

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 December 2023

Public Authority: Cornwall Council
Address: New County Hall
Truro
Cornwall
TR1 3AY

Decision (including any steps ordered)

1. The complainant has requested information held by Cornwall Council (the council) relating to the establishment of an Interim Executive Board (IEB) at a local primary school.
2. The council provided the complainant with some information, both with its original response to the request, and at the internal review stage. The council withheld the remaining information under section 40(2) – personal information, section 41(1) – information provided in confidence, and section 42 – legal professional privilege, of FOIA.
3. The Commissioner has decided that whilst the council is entitled to withhold the information it claimed to be subject to the exemptions at section 40(2) and section 42, it is only entitled to rely on section 41(1) in respect of part of the withheld information that remains.
4. As the council failed to provide the complainant with copies of any information in response to their request within 20 working days, and also failed to issue a refusal notice within the same statutory time period, the Commissioner has found a breach of section 10, and section 17(1), respectively.

5. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
 - Disclose the information highlighted within the confidential annex attached to this decision notice.
6. The council 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

7. On 3 November 2022, the complainant wrote to the council and requested information in the following terms:

“Please can you provide me with all documents relating to the application you made to the Department for Education to establish an Interim Executive Board at Whitstone Community Primary School, Oak Lane Whitstone Hollsworthy Cornwall EX22 6TH earlier in 2022.”
8. The complainant went on to describe the correspondence and types of information that they expected the council to consider when dealing with their request before going on to say that they also required the following information:

“any documents in relation to your decision to instal an IEB at Whitstone School.”
9. The council responded on 21 December 2022, providing the complainant with some of the information that it considered to be relevant to the request. The council also confirmed that it was withholding part of the requested information under section 40(2), section 41, and section 42 of FOIA.
10. On 3 January 2023, the complainant requested an internal review. They said the content of the information that had been released indicated that further information was likely to be held, and they went on to set out 13 separate points which described the information they believed to be missing.
11. The complainant wrote to the council again on 15 January 2023, and 24 January 2023, saying that they were also dissatisfied with the “excessive redaction of non personal or section 40 exemption data”, and that the council had not always been clear about the exemption it had applied. The complainant also said that the council should have

considered providing explanatory notes when withholding some information.

12. On 9 February 2023, the council provided its internal review response.
13. The council addressed each of the 13 specific points set out within the complainant's internal review request in turn, confirming whether each set of information referred to by the complainant was held.
14. Whilst the council did also release some additional information to the complainant, it advised that it was withholding parts of the information they had referenced in their internal review request under section 40(2), and section 41, of FOIA.

Scope of the case

15. The complainant has said that they are not satisfied with the council's handling of their request. In particular, they say that they are concerned that the council may not have been correct to rely on section 40 and section 41 of FOIA when withholding information.
16. The complainant has also raised concerns about the general way in which their request has been handled, including the content and timeliness of the council's responses.
17. It is very clear from the council's submissions to the Commissioner that, in addition to the information redacted from the bundles supplied to the complainant, other sets of information were withheld in their entirety in response to the request. In the Commissioner's opinion, this was not obvious from the council's initial response to the request. The complainant has only raised concerns about the council's decision to withhold information that they knew, or believed, existed from the initial response that they received to their request.
18. Therefore, the Commissioner considers that, in the circumstances of this case, it is appropriate for him to consider whether the council is entitled to rely on the exemptions it has cited in respect of the information which has been referred to by the complainant, and also the additional sets of information withheld in their entirety in response to the request.
19. The council has confirmed that it is relying on section 40(2), section 41, and section 42, as its basis for withholding information within the scope of the request.

20. The complainant has said that they are not concerned about redactions made to information which would reveal the identities of individuals, such as names and contact information. However, they are concerned that the council may be incorrectly relying on section 40(2) to withhold some additional information.
21. Having considered the withheld information, the Commissioner is satisfied that the council has only applied section 40(2) to the names and contact details of individuals.
22. The Commissioner has also found that an email (relevant to point 11 of the internal review request) which the complainant believed had been withheld in its entirety under section 40(2), was released in a redacted format with the council's internal review response. The Commissioner is also satisfied that the redactions contained within this email consist of either names and contact details of individuals, or information that is not within scope of the complainant's request.
23. As the Commissioner is satisfied that the only information that has been withheld by the council under section 40(2) of FOIA are names and contact details of third parties, which the complainant does not contest, he does not consider it necessary to consider the council's application of section 40(2) further within this decision notice.
24. The Commissioner will therefore decide whether the council is entitled to rely on section 41 or section 42 when refusing to provide the remaining withheld information.
25. The Commissioner will also consider certain procedural matters, and the council's general handling of the request, as requested by the complainant.

