conduct

¹ [ic-95205-v1w0.pdf \(ico.org.uk\)](https://ico.org.uk/your-information/our-work/our-work/95205-v1w0.pdf)

investigation following a complaint against two parish councillors. Additionally, the complainant requested a copy of the statement of the independent person following the investigation. The relevant information was therefore provided by a third party, i.e. another person/persons for the purposes of this exemption.

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.

(i) The quality of confidence and communication in circumstances importing an obligation of confidence.

17. The Commissioner has viewed the withheld information which was provided as part of a code of conduct investigation. The Council has also provided a link² to its privacy statement in relation to code of conduct investigations. This statement clearly indicates information is treated in confidence and indicates the limitations of how the information will be shared.

18. The Council stated:

“In terms of the information provided as part of the complaints process overall, as there is nothing in the privacy notice and nothing set out to the members that the information they provide will be placed into the public domain, or shared wider than is necessary to process the complaint it is considered that this obligation exists.”

19. The Commissioner finds the information is more than trivial as it relates to a code of conduct procedure. It is also information that is not available elsewhere therefore it has the necessary quality of confidence.

² <https://www.cornwall.gov.uk/the-council-and-democracy/councillors-and-meetings/code-of-conduct-complaints/make-a-code-of-conduct-complaint-online/>

(ii) Would disclosure constitute an unauthorised use of the information to the detriment of the confider?

20. The withheld information relates to concerns raised about two parish councillors and their conduct in a specific parish council meeting. Minutes of this meeting are available in the public domain but not the content of either the complaint made, or the responses received and investigated.
21. The Council has informed the Commissioner that there is the necessary obligation of confidence in the complaints process. They stated:

"The Code of Conduct complaints process operates as successfully as it does due to the fact it is a confidential process, removing this would then remove the trust and confidence."
22. The Council point out that to remove the confidential nature of the process would lead to complainants being hesitant to submit complaints if they perceived they would be placed in the public domain.
23. Furthermore, the Council advise in this case, it would undermine the confidence in the parish councillors in fulfilling their future role in the parish council. It would also impact on the confidence in the role of the independent person. This role would be compromised if the entirety of their investigation were open to public scrutiny. The Council consider this could lead to a reduction in the independent person's ability to consider information in a "free and frank" way as they could be hindered or limited if they also had to consider it would be released to the world at large.

iii) Is there a defence available to render the breach of confidence unactionable?

24. If the Council could establish a defence to a breach of confidence for disclosure of the withheld information, otherwise than under FOIA, the breach of confidence would be rendered unactionable and section 41 of FOIA would not be engaged.
25. 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."

26. In order to establish whether such an action would be likely to succeed, the Commissioner must consider whether the Council would be able to mount a public interest defence.
27. Being able to mount a public interest defence is not the same as the public interest test that would be applied to a qualified exemption. The English courts have historically recognised the importance of respecting duties of confidence as and when they arise. For a public interest defence to succeed, there must be clear and compelling public interest reasons that would override the duty of confidence – especially when breaching that confidence could have significant legal and commercial implications for the person whose confidence has been breached.
28. 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.
29. The Council is aware that the law of confidence contains its own inbuilt public interest test. The Council has considered the strong public interest in favour of keeping information confidential where a duty of confidence exists.
30. The Commissioner notes that the courts have traditionally recognised that the defence to breach of confidence in the public interest applies where disclosure would protect public safety, or where there has been wrongdoing, such as misfeasance, maladministration, negligence, or other inquiry on the part of the public authority. It is likely that a code of conduct inquiry would fall within these parameters.
31. The Council has considered whether the public interest would be served in disclosing the relevant information. They have decided that there is no reason or justification to depart from the position that the relevant information should remain confidential.
32. The complainant has argued that they believe their own statement of complaint was shared with the witnesses and the independent person. Therefore, they believe it should be reciprocal for the requested statements to be shared with the complainant for the purposes of justice.
33. However, the Commissioner notes through disclosure via FOIA as requested by the complainant, the information would not only be disclosed to the complainant, but to the world at large.

34. The Commissioner considers that there is a wider public interest in preserving the principle of confidentiality. He agrees with the Council that in this case, it would be likely to damage the confidence people have in the Council's ability to protect confidential information within a regulatory code of conduct process.
35. Disclosure of any confidential information undermines the principle of confidentiality, which itself depends on a relationship of trust between the confider and the confidant. It is the Commissioner's view that people would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected. It is therefore in the public interest that confidences are maintained.
36. In all the circumstances of the case, the Commissioner does not consider that a public interest defence would be available to the Council.
37. For the reasons outlined above, the Commissioner agrees that the Council was entitled to rely on section 41 of FOIA to withhold the disputed information. As he considers that section 41 applies to the entirety of the withheld information, he has not felt it to be necessary to consider the Council's application of section 40(2) and section 31(1) of FOIA in this case.

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: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: 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

Phillip Angell
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