

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 May 2020

Public Authority: Newcastle City Council
Address: Civil Centre
Newcastle upon Tyne
NE1 8QH

Decision (including any steps ordered)

1. The complainant requested from Newcastle City Council (the Council) information relating to communications about the removal of the Nakba exhibition. The Council provided responses to some parts of the request and withheld information within the scope of the remaining parts of the request under section 41(1) (information provided in confidence) of the FOIA.
2. The Commissioner's decision is that the Council correctly applied section 41(1) to the withheld information. Therefore, the Commissioner does not require the Council to take any steps as a result of this decision.

Background information

3. A decision was made to remove from Newcastle City Library an exhibition commemorating the Nakba of 1948. Subsequently, a FOI request was submitted to the Council relating to the exhibition and this request was mentioned in an on-line press article. The Commissioner has viewed the article which she considers provides a background to this case, and it consists of the following:

"Newcastle City Library, which is funded and run by the council, had initially agreed to host the PSC [Palestine Solidarity Campaign] exhibition.

In response to a Freedom of Information (FOI) request submitted by a PSC member, the library said it had cancelled the display because it had

received a comment that the material was 'inflammatory and biased' and that the decision to cancel was because of 'the one-sided nature of the display.' The library refused to reveal correspondence between the council and library over the ban, or who had made the final decision, or the exact wording of the comment or how many comments there had been. It now claims it will consider hosting the exhibition again if it is done in a 'balanced' way."

Request and response

4. On 17 July 2019 the complainant wrote to the Council and requested information in the following terms:

"I am an associate of [name redacted] and [name redacted] and they have shown me emails between you and [name redacted].

In [name redacted] email of 3.6.19 to [name redacted], he referred to receiving 'a small number of comments about the content....we need to take seriously'.

1) I request copies of comments received in writing whether that be letter, email, handwritten note and received verbally but the notes taken by staff of such verbal comments. All personal data to be redacted of course.

I would expand the meaning of comments to include complaints, etc, anything negative with regard to the content of the exhibition.

2) I request copies of communications regarding the exhibition between staff and externally, before, during and after the exhibition.

3) Whose decision was it to take down the exhibition?

4) Also in [name redacted] email, he stated, "On reflection some content contravened our Public Information and Display Policy...". Please specify which of content? If we remove this content others were unhappy with, are we permitted to exhibit what remains?"

5. On 13 August 2019 the Council responded. It informed the complainant that the comments were made in confidence, and that there is an expectation that the Council would not share other people's correspondence. The Council also provided an explanation of its "displays policy" and said that it had considered the comment and deemed it appropriate to take down the display. It referred the complainant to a section of the Council's displays policy which states the type of information that cannot be displayed.

6. On 16 August 2019 the complainant wrote to the Council and expressed his dissatisfaction with its response.
7. On 10 September 2019 the Council responded. It provided the complainant with responses to some parts of the request (parts 2, 3 and 4) and withheld information within the scope of part 1 and some of part 2. The Council cited section 41(1) (information supplied in confidence) of the FOIA in relation to the withheld information, which consisted of external communications and copies of any actual complaints.

Scope of the case

8. The complainant contacted the Commissioner on 9 December 2019 to complain about the way his request for information had been handled. Specifically, the complainant disputed the Council's refusal to provide information within the scope of some parts of his request, and its reliance on section 41(1) of the FOIA.
9. The following analysis focuses on whether the exemption at section 41(1) of the FOIA was cited correctly to the information withheld from the response to parts 1 and 2 of the complainant's request.

Reasons for decision

Section 41 – information provided in confidence

10. 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."

11. The withheld information in this case is a complaint to the Council from a third party and it is regarding the Nakba exhibition¹ organised by the Palestine Solidarity Campaign. The Commissioner is satisfied that the information has been obtained by the Council from an "other person."
12. The Commissioner's guidance² on section 41 states that a public authority wishing to rely on the exemption should consider the test of confidence set out in *Coco v A N Clark (Engineers) Limited [1968] FSR 415* in assessing whether a disclosure would constitute an actionable breach of confidence.
13. The decision in *Coco* suggested that three elements were usually required to bring an action for a breach of confidence:
 - the information must have the necessary quality of confidence,
 - it must have been imparted in circumstances importing an obligation of confidence, and
 - there must have been an unauthorised use of the information to the detriment of the confider.
14. 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.
15. The Commissioner asked the Council to set out, with reference to the above tests, why it considered that disclosure of the withheld information would constitute an actionable breach of confidence.
16. The Council's response was that the third party had made it clear to the Council that they did not want their name, details or the content of the complaint to be shared with anyone. The Council stated that when it receives a complaint from an individual, it is implied that their complaint will remain confidential.

¹ <https://www.revolutionarycommunist.org/branches/north-east-england/5697-newcastle-labour-council-bans-palestine-nakba-exhibition>

² <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

17. The Council also said that *"when someone specifically states that they do not want their complaint made public (as is the case here), we take that as an explicit instruction and any subsequent sharing would therefore be seen as an actionable breach of confidence."*
18. The Commissioner has decided that the information was imparted to the Council with an expectation that it would be held under a duty of confidence. The necessary obligation of confidence was therefore present.
19. The Commissioner is satisfied that the information has the necessary quality of confidence because it is not trivial information, and is not information that would otherwise be available to the public.
20. The Council said that the matters discussed in the correspondence suggests that disclosing the information would cause a detriment to the confider, as they consider this information confidential. The confider had specifically stated to the Council that they did not want their comments made public. The Commissioner has established that the information in this case constituted information of a confidential nature. Its release could cause the confider a degree of damage or distress. Therefore the Commissioner accepts that disclosure would be to the confider's detriment.

Is there a public interest defence for disclosure?

21. Although section 41(1) of the FOIA is an absolute exemption, and does not need to be qualified by a public interest test under section 2 of the FOIA, case law suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence.
22. The Commissioner has therefore considered whether there is a public interest defence available should the Council disclose the information. The duty of confidence public interest defence assumes that the information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.
23. The Council said it considered that disclosure of the information would enable the public to obtain satisfaction that the Council was being transparent in cases of this nature.
24. In favour of maintaining the exemption, the Council said that *"ensuring that complaints made by the public remain confidential (particularly under explicit instruction) would ensure trust and integrity in the authority."*

25. The Council also considered that on balance the public interest in maintaining the exemption outweighed that in disclosing the withheld information. It said that the confidentiality of the complaint and the detail it contained, would be jeopardised by any disclosure. The Council is of the view that the general public would discontinue using their right to the complaints process, if they thought that their complaints would be released to the world at large under the FOIA.
26. The Council confirmed to the Commissioner that the confider, along with their comments had provided a written "*explicit notice*" stating that they did not want their comments to be shared.
27. The Commissioner takes the view that a duty of confidence should not be overridden lightly, particularly in the context of a duty owed to the confider. Disclosure of any confidential information undermines the principle of confidentiality, which itself depends on a relationship of trust between the confider and the confidant.
28. The Commissioner considers that people would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected. It is therefore in the public interest that confidences are maintained.
29. The Commissioner is of the view that it is important for individuals to be able to complain about any subject, 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 complaints may not be submitted.
30. The complainant had argued that "*if the complaints were considered legitimate enough as a basis to remove the exhibition, then they should be disclosable.*" He also argued that "*how persons might feel about their complaints being disclosed isn't a consideration under the Act.*" The complainant considered that the Council would only need to redact the personal details. Therefore, the complainant believes that the withheld information should be disclosed, and he disagrees with the Council's reliance on section 41(1) of the FOIA to withhold this requested information.

31. The Commissioner appreciates the complainant's concerns regarding his request are of considerable importance to him. Although there is also a wider public interest in understanding the reasons for the display being withdrawn, it is not sufficient to override maintaining the duty of confidence, given that the Council has explained its reasons for withdrawing the exhibition in terms of its policy on displays. The Commissioner notes that the Council had demonstrated its accountability in this case by answering the complainant's questions where it was able to.
32. With regards to the redaction of personal details, the Commissioner considers that it would be difficult to make redactions to the information without disruption to the nature of the complaint. This is because there is confidential, identifiable or sensitive information throughout the correspondence and therefore it would be difficult to redact meaningfully.
33. The Commissioner is mindful of the wider public interest in preserving the principle of confidentiality. She recognises that the Council has taken the view that the grounds of breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly.

The Commissioner's conclusion

34. The Commissioner is satisfied that the withheld information has the necessary quality of confidence, was imparted in circumstances giving rise to an obligation of confidence and that disclosure would result in detriment to the confider.
35. On balance, having considered all the circumstances of this case and the withheld information, the Commissioner has concluded that the public interest in disclosing the withheld information does not outweigh that in maintaining the confidence and, therefore, the Council could not have relied on a public interest defence in an action relating to a breach of confidence. On this basis the Commissioner finds that section 41(1) of the FOIA was cited correctly and so the Council was not obliged to disclose the withheld information.

Right of appeal

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@justice.gov.uk.

Website: 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

Ben Tomes
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF