Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 July 2015

Public Authority: Isle of Anglesey County Council
Address: Council Offices
Llangefni
Anglesey
LL77 7TW

Decision (including any steps ordered)

1. The complainant requested various items of information in respect of two letters he had received from the Chairman of the Isle of Anglesey Council's Standards Committee. The Council provided some information but refused the rest by virtue of section 36(2)(c), section 41 and section 42(1) of the FOIA. It also stated that it did not hold some of the information.

2. The Commissioner's decision is that the Isle of Anglesey County Council correctly withheld information in respect of section 41 and section 42(1) of the FOIA. However, it incorrectly withheld information on the basis of section 36(2)(c) of the FOIA. The Isle of Anglesey Council also incorrectly informed the complainant that it did not hold information in respect of items III and VII of his request.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

    - Issue a fresh response in respect of items III and VII of the request compliant with section 1(1) of the FOIA.

    - Provide the information it holds in respect of items II and V of the request.

4. The public authority must take these steps 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

5. On 6 June 2014, the complainant wrote to the Council and confirmed that he was seeking a formal answer to his letters of 9 May and 10 May 2014 under the Freedom of Information Act. The letter of 10 May had requested background information in relation to two letters he had been sent from the Chairman of the Standards Committee in respect of his role as a member of that Committee. The letters concerned a recent article he had written about the storage of nuclear waste in Anglesey and published in a local newspaper (The Mail) and an email he had sent to a number of councillors in respect of wind turbines. The complainant's letter of 10 May stated:

"…I have sought advice and I think I would be correct in saying that the letter of the 8th May, signed by you, was not drafted by you.

[i]With reference to the Wind Turbine item would you please advise me on the sequence of events which occurred after the two e-mails were received by my elected Councillors,

[ii]the persons who took part in the drafting this item in your letter and

[iii]confirm that you were not involved in the drafting of this item in your letter?

[iv]With reference to The Mail item would you please advise me on the sequence of events which occurred after my letter was published in the Mail and your letter being drafted.

[v]Who took part in the drafting of this item in your letter,

[vi]how the item in The Mail was brought to the attention of the person drafting your letter and

[vii]confirm that you were not involved in the drafting of this item of your letter?" [For consistency with the Council, the Commissioner has inserted the Roman numerals.]

6. On 6 June 2014 the complainant confirmed that:
"On 10th May 2014 I wrote to [named individual A] … and requested information on the sequence of events within the County Council which caused him to write to me on 8th May 2014. …I now seek a formal

answer to my letter of 8th May 2014 under the terms of the Freedom of Information Act 2000."

7. The Council responded on 18 June 2014, informing the complainant that disclosures made under the FOIA are deemed to be made to the world at large and seeking his confirmation regarding whether or not he wished to pursue this course of action given that the matters to which his letter relates were largely personal to him.

8. Following the complainant's confirmation that he did wish to pursue his FOIA request, the Council provided its substantive response to the complainant on 17 July 2014. The response provided some information but refused to disclose other information on the basis of section 36(2)(c), section 41 and section 42 of the FOIA. The Council also confirmed that it did not hold relevant information in respect of items III and VII of the request.

9. Following an internal review the Council wrote to the complainant on 12 August 2014. The Council upheld its original response.

Scope of the case

10. The complainant contacted the Commissioner on 21 August 2014 to complain about the way his request for information had been handled. He referred to an email he had sent to a Councillor and expressed concern that a subsequent email from this Councillor to the Monitoring Officer had been withheld on the basis that it was legal advice. He added that the Council refused to tell him what advice was given and how his email to the Councillor had influenced the Planning Committee.

11. The complainant also referenced a further email mentioned in the Council's response, and received by the Monitoring Officer, which referred to his letter in the local newspaper and expressed concerns that he had not been allowed to see it.

12. Finally, the complainant informed the Commissioner that he believed information was being hidden from him, and he wanted to know what caused the letter of 8 May 2014 to be written and who wrote it.

13. The Commissioner considers that the scope of his investigation is to consider whether the Council has complied with its obligations under section 1(1) of the FOIA and the appropriateness of the exemptions relied on under sections 36(2)(c), 41 and 42 of the FOIA.

Reasons for decision

Section 1(1) – General right of access to information held

14. Under section 1(1) of the FOIA, in response to a request for information a public authority is only required to provide recorded information it holds and is not therefore required to create new information in order to respond to a request.

