

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 19 June 2018

**Public Authority:** Department of Education (NI)

**Address:** Karen.McCullough@education-ni.gov.uk

### Decision (including any steps ordered)

---

1. The complainant has requested information in the form of a report prepared about matters within a named primary school in Northern Ireland. The Department of Education Northern Ireland ("the Department") refused to disclose that information, citing sections 38 and 41 of the FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that the Department has correctly applied section 41 of the FOIA to the entirety of the requested information, so she did not go on to consider its application of section 38.
3. The Commissioner therefore requires no steps to be taken.

### Request and response

---

4. On 24 March 2017, the complainant wrote to the Department and requested information in the following terms:

"I would like to request the following item under the Freedom of Information Act:

A copy of the report held by the department of education as submitted directly to the (then) Education Minister and/or special adviser by Board of Governor member [name redacted] regarding ongoing matters at Newbuildings Primary School in Londonderry. This report was submitted on or around late October/early November 2016."

5. The Department responded on 10 May 2017. It stated that it held the requested information, however it refused to disclose it, citing section 41

of the FOIA as a basis for non-disclosure. The complainant then requested an internal review of that decision.

6. Following an internal review the Department wrote to the complainant on 22 May 2017. It stated that it was upholding the original decision, and also that the reviewer had decided that section 38 of the FOIA also applied to the requested information.

### **Scope of the case**

---

7. The complainant contacted the Commissioner on 12 June 2017 to complain about the way her request for information had been handled.
8. The Commissioner has considered the Department's application of sections 38 and 41 of the FOIA to the requested information.

### **Reasons for decision**

---

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

9. 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.
10. The Department stated that the requested information, which consists of a report regarding Newbuildings Primary School, is exempt under section 41(1) of the FOIA.

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

11. The Department stated that the information was provided to it by the Chair of Newbuildings Primary School. The Commissioner is satisfied that this is the case.

#### **Would disclosure constitute an actionable breach of confidence?**

12. 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.

### **Does the information have the necessary quality of confidence?**

13. 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.
14. The complainant states that the report has been shared with the Education Authority, the Board of Governors in the school, and the teachers in the school, therefore she contends that it does not have the necessary quality of confidence.
15. However, the report was prepared by certain individuals on behalf of the Board of Governors and of the school, and was only shared with individuals within those two bodies. It was also shared with the Education Authority and with the Department for reference and action purposes. The Commissioner considers that information is otherwise accessible if it is in the public domain. Information will be in the public domain if it is realistically accessible to the general public at the time of the request. As the report had only been shared with certain parties at the time of the request, it was not in the public domain.
16. Having regard to the above, the Commissioner would accept that the information cannot be said to be publicly available and as such it cannot be considered to be otherwise accessible. The Commissioner has viewed the requested information and considers that it cannot be said to be trivial as it contains important information regarding matters to do with Newbuildings Primary School.
17. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.

### **Was the information imparted in circumstances importing an obligation of confidence?**

18. The Commissioner refers to the test set out in *Coco v AN Clark (Engineers) Ltd [1969] RPC 41*, specifically:

*“...if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence”.*

19. The Department has stated that it considers that an obligation of

confidence would have been implicit and that there would have been an expectation on the part of the providers that the report would not be disclosed, given the references to sensitive and personal HR issues and the views expressed regarding issues affecting the school.

**Would disclosure be of detriment to the confider?**

- 20. The Commissioner is satisfied that the requested information contains both personal and sensitive personal information of parties named within the report and could be withheld under section 40 (2) of the FOIA.
- 21. This means that the Department is not required to demonstrate that the confider would suffer any tangible detriment from disclosure. The real impact of disclosing private, personal information will be an infringement of the confider's privacy, as well as the privacy of other individuals named within the report, and there is a strong public interest in protecting the privacy of individuals.

**Is there a public interest defence for disclosure?**

- 22. Section 41 is an absolute exemption and so 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 Department could successfully rely on such a public interest defence to an action for breach of confidence in this case.
- 23. For her part, the Commissioner accepts that there is a general public interest in public authorities being open and transparent about their processes.
- 24. The College has argued that, by sharing the report publicly and therefore breaching the confidence of specific individuals, it would make it less likely that members of the public would share information in confidence with the Department in the future, which would not be in the public interest.

- 25. The Commissioner is mindful of her own guidance:

*“There is a public interest in maintaining trust and preserving a free flow of information to a public authority where this is necessary for the public authority to perform its statutory functions”.<sup>1</sup>*

26. In weighing the above public interest arguments for and against disclosure, 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.
27. 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. To the Commissioner’s knowledge, there is no suggestion in this case that the information concerns such matters.
28. Having considered all the circumstances of this case, and the withheld information, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information.
29. Therefore, the Commissioner finds that the information was correctly withheld under section 41 of the FOIA and has not gone on to consider section 38.

## **Right of appeal**

---

1

[http://ico.org.uk/for\\_organisations/guidance\\_index/~/\\_media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/SEC41\\_CONFIDENCE\\_PUBLIC\\_INTEREST\\_TEST\\_V1.ashx](http://ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/SEC41_CONFIDENCE_PUBLIC_INTEREST_TEST_V1.ashx)

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: 0870 739 5836  
Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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 .....**

**Deirdre Collins**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**