

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 November 2021

**Public Authority:** Surrey Heath Borough Council  
**Address:** Surrey Heath House  
Knoll Rd  
Camberley  
GU15 3HD

#### Decision (including any steps ordered)

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1. The complainant requested information from Surrey Heath Borough Council ("the Council"), relating to the ongoing issue of an alleged illegal waste dump relevant to a specified address.
2. The Council provided the complainant with some of the requested information, however this was redacted and the Council cited sections 40 (personal information), and 41 (information provided in confidence) of the FOIA as a basis for non-disclosure.
3. The Commissioner's decision is that the Council correctly applied section 40 and section 41 to the redacted information. Therefore the Commissioner requires no steps to be taken.

#### Request and response

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4. On 8 December 2020, the complainant wrote to the Council and requested information in the following terms:  
*"Please provide copies of ALL emails, letters, transcripts and reports received and sent by (names redacted) from the 1st January 2018 up to and including the date of this request (8th December 2020) with the term or terms (address redacted) within their written content".*
5. The Council responded on 11 January 2021 and provided some of the requested information in the form of a number of redacted emails, to

and from Council employees. It did not provide any explanation for the redactions or cite any relevant applicable exemptions under the FOIA.

6. Following an internal review, the Council wrote to the complainant on 10 February 2021. It disclosed some further information to the complainant, i.e. information identifying senior Council members which it had previously redacted. It upheld its original response regarding the remaining redactions and cited both sections 40 (personal information) and 41 (information provided in confidence) as a basis for these.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 19 March 2021 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of this case to be to determine whether the Council has correctly applied sections 40 and 41 of the FOIA to the withheld information.

## **Reasons for decision**

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### **Section 41 - information provided in confidence**

9. 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.'*

10. 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.

11. In her guidance on section 41, 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 a FOIA request".*

*Was the information obtained by the Council from another person?*

12. 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.
13. The Council has provided the Commissioner with unredacted copies of the information which it has withheld under section 41 and has stated that this was provided to them by third party organisations and individuals outside of the Council. Therefore the Commissioner is satisfied that the information was obtained by the Council from another person or persons and therefore meets the requirements of section 41(1)(a).

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

14. 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;
  - 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. 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?*

16. 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.
17. The Commissioner recognises that information should be worthy of protection in the sense that someone has a genuine interest in the contents remaining confidential.
18. In this case, the Council considered the information has the necessary quality of confidence for the following reasons:
  - the matters relate to the conduct of Council employees;
  - the information refers and relates to third parties who provided information on a confidential basis; and
  - those third parties who provided information to the Council regarding the alleged issues would have an expectation that the information and their identities would be kept confidential.
19. Having viewed the information in its entirety, the Commissioner is satisfied that the withheld information is more detailed, and contains information beyond that which is in the public domain.
20. The Commissioner is also satisfied that the individuals who provided the information to the Council would have a genuine expectation that its content would remain confidential.
21. The Commissioner therefore considers 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?*

22. 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.
23. 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".*

24. In this case, with regard to the second limb of the test, the Council considered that the information was provided in circumstances importing an obligation of confidence.
25. The Council stated that some of the e-mails came with a protective marking for confidentiality. 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.
26. The Council also considered that an obligation of confidence was implicit due to the context in which the information was provided, namely an investigation, and due to the purpose of that investigation.
27. Having considered the '*reasonable person*' test used in the *Coco v Clark* case, and mindful of the circumstances in which evidence was gathered from individuals to produce information in this case, the Commissioner is satisfied that there is an implied obligation of confidence. She accepts that there is an expectation that the information provided was shared in confidence and will not be disclosed to the public.
28. 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?*

29. Having concluded that the withheld information has the necessary quality of confidence, and was imparted in circumstances giving rise to an obligation of confidence, the Commissioner proceeded to consider whether unauthorised disclosure could cause detriment to the confider.
30. The Council's position is that disclosure would cause detriment to the individuals that are the subject of, or relevant to, their investigation.
31. The Commissioner's guidance on section 41 states that:-

*"any invasion of privacy resulting from a disclosure of private and personal information can be viewed as a form of detriment in its own right".*

The guidance also highlights that:-

*"information about an individual's private and personal life can be protected by the law of confidence, even if disclosure would not result in any tangible loss to the confider."*

32. The Commissioner considers that the withheld information is of a personal nature and that disclosure of information provided under such circumstances may cause personal distress to individuals, and potentially issues between third parties. It is therefore not necessary for there to be any detriment to the confider(s) in terms of tangible loss, for this information to be protected by the law of confidence. Therefore the Commissioner has not considered this issue further.