15. In his consideration of this case, the Commissioner is mindful of the former Information Tribunal's ruling in EA/2006/0072 (Bromley) that there can seldom be absolute certainty that additional information relevant to the request does not remain undiscovered somewhere within the public authority's records. When considering whether a public authority does hold any additional information therefore, the normal standard of proof to apply is the civil standard of the balance of probabilities.

16. The Commissioner's judgement in such cases is based on the complainant's arguments and the public authority's submissions and where relevant, details of any searches undertaken. The Commissioner expects the public authority to conduct a reasonable and proportionate search in all cases.

17. In this particular case, with the exceptions of items II and V of the request which have been refused on the basis of section 36(2)(c) of the FOIA, the Commissioner has considered whether the Council has identified all information it holds relevant to this request for the remaining items.

18. In terms of item I, which states:

    (i) *"With reference to the Wind Turbine item would you please advise me on the sequence of events which occurred after the two e-mails were received by my elected Councillors…"*

19. The Commissioner notes that the complainant was provided with some details of a chronology of recorded information in that he was informed that one of the County Councillors whom the complainant had contacted had sought legal advice on 28 April 2014. He was further informed that following the Councillor's discussions with the Council's Monitoring Officer, clarification was sought from a specific number of local County Councillors to establish whether or not they had also received the email sent by the complainant. The Head of Function /Monitoring Officer, within the same email, provided advice to the County Councillors.

20. The Commissioner has considered the Council's response and acknowledges that it has provided details of events following his email which it has referred to as a chronology, as opposed to a sequence of events. The Council has also identified a particular email as falling within the scope of this item of the request which it has refused to disclose on the basis of section 42 of the FOIA and is discussed in paragraphs 31 to 56 of this notice. The Council has also confirmed that it does not have a written record of the subsequent legal advice as it was provided verbally. The Commissioner has concluded that on the balance of probabilities, the Council does not hold any additional information and that it has therefore complied with its obligations under section 1(1) of the FOIA in respect of this item of the request.

21. The Commissioner has considered the Council's response in respect of items (III) and (VII) of the request together as they are identical, although item III was in relation to the wind turbine issue and item VII to the Mail item. They both asked the Chair of the Council's Standard's Committee to:

    "… confirm that you were not involved in the drafting of this item in your letter."

22. The Commissioner notes that the Council informed the complainant in its original response that:

    "For the purposes of the Act, no such recorded information is held by the Council."

23. This response was upheld in the Council's internal review letter of 29 July 2014. However, the Council's response to the Commissioner of 11 December 2014 in respect of both items III and VII of the request states:

    "…as it was felt that the complainant was attempting to undermine the Chair…more information was not provided. The Council in drafting the response was conscious of the risk to the effective conduct of public affairs posed by a careless response to the request."

24. As its response to the Commissioner explicitly contradicts its response to the complainant, the Commissioner has no option but to conclude that the Council has not complied with its obligations under section 1(1) of the FOIA in respect of items III and VII and requires the Council to provide a fresh response to the complainant compliant with section 1(1) of the FOIA.

25. The Commissioner has also considered item IV of the request which stated:

"*With reference to The Mail item would you please advise me on the sequence of events which occurred after my letter was published in The Mail and your letter being drafted.*"

26. The Council's response to the complainant stated that for the purposes of the FOIA, no such recorded information was held. However, it also confirmed that it held an email addressed to the Head of Function (Council Business)/Monitoring Officer which refers to the letter in the Mail but made no comment about the complainant as the author. It was undecided whether the email forms part of the 'sequence of events' and fell within the scope of the request, however the Council confirmed that it would refuse this email by virtue of section 41 of the FOIA in the event that it did fall within the scope. This was upheld in the Council's internal review.

27. The Commissioner notes that in his request for an internal review, the complainant confirmed that:

"I would ask that e-mail be made available to me as [I] will help clarify events which caused the letter of the 8th May 2014 to be written."

28. The Commissioner has therefore concluded that the email was within the scope of the request, and has considered it separately under section 41 of the FOIA. In terms of section 1(1) however, he considers that on the balance of probabilities, the Council is unlikely to hold any additional relevant information.

