

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 14 September 2010

Public Authority: Saltburn, Marske and New Marske Parish Council
Address: The Cottage
Rear of Dundas Street West
Saltburn
TS12 1BL

Summary

The complainant requested information relating to a grant provided to a local bowling club by Saltburn, Marske and New Marske Parish Council ("the Council"). The Council offered to supply a copy of a letter from the bowling club but it refused to provide the accounts that were provided to it on the basis that it was exempt under section 21(1) of the Freedom of Information Act 2000 ("the FOIA"). In its internal review, the Council also sought to rely on section 41(1). During the Commissioner's investigation, the Council withdrew its reliance on section 21(1). The Commissioner was satisfied that section 41(1) was engaged and he requires no steps to be taken. He found breaches of section 17(1) and 17(1)(c).

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 FOIA"). This Notice sets out his decision.

Background

2. On 9 September 2009, a local bowling club wrote to the Council to ask for a grant towards the annual maintenance of its grass cutting machines. It supplied a copy of its accounts along with the letter as

requested by the Council. On 13 October 2009, the Council replied to the bowling club confirming that its application had been successful. The information being withheld in this case is the accounts that were provided to the Council.

The Request

3. On 5 October 2009, the complainant wrote to the Council as part of an exchange of correspondence and requested information in the following terms:

"I also notice that from the agenda of the Donations and General Purposes Committee that a grant application was received from Marske Bowling Club. I would be most grateful if you would send me the information with regard to this application".
4. The Council replied on 6 October 2009. The Council stated that it could send a letter received from the bowling club but that the club had requested that it withhold the accounts that accompanied the letter. It applied section 21(1) of the FOIA on the basis that the information was reasonably accessible by other means (in this case by making another request to the bowling club).
5. The complainant wrote on 6 October 2009 stating that the accounts mentioned were not available. He pointed out that the bowling club had refused him access to this information. He also stated that in his view, any organisation applying for a grant from public funds should not expect confidentiality in respect of the information they provide to support that application.
6. Following contact with the Commissioner, the complainant wrote to request an internal review of the refusal on 5 February 2010.
7. The Council replied on 17 February 2010. The Council reiterated its position that section 21(1) applied and it also stated that it now wished to rely on section 41(1) of the FOIA as well. In relation to section 21(1), the Council did not address the complaint that the information was not in fact "reasonably accessible elsewhere" and it did not justify its reliance on section 41(1) of the FOIA.

The Investigation

Scope of the case

8. On 12 January 2010, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the Council had correctly refused to provide the accounts.

Chronology

9. Following correspondence from the Commissioner on 4 March 2010 asking for further information to help him to consider the complaint, the Council wrote to the Commissioner on 18 March 2010. The Council presented arguments in support of the exemptions applied and it also provided a copy of the withheld accounts, a copy of an email from the bowling club, and a copy of its "donations policy". In the email, the bowling club confirmed that it had provided the accounts in confidence and did not wish them to be released to any third parties. The donations policy was created after the request that is the subject of this complaint.
10. On 8 June 2010, the Commissioner wrote to the complainant asking him to confirm that the Commissioner had accurately set out the scope of his complaint in the letter.
11. On 9 June 2010, the Commissioner wrote to the Council. He pointed out that the Council could not claim that the information was reasonably accessible under section 21(1) and that it was confidential under section 41(1) at the same time. He asked for further supporting arguments and invited the Council to withdraw its reliance on one of these exemptions.
12. On the same day, the Council telephoned the Commissioner. It acknowledged that it could not rely on both exemptions and stated that it wished to withdraw its reliance on section 21(1). The Commissioner and the Council discussed the request.
13. On the same day, the complainant also wrote to the Commissioner. He confirmed that the Commissioner's letter accurately reflected the scope of his complaint. The complainant referred to the Council's donations policy that had been created after his request.
14. On 23 June 2010, the Council replied to the Commissioner. It presented arguments in support of the application of section 41(1) of

- the FOIA. For background, it also provided a copy of the letter of application from the bowling club as well as a copy of its letter approving the grant.
15. The Commissioner telephoned the Council on 19 July 2010 to discuss the request.
 16. The Commissioner also wrote to the complainant on 19 July 2010. He set out his view that section 41(1) had been correctly applied in the circumstances of this case.
 17. On the same day, the complainant replied stating that he did not accept the Commissioner's conclusions. The complainant made comments questioning why the grant had been given to the bowling club and stated that it was in the public interest to know how public money is being spent.

Analysis

Exemption – Section 41(1)

18. Section 41(1) of the FOIA provides that information is exempt if it was obtained by the public authority from any other person and the disclosure would constitute an actionable breach of confidence. The exemption is “absolute” and therefore not qualified by the public interest test set out in section 2 of the FOIA.

Was the information obtained from another person?

19. It is clearly the case that the accounts were obtained by the authority from another person (in this case the bowling club). Therefore this part of the exemption has been met.

Would disclosure have constituted an actionable breach?

