

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 08 April 2010

Public Authority: Eastleigh Borough Council
Address: Civic Offices
Leigh Road
Eastleigh
Hampshire
SO50 9YN

Summary

The complainant requested various pieces of information regarding Eastleigh Borough Council's (the 'Council') investigation into working practices at the former employer of a now deceased individual. The Council disclosed some of the requested information, stated that some of the information was not held, and applied section 41(2) of the Freedom of Information Act 2000 (the "Act") to other information and refused to confirm or deny whether it was held. During the Commissioner's investigation the Council clarified that it was no longer seeking to rely on section 41(2) of the Act but applied section 41(1) to the withheld information. The Commissioner has determined that, on the balance of probabilities, the Council holds no further information and that the withheld information is exempt under section 41(1) of the Act. The Commissioner identified procedural breaches in the way in which the Council handled the request but does not require the Council to take any steps. The Commissioner also identified that some of the withheld information was likely to be the personal data of the complainant and this matter is being dealt with separately by the Commissioner.

The Commissioner's Role

1. 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 the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. An individual died while working for a private company (the “employer”) that is based within the geographical boundary of the Council. The complainant informed the Council that the individual had an existing medical condition that the employer was aware of. In her view the working practices of the employer had not taken account of the late employee’s illness, had caused him undue stress and had thereby contributed to his premature death. The complainant asked the Council to investigate the working practices of the employer.
3. The Council conducted an investigation to determine whether there was evidence that the employer acted in breach of the Health and Safety at Work etc Act 1974 (HASAWA) and associated regulations. The Council wrote to the complainant on 19 December 2008 to inform her that its investigation had concluded that there was insufficient evidence to “prove beyond a reasonable doubt” that there had been a breach and that there was no further action the Council could take.
4. The complainant was not satisfied with the Council’s conclusion and complained to its Chief Executive about the way in which the matter had been handled. In response, the Council agreed to review the case again and on 17 February 2009 informed the complainant that its Environmental Health Manager had been tasked with conducting the review. On 2 March 2009 the Council wrote to the complainant and stated that the review had concluded that the outcome of its original investigation was correct and that there was no further action it could take. The complainant remains dissatisfied with the outcome of the Council’s investigation.

The Request

5. Following telephone calls that she had made to the Council, on 22 August 2008 the complainant wrote to the Council and asked it to expedite its investigation into working practices at the employer. There followed a series of correspondence between the Council and the complainant regarding the investigation into this matter. The correspondence from the complainant included at least two requests for information that were not dealt with under the provisions of the Act. For example on 2 October 2008 the complainant expressed her dissatisfaction with the way the Council had handled her request for an investigation into working practices at the employer. In that letter the complainant stated that she had previously verbally requested sight of the Council’s report into Health and Safety practices at the employer and had received no response. As the complainant put the request in writing, it met the definition of a request provided by section 8 of the Act and should have been handled accordingly.
6. Following the Council’s letter to her of 19 December 2008 (see paragraph 3, above) the complainant wrote to the Council on 21 December 2008 and expressed dissatisfaction with the outcome of its investigation. The complainant stated that she wanted to know the questions that were put to the employer