29. The final item to be considered under this section is item VI, which asked:

"…how the item in the Mail was brought to the attention of the person drafting the letter…"

30. In its response to this item, the Council informed the complainant that it did not hold any information relevant to the request, with the exception of the email referred to above (item IV). The Commissioner considers that it is unlikely that a public authority would record such information and other than the email referred to in item IV of the request, is satisfied that on the balance of probabilities, no further information is held.

Section 42 – Legal Professional Privilege

31. Section 42(1) of the FOIA provides an exemption from the disclosure of information protected by legal professional privilege.

32. Section 42(1) will be engaged if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.

33. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated. In both these cases, the communications must be confidential, made between a client and professional legal advisor acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.

34. The Council has confirmed that it is relying on legal advice privilege in relation to the email referred to in paragraph 20 of this notice. However, as also confirmed in the same paragraph, the legal advice itself was provided verbally and is not therefore held by the Council.

35. Establishing who the legal advisor is will be key to them identifying when a communication is legally privileged. The Commissioner generally considers that the term 'lawyer' means a legal advisor acting in a professional capacity and includes legal executives.

36. The Council has confirmed that the advice was provided by the Council's Monitoring Officer and solicitor and the Commissioner accepts that the communications are therefore between a client and legal advisor. However, the Council has further stated that it is not so much the disclosure of the substance of the information it seeks to prevent as this has already been disclosed to the complainant, but to defend a process, namely the ability of the Chair of Standards to ask, unfettered by fear of consequences, for robust and relevant legal, tactical or managerial advice delivered by advisors whom are unhindered by concerns of disclosure.

37. Whilst the Commissioner accepts that the letter to the complainant may have disclosed the substance of the legal advice, the Commissioner notes that this was a confidential letter intended solely for the complainant. As this was a restricted disclosure, the Commissioner is satisfied that the advice itself remains essentially confidential.

38. The Council has further argued that there are occasions where even the fact that legal advice has been sought should be protected from disclosure as knowledge that legal advice has been sought could result in negative consequences. The Commissioner would wish to point out that section 42(2) provides a provision for a public authority to neither confirm nor deny whether legal advice has been sought, and the Council

could have chosen to rely on this if it felt that the circumstances justified it. However, the Council, in response to this request has confirmed the existence of legal advice by citing section 42 of the FOIA and referring explicitly to the email in question in its response. The Commissioner accepts that the email in question constitutes legal advice and that the requirements of legal professional privilege are fulfilled. He has therefore gone on to consider the public interest test.

Public interest in disclosure

39. The Council accepts that there is an inherent public interest in demonstrating transparency in the public sector.

40. The Commissioner notes that the Council has not however identified any additional factors in favour of disclosure and would include the generic public interest in favour of accountability in the public sector.

41. The Commissioner would also point out that disclosure of the disputed information would demonstrate that the Council had followed correct procedures in matters where more specialist advice was required and where there was a concern regarding the conduct of a member of its Standards Committee.

Public interest in maintaining the exemption

42. The Council considers that there is a public interest in safeguarding openness in all communications between a client and a lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.

43. In this particular case, the Council has further argued that the public interest is not served by individuals making use of the FOIA to pursue issues and agendas which are not relevant or of interest to the wider population.

44. The Council also considers that the disclosure of this information would hinder the effective operation of the Standards Committee and has argued that there is an inherent public interest in ensuring that the Council's Standards Committee is an effective functioning body. It has further argued that this is particularly important for the Council as it has recently emerged from a period of Welsh Government intervention following a breakdown in Member /Officer relations and Member behaviour issues.

45. The Council has further argued that disclosure of the information would have an adverse effect on the role of the Monitoring Officer in relation to the Standards Committee.

The balance of public interest

46. The Commissioner acknowledges the general public interest factors in favour of transparency and accountability referred to in paragraphs 39 to 41 of this notice.

47. The Commissioner is also mindful of the general public interest in being able to demonstrate that the Council has followed the correct procedures in matters where obtaining specialist advice is appropriate, and specifically in relation to the conduct of Members of the Standards Committee.

48. The Commissioner is not persuaded by the Council's argument that the issue would not be of relevance or interest to the wider population. Indeed, he considers that the conduct of Members of the Council's Standards Committee would undoubtedly represent an issue of significant relevance and interest to the population of Anglesey and indeed the wider population interested in standards in local government. Indeed, the Commissioner notes that the Council's arguments in paragraph 44 also support this view and contradict its own argument.

