

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 July 2018

Public Authority: Portsmouth City Council

Address: Civic Offices
Guildhall Square
Portsmouth
PO1 2AL

Decision (including any steps ordered)

1. The complainant has asked Portsmouth City Council for correspondence received by Solent Local Enterprise Partnership which relates to an application by the Fox and Hounds Co-operative for a Bridging the Gap Grant. The Council has refused to disclose the correspondence it holds on the grounds that it is subject to a duty of confidence owed to the owners of the Fox and Hounds. The Council therefore applied the exemption to disclosure provided by section 41(1) of the FOIA.
2. The Commissioner's decision is that Portsmouth City Council has correctly applied section 41(1) of the FOIA to the information it has withheld from the complainant.
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. On 6 June 2017, the complainant wrote to Solent Local Enterprise Partnership ("Solent LEP"). The complainant's email contained the following request for information:

"The final point is that the correspondence you have had with our tenant, it is not confidential. Indeed, I would suggest that where that correspondence is contributing to our inability to supply what you require, then there is a clear obligation on you, inferred into the contract, to provide that documentation and you are in breach of that inferred term for failing to supply that correspondence. Please provide it by return.

In the alternative, please take this as a request pursuant to the Freedom of Information Act 2000 to supply us with a copy of all correspondence received by any third party that relates to our application for the Bridging the Gap Grant request. For the avoidance of doubt, and as explained above, given the correspondence relates to the Co-operative's Grant application and Contract, and how you are implementing your monitoring programme, it cannot hold any right of confidentiality and it should be disclosed within 20 working days referred to in the statute."

5. Solent LEP acknowledged receipt of the complainant's request on 12 June and informed him that Solent LEP's accountable body is Portsmouth City Council. The complainant was therefore advised that he should make his request via the Council's email address at foi@portsmouthcc.gov.uk.
6. On 9 July 2017m the complainant wrote to the Council to ask for:
"...a copy of all correspondence received by Solent LEP from any third party that relates to our application (i.e. the application by the Fox and Hounds Co-operative for the Bridging the Gap Grant request)."
7. The Council responded to the complainant's request on 4 August 2017 by issuing a refusal notice under section 17 of the FOIA. The Council advised the complainant that:
"In accordance with Section 41(1) of the FOIA, the Council believes that any information fitting the description of your request would be held in confidence by the Solent LEP and would be exempt from disclosure in accordance with Section 41(2) of the Freedom of Information Act. However, it neither confirms nor denies the Solent Local Enterprise Partnership holds the information you have requested."
8. On 1 September 2017, the complainant wrote to the Council to argue that its reliance on Sections 41(1)(and 41(2) was not appropriate: In respect of the Council's reliance on Section 41(2), the complainant asserted that it is not applicable because, "There has been an acceptance in a meeting and in correspondence from [name redacted] of Solent LEP that correspondence has been received. As such, it is inappropriate to suggest it may not have been received and [...] to do so would not constitute an actionable breach as [name redacted] has already acknowledged the fact of such receipt.
9. In respect of the Council's reliance on Section 41(1), the complainant rejected the Council's suggestion that disclosing the correspondence would lead to an actionable breach of confidence.
10. On 14 September 2017, the complainant provided the Council with extracts of correspondence written by the tenants of the Fox and

Hounds, which had been circulated to members of the Co-operative, though not to members of the Board.

11. Following an internal review, the Council wrote to the complainant on 13 October to advise him of its final decision. The Council, having taken into account the complainant's recent emails, now confirmed that Solent LEP holds information fitting the terms of the complainant's request, but it determined that the recorded information is exempt from disclosure by virtue of Section 41 of the FOIA.

Scope of the case

12. The complainant contacted the Commissioner 7 December 2017 to complain about the way his request for information had been handled.
13. The Commissioner determined that the focus of her investigation would be to determine whether the Council has handled the complainant's request in accordance with the FOIA, and specifically, to determine whether the Council is entitled to rely on Section 41(1) of the FOIA to withhold information fitting the terms of the complainant's request.

Reasons for decision

14. The Council has advised the Commissioner that this request was originally submitted to Solent Local Enterprise Partnership (Solent LEP). The Council is the accountable body for Solent LEP and handles all requests for information on its behalf. In making its response to the Commissioner, the Council worked with Solent LEP.
15. The information requested by the complainant relates to concerns raised by the owners of S.A.D. Pub Ltd about a grant funding application from The Fox & Hounds (Denmead) Community Co-Operative (FHDCC). These were responded to in accordance with Solent LEP's complaints policy.¹
16. S.A.D. Pub Ltd is the tenant of FHDCC.
17. The Council has confirmed that the only information held by Solent LEP which is relevant to the terms of the complainant's request is the

¹ <https://solentlep.org.uk/media/2248/enquiry-complaints-and-whistleblowing-policy.pdf>).

correspondence received from the owners of S.A.D. Pub Ltd ("the owners"). The Council has provided the Commissioner with copies of this correspondence for her consideration of this complaint. It has also provided the Commissioner with a copy of Solent LEP's response to the owners' complaint and a copy of the most recent correspondence from owners.

18. The owners' recent correspondence to Solent LEP reiterates their request not to share or discuss their complaint with their landlord

Section 41 – information provided in confidence

19. Section 41(1) provides that –

“(a) Information is exempt information if 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.”

20. To properly engage section 41, disclosure of the requested information must give rise to a possible actionable breach of confidence. This requires the information to have the necessary quality of confidence. The information must therefore be more than trivial and not be otherwise accessible.
21. The information needs to be communicated in circumstances which import an obligation of confidence. This obligation can be implicit or expressed explicitly.
22. Finally, unauthorised disclosure of the information would need to cause detriment to at least one party.
23. In this case, the information sought by the complainant, which is being withheld, is the correspondence exchanged between Solent LEP and FHDCC's tenants.
24. Having examined that correspondence, the Commissioner agrees with the Council that the correspondence was provided by the owners and Solent LEP respectively. The Commissioner finds that the contents of the correspondence are not trivial because they resulted in Solent LEP commissioning an independent investigation of their complaints and she also finds that the correspondence is not publically available.

25. The Commissioner's decision is that the correspondence has the necessary quality of confidence required for the application of this exemption.
26. To assist the Commissioner in determining whether the withheld information was communicated in circumstances which give rise to an obligation of confidence, the Council has referred her to Solent LEP's published complaints policy. This states that complaints will be treated in confidence and consequently the owners would have a clear expectation of this.
27. This expectation is reinforced by the owners having explicitly asked for confirmation, in a number of their emails, that their information would not be shared with FHDCC.
28. In view of the above, the Commissioner has decided that the withheld correspondence is subject to an obligation of confidence and therefore she is content that the exemption provided by section 41(1) is engaged.
29. The Commissioner notes that the duty of confidence is not absolute. She recognises that information may be disclosed if disclosure is required by law and where there is a greater public interest in disclosing the information which overrides the duty of confidence.
30. The public interest test inherent within section 41 of the FOIA differs from the public interest test associated with the qualified exemptions in the Act. The position of the public interest test in qualified exemptions is that the information should be disclosed where the public interest in withholding the information outweighs the public interest in disclosing it. In respect of section 41, the information should not be disclosed unless the public interest requires disclosure.
31. When considering whether information should be disclosed, the Commissioner must consider that information in respect of its disclosure to the public at large and not just to the person who has requested it.
32. Generally, the Commissioner will give weight to the general principle that disclosure of information held by public authorities will achieve both accountability and transparency.
33. Such disclosures assist the public in understanding the basis and how public authorities make their decisions and carry out their functions. This in turn fosters trust in public authorities and may also allow greater participation in the Council's decision making process.
34. In this case, a letter sent by the owners to Solent LEP resulted in the commissioning of Portsmouth City Council's Audit & Counter Fraud team (ACF) to carry out an independent investigation. The investigation determined that a grant had not been claimed fraudulently and no

evidence was found to support concerns relating to the professional conduct or handling of the complaint.

35. Since that investigation, there have been no changes to Solent LEP's monitoring or discharge of the contract with FHDCC as a result of the owners' complaint.
36. The Council concedes that the investigation by the ACF into owners' concerns was "somewhat restricted". This is because evidence to support the owners' concerns could not be discussed with the FHDCC without the owners' consent. In the absence of this direct dialogue, it was not possible to draw any conclusions on this aspect of the owners' complaint.
37. Notwithstanding this, the Council asserts that that disclosure of the owners' correspondence would serve no purpose other than to cause further detriment to the relationship between the owners and the FHDCC.
38. In view of the Council having advised the Commissioner that the outcome of the independent investigation was that FHDCC's funding application was correctly agreed and that owners' complaint had no material effect on the contract between Solent LEP and FHDCC, the Commissioner considers that the weight of the public interest favouring disclosure of the owners' correspondence is significantly reduced.
39. The Commissioner considers that it is important for individuals to be able to complain in confidence about any matter without the risk of disclosure of their complaint without compelling reason. If this was not the case, the Commissioner believes there would be a real risk that potential complainants may not come forward.
40. The owners raised concerns in their emails that would potentially lead to "harassment and intimidation" from their landlord if the correspondence were to be disclosed to FHDCC. This danger is referred to in the owners' email of 23 April 2018.

The Commissioner's decision

41. The Commissioner must afford significant weight to the disclosure of recorded information where it would result in greater transparency and accountability of the actions taken by public authorities. This is especially so where the recorded information relates the granting of public money.
42. Weighed against is the fact that the owners' concerns were investigated by the Council's ACF and that investigation found that the FHDCC's grant application had not been made fraudulently.

43. On balance, and taking account of all the factors she is aware of in this case, the Commissioner has decided that the duty of confidence owed to the owners outweighs the public interest for disclosure of the requested correspondence. The Commissioner has therefore decided that the Council is entitled to rely on section 41(1) of the FOIA to withhold that information.

Right of appeal

44. 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

45. 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.
46. 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
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