

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 August 2014

Public Authority: Pembrokeshire County Council
Address: County Hall
Haverfordwest
SA61 1TP

Decision (including any steps ordered)

1. The complainant requested copies of correspondence received from members of the public regarding the proposal to part finance a particular play area. Pembrokeshire County Council ('the Council') stated that the information requested was exempt under sections 40(2) and 41. During the course of the Commissioner's investigation the Council also sought to rely on sections 40(1) in relation to an email which the complainant himself had sent to the Council giving his views on the proposal in question. The Commissioner has determined that one of the documents is exempt under section 40(1) and the other documents are exempt under section 41. The Commissioner does not require any steps to be taken.

Request and response

2. On 12 November 2013 the complainant wrote to the Council about a particular play area and requested information in the following terms:

"In our telephone conversation today, you informed me that you had received correspondence from the public regarding the proposal to part finance the [name of play area redacted] project.

I would appreciate you forwarding copies of the correspondence received".

3. The Council issued a refusal notice on 10 December 2013 stating that the information requested constituted personal data and was exempt under section 40(2) of the FOIA. The Council also stated that it considered section 41 to apply to the information requested.
4. On 10 December 2013 the complainant requested an internal review of the Council's refusal to disclose the information requested.
5. The Council provided the outcome of its internal review on 9 January 2014 and upheld its decision that the information requested was exempt under sections 40(2) and 41 of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 5 February 2014 to complain about the way his request for information had been handled.
7. During the course of the Commissioner's investigation, the Council stated that it considered section 40(1) to apply to one document, an email from the complainant to the Council providing his views on the proposals for the play area in question. The Council wrote to the complainant to confirm this and offered to provide a copy of the email if he required it.
8. The Commissioner considers the scope of this complaint to be whether the Council should disclose the information requested on 12 November 2013.

Reasons for decision

Section 40(1) – the complainant's own personal data

9. There is no right of access to personal data about oneself under the FOIA, as section 40(1) provides that information is exempt if it constitutes the personal data of which the applicant is the data subject. Personal data is defined in section 1 of the DPA as data which relates to a living individual who can be identified:
 - from that data,
 - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

10. One of the documents which the Council has withheld is an email from the complainant giving his views on the proposals for the play area in question. The email contains the complainant's name and email address. The complainant is clearly identifiable from the information in question and the Commissioner is satisfied that the information is his personal data. The Commissioner therefore finds that section 40(1) is engaged and the Council is not required to disclose this information under the FOIA.
11. During the course of his investigation the Commissioner notes that the Council notified the complainant that some of the information held was considered to be his own personal data as it was sent by him to the Council. The Council offered to provide a further copy of the information should the complainant require it. The Commissioner considers that this was an appropriate step for it to take.

Section 41 – information provided in confidence

12. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and disclosure would constitute an actionable breach of confidence. This exemption is absolute and therefore not subject to a public interest test.

Was the information obtained from another person?

13. Letters sent by members of the public to the Council about proposals for the play area in question clearly constitutes information provided by a third party (the public) to the Council and the Commissioner therefore accepts the first limb of section 41 is met.

Would disclosure constitute an actionable breach of confidence?

14. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
 - Whether the information has the necessary quality of confidence;
 - Whether the information was imparted in circumstances importing an obligation of confidence; and
 - Whether disclosure would be an unauthorised use of the information to the detriment of the confider.

15. The Council contends that the information contained within the letters is of significance to the individuals involved and is not trivial or otherwise accessible.
16. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. After viewing the withheld information and taking into account the submissions made by the Council he accepts that neither the identity of the individuals who submitted representations to the Council nor details of their views are available elsewhere, and is information which is clearly of importance to the confiders. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.
17. The Commissioner has gone on to consider whether the information was imparted in circumstances importing an obligation of confidence.
18. In support of its position, the Council stated that the letters in question were not provided to it as part of any public consultation exercise where it could be argued that there may be an expectation of the information being shared. In light of this, the Council contends that there is a general expectation among members of the public that when submitting representations about such proposals in their area they are doing so with the reasonable expectation that their representations will be kept confidential. In addition, some of the individuals in this case explicitly expressed a wish that their information be kept in confidence and the Council took this into account when determining whether the information should be disclosed, essentially into the public domain. In addition, on receipt of the request for information, the Council wrote to the third parties concerned seeking their consent to disclosure of the information and it did not receive any response from the individuals.
19. The Commissioner accepts that when an individual submits representations about such proposals, outside any formal consultation exercise, they would have a general expectation that the Council would not disclose their views and representations to the public at large.
20. On this basis the Commissioner accepts that the information was communicated in circumstances importing an obligation of confidence.
21. The third element of the test of confidence involves the likely detriment to the confider if the confidence is breached. The test under section 41 is whether disclosure would constitute a breach of confidence actionable by the person who provided the information or any other person
22. In many cases it may be difficult to argue that disclosure will result in the confider suffering a detriment in terms of any tangible loss. The real consequence of disclosing information provided in confidence is an

infringement of the confider's privacy and there is a public interest in the protection of privacy.

23. In this case, the Council has advised that, due to the history of disputes in this small community, it considers there is a real risk that if the information were disclosed to the world at large, it would be detrimental to the individuals concerned. The individuals themselves have also expressed concern at possible detriment if the information were disclosed.
24. The Council referred to the Information Tribunal case of Pauline Bluck v IC & Epsom & St Helier University NHS Trust¹, which found that it would be a sufficient detriment to the confider if information given in confidence were disclosed to persons to whom he "... would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way."
25. The Commissioner is mindful of the Tribunal's decision in the case of Bluck in that the loss of privacy can be a detriment in its own right. He considers that the representations and views expressed by the individuals in this case constitute information of a personal nature. The Commissioner also notes that the opinions and views offered by the individuals are candid and frank in relation to the subject-matter of the play area. The Commissioner is satisfied that unauthorised use of the letters could cause detriment to the confiders, particularly in respect of their right to privacy.

Is there a public interest defence for disclosure?

26. Since Section 41 is an absolute exemption there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a *defence* to an action for breach of confidentiality. The Commissioner is therefore required to consider whether the Council could successfully rely on such a public interest defence to an action for breach of confidence in this case.
27. The Commissioner accepts that there is a public interest in the subject matter of the request, which relates to proposals to develop a particular play area and funding issues associated with the proposal. He also

¹ EA/2006/0090

accepts the complainant has a personal interest in the information, as at the time of the request he was a councillor for the local community council involved in the proposal to develop the play area. On the other hand the Commissioner considers that there is a strong argument that members of the public who make representations to a public authority in confidence outside of formal consultation exercises and processes should have that confidence protected. To disclose such information would dissuade others from submitting such representations in the future as they would have no guarantee that their views would be kept out of the public domain.

28. In weighing the above against the public interest in keeping the information confidential, the Commissioner has been mindful of the wider public interest in preserving the principle of confidentiality. The Commissioner recognises 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 information requested against both the wider public interest in preserving the principle of confidentiality and the impact that disclosure of the information would have on the interests of the confider. Particular weight should be attached to the privacy rights of individuals. As the decisions taken by courts have shown, very significant public interest factors must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality.
29. Having considered all the circumstances of this case, and the withheld information, the Commissioner has concluded that the public interest in maintaining the duty of confidence outweighs the public interest in disclosure in this case. Therefore the Commissioner finds that the information was correctly withheld under section 41 of the FOIA. As he considers this to be the case, he has not gone on to consider the Council's application of section 40(2) FOIA to the information.

Right of appeal

30. 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: GRC@hmcts.gsi.gov.uk

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

31. 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.
32. 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

Anne Jones
Assistant Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF