

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

### **Decision notice**

**Date:** 3 October 2013

**Public Authority:** Wirral Borough Council  
**Address:** Wallasey Town Hall  
Brighton Street  
Wallasey  
Wirral  
Merseyside  
CH44 8ED

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

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1. The complainant has requested correspondence between Wirral Borough Council ('the council') and a specific law firm. The council initially applied the exemptions for information provided in confidence at section 41 and legal professional privilege at section 42 of the FOIA but retracted its reliance on section 42 during the Commissioner's investigation. The Commissioner's decision is that the council was not entitled to rely on section 41 in relation to some of the information, as it was not provided by another party, and has not provided sufficient justification for the application of section 41 to the remainder of the information.
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
  - Disclose the requested information.
3. The public authority must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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4. On 4 February 2012, the complainant wrote to the council via the WhatDoTheyKnow website and requested information in the following terms:

“Please forward copies of ALL correspondence you have, whether received or sent, regardless of the medium used, (letter; email; fax; memorandum, etc) and regardless of subject matter, with the following law firm:

DLA Piper UK LLP.”

5. Having received no response from the council, the complainant then requested an internal review on 6 March 2012.
6. The council acknowledged the request for an internal review on 9 March 2012 stating that the review request is currently with the legal department and the name of the reviewing officer will be provided when assigned.
7. On 2 May 2012 the complainant informed the council that he had appealed the request to the Commissioner as the council had failed to respond to the request and failed to carry out the promised internal review.
8. On 10 October 2012, after having twice contacted the council requesting that it respond to the request, the Commissioner issued a decision notice reminding the council of its obligations under the FOIA and requiring that it either respond to the request in accordance with the legislation or issue a valid refusal notice under section 17(1).
9. The council issued a response on 22 November 2012. It refused to provide the requested information citing the exemption for information provided in confidence at section 41 of the FOIA.
10. An internal review was requested on 23 November 2012. The council provided its internal review response on 21 February 2013 in which it maintained its reliance on section 41 and also stated that the exemption for legal professional privilege at section 42 of the FOIA applies to the requested information.

## **Scope of the case**

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11. The complainant contacted the Commissioner on 25 November 2012 to complain about the application of section 41 of the FOIA to the requested information. The Commissioner wrote to the council on 24 January 2013 requesting that it issue an internal review decision within 20 working days. As the council maintained its reliance on section 41 and also applied section 42 in its internal review response, another complaint was made to the Commissioner about the application of these exemptions.
12. During the Commissioner's investigation the council confirmed that it was no longer seeking to rely on the exemption at section 42 on the basis that the council was not the client of DPA Piper Solicitors and is therefore not entitled to rely on legal professional privilege.
13. The Commissioner has therefore only considered the exemption for information provided in confidence at section 41.

## **Reasons for decision**

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### **Section 41 – Information provided in confidence**

14. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and the disclosure would constitute an actionable breach of confidence.

### **Was the information obtained from another person?**

15. The first step is for the Commissioner to consider whether the information was obtained by the council from any other person in order to satisfy the requirement of section 41(1)(a).
16. The council has stated that much of the withheld information in this case is correspondence between DLA Piper Solicitors and its client, Anna Klonowski Associates Limited ('AKA'), who was contracted by the council to undertake an investigation following whistleblowing claims made by a former employee of the council and that it was AKA who provided the information to the council. Also contained within the withheld information is an amendment to the original contract AKA had entered into with the council dated November 2011. It is the Commissioner's established line that a concluded contract between a public authority

and a third party does not fall within section 41(1)(a) of the Act. In *Derry City Council v The Information Commissioner*<sup>1</sup> the Tribunal upheld the ICO view that a written agreement between two parties did not constitute information provided by one of them to the other, and that therefore, a concluded contract between a public authority and a third party does not fall within section 41(1)(a) of the Act. Therefore, in this case, the Commissioner considers that the council cannot rely on section 41(1)(a) to withhold the amended contract as it is not information obtained from another person.

17. The Commissioner also notes that within the withheld information is a communication from the council's Director of Law, HR and Asset Management to councillors setting out his legal advice on publishing AKA's preliminary draft report. The Commissioner's guidance on section 41<sup>2</sup> states that this exemption will not apply to information that the public authority has generated itself. This reflects the fact that the exemption is not just concerned with the sensitivity of the information but that it also requires the information be obtained from another party. Therefore section 41 cannot apply to the advice from the council's Director of Law, HR and Asset as it has not been obtained from another party; it was produced by the council.
18. The Commissioner does however consider that some of the withheld information has been obtained from another party, namely AKA and DLA Piper Solicitors and has therefore gone on to consider whether disclosure would constitute an actionable breach of confidence.

### **Actionable claim for breach of confidence**

19. Whilst it is not the only test for establishing confidence, the Commissioner finds that the appropriate test for this case is that which is set out in the case of *Coco v Clark* [1969] RPC 41. According to the decision in this case a claim for breach of confidence can be established a

"... three elements are normally required if ... a case of breach of confidence is to succeed. First, the information itself ... must 'have the necessary quality of confidence about it'. Secondly, that information

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<sup>1</sup> Appeal number EA/2006/14

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[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~/media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/CONFIDENTIALINFORMATION\\_V4.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/CONFIDENTIALINFORMATION_V4.ashx)

must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it..."

20. All three elements must be present for a claim to be made and, for that claim to be 'actionable' within the meaning of section 41(1)(b) of the FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed. This requires consideration of whether or not there would be a public interest defence to such a claim.

### **Obligation of confidence**

21. An obligation of confidence may be expressed explicitly or implicitly.
22. The council has stated that the contractual arrangements between it and AKA imposed an express obligation of confidentiality and drew the Commissioner's attention to the following clauses:

Clause 12.3 - "All parties will take all reasonable steps to ensure that any information, documents or other materials which are supplied to the other party in the provision of the Assignment and are clearly marked as confidential or may reasonably be construed as such, remain confidential to the parties."

Clause 12.4 - "the obligation for confidentiality will remain in force beyond the cessation or termination of this agreement."

23. The Commissioner is satisfied that there is an obligation of confidence in this case.

### **Necessary quality of confidence**

24. For information to have the necessary quality of confidence it must be more than trivial and not otherwise accessible.
25. The Commissioner is satisfied that the information in this case, that being correspondence relating to the publication of an investigation following whistleblowing claims is not trivial.
26. However, as stated above, this alone is not sufficient to indicate that the information has the necessary 'quality of confidence'. Therefore the Commissioner has considered whether the information is otherwise accessible.
27. The council has not specifically confirmed that the information is not otherwise accessible. Given the subject matter, and in the absence of evidence to the contrary, it is reasonable to deduce that the information is not accessible elsewhere.

## **Detriment to confider**

28. Having considered whether the information in this case was imparted in circumstances giving rise to a duty of confidentiality and had the necessary quality of confidence, the Commissioner considered whether unauthorised disclosure would cause detriment to the confider.

29. The council did not provide any details of what the detriment to the confider would be or how the detriment would be experienced if the confidence was breached, it simply stated that;

“Unauthorised disclosure would cause a specific detriment to AKA, [specific investigators name] and also to the Council.”

30. It is not for the Commissioner to speculate as to what the detriment would be. The council was informed by the Commissioner that it must justify its position and was provided with the Commissioner's guidance on how he deals with complaints<sup>3</sup> which clearly states that it is the responsibility of the public authority to satisfy the Commissioner that information should not be disclosed and that it has complied with the law.

31. The Commissioner considers that the council has been provided with sufficient opportunity to provide its rationale for withholding the requested information. The rationale should have been in place since the request was refused and therefore opportunities for providing this existed at the original refusal, at the internal review and when requested by the Commissioner.

32. He has therefore concluded that the council has not sufficiently demonstrated that there would be detriment to the confider and therefore it has not been shown that there would be an actionable breach of confidence and the exemption at section 41 does not apply in this case.

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[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Corporate/Practical\\_application/complaints\\_guide\\_for\\_public\\_authorities.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Corporate/Practical_application/complaints_guide_for_public_authorities.ashx)

**Other matters**

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33. The Commissioner is concerned about the council's initial lack of response to this request, the severity of the delays and the council's failure to keep the Commissioner and the complainant updated on its progress.
34. The Commissioner issued an Undertaking in July 2013 under case reference ENF0476820, which the Chief Executive of the council has signed, agreeing to ensure that requests for information are handled in accordance with section 1 of the FOIA and regulations 5 and 11 of the Environmental Information Regulations 2004.

## Right of appeal

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35. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

36. 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.
37. 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 .....**

**Andrew White**  
**Group Manager – Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**