49. The Council also considers that disclosure of the information would have an adverse effect on the role of the Monitoring Officer in relation to the Standards Committee. The Commissioner would point out that the role of Monitoring Officer is widely understood in local government and there is a general acceptance that the role would include giving advice to Members of the Standards Committee. The Commissioner has not therefore afforded much weight to this argument.

50. However, the Commissioner recognises the general principle that clients should be able to receive free and frank legal advice from their lawyers and acknowledges that this in itself is a strong public interest factor in maintaining the exemption, as confirmed by the Tribunal in the case of Bellamy v the Information Commissioner and the DTI [EA/2005/0023] which concluded that as:

"there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest."

51. This was further reinforced in Crawford v Information Commissioner & Lincolnshire County Council (EA/2011/01445) in which the Tribunal states:

"Our starting point, therefore is that the exemption is qualified, not absolute, but that …must show clear, compelling and specific justification that at least equals the public interest in protecting the information in dispute.

52. The Commissioner notes that factors which might suggest equally strong countervailing arguments include whether there is a large amount of money involved or a large number of people affected, lack of transparency in the public authority's actions, misrepresentation of advice given, or the selective disclosure of only part of that advice. The Commissioner notes that there is no evidence of any of these factors involved in this particular case.

53. Additionally, the Commissioner acknowledges the significant public interest in the Council being allowed to ensure that its Standards Committee can operate effectively and is mindful that this is particularly significant given that the Council had only recently emerged from a period of Welsh Government intervention following a breakdown in Member/Officer relations and Member behaviour issues.

54. He also notes that at the time of the request, the legal advice was very recent and directly related to the complaint's conduct as a Member of the Standards Committee.

55. Having considered the relevant public interest factors both in favour of disclosure and maintaining the exemption, the Commissioner considers the weight of public interest is balanced in favour of maintaining the exemption.

Section 36(2)(c) – prejudice to the effective conduct of public affairs

56. Section 36(2) (c) states that:

"*Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-*

would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

57. This is a prejudice-based exemption, therefore a public authority must confirm whether it considers disclosure of the disputed information would, or would be likely to prejudice the effective conduct of public affairs.

58. However, unlike the other prejudiced based exemptions, section 36 can only be engaged if, in the reasonable opinion of the Qualified Person, disclosure would or would be likely to result in any of the effects set out in section 36(2).

59. In order to rely on section 36 therefore, a public authority must show that:

- The decision to use the exemption was taken by the 'qualified person' (QP);
- The QP's opinion is a reasonable one (i.e. that it is reasonable to expect the disclosure of the information would, or would be likely to, prejudice one or more of the functions listed within section 36); and
- In all the circumstances, the public interest in maintaining the exemption outweighs the public interest in disclosure.

60. In this particular case, the relevant items for consideration under this exemption are:

    Item II, in respect of Wind Turbines– *"…the persons who took part in the drafting of this item in your letter*

    Item V, in respect of the letter in The Mail – *"Who took part in the drafting of this item in your letter…"*

61. The Commissioner must therefore consider whether the disclosure of these details would prejudice the effective conduct of public affairs.

62. The Commissioner notes that the Council has confirmed that it is relying on the test of 'would prejudice', rather than 'would be likely to prejudice'.

63. The Council has also confirmed that the QP was its Chief Executive. The Commissioner is satisfied that the Chief Executive is authorised as the QP under section 36(5)(h) of the FOIA.

64. The Commissioner notes that the submission to the QP was undated, however it confirmed that the complainant was seeking clarification as to the authors of the Council's letter of 8 May 2014. The submission argued that disclosure could have both direct and indirect consequences, indirectly impacting on the effective business of the Standards Committee and directly, in that the advice offered by the individuals would be challenged and their role in the business of the Standards Committee undermined. It was further argued that this be would or would be likely to result in the provision of less candid and robust advice to the Chair of the Standards Committee in the future and detriment the working relationship between the Committee and those individuals. The submission also contained the following proposed response to the request.

    "…letters are commonly drafted on behalf of senior figures within large public bodies, particularly if specialist advice is required. It is generally accepted that signing a letter establishes ownership, irrespective of the

number of individuals who may have been involved with the drafting of a letter."

65. The Qualified Person's opinion dated 17 July 2014 states:

"I consider that the exemption at section 36(2)(c) FOIA is engaged, and that disclosure of the information is likely to affect the effective conduct of public affairs."