- during the Council's investigation and to know the considered opinion of the investigating officer regarding working practices at the employer. This again could be considered a request for information under the provisions of the Act but there is no evidence that the Council considered it as such.
7. Following further correspondence between the Council and the complainant, on 21 February 2009 the complainant wrote to the Council and specifically pointed out that she was requesting information under the provisions of the Act. She asked for disclosure of the questions the Council put to the employer during its investigation and "what the document was that [name of Council official] asked to see" during his meeting with the employer. The complainant also stated that she wanted a copy of the Council official's report into his visit to the employer.
 8. On 22 February 2009 the complainant wrote to the Council and requested copies of everything that was on the working file of the Council official who was investigating working practices at the employer. She also asked for copies of all the letters she had sent to the Council and the Council's responses. On the same date the complainant also wrote a separate letter to the Council and asked for the details of any complaints it had received about the employer.
 9. On 24 February 2009, the complainant wrote to the Council and asked for:
 1. All information relating to the meeting between [name of Council official] and [name of employer].
 2. The document [name of Council official] asked for and allowed [name of employer] 3 weeks to provide.
 3. Any complaints that have been made against [name of employer] such as employee's.
 4. [Name of Council's Environmental Health Manager]'s file – full contents.
 5. All paperwork relating to the investigations [name of employer] undertook prior to [name of Council official]'s visit. i.e. I understand an outside company came into [name of employer] and assessed their working practices / arrangements – what was the outcome of this I have been told recommendations were made.
 6. What recommendations did [name of Council official] make following his visit."
 10. On 19 March 2009, the Council issued the following response to the complainant's requests:
 - It stated that there was no record of the details of the meeting between the Council official referred to in the request and the employer, other than those mentioned in the "Environmental Health note", which the Council disclosed.
 - It disclosed a copy of the file that its Environmental Health manager worked from.
 - It stated that it held no record of any complaints about the employer.
 - It disclosed the recommendations made to the employer following its investigation.
 11. On 23 March 2009 the complainant wrote to the Council and stated that she believed the information disclosed by the Council to be incomplete. In a separate letter to the Council of the same date, the complainant asked the Council to review its handling of her requests and in a third letter of the same date the

complainant wrote to the Commissioner and stated her dissatisfaction with the way in which the Council had handled her requests.

12. On 11 May 2009 the Council wrote to the complainant with the outcome of its internal review of its handling of her requests. The Council addressed four points:
- Firstly it addressed the request for a file note or transcript of the Council's meeting with the employer during the investigation. The Council stated that the only record of the meeting was a file note that had previously been disclosed to the complainant.
 - Secondly, the Council addressed the request for the recommendations made by the Council in its meeting with the employer (point 5 of her request of 24 February 2009). The Council stated that the results of the visit were confirmed in an email from the Council to the employer and a copy was disclosed. In addition the Council disclosed a copy of an internal report conducted by the employer as a result of the meeting.
 - Thirdly, the Council stated that all papers relating to the investigation had been disclosed.
 - Lastly, the Council addressed the request for a copy of a report drafted by a third party (point 5 of the request of 24 February 2009 – see paragraph 9, above). The Council stated that it believed section 41 of the Act to apply. As such, the Council refused to either confirm or deny whether the information was held.

The Investigation

Scope of the case

13. The complainant contacted the Commissioner with her complaint about the way in which the Council had handled her request for information before the Council had issued its response to her request for an internal review. As such, the Commissioner stated that he was unable to take any further action until the Council had completed its review. Following completion of the Council's internal review, on 25 June 2009 the complainant reiterated her complaint to the Commissioner. She stated that in addition to the information requested on 21, 22 and 24 February 2010, she had also requested all correspondence between the Council and her MP and she also wanted to complain about the way in which the Council handled that request for information.
14. On 10 July 2009 the Commissioner wrote to the complainant to set out the scope of his investigation. He clarified that he could only consider whether the Council had complied with the provisions of the Act and that he was unable to look at her complaint about the way in which the Council conducted its investigation into working practices at the employer. The Commissioner stated that, although the requests submitted by the complainant covered a wide range of information, his view - based on the correspondence he had seen and because some of the requested information appeared to have been disclosed – was that the primary concern of the complainant was to pursue the report that she believed that an external consultant had provided to the employer (point 5 of her request of 24

February 2009). The Commissioner therefore suggested that his investigation would focus on this element of the request.

