

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 April 2019

Public Authority: Athertone Town Council
Address: Atherstone
Warwickshire
CV9 1YN

Decision (including any steps ordered)

1. The complainants have requested documentation from Atherstone Town Council ("the Council") regarding the ownership of their late parent's grave.
2. The Commissioner's decision is that the Council is not entitled to rely on section 41 for the reasons outlined in this notice.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:

Disclose the withheld information, ensuring that any personal data is redacted under the terms of the Data Protection Act 2018.
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.

Request and response

5. On 30 July 2018, when asking for an internal review for a previous request, the complainants made a further request for information in the following terms:

"...There is also in point 24 mention of 2 emails received from the ICCM dated 22.3.18 and 23.03.18. Please can we request the freedom of information on these as well."

6. The Council responded on 20 August 2018 and advised that it held the information but that it was withheld under section 41(1) of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 9 September 2018 to complain about the way their request for information had been handled.
8. After reviewing minutes from a Council meeting, the complainant requested to view two emails, from the Institute of Cemetery and Crematorium Management ("ICCM"), which had been referred to within the meeting.
9. The following analysis covers whether the Council correctly withheld the emails requested under section 41(1) (information provided in confidence) of the FOIA.

Reasons for decision

Section 41: information provided in confidence

10. Section 41(1) of 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."*

Was the information obtained from another person?

11. The first step is for the Commissioner to consider whether the information was obtained by the Council from any other person in order to satisfy the requirement of section 41(1)(a).

12. In this case, the Council obtained the information, which comprises two emails dated 22 March 2018 ("Email 1") and 23 March 2018 ("Email 2") respectively, from the Chief Executive of the Institute of Cemetery and Crematorium Management.
13. Having established that the withheld information was obtained from another person, the Commissioner must next consider whether or not its disclosure to the public (otherwise than under the FOIA), would constitute a breach of confidence 'actionable' by that or any other person.

Would disclosure constitute an actionable breach of confidence?

14. 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.
15. All three elements must be present for a claim to be made. However, for that claim to be 'actionable' within the meaning of section 41(1)(b) of the FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed. This requires consideration of whether or not there would be a public interest defence to such a claim. The Commissioner will consider later in this notice if the three elements are present.

Does the information have the necessary quality of confidence?

16. Information will have the necessary quality of confidence if it is more than trivial and if it is not otherwise accessible. The Commissioner has reviewed the emails and can see that they both provide advice to the Council regarding the transfer of ownership of graves. The Commissioner has therefore determined that the emails are not trivial.
17. As stated above, this alone is not sufficient to indicate that the material has the necessary 'quality of confidence'. The Commissioner has also considered whether the information is otherwise accessible and is satisfied that the emails would only be accessible by the Council and the ICCM.

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

18. 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. An obligation of confidence may be expressed explicitly or implicitly.
19. The Commissioner will now consider whether the information was "*imparted in circumstances importing an obligation of confidence*" and will consider each email separately.

Email 1 (22 March 2018)

20. The Commissioner finds that this email provides general advice to the Council. The information refers to the requirements for the transfer of grave ownership and applies to any set of similar circumstances, not just to the complainants' case.
21. The Commissioner is not satisfied that the information contained in Email 1 was imparted in circumstances creating an obligation of confidence, since it provides general advice.
22. She is therefore not satisfied that Email 1 was provided in confidence and has determined that the exemption at section 41(1) is not engaged. Her decision is therefore that Email 1 should be disclosed.

Email 2 (23 March 2018)

23. The Commissioner finds that the information in this email concerns the complainants' parent's grave.
24. She is satisfied that this email can be said to have been imparted in circumstances imparting an obligation of confidence, since the ICCM is evidently advising the Council with regard to a specific case.
25. She has therefore gone on to consider whether disclosure of Email 2 would be unauthorised and of detriment to the provider, the ICCM.

Would disclosure be an unauthorised use of the information and a detriment to the confider?

26. The Council has provided arguments as follows:

"The advisory information from the ICCM was communicated to the Council within their Private and Confidential discussions about a grave in Atherstone Cemetery on the 18th April 2018. The Council are a Burial Authority and from time to time seek advice on procedural legal matters relating to this role from the ICCM. In this case, it was a continuation of

a private family dispute over one particular grave. The dispute has been the subject to police enquiries and court proceedings and ongoing legal debate. The Deputy Clerk sought advice from many sources when determining whether the two ICCM emails should be disclosed under the FOI request and reported as such to the Council at the meeting of 15 August 2018..."

27. The Commissioner is aware that the Council considers that the emails concern a private matter. However, she considers that the Council has not provided evidence that disclosure of Email 2 will cause detriment to the third party (ICCM). In her view, the ICCM is providing accurate advice to the Council and would not be adversely affected by disclosure of this advice.
28. The Commissioner considers, having reviewed Email 2, that the exemption at section 41(1) of the FOIA has not been engaged. She therefore orders the Council to disclose Email 2, subject to paragraph 29 below.

Third party personal data

29. The Commissioner has ordered the disclosure of Email 1 and Email 2. The Commissioner requires the Council to review these items for third party personal data and to make appropriate redactions. In particular, she considers that Email 2 and the attachment thereto contain personal data (sets of initials). In order to protect the identity of the individuals, the Commissioner orders the sets of initials to be redacted.

Right of appeal

30. 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

31. 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.
32. 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
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