

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 May 2022

Public Authority: Didcot Town Council
Address: Council Offices
Britwell Road
Didcot
Oxfordshire
OX16 7HN

Decision (including any steps ordered)

1. The complainant has requested from Didcot Town Council (DTC) financial information relating to the closure of a council leisure centre. DTC refused the request on the grounds that section 41 (Information provided in confidence) of FOIA applied.
2. The Commissioner's decision is that part of the request was not a valid request for information under FOIA, because it did not meet the requirements of section 8(1)(c) of FOIA. As regards the remainder of the request, he finds that DTC was not entitled to rely on section 41 to withhold information about the amount owed to DTC, as this information was already in the public domain at the time of the request. He also finds that DTC failed to comply with obligations imposed by section 17(1) (Refusal of request) of FOIA to properly identify the basis of its refusal.
3. The Commissioner requires DTC to take the following steps to ensure compliance with the legislation.
 - Disclose the information requested at point (4) of the request.
4. DTC 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 FOIA and may be dealt with as a contempt of court.

Background

5. A company voluntary arrangement (CVA) is an arrangement whereby a company with debt problems, or that is insolvent, reaches a voluntary agreement with its business creditors regarding repayment of all, or part of its corporate debts over an agreed period of time.
6. DTC owned Willowbrook Leisure Centre, which was operated by a management company, Soll (Vale). In November 2020 Soll (Vale) said it could no longer operate the site, due to financial problems. In December 2020, Willowbrook Leisure Centre closed.
7. Companies House records dated 24 December 2020 show that Soll (Vale) entered into a CVA with its creditors on 15 December 2020¹. One of the creditors was DTC.
8. On 4 May 2021 the complainant requested information from DTC about the total amount owed to it by Soll (Vale) following the Willowbrook Leisure Centre closure. DTC responded on 3 June 2021, stating that the information was "confidential due to the ongoing nature of the Company Voluntary Agreement (CVA)" with Soll (Vale) and that it could not be disclosed while the CVA was ongoing.

Request and response

9. Following DTC's response to the earlier request, on 3 June 2021, the complainant wrote to DTC and requested information in the following terms:
 - "1. As DTC is a creditor of Soll, who voted, on their behalf, to approve the CVA action?
 2. Does this mean DTC now have a legal agreement with Park Club – Soll, that DTC as a creditor, will be paid within a specific time limit?
 3. How much has this CVA cost DTC so far?
 4. DTC debts are not confidential information, so please can you provide me with the total amount that is currently outstanding from Soll?

¹ <https://find-and-update.company-information.service.gov.uk/company/05184368/filing-history>

5. I have found nothing that says CVA information is confidential, will you therefore publish the full details of this CVA on DTC website within the next few days?"

10. DTC responded on 14 June 2021. It provided free text answers to parts (1) – (3) of the request. For parts (4) and (5) it repeated that the information remained confidential until the CVA was resolved.

Scope of the case

11. The complainant contacted the Commissioner on 14 June 2021 to complain about the way her request for information of 3 June 2021 had been handled.
12. As it had not specified valid grounds under the remit of FOIA for refusing to disclose information, the ICO contacted DTC on 22 July 2021 and asked it to do so.
13. DTC responded on 28 July 2021, saying that it was relying on sections 41 (Information provided in confidence) and 42 (Legal professional privilege) of FOIA to withhold information in respect of parts (4) and (5) of the request. It later withdrew reliance on section 42, stating that it did not believe the criteria necessary for engaging that exemption were met. However, it maintained that section 41 had been applied correctly.
14. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of FOIA. FOIA is concerned with transparency and provides for the disclosure of information held by public authorities. It gives an individual the right to access recorded information (other than their own personal data) held by public authorities. FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions, unless this is recorded information that they already hold.
15. The Commissioner wrote to the complainant on 15 March 2022 and explained that he proposed to consider DTC's response to parts (4) and (5) of her request. He invited the complainant to let him know if there were other matters which she believed should also be addressed. The complainant did not respond.
16. The analysis below therefore considers whether DTC was entitled to rely on section 41 of FOIA to refuse part (4) of the request. The Commissioner has considered whether part (5) of the request was a valid request for information for the purposes of FOIA. The Commissioner has also considered DTC's compliance with section 17 of FOIA.

