

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 April 2017

Public Authority: Charity Commission for Northern Ireland
Address: 257 Lough Road
Lurgan
BT66 6NQ

Decision (including any steps ordered)

1. The complainant has requested information relating to the sale of land by the RC Parish of Maghera, in Newcastle, County Down, Northern Ireland. The CCNI provided the complainant with some information, however it refused to disclose the remainder ("the withheld information,") citing sections 31, 40(2), 41 and 43(2) of the FOIA.
2. The Commissioner's decision is that the CCNI has correctly applied section 40(2) of FOIA to the information withheld under that section and that it has correctly applied section 41 to some of the remaining withheld information, however some should be disclosed as section 41 is not applicable to it. The Commissioner has not considered the CCNI's application of sections 31 and 43(2), the reason for which is explained later in the Decision Notice.
3. The Commissioner requires the CCNI to take the following steps to ensure compliance with the legislation.
 - To disclose the information to which section 41 of FOIA does not apply, which is set out in a confidential annex to this Notice.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background to request

5. The site of the old St Mary's Girls' school in Newcastle, County Down, was sold in 1963 to the Parish of Maghera on the implicit understanding that the land would be used to benefit the community. Following several bids for the land, the Parish eventually made the decision to sell the land to Lidl supermarket chain. This gave rise to local contention, as the then Down District Council had also submitted a bid to purchase the land to build leisure and recreational facilities, which was considered by many to be more in keeping with the implicit terms of the original sale of the land to the Parish.

Request and response

6. On 15 November 2015, the complainant wrote to the CCNI and requested information in the following terms:

"All written correspondence, and notes of telephone conversations over the last three years relating to the RC Parish of Maghera and the site of the old St Mary's Girls' School site in Newcastle County Down. Specifically I require copies of correspondence from the Parish, Parish Solicitor, Estate Agent, Parish priest or Parish Council and trustees as well as any letters from the Department of Education, Bishop or any of his representatives relating to the school site along with any correspondence from the Charity Commission to them. Additionally I require copies of any correspondence from Down District Council or Newry Mourne and Down District Council to and from the Charity Commission about the old Girls' School site."

7. The CCNI responded to the complainant on 4 December 2015, disclosing some of the requested information but stating that it was refusing to disclose the remaining requested information ("the withheld information"), citing sections 40(2), 41 and 43(2) of FOIA as a basis for non-disclosure. The complainant then sought an internal review of this decision, the result of which was later provided to him. The reviewer upheld the original decision.

Scope of the case

8. The complainant contacted the Commissioner on 10 May 2016 to complain about the way his request for information had been handled.

9. The Commissioner has considered the CCNI's application of the exemptions as set out in sections 40(2) and 41 of the FOIA to the withheld information.

Reasons for decision

Information withheld under Section 40(2) of the FOIA

10. Section 40(2) provides that:

Any information to which a request for information relates is also exempt information if–

- (a) it constitutes personal data which do not fall within subsection (1), and
(b) either the first or the second condition below is satisfied.*

11. Section 40(3) provides that:

The first condition is–

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene–

- (i) any of the data protection principles

Is the withheld information personal data?

12. Personal data is defined by section 1 of the Data Protection Act 1998 ("the DPA") as:

...data which relate to a living individual who can be identified–

- (a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any

indication of the data controller or any person in respect of the individual.

13. In order for the exemption to apply the information being requested must constitute personal data as defined by section 1 of the DPA.
14. The information that the CCNI has withheld under section 40(2) relates to a particular individual. The Commissioner is satisfied that it is information directly about that individual, and therefore is the individual's personal data.

Would disclosure breach any of the data protection principles

15. The data protection principles are set out in schedule 1 of the DPA. The Commissioner considers that the first data protection principle is most relevant in this case. The first principle states that personal data should only be disclosed in fair and lawful circumstances, the conditions of which are set out in schedule 2 of the DPA.
16. The Commissioner's considerations below have focused on the issues of fairness in relation to the first principle. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the data subject and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

Reasonable expectations of the individual

17. When considering whether a disclosure of personal information is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the data subject. However, their expectations do not necessarily determine the issue of whether the disclosure would be fair. Public authorities need to decide objectively what would be a reasonable expectation in the circumstances.
18. The Commissioner recognises that the information withheld under section 40(2) of FOIA contains the personal information of an individual, which that individual would not reasonably expect to be disclosed into the public domain. The CCNI informed the Commissioner that it felt that such disclosure would be unfair to that individual as their personal information was contained in documents which they asked to be treated as private by the CCNI and would not have been given to the CCNI had there been any expectation of disclosure.

Potential consequences of disclosure

19. The Commissioner accepts that disclosure of the information withheld under section 40(2) of FOIA may cause some distress to the individual, who would have expected their information to remain private. There is also a concern that disclosure would deter that individual or other individuals from seeking the CCNI's advice on similar or other matters in the future.

Balancing the rights and freedoms of the data subject with the legitimate interest in disclosure

20. In this case, the Commissioner recognises that under schedule 2 of the DPA, the main condition for processing that may apply in this case is condition 6, which states that the processing will be fair where it is for the legitimate interests pursued by the data controller or a third party, and is not unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
21. In balancing the rights and freedoms of the data subject against the legitimate interests pursued by the complainant in this case, the Commissioner has considered all the circumstances of the case. He has taken into account the complainant's argument that there is wide local interest in the Parish's decision regarding the sale of the land in question. The complainant considers that openness and transparency with regard to the withheld information would clear up such confusion and enlighten the public as to the true facts.
22. The CCNI accepts the important principles of transparency and accountability, however it argues that, as charity regulator, it receives information under a range of confidential processes, including personal information. To regularly disclose the personal data of people who had submitted queries or requested advice would be likely to have a detrimental impact upon public confidence in the CCNI's policies and procedures.
23. The Commissioner has considered all arguments whilst carrying out her balancing exercise and has read a considerable amount of information, which is now in the public domain, regarding the sale of the land. The Commissioner considers that, whilst there is a public interest in knowing all the facts surrounding the sale, this does not outweigh the likely detrimental impact upon the CCNI's processes and ultimately upon its efficacy. Therefore, the Commissioner considers that disclosure of the individual's personal information would be unfair and that there would be no legitimate interest in disclosure which would outweigh the likely

detriment to both the individual and to public confidence in the CCNI's processes and procedures.

Information withheld under Section 41 of the FOIA

24. Section 41(1) of the FOIA states that information is exempt from disclosure 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?

25. The CCNI has informed the Commissioner that the information was obtained by it from a specified person for the purpose of advice and guidance. Some of the information withheld under section 41(1) is contained in a letter from the CCNI itself. Although section 41(1) does not cover information which the public authority has itself generated, the Commissioner's guidance states that it may cover documents, or parts of documents, generated by the public authority if these record information which was provided to the public authority in confidence. Therefore, having perused the information withheld under section 41(1), the Commissioner is satisfied that it was obtained by the CCNI from another person.

Would disclosure constitute an actionable breach of confidence?

26. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:

- whether the information has 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?

27. 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.
28. The CCNI claims that, at the time of the complainant's request, there was general information in the public domain regarding the dispute over the sale of the land. However, it claims that none of the specified information withheld under section 41(1) of the FOIA was accessible to the public at the time of the request. The Commissioner, having researched this point, has concluded that some of the information withheld under section 41(1) **was** accessible to the public at the time of the request, therefore it does not have the necessary quality of confidence and section 41(1) of the FOIA does not apply. The Commissioner has listed this information in a confidential annex to this Notice.
29. In relation to the remaining information withheld under section 41(1), the Commissioner accepts that the information is of a legal and commercial nature and is therefore not trivial. She also accepts that this information was not accessible to the public at the time of the request. Therefore, the Commissioner finds that the remaining information withheld under section 41(1) does have the necessary quality of confidence.

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

30. A breach of confidence will not be actionable if the information was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.
31. The CCNI has informed the Commissioner that the person from whom it obtained the information made it clear that the information was being provided in confidence in order to seek guidance from the CCNI. The Commissioner accepts that the person would have had an expectation of confidence upon providing the information and that therefore the information was communicated in circumstances that created an obligation of confidence.

Would disclosure cause detriment to the confider?

32. The CCNI believes disclosure would undermine the confidence the public has in knowing that they can approach the CCNI

in a confidential manner to seek guidance. The Commissioner notes that in a decision by the Information Tribunal¹ it was noted that *"the loss of privacy can be a detriment in its own right"* and the Commissioner therefore acknowledges there is not necessarily a need for there to be any detriment to the confider, in terms of tangible loss, in order for it to be protected by the law of confidence.

33. The Commissioner considers that while disclosure would not be likely to cause harm to the confider in terms of loss, knowledge of the disclosure of the information provided would be likely to cause some distress and to deter the confider and perhaps others from seeking advice and guidance from the CCNI in the future. This would constitute, in the Commissioner's view, a detriment to the confider.

Is there a public interest defence for disclosure?

34. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a ***defence*** to an action for breach of confidentiality. The Commissioner is therefore required to consider whether the CCNI could successfully rely on such a public interest defence to an action for breach of confidence in this case.
35. The CCNI accepts that, as a regulator and a public authority, there is a public interest in transparency in its decision-making processes. However, it considers that, while the sale of the school site is likely to be of significant interest to the local community, there is a greater public interest in preserving the principle of confidentiality by respecting the processes whereby charities and individuals can approach the CCNI confidently and confidentially for advice and guidance.
36. The CCNI considers that release of the CCNI's general guidance on such matters, which is contained in part of the information already disclosed to the complainant (namely a letter with redactions) would achieve the aim of transparency and a wider public understanding of its decision-making processes without the need to disclose information provided in confidence.
37. The Commissioner acknowledges there is a public interest in

¹ Bluck v IC and Epsom & St Helier University Trust (EA/2006/0090)

transparency but she is mindful of the wider public interest in preserving the principle of confidentiality and the need to protect the relationship of trust between confider and confidant. She considers this to be particularly strong in this case where the CCNI's advice and guidance is being sought in confidence.

38. The Commissioner recognises that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly. Whilst much will depend on the facts and circumstances of each case, a public authority should weigh up the public interest in disclosure of the information requested against both the wider public interest in preserving the principle of confidentiality and the impact that disclosure of the information would have on the interests of the confider. As the decisions taken by courts have shown, very significant public interest factors must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality. To the Commissioner's knowledge, there is no suggestion in this case that the information concerns such matters.
39. The Commissioner considers that the public interest in disclosing the information does not outweigh the public interest in maintaining the trust between confider and confidant; and that the CCNI would not have a public interest defence for breaching its duty of confidence.
40. Therefore, the Commissioner finds that the remaining withheld information was correctly withheld under section 41 of the FOIA.
41. The CCNI also applied section 43(2) (commercial interests) to some of the withheld information. However, the information withheld under that exemption was also withheld under section 41(1) and was either accessible to the public at the time of the request or exempt from disclosure under section 41(1). Therefore the Commissioner has not gone on to consider the CCNI's application of section 43(2) of the FOIA to the complainant's request.

Other matters

42. The Commissioner notes that, as some time has passed since the date of the request, more of the requested information is now in the public domain. The Commissioner trusts that the CCNI will bear this in mind when considering any new request under the FOIA for the same information.

Right of appeal

43. 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

44. 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.
45. 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

Deirdre Collins
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