66. The Commissioner must therefore decide whether the Qualified Person's opinion was reasonable. The Commissioner has published guidance which sets out his approach.[1] In short, if the opinion is in accordance with reason and not irrational or absurd, then it is reasonable. It is not reasonable only if it is an opinion that no reasonable person in the QP's positon could hold.

67. In considering whether the opinion is reasonable, the Commissioner has taken into account the submission to the QP, the opinion itself, and the actual response to the complainant.

68. Having taken into consideration the above, and with knowledge of the disputed information, the Commissioner's view is that the proposed response does not explain why, or indeed actually specify, that section 36(2)(c) is engaged. He does however acknowledge that the actual response subsequently made reference to section 36(2)(c), albeit without any explanation.

69. The Commissioner further considers that although the response appears to reflect the conclusions of the Council, it does not provide any explanation as to *how* disclosure would undermine the effective conduct of the Standards Committee or indeed, the public authority in general or why it would be likely to result in the provision of less candid and robust advice to the Chair of the Standards Committee in the future. Neither do the responses explain how or why the advice offered by the individuals would be challenged and their role in the business of the Standards Committee undermined. Therefore, when looking at the substantive opinion itself the Commissioner is simply considering whether the prejudice or inhibition specified in section 36(2)(a)-(c) would or would be likely to occur. In this instance, the Commissioner can see no evidence to this effect.

[1] Prejudice to the effective conduct of public affairs (section 36) page 6

70. In the light of the above, the Commissioner is not satisfied that the opinion given by the QP was a reasonable one. This means that the exemption at section 36(2)(c) is not engaged. There is no requirement in these circumstances to consider the public interest test.

Section 41- Information provided in confidence

71. 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"

72. As section 41 is an absolute exemption, it is not subject to the public interest under the FOIA.

73. The commissioner notes that there seems to be some confusion from the Council regarding exactly what information is being withheld by virtue of section 41. The Council's correspondence to the Commissioner in support of section 41 appears to be referring to the information under item I of this request, and already considered under section 42 of the FOIA in paragraphs 31 to 55 of this notice.

74. However, the Commissioner would draw the Council's attention to its response to the complainant of 17 July 2014 and would point out that there is no reference to section 41 in its response to item I of the request, yet its response to item IV states:

"The Council does hold an email to the Head of Function (Council Business) / Monitoring Officer which refers to the letter in the Mail, but makes no comment about you as the author. It is unclear whether this email forms part of a "sequence of events" or not, and I am unsure if the email is relevant and caught by the Act.

However, as the email is marked confidential, and the author of the email has reasonable expectations of confidentiality, the email is exempt under section 41 of the Act."

75. As stated in paragraph 28 of this notice, the Commissioner does consider the above email to be within the scope of the request. However, he is not considering the information referred to in the Council's response to item I of the request under section 41, as this section was not cited in either the refusal notice or the internal review,

and although he has the discretion regarding whether to consider late reliance on an exemption, the information has already been considered, and the Council's stance upheld, under section 42. Where multiple exemptions have been applied to the same information, and one upheld, he does not then go on to consider the remaining exemptions.

76. The Commissioner is therefore only considering the information relevant to item IV of the request and referred to in paragraph 28 of this notice.

77. The Council has confirmed that the information in question was provided by one of its Councillors and has argued that as a Councillor, the information was from a third party with expectations of confidentiality. The Council has further stated that disclosure would constitute an actionable breach of confidence.

78. The Commissioner must first consider whether the Councillor is in fact a third party. In the event that the individual is not a third party, section 41 cannot be engaged.

79. When considering whether the Councillor is a third party, it will depend on in what capacity the Councillor provided the information to the Council.

80. The Commissioner has previously considered the various roles fulfilled by Councillors in his decision notice against the London Borough of Camden (FS50422800).

https://ico.org.uk/media/action-weve-taken/decision-notices/2012/713050/fs_50422800.pdf

81. Briefly, Councillors may have three different roles within the Council to which they have been elected.

82. Firstly, they may sit on various committees, carrying out the Council's functions and in this case, any information held will be held on behalf of the Council and therefore caught by the FOIA.

