

Freedom of Information Act 2000 (Section 50)

Decision Notice

26 July 2007

Public Authority: Mid Sussex District Council
Address: Oaklands Road
Haywards Heath
West Sussex
RH16 1SS

Summary

The complainant requested access to information held by Mid Sussex District Council ('the Council') which led to a specific statement being made by the Strategic Director of the Council. The statement was made in a letter dated 13 May 2005 in response to a complaint the complainant had submitted regarding a planning application. The Council responded and informed the complainant that it was unwilling to release the information, as it considered that it was exempt from disclosure under section 41 of the Act. As he remained dissatisfied, the complainant contacted the Commissioner and requested that the Council's decision to withhold the information be given formal consideration. The Commissioner reviewed the information requested and concluded that the Council was correct to rely on section 41 of the Act for the non disclosure of the information and therefore dealt with the complainant's request in accordance with section 1 of the Act.

The Commissioner's Role

1. The Commissioner's role is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

The Request

2. In a response the complainant received from the Council dated 13 May 2005 in respect of a complaint he submitted regarding a planning application, the Strategic Director stated that the Council was "aware that there is a long standing civil dispute between you and your neighbour". On 26 July 2005 the complainant made the following request in accordance with section 1 (full text of this section of

the Act can be found in the Legal Annex section towards to the end of this Notice) of the Act:

“access to any correspondence that supports this statement”.

The complainant stated that he believed this statement was untrue and that it had prejudiced the assessment of his complaint regarding the planning application.

3. The Council responded on 24 August 2005 and advised the complainant that the statement was in reference to an item of correspondence held by the Council (the requested information). It confirmed that this correspondence was provided to the Council on the understanding that it would be held in confidence and therefore it felt that the information was exempt from disclosure under section 41(1)(b) (an explanation of this section of the Act is set out fully in the Legal Annex section towards the end of this Notice) of the Act. The Council explained that if it were to disclose this information to the public, this would constitute a breach of confidence actionable by that or any other person.
4. The complainant wrote to the Council on 13 September 2005 to express his dissatisfaction with its decision to withhold the requested information. He stated that he believed the Council had misinterpreted section 41 of the Act and in addition requested further information relating to the item of correspondence the Council held.
5. The Council responded further on 29 September 2005. It stated again that it considered this information was exempt from disclosure under section 41 of the Act and explained to the complainant that this exemption was absolute. For this same reason, the Council was also unwilling to release or confirm the additional information the complainant requested in his letter dated 13 September 2005.
6. On 11 October 2005 the complainant wrote to the Head of Scrutiny at the Council to request an internal review. The complainant explained again that he felt the Council had applied section 41 of the Act to the requested information incorrectly and asked that his request be reconsidered.
7. The Council responded further on 22 November 2005 informing the complainant of the outcome of the internal review. It confirmed that it had reconsidered the complainant's request. However, it remained of the opinion that the requested information was provided to the Council in confidence and therefore it was satisfied that this exemption applied.
8. As the complainant remained dissatisfied, he contacted the Commissioner on 1 January 2006 to request that his complaint be given formal consideration.

The Investigation

Scope of the case

9. To clarify, although the complainant requested further information from the Council on 13 September 2005 regarding the date of the information it held and whether this was unsolicited or in response to a request from the Council, the complainant has only asked the Commissioner to consider his initial request dated 26 July 2005 and the Council's application of section 41 of the Act to the information held.
10. The Commissioner's investigation has therefore sought to establish whether the Council complied with section 1 of the Act and, in particular, whether it was correct to rely on the exemption cited in refusing to release a copy of the information held.

Chronology of the case

11. The Commissioner wrote to the Council on 19 January 2006 to request a copy of the withheld information to enable him to consider the Council's application of section 41 of the Act.
12. The Council responded on 25 January 2006 providing a copy of the withheld information.
13. As the Council's arguments as to why it considers section 41 of the Act applies in this case were outlined in its responses dated 24 August, 29 September and 22 November 2005, the Commissioner was satisfied that no further information was required.

Analysis

Section 41 – Information provided in confidence

14. Section 41 of the Act provides an exemption to the right to know if the information in question was provided to the Council in confidence. There are two components to this exemption:
 - The information must have been obtained by the Council from another party and,
 - Disclosure of the information would give rise to an actionable breach of confidence.
15. The Commissioner has reviewed the information being withheld and he is satisfied that the information was provided to the Council by a third party. He now needs to consider whether the information requested has the necessary quality of

confidence and whether there would be an actionable breach of confidence if this information were released.

