

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 June 2020

Public Authority: Serious Fraud Office
Address: 2-4 Cockspur Street
London
SW1Y 5BS

Decision (including any steps ordered)

1. The complainant requested information relating to a Deferred Prosecution Agreement (DPA). The Serious Fraud Office (SFO) refused to provide the requested information, citing sections 30 (investigations and proceedings) and 41 (information provided in confidence) of the FOIA.
2. The Commissioner's decision is that the information is exempt from disclosure on the basis of section 41(1).
3. The Commissioner requires no steps to be taken as a result of this decision.

Background

4. A UK Deferred Prosecution Agreement (DPA) is an agreement reached between a prosecutor and an organisation which could be prosecuted, under the supervision of a judge¹.

¹ <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/>

5. The agreement allows a prosecution to be suspended for a defined period, provided the organisation meets certain specified conditions.
6. DPAs were introduced on 24 February 2014, under the provisions of Schedule 17 of the Crime and Courts Act 2013.
7. By way of background in this case, the SFO told the complainant:

"DPAs were introduced in England and Wales by virtue of section 45 and Schedule 17 to the Crime and Courts Act 2013.

...

On 17 January 2017 a DPA between the SFO and Rolls Royce PLC was approved by Sir Brian Leveson in relation to bribery and corruption.

Part 7 of the agreement addresses the appointment of Lord Gold to conduct an independent review of the company's approach to anti-bribery and corruption compliance. By the time the DPA was approved Lord Gold's independent review was underway and he had already delivered two reports identifying risk areas and making recommendations for change. Under the terms of the agreement Rolls Royce was required to use best endeavours to procure two further reports and provide copies to the SFO. Both reports have since been received by this office".

Request and response

8. On 22 August 2019, the complainant wrote to the SFO and requested information in the following terms:

"All reports the SFO has received from Rolls-Royce as required by part F of the deferred prosecution agreement dated 17 January 2017".

9. The SFO provided its substantive response on 26 November 2019. It refused to provide the requested information. It cited the following exemption as its basis for doing so:
 - section 30(1)(a) to (c) (investigations and proceedings).
10. Following an internal review, the SFO wrote to the complainant on 6 January 2020, revising its position. It confirmed its application of section 30(1), citing subsections (b) to (c), and additionally cited section 41 (information provided in confidence) of the FOIA.

Scope of the case

11. The complainant contacted the Commissioner on 7 January 2020 to complain about the way his request for information had been handled.
12. In the absence of any further explanation about the nature of his complaint, the Commissioner wrote to the complainant advising that the focus of her investigation would be to determine whether the SFO was entitled to rely on section 30 and/or section 41 of the FOIA as a basis for refusing to provide the withheld information.
13. During the course of her investigation, the SFO wrote to the Commissioner confirming its application of sections 41(1) and 30(1)(b) to (c) of the FOIA to the requested information. Although not required to do so, the SFO provided the complainant with a copy of its submission to the Commissioner.
14. The analysis below considers the SFO's application of the exemptions to the requested information. That information comprises two reports, namely Lord Gold's third and final reports dated 17 January 2017 and 30 August 2019 respectively.

Reasons for decision

15. The SFO confirmed it considers that both exemptions apply to both reports in their entirety. The Commissioner first considered its application of section 41 to the withheld reports.

Section 41 information provided in confidence

16. Section 41 sets out an exemption from the right to know where the information was provided to the public authority in confidence.

17. Section 41 of the FOIA states that:

'(1) 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.'

18. Therefore, for this exemption to be engaged, two criteria have to be met: the public authority has to have obtained the information from a

third party and the disclosure of that information must constitute an actionable breach of confidence.

19. In her guidance on section 41², the Commissioner acknowledges:

"[Section 41] is designed to give those who provide confidential information to public authorities, a degree of assurance that their confidences will continue to be respected, should the information fall within the scope of an FOIA request".

Was the information obtained by the SFO from another person?

20. Section 41(1)(a) requires that the requested information must have been obtained by the public authority from another person. In her guidance on section 41, the Commissioner acknowledges that, in this context, the term 'person' means a 'legal person'. This could be an individual, a company, another public authority or any other type of legal entity.