15. In a telephone discussion with the Commissioner's investigating officer on 13 July 2009 the complainant clarified the specific information she intended to pursue:
 - The document she believed to have been provided to the employer by an external consultant and then to the Council during its investigation (referred to in this Notice as 'the report') – point 5 of her request of 24 February 2009.
 - The contents of the file held by the Council's Environmental Health Manager (EHM) during his fresh investigation into working practices at the employer – point 4 of her request of 24 February 2009.
16. During the course of the Commissioner's investigation the following matters were resolved informally and do not form part of this Notice:
 - In relation to the report, the Council withdrew its reliance on section 41(2) of the Act. However the Council sought to rely on section 41(1) of the Act.
17. In light of his discussion with the complainant on 13 July 2009, in which the scope of her complaint was agreed, and the change in the Council's position regarding section 41, the Commissioner altered the scope of his investigation to focus on the following issues:
 - Rather than focusing on whether the Council was correct to neither confirm nor deny that the report was held, the Commissioner focused on whether the report was correctly withheld under section 41(1).
 - The Commissioner considered whether, on the balance of probabilities, the Council held further information that was generated by its EHM during his review of the Council's investigation into working practices at the employer and whether that information should be disclosed.
 - The Commissioner also considered if any procedural breaches of the Act occurred.
18. During the course of the Commissioner's investigation the complainant sought to extend the scope by introducing the matter of a vehicle / driver declaration form that she says was held by the Council and demonstrated that the employer was aware of the deceased's existing health problem. The complainant said that the Council delayed disclosure of this information to her and stated that this was evidence of the Council's failure to comply with the provisions of the Act. The Commissioner is unaware when the information was disclosed to the complainant but it is clear that it is now in her possession. The Commissioner therefore limited the scope of his investigation to that agreed with the complainant in the telephone conversation of 13 July 2009.

Chronology

19. On 9 July 2009 the Commissioner wrote to the Council and stated that he did not think that section 41(2) (the duty to confirm or deny) was engaged in relation to the report. He asked the Council to provide further arguments to demonstrate that section 41(2) was engaged.
20. Following a discussion with the complainant on 13 July 2009, the Commissioner wrote to the Council to clarify that the scope of his investigation also included any information created by its EHM during his review of the Council's original investigation. He asked the Council to clarify the scope of the EHM's investigation, the nature of any information he created and how his findings were recorded. The Commissioner asked the Council to clarify what information it held and whether it would disclose it to the complainant.
21. On 12 August 2009, the Council provided a response. It stated that it no longer sought to rely on section 41(2) of the Act in relation to the report. The Council also provided arguments to support its view that no further information was created by its EHM during his review.
22. On 25 August 2009, the Commissioner emailed the Council and put forward his view that the report contained some personal data of the complainant. The Commissioner asked the Council whether it considered the complainant's right of access to her personal data under section 7(1) of the Data Protection Act 1998 (the "DPA"). The Commissioner also asked the Council to clarify whether it intended to put forward any arguments under section 41(1) of the Act.
23. On 28 August 2009, the Council responded to the Commissioner and stated that it had reservations about the possible adverse consequences that disclosure of the complainant's own personal data under the provisions of the DPA might have. The Council also provided some arguments to support its position that the rest of the report (i.e. the information that was not the complainant's own personal data) was exempt by virtue of section 41(1) of the Act.
24. There followed a period of internal consultation and consideration within the Commissioner's Office regarding the most appropriate course of action to take regarding the complainant's personal data held within the report. On 16 October 2009 the Commissioner emailed the Council and stated that, while the report largely contained information relating to workplace matters it did contain information that could be considered the complainant's personal data. As such, the Commissioner advised the Council to consider the provisions of the DPA and either disclose the complainant's personal data to her or cite a relevant exemption from that legislation.
25. On 22 October 2009, the Council contacted the Commissioner by telephone and stated that it noted the comments in his email of 16 October and that it would disclose to the complainant any information that it considered to be her personal data by 6 November 2009. The Council failed to meet to this deadline and by 16 December 2009 the Commissioner had reached the view that the Council was unlikely to consider the provisions of the DPA without a formal assessment by

him. A separate case was established to consider whether the Council has complied with the DPA and, at the time of drafting this Notice, it was awaiting allocation to a case officer.

26. On 18 December 2009, the Commissioner wrote to the complainant with his preliminary view of her complaint under the Act. He explained that the matter of her personal data would be treated separately but that, in his view, the remainder of the report was exempt under section 41(1) of the Act and that no further information was held by the Council in relation to the review conducted by its EHM.
27. The complainant wrote to the Commissioner on 31 December 2009 and stated her dissatisfaction with his preliminary view. The Commissioner therefore proceeded to draft a Decision Notice.