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

33. Section 41(b) provides that the breach of confidence must be actionable by either the legal person who provided the information to the public authority, or by any other legal person.

34. 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".*

35. Given the nature of the allegations in this case, the Commissioner is satisfied that disclosing the information would be a breach of confidence, where action could be taken by those who provided the information.
36. The final part of the test for engaging section 41 is whether an action for breach of confidence is likely to succeed.

*Is there a public interest defence for disclosure?*

37. Section 41 is an absolute exemption and therefore not subject to the conventional public interest test under section 2 of the FOIA. However, a public authority must carry out a test to determine whether it would have a public interest defence for the breach of confidence. 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.
38. Therefore the Commissioner has considered whether there would be a public interest defence available to the Council if it disclosed the requested information.

39. 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, therefore providing a public interest defence to any action taken regarding disclosure.

### **Public interest defence arguments**

40. The complainant has argued:

*"I believe Surrey Heath BC have redacted senior staff names, email content that exposes unlawful decision procedures to not take enforcement action based on funding, personal opinions and personal relationships that have affected decisions to not follow the enforcement requirements of local planning policy and case law rulings."*

41. With regard to the Council's consideration of the public interest, the complainant stated:

*"... given the weight of the public interest element and the critical nature of the information in being able to hold the council to account"*

*"...The email content requested is in the public interest to establish if the resident's complaints and the evidence of illegal activity submitted to Surrey Heath BC have been treated without bias, fairly and lawfully"*

42. The complainant also told the Commissioner:

*"I requested two years of email correspondents held by four senior council staff members responsible for enforcement decisions to find out why Surrey Heath BC have not enforced the law. I received the redacted information with some emails withheld"*

### **Arguments in favour of maintaining the confidence**

43. In its submission to the Commissioner, the Council made a case that the disclosure of information gained by way of confidential correspondence "could significantly prejudice" future investigations in terms of individual cooperation.

## **The Commissioner's view**

44. 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.
45. The Commissioner has considered whether there is any overriding public interest in the disclosure of unredacted information that would justify an actionable breach of confidence.
46. The Commissioner understands that the complainant considers that disclosure would add to the public's understanding of the Council's response, and its ability to hold the Council to account.
47. The Commissioner 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.
48. She has also taken into account the argument that disclosure of confidential information would undermine the relationship of trust between public authorities and confiders, thereby in the Council's case significantly prejudicing future investigations. She has accorded significant weight to the importance of maintaining confidence in order to preserve the Council's ability to conduct full and thorough investigations.
49. 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 and the impact of disclosure on the interests of the confider. 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 public certainty that such confidences will be respected by a public authority.
50. 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.



## Section 40 personal information

51. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
52. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
53. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
54. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

### *Is the information personal data?*

55. Section 3(2) of the DPA defines personal data as:

*"any information relating to an identified or identifiable living individual".*

56. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
57. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
58. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
59. The information redacted under section 40(2) FOIA is that of junior staff members in the Council.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

60. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subject(s). She is satisfied that this information both relates to and identifies the data subject(s) concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
61. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles. The most relevant DP principle in this case is principle (a).

*Would disclosure contravene principle (a)?*

62. Article 5(1)(a) of the GDPR states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject"*

63. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
64. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

*Lawful processing: Article 6(1)(f) of the GDPR*

65. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.
66. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"<sup>2</sup>.*

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<sup>2</sup> Article 6(1) goes on to state that:-

67. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;
  - ii) Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
68. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

*Legitimate interests*

69. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

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"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted"

70. The Council cannot identify a legitimate interest in the public or applicant having access to the withheld information (the names of junior members of staff). It has included all names of the more senior of public facing members of staff and the complainant has been provided with this.
71. The Commissioner does not consider that disclosure of the names of junior members of staff would further public debate or contribute towards the accountability of the Council.
72. As the Commissioner does not consider there is a legitimate interest in disclosure of the redacted information she has not gone on to consider whether disclosure was necessary or the balancing test.
73. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
74. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to consider whether disclosure would be fair or transparent.

**The Commissioner's view**

75. The Commissioner has therefore decided that the Council was entitled to withhold the redacted information under section 40(2), by way of section 40(3A)(a) of the FOIA.

## Right of appeal

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76. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

77. 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.
78. 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**

**Senior Case Officer**

**Information Commissioner's Office**

**Wycliffe House**

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**SK9 5AF**