21. The SFO confirmed that the reports under consideration:

"... were provided to the SFO by Rolls Royce in accordance with Part F of the DPA which was approved by the court on 17 January 2017".

22. From the evidence she has seen, the Commissioner is satisfied that the withheld information was obtained by the SFO from another person and therefore met the requirements of section 41(1)(a).

Would disclosure of the information constitute an actionable breach of confidence?

23. In considering 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;

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

- 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.

24. Further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

Does the information have the necessary quality of confidence?

25. For the information to have the necessary quality of confidence it must not be trivial and not otherwise available to the public. Information which is of a trivial nature, or already available to the public, cannot be regarded as having the necessary quality of confidence.

26. The Commissioner recognises that information should be worthy of protection in the sense that someone has a genuine interest in the contents remaining confidential.

27. In this case, the SFO considered the information has the necessary quality of confidence for the following reasons:

- the reports are not in the public domain, or otherwise accessible to the public; and
- they set out detailed information about Rolls Royce that would not be revealed in the normal course of business.

28. In its submission, the SFO described the reports as containing:

"...wide-ranging explanation and analysis of the company's internal procedures, processes and controls in relation to the way it operates and undertakes business ..."

29. It told the Commissioner:

"There are also lengthy discussions in both reports concerning matters such as the company's business operations, organisational structure and governance arrangements. Information of this nature is plainly confidential as well as being commercially sensitive and of value to competitors"

30. The Commissioner considers that information will be in the public domain "if it is realistically accessible to the general public at the time of the request". She acknowledges that this is a matter of degree and will depend on the specific circumstances of the case.

31. In this case, the subject matter of the request is the reports received by the SFO from Rolls Royce under the terms of the DPA. The Commissioner recognises that there is information in the public domain about Rolls Royce entering into a DPA with the SFO. She also accepts that there is information in the public domain, including on Rolls Royce's website, relating to information in the report itself, for example references to its policies and procedures. However, she is not aware that the actual reports themselves have been published and considers their content to be more detailed than the information available elsewhere.
32. Having considered the withheld information, she is satisfied that it is more than trivial and not already in the public domain. She is also satisfied that Rolls Royce would have a genuine interest in the content of the reports remaining confidential.
33. The Commissioner is therefore satisfied that the withheld information in this case has the necessary quality of confidence required to sustain an action for breach of confidence, and as such she considers that this limb of the confidence test is met.

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

34. Even if information is to be regarded as confidential, a breach of confidence will not be actionable if it was not communicated in circumstances that created an obligation of confidence.
35. The Commissioner's guidance recognises that there are essentially two circumstances in which an obligation of confidence may apply:

"The confider has attached explicit conditions to any subsequent use or disclosure of the information (for example in the form of a contractual term or the wording of a letter); or

The confider hasn't set any explicit conditions, but the restrictions on use are obvious or implicit from the circumstances. For example, a client in therapy wouldn't need to tell their counsellor not to divulge the contents of their sessions to others, it is simply understood by both parties that those are the rules".

36. In this case, with regard to the second limb of the test, the SFO considered that the reports were provided in circumstances importing an obligation of confidence on the basis that they are clearly marked, on every page, as being '*Strictly Private & Confidential*'.
37. The Commissioner acknowledges in her guidance that, while protective markings may provide a useful preliminary indication that information may be confidential, authorities should not rely on them to make final decisions.

38. In its submission to the Commissioner, the SFO said:

"Second, even if the confidential nature of the reports were not spelled out in this manner, an obligation of confidence would have applied in any event by virtue of the statutory Code of Practice".

39. While it acknowledged that the statutory provisions in schedule 17 to the Crime and Court Act 2013 impose transparency requirements in relation to DPAs, the SFO told the complainant these do not extend to the requested reports. In that respect, the Commissioner acknowledges that the SFO told the complainant:

"Lord Gold's role as the independent reviewer of Rolls Royce's compliance programme closely aligns with the responsibilities of a monitor as set out at paragraph 7.12 of the Code of Practice on DPAs. Given paragraph 7.20 of the Code provides that the reports of monitors will be designated as confidential, coupled with the absence of any contrary indication on the face of the court approved DPA, I consider that Lord Gold's reports were provided to the SFO in the clear expectation that they would be protected by a duty of confidence".

40. In support of that view, it told him:

"It follows that the SFO is obliged to treat the reports as being held in confidence and any failure to do would constitute an actionable breach of confidence for which proceedings could be initiated by Rolls Royce in the High Court".

41. The Commissioner has had due regard to the statutory provisions in schedule 17 to the Crime and Court Act 2013 and the wording of the Code³ referred to by the SFO. She also recognises that, in his judgement of 17 January 2017, the then President of the Queen's Bench Division, (the Right Honourable Sir Brian Leveson), stated:

"In addition, at Rolls-Royce's expense, Lord Gold must continue his role as an independent specialist to report on their findings and where appropriate advise and make recommendations which should be implemented. There are also provisions which require copies of Lord Gold's reports to be submitted to the SFO and a requirement

³ <https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf>

that he address specified risk areas. These requirements are obviously fair reasonable and proportionate”.

42. Having considered the ‘reasonable person’ test used by Judge Megarry in the *Coco v Clark* case, the Commissioner accepts that there is an expectation of confidence on the part of the provider that the information provided was shared in confidence and will not be disclosed to the public. The Commissioner therefore accepts that there is an obligation of confidence in this case. As such she considers that this limb of the confidence test is met.

Would disclosure be of detriment to the confider?

43. Having concluded that the information withheld in this case has the necessary quality of confidence, and was imparted in circumstances giving rise to an obligation of confidence, the Commissioner has proceeded to consider whether unauthorised disclosure could cause detriment to the confider.

44. Her guidance on that point states:

“If the requested information is commercial in nature then the disclosure will only constitute a breach of confidence if it would have a detrimental impact on the confider”.

45. The SFO’s position is that disclosure would cause detriment to the confider, namely Rolls Royce, because other companies which operate in the industry “are under no obligation to disclose similar information concerning their inner workings”.

46. It further argued that release under the FOIA would cause detriment to the interests of the SFO, and the DPA regime more generally, by undermining the expectation created by the statutory Code of Practice that reports of this nature will remain confidential when provided to the SFO pursuant to the terms of a DPA.

47. It told the Commissioner in that respect:

“In turn, this would be liable to harm the ability of the SFO (and other designated prosecutors) to obtain similar information from other organisations in the future and diminish our ability to promote corporate rehabilitation and deterrence through improved compliance”.

48. While the Commissioner notes the SFO’s comments about detriment to itself and other designated prosecutors, she is mindful that the test is in relation to detriment to the confider.

49. Although unable to give an expert view, the Commissioner considers that the SFO put forward an explicit case for detriment to Rolls Royce's commercial interests if the requested information was disclosed. In that regard she accepts that the SFO considered that disclosure of the requested information:

"... would distort the level playing field on which business in this global marketplace is meant to be conducted by gifting a competitive advantage to the company's competitors".

50. The Commissioner has taken into account that the information in the reports provides an overview of the actions taken by Rolls Royce, and goes some way to demonstrating their approach to ethics and anti-bribery and corruption compliance over time.
51. She is also mindful that Rolls Royce was obliged, by virtue of the DPA process, to provide the information contained in the requested reports. In that respect she considers that there would be no expectation that the information, demonstrating compliance strategies etc, would be disclosed, as there might be where a direct contractual relationship was entered into with a public authority.
52. She accepts that disclosure of the information within the reports, such as compliance strategies, could be of value to competitors and therefore distort the level playing field as highlighted by the SFO.
53. Furthermore, she is not aware that Rolls Royce has agreed to the disclosure of the requested information.
54. As such, she considers it plausible that disclosure would cause detriment to the confider and is satisfied that it would be an unauthorised use of the information. The Commissioner is therefore satisfied that this limb of the confidence test is also met.