Analysis

Substantive Procedural Matters

28. The Commissioner has considered whether the Council held further information that had been generated by its EHM during his review of the Council's original investigation into working practices at the employer.
29. Section 1 of the Act states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds that information and, if it does, to have that information communicated to him. In this case there is a dispute over whether the information is held by the Council.
30. In investigating cases involving a disagreement as to whether or not information is in fact held by a public authority, the Commissioner has been guided by the approach adopted by the Information Tribunal in the case of *Linda Bromley & Others and Information Commissioner v Environment Agency (EA/2006/0072)*. In this case the Tribunal indicated that the test for establishing whether information was held by a public authority was not certainty, but rather whether on a balance of probabilities, the information is held.

Reasons to suggest that the information is held

31. The complainant's view is that if, as it indicated to her in its letter of 17 February 2009, the Council's EHM had been tasked with reviewing the case "afresh", it would be reasonable to suggest that further information (in addition to that created during the Council's original investigation) in the form of file notes and correspondence would have been generated.

Reasons to suggest that the information is not held

32. The Council's view is that its EHM carried out a review of its original investigation rather than a fresh investigation and did not produce any new documentation or correspondence. The Council stated that the EHM looked at the work that had been undertaken in the original investigation and reviewed the conclusions. The Council stated that the conclusions of the EHM were recorded in letters to the complainant and the Council provided the Commissioner with copies of those letters.

Balance of probabilities

33. In determining whether, on the balance of probabilities, requested information is held, the Commissioner will consider the explanations offered by the public authority to explain why the information is not held and the scope quality and thoroughness and results of the searches carried out by the public authority.
34. The Commissioner notes that the Council indicated in its letter to the complainant of 17 February 2009 that the EHM would review the matter "afresh" and this gave the complainant the impression that a new investigation would be undertaken.
35. The Commissioner is mindful of the Council's explanation that it conducted a review of the original investigation rather than a new investigation. He has had sight of a letter of 2 March 2009 from the Chief Executive of the Council to the complainant, in which the Council set out the findings of the EHM. The Commissioner has also seen a draft letter prepared by the Housing and Environmental Health Department that provides the content of the Chief Executive's letter.
36. The Commissioner also noted the relatively short time period between the start of the Council's review of this matter and its concluding letter to the complainant. The Commissioner presumes that the review started on or around the 17 February 2009 (see paragraph 33, above) and concluded sometime before its findings were communicated to the complainant on 2 March 2009. The review was therefore completed and the findings communicated within two weeks. The Commissioner's view is that the relatively short timescale adds weight to the Council's argument that a review of the initial investigation was conducted rather than a full and new investigation.
37. Based on the Council's explanation of the way in which the EHM conducted his review, the short timescale involved and the detailed findings provided to the complainant in the Council's letter of 2 March 2009, the Commissioner is satisfied that the Council conducted a review of its investigation not a full, new investigation and that no further information was generated during the EHM's review. He has not therefore gone on to consider the scope, quality and thoroughness of searches for the information.

38. The Commissioner has seen no evidence that further information exists and has therefore determined that, on the balance of probabilities, no further information was generated during the EHM's review of the original investigation.

Exemptions

39. Section 41(1) of the Act sets out an exemption to disclosure where the information requested was provided to the public authority in confidence. There are two components to the exemption:
- The information must have been obtained by the public authority from another person. A person may be an individual, a company, a local authority or any other "legal entity". It is not restricted to information provided verbally or in writing. It is the information itself, and not the document or other form in which it is recorded, which needs to be considered.
 - Disclosure of the information would give rise to an actionable breach of confidence. In other words, if the public authority disclosed the information the provider or a third party could take the authority to court.
40. The information to which section 41 has been applied is the report described in point 5 of paragraph 9, above. The matter of the complainant's own personal data contained within the report has been referred to previously in this Notice.
41. The Commissioner was not aided in his investigation by a lack of detailed arguments provided by the Council to support its position. The Council's arguments to support its application of the exemption were as follows:
42. "...the information was given to us in confidence and on the understanding that it would not be passed to a third party and was accepted on that basis. The information in the report is not available elsewhere and that nature of the information contained within the report is highly important to the reputation of the company involved and in our opinion clearly has the quality of confidence required. The report is clearly headed strictly private and confidential".
43. As a result of the lack of detail provided by the employer, the Commissioner had to base his view on generic arguments, rather than arguments specific to this case.

Was the information obtained from a third party?

44. In order for the exemption under section 41 to apply, public authorities must first be able to satisfy the Commissioner that the requested information was obtained by that authority from a third party.
45. In this case the report was provided to the Council by the employer who had commissioned an external consultant to produce it. The Commissioner's view is that the information was clearly obtained by the Council from a third party and that the first limb of the exemption is engaged.

Would disclosure give rise to an actionable breach of confidence?

46. Once it has been established that the requested information has been provided to the public authority by a third party, the Commissioner must assess whether an actionable breach of confidence would arise if the information were to be disclosed.
47. When considering whether or not a breach of confidence is itself actionable, the Commissioner has decided that it is appropriate in this case to follow the test set out by Megarry J in *Coco v A N Clark (Engineers) Limited* (1968) FSR 415 and cited by the Information Tribunal in *Bluck v the Information Commissioner & Epsom St. Helier University NHS Trust* (EA/2006/0090). Megarry J stated that:
- ‘...three elements are normally required, if apart from contract, a case of breach of confidence is to succeed. First, the information itself must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of the information to the detriment of the party communicating it...’
48. In order to determine whether disclosure would give rise to an actionable breach of confidence, the Commissioner therefore considered whether the above three factors could be met in this case.

Does the information itself have the necessary quality of confidence about it?

49. Information will have the necessary quality of confidence if it is not trivial and otherwise accessible; in other words if it is not already in the public domain. According to Megarry J in *Coco v Clark*, “however confidential the circumstances of communication, there can be no breach of confidence in revealing something to others which is already common knowledge.”
50. It is not possible for the Commissioner to provide a high level of detail regarding the withheld report without disclosing the withheld information but he is satisfied that it is not information already in the public domain or trivial in nature. The report is the opinion of an external consultant based on his experience and the opinion of colleagues of the deceased individual and other employees whom he interviewed. The consultant was commissioned to provide his opinion to the employer and did so via the report in question. The report was intended for a very limited audience and, to the Commissioner’s knowledge, was not widely circulated. It cannot therefore be considered to be in the public domain. In addition, the report was commissioned as the result of the death of the employee and contains opinion of working practices at the employer and whether they could have contributed to his death. As such, the Commissioner’s view is that the information is clearly not trivial and that it has the necessary quality of confidence.

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

51. An obligation of confidentiality may be expressed explicitly, or implicitly. Other than the 'strictly private and confidential' marking on the report (which could be added to any document regardless of the content), the Commissioner has seen no evidence of an explicit obligation of confidence and has gone on to consider whether there was an implied obligation of confidence.
52. The Commissioner felt it appropriate to review the content of the report when considering whether it was imparted in circumstances importing an obligation of confidence and noted that it contained not only the opinion of the author (an external HR consultant) but the opinion of other employees of the employer. The Commissioner was not informed of the circumstances in which opinions were obtained from employees by the external consultant – i.e. whether interviews were held in private or if they were informed that information would be treated in confidence – but he is of the view that any employee providing an opinion as part of an investigation into an issue as sensitive as the death of a colleague would have a reasonable expectation that the opinion would be treated in confidence and not widely disclosed.
53. Similarly the Commissioner is of the view that the external consultant would have provided his views and opinions to the employer with the reasonable expectation that they would be treated as confidential and not widely circulated.
54. The Commissioner's view is that, in general, employees providing views to an external HR consultant during such an investigation would have an expectation that the information would be treated as confidential and external consultants would have a similar expectation. He is therefore of the view that the information was imparted to the employer in circumstances that imported an implied obligation of confidence.
55. The Commissioner went on to consider whether the information was provided to the Council by the employer in circumstances that imported an implied obligation of confidence. The Commissioner noted that the information was provided to the Council by the employer during the Council's investigation into working practices at the employer. The Commissioner has not been informed what part the report played in the Council's investigation but it appears that it was provided as background information.
56. The Council stated that the report was marked 'strictly private and confidential' – although as mentioned in paragraph 51 above, this marking could be attributed to any information but does not necessarily mean that it has the necessary quality of confidence or that it was provided in circumstances that import an obligation of confidence – and that it was not given permission by the employer to disclose it.
57. The Commissioner's view is that the report was imparted to the Council by the employer in circumstances that imported an implied obligation of confidence. In reaching this view the Commissioner took into account the content of the report, as detailed in paragraph 49, above and the fact that the employer was under no

