

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 22 February 2018

**Public Authority:** Middlesbrough Council  
**Address:** 109-111 Parliament Rd  
Middlesbrough  
TS1 4JE

#### Decision (including any steps ordered)

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1. The complainant submitted a whistleblowing report to Middlesbrough Council who undertook an investigation in response. The complainant has requested copies of information pertaining to the investigation and its outcome. The council withheld the requested information citing the Freedom of Information Act, specifically sections: 40(2) – Legal and Professional Privilege; 41 - Information Provided in Confidence; and 31(2) - Law Enforcement (for the purpose of protecting charities).
2. The Commissioner's decision is that Middlesbrough Council has correctly withheld the requested information under section 41 of the Freedom of Information Act.
3. The Commissioner does not require Middlesbrough Council to take any steps.

## Request and response

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4. On 7 March 2017 the complainant wrote to Middlesbrough Council ('the Council') and requested information in the following terms:

In relation to a whistleblowing report regarding [name redacted] submitted to the Council by the complainant:

*"Is it possible to obtain a copy of your investigations and subsequent report into this matter? I appreciate you may wish to sanitise parts of your report to comply with data protection."*

5. The Council responded on 5 April 2017 and confirmed that it held the information. The Council withheld the information stating:

*"After due consideration we consider the report and associated documents to be exempt under Section 40(2) Personal Information and 41 Information given in Confidence"*

6. Following an internal review the Council wrote to the complainant on 30 June 2017, it stated:

*"The Council have decided to maintain the refusal for that information under section 40(2), 41 and 31(2) of the Freedom of Information act."*

## Background to the case

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7. The complainant submitted a whistleblowing report to the Council outlining serious concerns in regard to [name redacted] housing scheme. He has advised that he *"provided 80+ documents to support and substantiate my claims"*
8. The housing scheme is run by a charitable Registered Society under the Co-operative and Community Benefit Societies Act 2014.

## Scope of the case

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9. The complainant contacted the Commissioner on 12 August 2017 to complain about the way his request for information had been handled. He considers that the whistleblowing report provided the Council with clear evidence of *"serious safeguarding breaches, misconduct, maladministration and negligence."* However the refusal by the Council to release its subsequent findings (the 'investigation report') causes the

complainant concern that this evidence was not thoroughly and impartially considered.

10. The Commissioner considers the focus of the investigation to be whether the Council handled the request in accordance with the FOIA, and will initially consider whether it is entitled to rely on the exemption at section 41 as a basis for refusing to provide the withheld information.

## Reasons for decision

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### Section 41 – information provided in confidence

11. 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.”*

*Was the information obtained from another person?*

12. The investigation report comprises a breakdown of the concerns raised in the whistleblowing report, the investigative areas and actions identified by the Council, and a final outcome for each concern.
13. The Council was provided with information by staff at the housing scheme in order to derive the final outcome. The scheme is run by a registered charity, therefore this information was obtained by the Council from another person.
14. The concerns are derived from the whistleblowing report and the investigative areas and actions originate from the Council's analysis of that report. Although this information is not generated by another person the Commissioner considers that disclosure of this information will infer the content derived<sup>1</sup> in the final outcome.

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

15. The Commissioner is therefore satisfied that the information was obtained from another person and that the requirement of section 41(1)(a) is met.

*Would disclosure constitute an actionable breach of confidence?*

16. With regard to whether disclosure would constitute an actionable breach of confidence, the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. That judgment suggested that the following three-limbed test should be considered in order to determine if information was confidential:

- whether the information had 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?*

17. 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.
18. The Council states it is *"of the view that the information contained within the report which was the subject of the FOI request remains sensitive and as such should remain confidential. The rationale for this recommendation is that those people who participated in and gave information during the initial investigation largely remain actively employed by the provider in question. As such any decision to make the information they provided to assist with the investigation would breach their confidence."*
19. The withheld information contains details of concerns raised in the whistleblowing report, including allegations of wrong-doing by the scheme and involving individuals. The outcomes are based on the evidence provided by staff who participated in the investigation with regard to the allegations. Having viewed the withheld information the Commissioner is satisfied that it is not trivial.
20. As author of the whistleblowing report, the complainant is aware of the issues it raises. The Commissioner is unaware of whether the complainant has made the whistleblowing report available to the public at large. Whilst the investigation report comprises a component of the information held in the whistleblowing report, the resulting analysis by the Council, investigation and outcomes are not publically available.

21. The Commissioner is therefore satisfied that the information has the necessary quality of confidence and is more than trivial.

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

22. 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".*

23. The Council explained that *"staff were given the opportunity to discuss issues in confidence and were also given the opportunity to respond to an anonymous survey should there be any fear of reprisal."* The Council further explained that there is *"a level of confidence expected when organisations are required to provide information to the authority in order to comply with an investigation."*

24. Furthermore the Council states that where no fault is found then *"the disclosure of information would be likely to be prejudicial to the reputations of organisations, at least some individuals and contributors may become unduly stressed or unhappy about the disclosure of their comments or statements."*

25. Considering the nature of the allegations, and the circumstances in which evidence was gathered from individuals to form the outcomes of the investigation, the Commissioner is satisfied that there is an implied obligation of confidence.

*Would disclosure be of detriment to the confider?*

26. The Commissioner's guidance *Information provided in confidence (section 41)* establishes that case law now suggests that *"any invasion of privacy resulting from a disclosure of private and personal information can be viewed as a form of detriment in its own right"*.

27. The Commissioner considers that the allegations and investigations into the allegations made against the scheme constitute information of a personal nature. Additionally information provided under such circumstances may cause personal distress and potentially issues between employees if it is about other employees work. It is therefore not necessary for there to be any detriment to the confider(s) in terms of tangible loss, for this information to be protected by the law of

confidence. Therefore the Commissioner has not considered this issue further.

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

28. Section 41 is an absolute exemption which means there is no requirement for an application of the conventional public interest test. However, there is a defence to an otherwise actionable breach of confidence where there is an overriding public interest in the information being disclosed. 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.
29. The Council says *"that the disclosure of information would be likely to be prejudicial to the reputations of [scheme] and that because there had been no fault found, the public interest test did not override this and it was judged that it would be unfair to release the information."*
30. The Council has also made a case that the disclosure of information gained through the course of such an investigation may have a negative impact on the effective conduct of future investigations and complaints processes *"as organisations, staff or clients may become reticent about reporting grievances / complaints or being open and frank with the investigating officer if they thought information they provided in confidence is then released into the public domain."*
31. The Commissioner notes that although the Council withheld the investigation report it advised the Complainant to seek an appointment with Monitoring Officer for the Council if he wishes to discuss the whistleblowing complaint further.
32. The Commissioner is cognisant of the serious nature of the allegations made by the Complainant in the whistleblowing report. However she is also mindful of the potential negative impact of releasing the investigation report to the public at large.
33. 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.
34. With regard to the complainants outstanding concerns and the serious nature of the whistleblowing report it may be more appropriate for him to pursue other avenues, such as the Council's monitoring officer or the Local Government Ombudsman.

35. The Commissioner finds that the Council correctly withheld the information under section 41 of the FOIA. As such she has not gone on to consider section 40(2) and 31(2).

## Right of appeal

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36. 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)

37. 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.
38. 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**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**