83. However, Councillors also perform the role of an elected representative for their ward, holding surgeries and corresponding with constituents. This role is distinct to any role a Councillor may have on a committee and any information held by a Councillor in respect of this role is considered to be as part of their role as an elected individual, as opposed to a public authority. Any information held in respect of this role is not therefore covered by the FOIA. It should also be noted that even if it is held in email addresses owned by the Council itself, the information is not held by the Council but held on behalf of another person as stated in section 3(2)(a) of the FOIA.

84. Finally, a Councillor may also represent a political party and information of a party political business could not be considered Council business and therefore would not be held on behalf of the Council or therefore covered by the FOIA.

85. Similarly, it will depend in what capacity the Councillor provided the information to the Council. The Commissioner notes that in this case, the Councillor in question was not a member of the Standards Committee and had received the information from the complainant as one of three Councillors on the Council who represent the Ward where he lives. The Commissioner therefore considers that the Councillor's response was solely in respect of his role as a Ward Councillor and accepts that he can be considered a third party. He has therefore gone on to consider whether disclosure would constitute an actionable breach of confidence.

86. In his analysis of whether disclosure of the information constitutes an actionable breach of confidence the Commissioner must consider:

- 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 and to the detriment of the confider.

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.

87. In this case, the disputed information is the email to the Council from the Councillor. The Commissioner has seen no evidence that the withheld information has been put in the public domain and accepts the assurances from the Council that the information remains confidential He is therefore satisfied that the information is not accessible by other means.

88. The Commissioner notes that the email in question is in response to the Council's query regarding whether or not he had received an email from the complainant, and that his reply would not be considered trivial to the Councillor in question.

89. The Commissioner is therefore satisfied that the withheld information has the necessary quality of confidence.

90. The Commissioner has therefore gone on to consider whether the information was imparted in circumstances importing an obligation of confidence.

91. The information was provided by the Councillor on a voluntary basis and although there was not an explicit obligation of confidence, the Councillor is likely to have a reasonable expectation that his response would be treated in confidence, giving rise to an implicit obligation of confidence on the part of the Council.

92. The Commissioner has therefore gone on to consider whether disclosure of the information would be to the detriment of the confider.

93. The Commissioner is 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.

94. In this particular case, the Commissioner considers that disclosure into the public domain of the Councillor's response, is likely to be viewed as a loss of privacy by the Councillor. He therefore considers the absence of detriment would not defeat a cause of action.

95. The Commissioner has therefore gone on to consider whether there is a public defence for a breach of confidence.

96. The Commissioner accepts that there may be a public interest in the disclosure of an email response linked to a code of conduct Council investigation. He also accepts the complainant has a personal interest in this information. However, in weighing this 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.

97. The Commissioner is also guided by paragraph 8 of the Tribunal decision referred to in paragraph 42 of this notice, that it is in the public interest that confidences should be respected. The encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing an obligation of confidence. The Commissioner is mindful of the need to protect the relationship of trust between the confider and the confident; and the need not to discourage or otherwise hamper a degree of public certainty that such confidences will be respected by a public authority.

98. The Commissioner considers that the public interest in disclosing the information does not outweigh the public interest in maintaining that trust. He therefore finds that the Council would not have a public interest defence for breaching its duty of confidence and that the request for information is exempt under section 41 of the FOI. He has therefore concluded that the Council applied the exemption appropriately.

Other matters

The Council's handling of the request and responses to the Commissioner

99. Whilst the Commissioner has no concerns regarding the willingness of the Council to engage with the Commissioner during his investigation, he would wish to highlight that the Council's handling of the request and its response to the Commissioner's queries during his investigation of this complaint, fell short of his expectations of a public authority experienced in handling requests for information under the FOIA.

100. He considers its 'information not held' response to items III and VII of the request discussed in paragraphs 21 to 24 of this notice as a clear breach of its section 1(1) obligations. However, as this has already been discussed he will not repeat the details here.

101. The Commissioner does however wish to highlight the fact that it was necessary for him to request a copy of the withheld information on more than one occasion, and even when it was provided, it was evident that further information was outstanding.

102. Additionally, the quality of its responses to the Commissioner fell short of expectations in that it omitted to address his initial queries regarding section 41 and provided details of its search for items it was not required to provide.

103. The Commissioner trusts that the Council's handling of this request for information and its responses during his investigation are not indicative of its normal handling of requests for information under the FOIA and would confirm that future complaints against the Council will be monitored. Should a trend of non-compliance become evident, he will consider whether further action is necessary.

Right of appeal

104. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

105. 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.

106. 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