obligation to provide the information to the Council but did so on a voluntary basis with the associated expectation that it would be treated in confidence and not widely circulated.

58. Having concluded that the first two elements set out in paragraph 47, above, were satisfied the Commissioner went on to consider whether disclosure would be to the detriment of the confider.

What would be the detriment?

59. The third element of the test of confidence involves the likely detriment to the confider if the confidence is breached. In some cases, for example involving the personal information of individuals acting in their private capacities, there is no need to prove the element of detriment. Indeed the Information Tribunal has taken the view that the loss of privacy is a sufficient detriment in itself.
60. The Commissioner's view is that in this case the withheld information relates to the personal information of individuals (although those individuals were interviewed as employees, the report includes references to information that they would only have known due to their personal relationships with the deceased), the view of author of the report acting in his capacity as an external consultant commissioned by the employer, and information about the employer's working practices and dealings with the deceased.
61. The Commissioner considers therefore that there is potential detriment not only to the employer, but also to its employees and to the external consultant. Weighing up the detriment in this case was therefore not straightforward and the Commissioner has summarised below his view in relation to the detriment to the individuals and the employer:
- The employer – the Council argued that the nature of the information contained in the report is “highly important to the reputation of the company involved”. The Commissioner cannot comment in any detail on the content of the report without disclosing the withheld information, but he agrees that the way in which employers deal with their employees is highly important to their reputation, both as an employer and as a business. Furthermore, he considers that such a disclosure would be outside the expectations of the employees who had contributed to the report and would therefore be detrimental to the employer/employee relationship of trust and confidence.
 - Employees – the Commissioner considers that the detriment in relation to the former colleagues of the deceased would be a loss of privacy. He considers that the opinions they provided as part of the consultant's investigation were made in their capacity as employees but also as colleagues of the deceased and, as such, in a personal capacity. The investigation covered some sensitive matters and, given that the context was the death of a colleague, the Commissioner does not consider those matters to be trivial.
 - The external consultant – the Commissioner considers that the consultant who was the author of the report would be less likely to suffer a detriment than the employees referred to above. This is because he was acting in his professional capacity and was tasked with investigating a third party (the employer). The

Council did not provide the Council with any arguments to demonstrate that disclosure would be to the detriment of the consultant and the Commissioner was therefore unable to conclude that there would be a detriment.

62. As such - and taking into account the other elements of the 'test of confidence' previously mentioned in this Notice - the Commissioner agrees that disclosure of the information contained in the report would be to the detriment of both the employer and the employees who provided their views during the investigation.
63. However, the Commissioner is mindful that there are of defences to a disclosure of confidential information which prevent action being taken against the discloser, the most commonly used of which is the public interest defence.

The public interest defence

64. The Commissioner has considered whether an action for a breach of confidence would fail because the disclosure of the information would be protected by a public interest defence.
65. In *Derry v ICO* (EA/2006/0014) the Information Tribunal clarified that the test to be applied in deciding whether the public interest provides a defence to a breach of a duty of confidence is that the duty should be maintained unless the public interest in disclosing the information outweighs the public interest in protecting confidences.