A legal person must be able to bring an action for breach of confidence

55. Section 41(b) provides that the breach of confidence must be actionable by either the legal person who gave the information to the public authority, or by any other legal person.
56. The SFO considered that failure to treat the reports as being held in confidence would constitute an actionable breach of confidence for which proceedings could be initiated by Rolls Royce.
57. In her guidance on the section 41 exemption, the Commissioner states:

"It is not necessary for the authority to establish that a particular person would be likely to bring a claim for breach of confidence, only that a person would be able to do so".

58. The Commissioner is satisfied that a person, in this case Rolls Royce, would be able to bring a claim for breach of confidence.
59. The final part of the test for engaging section 41 is whether the action of breach of confidence is likely to succeed.

Is there a public interest defence for disclosure?

60. Although section 41 is an absolute exemption, and does not need to be qualified by a public interest test under section 2 of the FOIA, case law on the common law of confidence suggests that a breach of confidence will not succeed, and therefore will not be actionable, in circumstances where a public authority can rely on a public interest defence.

61. In its correspondence with the Commissioner, the SFO acknowledged:

"Some weight must always be afforded to the general public interest in ensuring that public authorities such as the SFO remain transparent, accountable and open to scrutiny".

62. However, it considered that in the circumstances of this case:

"... this would not be enough to provide a public interest defence to an action for breach of confidence because the countervailing factors in favour of maintaining confidentiality are much stronger".

63. In that respect, the SFO acknowledged the general public interest in preserving the principle of confidentiality, arguing that any disclosure of confidential information would undermine the relationship of trust between public authorities and confiders.

64. It told the Commissioner:

"This is a weighty factor in the context of the DPA regime as the effective functioning of levers to improve corporate compliance are dependent on the provision of confidential information by organisations. At present, there is a relationship of trust with organisations which operates to serve the public interest, but if the SFO were to release the reports under FOIA there would no longer be any certainty that confidentiality would be respected and going forward organisations may be discouraged from providing the sort of information which Rolls Royce was prepared to share with Lord Gold".

65. It also told her that disclosure of the reports would contravene the clear commitment in the Code of Practice regarding the confidentiality of monitors' reports, and highlighted the risk that monitors and independent reviewers would not be as candid in future reports.

The Commissioner's view

66. In a case such as this, the test is whether there is a public interest in disclosure which overrides the competing public interest in maintaining the duty of confidence.
67. This test does not function in the same way as the public interest test for qualified exemptions, where the public interest operates in favour of disclosure unless outweighed by the public interest in maintaining the exemption. Rather, the reverse is the case. The test assumes that the public interest in maintaining confidentiality will prevail unless the public interest in disclosure outweighs the public interest in maintaining the confidence.
68. The Commissioner has considered whether there is any overriding public interest in the disclosure of the reports that would justify an actionable breach of confidence.
69. The Commissioner understands that the complainant considered that disclosure would add to the public's understanding of the work of the SFO.
70. She recognises that some weight should always be afforded to the general public interest in ensuring that public authorities remain transparent, accountable and open to scrutiny.
71. In contrast, she has also considered the wider public interest in preserving the principle of confidentiality and the impact of disclosure on the interests of the confider.
72. The Commissioner recognises that DPA's were a new measure⁴, introduced:

"[To] help prosecutors combat corporate offending including fraud, money laundering and bribery - which cost the UK billions of pounds each year".
73. 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. She is mindful of the need to protect the relationship of trust between confider and confidant and not to discourage, or otherwise hamper, a degree of

⁴ <https://www.gov.uk/government/news/new-tool-to-fight-economic-crime>

public certainty that such confidences will be respect by a public authority.

74. The role of the Commissioner is to regulate access to recorded information under the FOIA. Her role in this case is simply to consider if the public interest in disclosure outweighs the competing public interest in maintaining a confidence.
75. Having considered all the circumstances of this case, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information. Therefore the Commissioner finds that the information was correctly withheld under section 41 of the FOIA.

Other exemptions

76. In light of the above, the Commissioner has not gone on to consider the SFO's application of section 31 to the same information.

Right of appeal

77. 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

78. 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.

79. 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

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