16. The Commissioner notes that the author of the item of correspondence held by the Council stated clearly that it was confidential information and that it should not be disclosed to any third party. It is the Commissioner's view that even if the author had not expressly stated this the information is confidential by nature because it is not in the public domain. The Commissioner is also satisfied that this information is not trivial in nature and has the necessary quality of confidence. The Commissioner has considered the context in which the information was provided to the Council and is satisfied that these circumstances give rise to a duty of confidence.
17. With regards to whether there would be an actionable breach of confidence, it is important to first consider what is meant by the word actionable. It is the Commissioner's view that actionable is interpreted as meaning that an aggrieved party would have the right to take a public authority to court as a result of the disclosure. In this case, the Commissioner accepts that due to the author's explicit instructions as outlined in paragraph 16 it is reasonable to conclude that if disclosure were made the provider of the information could take the Council to court for breaching a duty of confidence.
18. However, the Commissioner notes that the duty of confidence is not absolute. The courts have recognised three broad circumstances in which information may be disclosed in spite of a duty of confidence. These include where the disclosure is consented to by the confider, where disclosure is required by law, and where there is a greater public interest in disclosing the information which overrides the common law concept of confidentiality and any duty of confidence that may be owed.
19. The Commissioner accepts that there are no issues surrounding whether consent has been provided or whether disclosure is required by law in this case. This leaves the consideration of the public interest and whether there is a public interest in disclosure which overrides the duty of confidence owed in this case.
20. The public interest test inherent within section 41 of the Act differs from the public interest test contained in qualified exemptions in the Act. The default position for the public interest test in qualified exemptions is that the information should be disclosed unless the public interest in withholding the information outweighs the public interest in disclosing the information. With regards to the public interest inherent within section 41, this position is reversed. The default position being that information should not be disclosed because of the duty of confidence unless the public interest requires disclosure.
21. It is important to clarify that a request for information under the Act is applicant and purpose blind. When considering whether information should be disclosed, the Commissioner must consider disclosure in the widest context, as disclosure would be to the public at large and not just to the particular applicant.

22. In this particular case the complainant believes the requested information led the Council to make an untrue statement in a letter dated 13 May 2005 (statement quoted above in paragraph 2). The complainant is also of the view that this information prejudiced the assessment of his complaint regarding a planning application. The Commissioner cannot comment on whether the statement is true or false or if the information withheld was prejudicial to the complainant's request, as this is not within the scope of his duty under section 50 of the Act as outlined at paragraph 1 above. While the Commissioner accepts that there is a public interest in disclosing information which allows individuals to gain a greater understanding of decisions taken by public authorities which may affect their lives, and in some cases, assist individuals in challenging those decisions or issues. The Commissioner is also of the view that there is a public interest in public authorities acting transparently and being willing to share information with the general public.
23. However, the Commissioner does not accept that in this case such general public interest considerations would override the duty of confidence owed to the author of the requested information.
24. Based on the reasons explained above, the Commissioner is satisfied that a duty of confidence exists and that disclosure of this information would constitute an actionable breach of confidence. The Commissioner has considered the public interest inherent in the common law principle of confidentiality and the submissions from both the complainant and the Council. However, he has concluded that in this case there is no overriding public interest which would require disclosure of the requested information in this case.

The Decision

25. The Commissioner has concluded that the Council dealt with the complainant's request in accordance with section 1 of the Act and was correct to rely on the exemption provided by section 41 of the Act to withhold this information.

Steps Required

26. The Commissioner requires no steps to be taken.

Other matters

27. The Information Commissioner is also responsible for the enforcement of the Data Protection Act 1998 ('the DPA'). Under this legislation an individual has the right of access to personal data held by any data controller of which they are the subject. The Commissioner notes that the information requested also contains the personal data of the complainant and therefore he has requested the Data

Protection Division of the Commissioner to assess whether this information requested is accessible to the complainant under the DPA. It is, however, important to highlight that although the access regime under the DPA is different from the Act, it does contain its own exemptions from the right of access. A separate case has been set up. Once this has been allocated to a case officer in the Data Protection Division, the complainant will be informed in writing of the Commissioner's assessment.

Right of Appeal

28. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 26th day of July 2007

Signed

**Marie Anderson
Assistant Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Freedom of Information Act (2000)

Section 1

Provides that “any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 41(1)

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.”