20. For the purposes of this exemption, the Commissioner considers that it is appropriate to adopt the test set out in *Coco v A N Clark (Engineers)* [1968] FSR 415 that a breach will be actionable if:
 - The information has the necessary quality of confidence,
 - The information was imparted in circumstances importing an obligation of confidence; and
 - There was an unauthorised use of the information to the detriment of the confider.

21. Information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. Both parties agree that the information is not otherwise accessible and there appears to be no reason to doubt that this is the case. The Commissioner is also satisfied that accounts cannot be classified as "trivial" information. He appreciates that accounts can, on the contrary, contain sensitive information.
22. Even if information might otherwise be regarded as confidential, a breach of confidence will not be actionable if it was not communicated in circumstances that created an obligation of confidence. An obligation may be expressed explicitly or implicitly.
23. The complainant argued that the information was not communicated in circumstances that created an obligation of confidence. He believes this to be the case because the bowling club was applying for a grant of public money and ought not to expect confidence. The complainant also pointed out that although the Council now has a written policy that makes this expectation explicit this was not in existence at the time of the request.
24. The Council argued that the information was supplied to it in confidence by the bowling club. It accepts that the clear written policy did not exist at the time of the request, but it advised the Commissioner that this policy merely consolidated the arrangements that were already in place at the time of the request. It explained that when groups contact the Council about applying for a grant, they are asked to submit a letter outlining the purpose of the grant and other relevant information. In order to establish that the groups are legitimate and active, the Council asks them to submit a copy of their last audited accounts or if these are not available a copy of a recent bank statement. They are told that the accounts or bank statements will be treated in confidence. The Council also explained to the Commissioner that following the request, it had asked the bowling club whether it would be willing to consent to the disclosure of the accounts. The club confirmed that it expected the information to be treated in confidence and would not consent to its disclosure.
25. Having considered the above circumstances, the Commissioner agrees with the Council that an implicit obligation of confidence arose in the circumstances of this case that was owed to the bowling club. There was never any indication given to the bowling club that the information would be released. In fact, they were given the opposite expectation. The Commissioner accepts that accounts contain sensitive information about the organisation involved and that in the circumstances

described, an obligation of confidence arose. It is not correct, in the Commissioner's view, to argue that because the application was for a grant of public money, no obligation of confidence could arise.

26. The Commissioner believes that an unauthorised use of the information would be of detriment to the confider (i.e. the bowling club) because it may draw unwarranted and undue attention to the activities of the club which may discourage members of the club from taking on voluntary roles in the future. This could ultimately lead to the club deciding not to apply for grants from the Council.
27. In view of the above, the Commissioner considers that disclosure to the public would constitute an actionable breach of confidence.

Would a public interest defence be available?

28. Case law suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. The duty of confidence public interest test assumes that the information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.
29. The Commissioner takes the view that a duty of confidence should not be overridden lightly. Disclosure of any confidential information undermines the principle of confidentiality itself which depends on a relationship of trust between the confider and the confidant. It is the Commissioner's view that people would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected.
30. In the circumstances of this particular case, the Commissioner's view is that it is important that organisations undertaking activities that benefit the community are not discouraged from applying for grants because they are fearful that sensitive information about their organisation could be made publicly available without their permission.
31. The Council informed the Commissioner that it asks for accounts to check that it is dealing with a legitimate organisation that is still active. There is always some public interest in disclosure of information held by public authorities to help to bring about accountability and transparency. This is especially so in relation to activities involving the spending of public money. However, there is no evidence available to the Commissioner indicating that the public interest in disclosure of the full accounts requested is sufficient enough in these circumstances to outweigh the strong public interest in maintaining the confidentiality.

32. The Commissioner noted that in the complainant's correspondence on 19 July 2010, he had expressed the view that it was in the public interest to know how public money is being spent. The complainant also made comments to the Commissioner questioning whether or not it was appropriate to give such a grant to the bowling club. However, the Commissioner's view is that disclosure of the accounts would not address the particular public interest argument raised by the complainant concerning whether or not it was appropriate to make the grant.

Was section 41 engaged?

33. For the reasons set out above, the Commissioner's view is that section 41(1) was engaged.

Procedural Requirements

34. The Council only relied on the exemption under section 41(1) in its internal review. This represented a breach of section 17(1) because the Council should have claimed this exemption within 20 working days of the request.
35. The Commissioner also considers that the Council breached section 17(1)(c) because it failed to explain why the exemption under section 41(1) was engaged in the circumstances of this case.

The Decision

36. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the FOIA:
- It correctly applied section 41(1) of the FOIA to withhold the accounts of the bowling club.
37. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the FOIA:
- It breached section 17(1) for failing to rely on the exemption under section 41(1) within 20 working days of the request.
 - It breached section 17(1)(c) for failing to explain why section 41(1) was engaged in its internal review.

Steps Required

38. The Commissioner requires no steps to be taken.

Right of Appeal

39. 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,
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 sent.

Dated the 14th day of September 2010

Signed

**Rachael Cragg
Group Manager – Complaints Resolution
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that –

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

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- (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.”

Effect of exemptions

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

Refusal of Request

Section 17(1) provides that –

“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.”

Information Accessible by other Means

Section 21(1) provides that –

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

Information provided in confidence

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.”