Reasons for decision

Section 41 of FOIA – information provided in confidence

26. Section 41 of the FOIA states that information is exempt from disclosure if –
 - (a) It was obtained by the public authority from any 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.

27. The council has confirmed that it would now be willing to disclose information contained within one email which had been withheld under section 41, with redactions made only to the personal information contained within that email.

Was the information obtained from another person?

28. The remaining information which has been withheld under section 41 is, in part, information that was generated by a third party and provided to the council; the remainder of the information was generated by the council itself. The council has not, in its submissions to the Commissioner, acknowledged that fact.
29. However, the Commissioner's published guidance on [section 41](#) states that a public authority must also consider whether the disclosure of information that it created would reveal the content of the information it obtained from another person. If it would, then the exemption may also cover the material it generated itself.
30. Having considered all of the information withheld under the exemption at section 41, the Commissioner is satisfied that the release of it would reveal the content of information received from a third party.
31. As a result, the Commissioner considers that the first criteria set out in paragraph 26 of this decision notice is met.

Would disclosure constitute an actionable breach of confidence?

32. In considering whether the disclosure of information constitutes an actionable breach of confidence the Commissioner will take account of the following:
- Whether the information has the necessary quality of confidence
 - Whether the information was imparted in circumstances importing an obligation of confidence
 - Whether disclosure would be an unauthorised use of the information to the detriment of the confider.

Necessary quality of confidence

33. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
34. The council has confirmed that at the time of the request, the withheld information was not accessible elsewhere and that the information is of importance to the third party providing it.

35. The Commissioner is satisfied that the matter to which the withheld information relates, that being decisions reached that had a direct impact on the governance of a particular school, and the importance of this information to the third party that provided it, means that it is not trivial.
36. With regard to accessibility, on the basis of the evidence available to the Commissioner, at the time of the request the withheld information was not already in the public domain.
37. The Commissioner is therefore satisfied that the withheld information is not trivial and was not otherwise accessible at the time of the request, and so has the necessary quality of confidence.

Circumstances importing an obligation of confidence

38. The council has said that the information was communicated to the council in circumstances importing an obligation of confidence, which it states has been expressed explicitly.
39. Whilst the council has not provided any evidence that all of the withheld information was provided in confidence, the Commissioner is satisfied that the restrictions on the use of the withheld information are, in the main, obvious from the circumstances. It reveals information that relates directly to correspondence, discussions and decisions that were reached about the governance of a school and the application made for an Interim Executive Board to replace the Board of Governors.
40. It is the Commissioner's view that this information would have been provided to the council with the expectation that it would be treated in confidence. The Commissioner is therefore satisfied that the information was imparted in circumstances giving rise to an obligation of confidence.

Would disclosure be detrimental to the confider?

41. The Commissioner considers that part of the withheld information contained within the minutes of a meeting held by the Board of Governors (relevant to points 3, 4, 6 and 6a of the internal review request) is very similar to information which has already been released by the council.
42. Whilst accepting that the release of this particular information would provide some insight into what was considered at the meeting, the Commissioner is satisfied it would only reveal details of the council's formal position on matters; it would not reveal the opinions, representations or decisions reached by any of the individual governors who attended the meeting.

43. The Commissioner is not persuaded from the arguments presented by the council that the disclosure of part of the information contained within the minutes of the meeting could cause detriment. Therefore, the Commissioner finds that the council is not entitled to rely on section 41 as its basis for refusing to provide such information.
44. The Commissioner also considers that part of a further set of information (relevant to point 3 of the internal review request) contained within a letter which was redacted before disclosure is also very similar in content to information that has been released by the council.
45. Whilst again accepting that the disclosure of such information would reveal that it is held in a different format to that which has already been released, and would also disclose some detail about the circumstances in which it was provided, the Commissioner is satisfied that this would not cause any detriment.
46. The Commissioner will now consider whether disclosure of any of the remaining information withheld under section 41 of FOIA, which is not significantly similar in content to other information already released, would cause detriment.
47. The Board of Governors will include a number of individuals who provide their services voluntarily. The Commissioner considers that whilst they are making formal decisions about the management of the school, as volunteers there is also a personal element involved in what they do, and that this is relevant to his consideration of the potential personal impact of, and detriment caused, as a result of the disclosure of any part of the withheld information.
48. Whilst accepting that the governors have to be accountable for the decisions that they reach that affect the governance of the relevant school, this must be balanced against such individuals being assured that, in relation to certain information they provide, a duty of confidence will be maintained and it will not be placed into the public domain.
49. The Commissioner is satisfied that the disclosure of parts of the withheld information which document the personal opinion of the third parties, reveal details of certain activities, and reference the private discussions that took place would, in this instance, constitute an invasion of the third party's privacy, and could cause personal detriment.
50. Although section 41 is an absolute exemption and is not subject to the consideration of the public interest test under the FOIA, there exists a recognised defence to an actionable breach of confidence, if there is an overriding public interest in the information being disclosed.

Is there a public interest defence for disclosure?

51. The public interest defence for disclosure 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 as 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.
52. The council has provided little detail of its consideration of the test in its submissions to the Commissioner.
53. In the Commissioner's opinion, there is some weight to be afforded to the public interest in ensuring that public authorities remain transparent, accountable, and open to scrutiny.
54. However, it is the Commissioner's view that the information that is in the public domain goes some way in meeting the public interest in accountability and understanding the decisions reached about the governance at the relevant school in this case.
55. It is the Commissioner's view that, in the circumstances of this case, there would have to be a significant public interest defence that would override the duty of confidence in relation to the information that has been withheld which he has found was supplied in confidence.
56. The Commissioner considers that the public interest in preserving the principle of confidentiality, and the impact disclosure would have on the confider, carries significant weight in favour of the public interest in maintaining the confidentiality of the information in question.
57. The Commissioner is therefore satisfied that the council is entitled to rely on section 41(1) of FOIA when withholding the remaining parts of the information that it claimed to be subject to this exemption.

Section 42 of FOIA – legal professional privilege

58. Section 42(1) of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings. Legal professional privilege protects the confidentiality of communications between a lawyer and client.

59. The two categories of legal professional privilege are litigation privilege and legal advice privilege.
60. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is litigation in prospect but where legal advice is needed.
61. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
62. Having considered the information that has been withheld by the council under section 42, the Commissioner is satisfied that it forms legal advice between a legal adviser and the council about matters that concern the relevant school.
63. Furthermore, as far as the Commissioner is aware, the withheld information is not in the public domain and remains confidential. Therefore, the privilege attached to this information has not been lost.
64. The Commissioner is therefore satisfied that the exemption at section 42(1) is engaged. As this is a qualified exemption, he will go on to consider the public interest test.

Public interest test

65. In the Commissioner's opinion, the general public interest inherent in the exemption at section 42 of FOIA will always be strong due to the importance of the principle behind legal professional privilege, that is, safeguarding openness in all communications between a client and their lawyer to ensure access to full and frank legal advice.
66. In this case, the withheld information relates to matters concerning the governance of a particular school. It is therefore understandable that the public would want to be reassured that the right decisions were being made in the best interests of the pupils and staff.
67. However, the Commissioner's view is that this public interest in favour of disclosure, whilst valid, does not equal the public interest in maintaining legal professional privilege. His conclusion is, therefore, that the public interest in the maintenance of the exemption does not outweigh the public interest in favour of disclosure. The council was not, therefore, obliged to disclose the information it claimed to be subject to the exemption at section 42(1).

Procedural matters

68. As the council failed to provide the complainant with copies of any information within 20 working days, the Commissioner has found a breach of section 10 of FOIA.
69. In addition, as the council failed to issue a refusal notice in response to part of the request within the same statutory time period, the Commissioner has found a breach of 17(1) of FOIA.

Other matters

70. The complainant has said that whilst they accept that it was appropriate for names and contact details to have been redacted under section 40(2), as a matter of good practice, the council should have added information about all the departments or agencies that were sent copies of certain correspondence.
71. However, having considered the information that has been disclosed, the Commissioner does not consider that it was necessary for the council to have added additional explanations in this particular instance. He therefore does not have any concerns about the council's action in this regard.
72. The complainant has also raised concerns that the response to the request and the internal review may have been handled by the same officer, and that this does not follow the Commissioner's guidance on good practice.
73. The council has provided the Commissioner with details of those officers who were involved in providing a response to the original request, and those involved in the internal review. The Commissioner accepts that there were different officers involved in each process and that there is no indication that the internal review was not considered independently from the original request.
74. However, the Commissioner does have some concerns that the council's original response to the request was open to misinterpretation about what was held. The council said the following:

"Please see the attached pdf document which contains redacted copies of the documentation asked for...."
75. Whilst a public authority is not required to set out the full details of information that has been withheld in response to a request, in the

Commissioner's view, the council's statement suggests that it had provided the complainant with a copy of all the information held (albeit in a redacted format), which is not correct.

76. The Commissioner also notes that a small part of the information released in response to the original request was subsequently redacted by the council when it released further information within the same documents at the internal review stage.
77. The council should take appropriate steps to ensure that it has a consistent approach to redacting information, and that its responses to information requests are clear, and do not allow for incorrect conclusions to be drawn about the extent of information that is held.

Right of appeal

78. 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

79. 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.

80. 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

Suzanne McKay
Senior Case Officer
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Wycliffe House
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