Reasons for decision

Section 8 – request for information

17. Section 8(1) of FOIA defines a valid request for information under FOIA as a request which:
 - (a) is in writing,
 - (b) states the name of the applicant and an address for correspondence, and
 - (c) describes the information requested.
18. Section 84 (Interpretation) of FOIA defines “information” as:

“...information recorded in any form”.
19. Therefore, in order to constitute a valid request for information under FOIA, not only must the complainant’s request satisfy the criteria in section 8 of FOIA, but it must also be a request for recorded information.
20. Part (5) of the request asks:

“...will you therefore publish the full details of this CVA on DTC website within the next few days?”
21. Having specific regard to its wording, the Commissioner is not satisfied that this is a valid request for information under FOIA. Read objectively, it is a question about DTC’s intentions regarding publishing information about the CVA. It does not describe recorded information which the complainant would herself like to be provided with.
22. On that point, the Commissioner notes that the right of access provided by section 1(1)(b) of FOIA is a right to have information communicated **to the requester**. This is apparently not the complainant’s intention at part (5) of the request. Rather, she appears to be urging DTC to publish information on its website. Furthermore, the Commissioner notes that the complainant specifies a time for publishing (“within the next few days”) which is not the 20 working day compliance period provided for by FOIA.
23. The Commissioner therefore does not consider that the request satisfies the requirements at section 8(1)(c) of FOIA.
24. Since the Commissioner is satisfied that, for the above stated reasons, part (5) was not a valid request for recorded information under the FOIA, it is not considered further in this decision notice.

Section 41 – Information provided in confidence

25. DTC applied section 41 to withhold the total amount owed to DTC by Soll (Vale), requested at part (4) of the request.

26. Section 41(1) provides 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.”

27. 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.

28. 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 an FOIA request.

29. The Commissioner’s guidance on section 41² states that:

“...information will be covered by section 41 if –

- it was obtained by the authority from any other person,
- its disclosure would constitute a breach of confidence,
- a legal person could bring a court action for that breach of confidence, and
- that court action would be likely to succeed.”

² <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

Was the information obtained from any other person?

30. Section 41(1)(a) states that the information must have been obtained from "any other person". The term means a 'legal person'. The Commissioner's guidance explains that this could be an individual, a company, another public authority or any other type of legal entity.
31. The Commissioner's guidance on this point states:

"... the exemption won't cover information the authority has generated itself, although it may cover documents (or parts of documents) generated by the public authority if these record information provided in confidence by another person ...".
32. DTC provided the Commissioner with a figure for the amount Soll (Vale) owed it as part of wider background on the CVA. It did not explain why this figure was information which had been provided to it by another person, as opposed to being information which it had calculated itself, as a creditor of Soll (Vale).
33. The Commissioner has reserved judgement on this point and has gone on to consider whether the remaining criteria for engaging section 41 are nevertheless satisfied.

Would disclosure constitute an actionable breach of confidence?

34. 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. This 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.

Does the information have the necessary quality of confidence?

35. 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. This reflects the position taken in *Coco v A N Clark (Engineering) Ltd* where the Judge stated;

"...there can be no breach of confidence in revealing something to others which is already common knowledge."

36. The Commissioner notes that the information requested in part (4) of the request has been in the public domain since 24 December 2020, it being included in the Companies House document referred to in paragraph 7, above. Having regard to Judge's comments in *Coco v A N Clark (Engineering) Ltd*, the Commissioner finds that this information could not attract the necessary quality of confidence at the time of the request, because it was contained in publicly available documents published on the Companies House website.
37. The Commissioner's decision is therefore that section 41 is not engaged, and that DTC was not entitled to rely on it to withhold the information requested at part (4) of the request.
38. As the exemption is not engaged, it is not necessary to consider the public interest.
39. DTC should now take the action specified at paragraph 3.

Section 17 – Refusal of request

40. Section 17 of FOIA states:

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies."

41. In this case, when refusing to disclose information, DTC did not identify which exemptions it was relying on under FOIA. DTC therefore breached section 17(1) of FOIA.
42. The Commissioner uses intelligence gathered from individual cases to inform his insight and compliance function. This aligns with the goal in

his draft "Openness by design"³ strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting systemic non-compliance, consistent with the approaches set out in his "Regulatory Action Policy"⁴.

³ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁴ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

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@justice.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

Samantha Bracegirdle
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF