

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 November 2023

Public Authority: Birmingham City Council

Address: Council House
Victoria Square
Birmingham
B1 1BB

Decision (including any steps ordered)

1. The complainant requested information from Birmingham City Council ("the Council") relating to a specific project.
2. The Commissioner's decision is that the Council is entitled to rely on section 41(1) (information provided in confidence) to refuse to provide the withheld information.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 18 May 2023, the complainant wrote to the Council and requested information in the following terms:

"I am writing this FOI request to request any documents and communications within the council's leadership (both senior staff and elected officers) related to a project named 'Project Burlington'."

5. The Council withheld the requested information citing section 41(1) (information provided in confidence) of FOIA as its basis for doing so.

Reasons for decision

6. This reasoning covers whether the Council is entitled to rely on section 41(1) of FOIA to withhold the requested information.
7. Section 41(1) of FOIA states that information is exempt from disclosure if the information was obtained by the public authority from any other person and the disclosure of the information to the public would constitute an actionable breach of confidence.
8. In order for section 41 to be engaged, the following criteria must be fulfilled:
 - the authority must have obtained the information from another person,
 - its disclosure must constitute a breach of confidence,
 - a legal person must be able to bring an action for the breach of confidence to court, and
 - that court action must be likely to succeed.

Was the withheld information obtained from another person?

9. In this case, the Council has relied on section 41(1) to withhold a report relating to Project Burlington which investigated allegations made by a whistleblower. The Council considers the report to have been obtained from another person as the report was provided by an internal service for the purposes of determining serious misconduct and contains information provided by current and former employees as well as third parties to an independent investigating officer.

10. The Commissioner has viewed the withheld information which details the whistleblower's allegations, the Council's investigation into those allegations and the outcome of that investigation. The Commissioner is satisfied that the whistleblower's allegations which are contained within the withheld report were provided to the Council by another person, that being the whistleblower. He also considers that as the report discusses the whistleblower's allegations in detail, its disclosure would reveal the content of the whistleblower's allegations. Therefore, the Commissioner considers the whole of the report to have been obtained from another individual and so this requirement of section 41(1) is met.

Would disclosure constitute an actionable breach of confidence?

11. For section 41(1)(b) to be met disclosure of the withheld information must constitute an actionable breach of confidence. In the Commissioner's view a breach will generally be actionable if:

- The information has the necessary quality of confidence.
- The information was communicated in circumstances importing an obligation of confidence.
- Unauthorised disclosure would cause detriment to either the party which provided it or any other party.

12. In order for the withheld information to have the necessary quality of confidence, it must be more than trivial and not otherwise accessible. The Commissioner is satisfied that the withheld information is not trivial as it relates to allegations of misconduct made by a whistleblower. Furthermore, the Council has confirmed that only a limited number of people within the Council have access to the withheld information and so the withheld information is not otherwise accessible. Therefore, the Commissioner considers the withheld information to have the necessary quality of confidence.

13. The Commissioner notes that the withheld information was provided to the Council by a whistleblower and would therefore be subject to the Council's whistleblowing and serious misconduct policy. This policy states that "the Council will seek to treat all disclosures in confidence as a means of preventing victimisation and will endeavour to avoid disclosing information identifying any whistleblower".¹ The

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https://www.birmingham.gov.uk/downloads/file/787/whistleblowing_and_serious_misconduct_policy

Commissioner therefore considers that the whistleblower would reasonably expect their allegations to be kept in confidence by the Council and so he is satisfied that the withheld information was provided in circumstances importing an obligation of confidence.

14. The Commissioner also considers that disclosure of the withheld information would cause detriment to the whistleblower due to the nature of the allegations made and the fact that the whistleblower could potentially be identified from their allegations. Therefore, the Commissioner is satisfied that the three tests are met and so is also satisfied that disclosure would constitute an actionable breach of confidence.

Would an actionable breach of confidence succeed?

15. The exemption at section 41 is not subject to the public interest test at section 2(2) of FOIA. However the Commissioner is mindful that an action for breach of confidence will fail if there is a public interest defence to disclosure.
16. With regards to the public interest, in its response to the request, the Council acknowledged that the allegations made by the whistleblower are serious and would be of considerable interest to the public as they relate to maladministration and misconduct by individuals conducting Council business. However, the Council also considers that there is a strong public interest in protecting an individual's right to privacy. In this case, that would be the whistleblower's right to privacy.
17. Furthermore, the Council considers that disclosure of the withheld information would have a negative impact on the effective conduct of future investigations as Council staff and other individuals may be reluctant to report concerns if they thought the information provided would be put into the public domain. Therefore, the Council considers that it would not have a public interest defence for breaching the duty of confidence.
18. The Commissioner recognises that there is a strong public interest in the disclosure of the withheld information as the information relates to allegations of misconduct and maladministration. However, he also recognises that there is a need to protect the whistleblower's right to privacy. Whilst the withheld information does not name the whistleblower, the Commissioner considers that an individual could potentially identify the whistleblower from the information and so its disclosure would infringe on the whistleblower's privacy. This would be detrimental to the whistleblower.

19. Furthermore, the Commissioner accepts that disclosure of the withheld information may discourage other individuals from raising concerns about the Council if they felt that their privacy would be infringed upon and the information provided would be made public. The Commissioner does not consider that this would be in the public interest.
20. The Commissioner considers that in this case, the public interest in disclosing the withheld information and the public interest in maintaining the obligation of confidence are finely balanced. However, he considers that the public interest in disclosure falls short of allowing the Council to defend a claim of breach of confidence. Therefore, he finds that the Council is entitled to rely on section 41(1) of FOIA to refuse to provide the withheld information.

Right of appeal

21. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

22. 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.
23. 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
Group Manager
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Wycliffe House
Water Lane
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Cheshire
SK9 5AF