Public interest in disclosing the information v the public interest in protecting confidences

66. The Commissioner has been unable to identify any strong public interest arguments that could be used to defend the disclosure of the report. There is of course a public interest in knowing that investigations of alleged breaches of Health and Safety legislation are conducted thoroughly and robustly by local authorities. However, in this case the report was provided to the Council by the employer as background information and does not clarify how the Council's investigation was conducted.
67. The complainant has particular reasons why she would like the information to be disclosed. The Commissioner does not dispute the validity of these, but he does not in general consider a personal interest in disclosure to constitute an overriding public interest defence.
68. The Commissioner notes that the courts have generally taken the view that the grounds for breaching confidentiality must be strong ones, since confidentiality is recognised as an important value in itself. There is a public interest in maintaining trust and preserving the free flow of relevant information to public authorities to enable them to perform their functions and this is an argument that the Council put to the Commissioner during his investigation. That is, there is a strong public interest in ensuring that companies comply in full with local authorities' investigations and therefore a public interest in ensuring that the confidence of information provided by companies during such investigations remains intact. If such confidence were eroded, there is a chance that companies would be less

likely to fully co-operate with local authorities by voluntarily sharing all relevant information. This would clearly not be in the wider public interest.

69. In the case of *Bluck*, the Information Tribunal quoted from the Lords decision of *Attorney General v Guardian Newspapers* [1990] 1AC109:

‘as a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence...’

70. Historically, a duty of confidence has only been disapplied by the courts in very limited circumstances. Examples of cases where the courts have required disclosure in the public interest include those where the information concerns misconduct, illegality or gross immorality.
71. The Commissioner notes that the report does concern allegations made by the complainant about working practices at the employer. However the report contains the opinion of an external consultant commissioned by the employer and not the findings of the Council’s own investigation. It is the Council’s findings that are significant in this case; it is the Council that determines whether there was any breach of Health and Safety legislation and those findings have already been disclosed in response to the complainant’s request. The Commissioner considers this to be a significant point and does not find there to be a public interest in disclosure of a report commissioned by the employer for its own purposes that was then shared with the Council to provide background to the matter being investigated.
72. Taking the above factors into account, the Commissioner has reached the view that in this case the public interest in protecting the confidence of the report outweighs any public interest in disclosure.

Procedural Requirements

73. On 24 February 2009 the complainant requested, amongst other things, a copy of the report. The Council did not address this point in its refusal notice of 19 March 2009 and did not address this matter until it issued the findings of its internal review on 11 May 2009 when it neither confirmed nor denied whether it held the information. By failing to address this part of the request within 20 working days the Council breached section 10(1) of the Act and by failing to issue a proper refusal notice within 20 working days the Council breached section 17(1) of the Act.

The Decision

74. The Commissioner’s decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- The Council correctly stated that it did not hold further information in relation to the review of its initial investigation into working practices at the employer.
- The Council was correct to apply section 41(1) of the Act to the report provided to the Council by the employer.

However, the Commissioner has also decided that the following element of the request was not dealt with in accordance with the Act:

- By failing to issue a proper refusal of point 5 of the complainant's request of 24 February 2009 within 20 working days the Council breached sections 10(1) and 17(1) of the Act.

Steps Required

75. The Commissioner requires no steps to be taken.

Other matters

76. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters.
77. The complainant made requests for information on 2 October and 21 December 2008 that the Council did not handle as requests under the provisions of the Act. The Commissioner like to draw the Council's attention to paragraph 15 of the introduction to the section 45 Code of Practice which states the importance of recognising requests, dealing with them under the provisions of the Act and providing proper training to employees. The Commissioner's Good Practice and Enforcement Team will monitor future complaints to the Commissioner to determine whether there is a pattern of non compliance.
78. The internal review was requested on 23 March 2009 and the outcome sent to the complainant on 11 May 2009. This exceeds the 20 working days recommended by the Commissioner in his guidance (http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/internal%20reviewsv1.pdf) but is within the 40 working days recommended in exceptional circumstances. The content of the review, which is relatively brief, does not suggest that the extra time was warranted in this instance and it is unlikely that the Council's review conformed to the Commissioner's recommendations in respect of timeliness.
79. The Commissioner is concerned at the Council's approach to the complainant's own personal data and the fact that it agreed to disclose it to her but later changed its position. The Commissioner is not clear why the Council adopted this approach and this matter is being investigated separately.

Right of Appeal

80. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals
PO Box 9300
Arnhem House
31 Waterloo Way
Leicester
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 8th day of April 2010

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 17(1) provides that -

“A public authority which ... 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.”

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.”

Section 41(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”