

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 22 December 2009

Public Authority: Leicestershire County Council
Address: County Hall
Glenfield
Leicestershire
LE3 8RA

Summary

The complainant asked for access to all social work records regarding her father, who was deceased. Leicestershire County Council ("the Council") refused to provide this information citing the exemptions under section 41(1) of the Freedom of Information Act 2000 ("the FOIA") and section 40(2). The Commissioner investigated and found that some of the information should have been refused under section 40(1) because it represented the complainant's own personal data. However, in respect of the remaining information, the Commissioner agreed that section 41(1) and 40(2) had been correctly applied in this case. He also found breaches of section 17(1) and 17(c) of the FOIA. The Commissioner requires no steps to be taken.

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 FOIA. This Notice sets out his decision.

The Request

2. On 4 July 2008, the complainant wrote to the Council and requested information in the following terms:

"I would like access to all Social Work records regarding my father please".

3. On 14 July 2008, the Council wrote to the complainant acknowledging receipt of the request. It stated that it would consider the request under the terms of the

- FOIA and it asked the complainant to confirm whether she was the eldest or only child.
4. On 22 July 2008, the complainant replied to the Council stating that she was the eldest child but had a younger brother. She stated that she did not have any contact details for her brother.
 5. On 23 July 2008, the Council supplied the complainant with a refusal notice claiming that all of the information was exempt under section 41(1) of the FOIA. It stated that the information was provided by the complainant's father on the understanding that it would be held confidentiality. It stated that its release would be an actionable breach of that confidence. The Council also stated that a considerable amount of information on the case file relates to a third party and their relationship with the complainant's father and involvement in his care. It stated that as it had not received any permission to release this information it considered that disclosure would breach the terms of the Data Protection Act 1998 ("the DPA"). It added that it felt that if this information was removed, the file would no longer represent a coherent record.
 6. On 30 July 2008, the complainant wrote to request an internal review of the Council's refusal. She stated that she did not consider that section 41(1) applied because a duty of confidence was not capable of surviving a person's death. As regards section 40(2), the complainant stated that she was aware the third party involved was her brother. She explained that she had concerns about her father's care and considered that access to the information would help her to "find justice".
 7. On 29 August 2008, the Council replied to the complainant stating that it had reviewed the refusal and had decided not to alter its position.

The Investigation

Scope of the case

8. On 5 September 2008, the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider whether the Council had correctly refused to provide the information she had requested.

Chronology

9. On 17 October 2008, the Commissioner wrote to the Council stating that although the case had yet to be allocated, he would be grateful if the Council could supply copies of the withheld information to the Commissioner for inspection.
10. In an undated letter received by the Commissioner on 11 November 2008, the Council stated that it had supplied the withheld information to the Commissioner.

11. On 17 August 2009, the Commissioner wrote to the complainant setting out his understanding of the complaint. He also asked the complainant to confirm whether she knew if any person had been appointed to act as her father's personal representative.¹
12. On 20 September 2009, the complainant sent an email to the Commissioner confirming that her father was considered to have died intestate and that letters of administration had been given to her and her brother in May 2009.
13. On 21 September 2009, the complainant telephoned the Commissioner. The complainant confirmed that she thought her brother was likely to object to the disclosure of the information. The Commissioner explained that he was very likely to find that disclosure of information concerning her brother would be unfair in these circumstances. The Commissioner also explained that a disclosure under the FOIA would be a disclosure to the general public rather than just to her and he asked the complainant to confirm whether she wished to proceed in view of this. The complainant confirmed that she did.
14. On 28 September 2009, the Commissioner wrote to the Council. The Commissioner asked the Council to provide more rationale supporting its application of the exemptions and he also asked whether it was able to contact the complainant's brother to ascertain whether he would object to the disclosure of the information. The Commissioner also stated that having inspected the information, he had noted that some of it related to the complainant who is mentioned by name. He stated that this information would represent personal data about the complainant and should be considered under the terms of the DPA.
15. The Council replied on 13 October 2009 and provided the information requested by the Commissioner. It also confirmed that it had contacted the complainant's brother who had objected to the disclosure of any of the information. The Council made no comments in respect of the Commissioner's indication that some of the information represented the complainant's personal data.
16. The Commissioner telephoned the Council on 27 October 2009 to discuss the case. During this conversation, the Commissioner pointed out that the Council had not addressed the point raised by the Commissioner that some of the information represented the complainant's personal data.
17. In a subsequent telephone conversation on 4 November 2009, the Commissioner also highlighted that the Council had not specified which Data Protection Principle it considered would be breached if the information was disclosed. The Council confirmed that it was relying on the first principle because disclosure of the information would be unfair.
18. On 4 November 2009, the Commissioner wrote to the complainant to provide his initial assessment of the case. He stated that his view was that the exemptions

¹ For clarity the personal representative of the deceased is the person (or persons though no more than four) who is entitled to administer the deceased person's estate by virtue of a grant of probate or a letter of administration.

- under section 41(1) and 40(2) had been correctly applied in the circumstances and he asked whether the complainant was willing to withdraw her complaint in view of these findings. He informed the complainant that some of the information represented her personal data and that she has a general right to access this information under section 7 of the DPA. The Commissioner noted however that this information was unlikely to be of real interest to her.
19. On 27 November 2009 the complainant sent an email to the Commissioner confirming that she wished to pursue the complaint to a Decision Notice under section 50 of the FOIA.
 20. The Commissioner wrote further to the complainant on 27 November 2009 and 7 December 2009 regarding some background details to the case.
 21. The complainant responded to the Commissioner on 6 and 7 December 2009.
 22. The Commissioner telephoned the Council on 15 December 2009 and sent an email later that day to clarify some details regarding the dates of correspondence concerning the request. He also raised the issue of the complainant's personal data and advised the Council that it would need to consider the disclosure of this information under the terms of the DPA. The Council agreed to consider this.
 23. He received a reply from the Council on 15 December 2009.

Analysis

Exemptions

Section 40(1) – Personal data of which the applicant is the data subject

24. Section 40(1) provides that information is exempt from disclosure under the FOIA if it constitutes personal data of which the applicant is the data subject. This is because this information should be handled under the provisions of the DPA. Section 7 of the DPA gives individuals the right to request access to personal data held about them by public authorities. This is referred to as the right of subject access.
25. The Council did not apply this exemption to any of the information being withheld however the Commissioner considered that in these circumstances it was appropriate for him to consider its application.
26. Personal data is defined by the DPA as any information relating to a living and identifiable individual. Having inspected the withheld information, the Commissioner notes that some of it relates to the complainant as she is mentioned by name. This is her personal data which is exempt from public disclosure under section 40(1).

Section 40(2) – third party personal data

27. This exemption provides that third party personal data cannot be disclosed under the FOIA if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the DPA.
28. Having inspected the information, the Commissioner was satisfied that a significant amount of it relates to the complainant's brother while he was caring for the deceased and this information is clearly his personal data.
29. The Council stated that it considered disclosure of the complainant's brother's personal data would breach the first Data Protection Principle which provides that personal data shall be processed fairly and lawfully and in particular shall not be processed unless at least one of the conditions in Schedule 2 has been met.
30. As noted in the Chronology section of this Notice, the Council contacted the complainant's brother to ask whether he would agree to the disclosure but he refused. Although a lack of consent in itself does not necessarily mean that disclosure would be unfair, the Commissioner has also had regard to the nature of the information. The Commissioner accepts that when people are in contact with social services, that contact carries a very strong general expectation of confidence because of the personal and sensitive nature of that information. The information clearly relates to the complainant's brother's personal life as a private individual and the Commissioner is satisfied that it would not have been reasonable for him to have expected that any of his personal data would be disclosed to the public.
31. As the Commissioner was satisfied that disclosure of the information would have been unfair, he did not find it necessary to consider any of the Schedule 2 conditions.

Section 41(1)

32. The Commissioner noted that there was some information that was neither the complainant's nor her brother's personal data. In respect of this, he considered whether the exemption under section 41(1) was engaged.
33. Section 41(1) 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?

34. In deciding whether information has been “obtained from any other person”, the Commissioner will focus on the content of the information rather than the mechanism by which it was imparted and recorded.
35. Social services records are about the care of a particular individual and the Commissioner therefore accepts that such information may be considered to be information obtained from another person (i.e. the person who is the subject of the social service activity) despite the fact that much of it is likely to be the assessment and notes of the professionals involved in the case. As the Commissioner accepts that the information in the files was obtained from the deceased, he has therefore gone on to consider whether the disclosure would constitute an actionable breach of confidence.

Would the disclosure have constituted an actionable breach?

36. The Commissioner has taken the view, in line with the Information Tribunal’s decision in *Pauline Bluck v the Information Commissioner and Epsom and St Helier University NHS Trust (EA/2006/0090)* that a duty of confidence is capable of surviving the death of the confider. In the *Bluck* case, the appellant had been appointed to act as the personal representative of her deceased daughter and was seeking the disclosure of her daughter’s medical record, but the daughter’s next of kin, her widower who was also the daughter’s personal representative, objected. In *Bluck*, the Tribunal confirmed that even though the person to whom the information relates has died, action for breach of confidence could still be taken by the personal representative of that person and that the exemption under section 41(1) therefore continues to apply. The Commissioner’s view is that this action would most likely take the form of an application for an injunction seeking to prevent the disclosure of the information. It should be noted however that there is no relevant case law to support this position.
37. In this case the complainant has stated that both her and her brother were appointed as personal representatives in May 2009 and were given letters of administration. The complainant’s brother has objected to the disclosure. The Commissioner therefore accepts that the complainant’s brother or any other personal representative that may be appointed in the future could bring a claim against the Council for breach of confidence. As the Commissioner accepts that if there was a duty of confidence, it would be capable of surviving the confider’s death, he has gone on to consider the test set out in *Coco v A N Clark (Engineers) [1968] FSR 415* concerning an actionable breach of confidence.
38. For the purposes of section 41(1), 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

39. Information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. Information which is known only to a limited number of individuals will not be regarded as being generally accessible although information that has been disseminated to the general public clearly will be. Information which was important to the confider cannot be considered to be trivial. The Commissioner is satisfied that social services records have the necessary quality of confidence required to sustain an action for breach of confidence as they are clearly very personal and sensitive and for obvious reasons, would not have been made generally accessible.
40. Further, following the decision of the High Court in *Home Office v BUAV and ICO* [2008] EWHC 892 (QB), the Commissioner recognises that with the introduction of the Human Rights Act 1998 (“the HRA”), all domestic law, including the law of confidence, has to be read in the context of the HRA. In relation to personal information, this involves the consideration of Article 8 which provides for a right to privacy. In relation to the triviality of information, the High Court found at paragraph 33 that:
- “It is beyond question that some information, especially information in the context of personal matters, may be treated as private, even though it is quite trivial in nature and not such as to have about it any inherent ‘quality of confidence’”.*
41. 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. When a social services client is under the care of professionals, the Commissioner accepts that they would expect that the information produced about their care would not be disclosed to third parties without their consent. In other words, he is satisfied that an obligation of confidence is created by the very nature of the relationship and the duty is therefore implicit.
42. Having satisfied himself that the information had the quality of confidence and was imparted in circumstances giving rise to a duty of confidence, the Commissioner considered whether unauthorised disclosure would cause detriment to the deceased. In many cases, it may be difficult to argue that disclosure of confidential information would result in the confider suffering a detriment in terms of any tangible loss. As the complainant’s father is now deceased, the Commissioner does not consider that the disclosure would cause him any tangible loss but he considers that the real consequence of disclosing the information would be that it would be an infringement of his privacy and dignity as the disclosure would not only be to the complainant, his daughter, but to the general public. This is supported by the fact that in *Attorney General v Guardian Newspapers* [1990] 1AC 109, Lord Keith of Kinkel found that it would be a sufficient detriment to the confider if information given in confidence was disclosed to persons whom the confider, “...would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way”.

43. Further to the above, Article 8 of the HRA recognises the importance to individuals to have the privacy of their affairs respected and in line with this an invasion of privacy would be a sufficient detriment to the confider.
44. The Commissioner also considered whether there would have been a public interest defence available if the Council had disclosed the information. As section 41(1) is an absolute exemption, there is no public interest test under section 2 of the FOIA. However, 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.
45. The Commissioner takes the view that a duty of confidence should not be overridden lightly, particularly in the context of a duty owed to an individual. 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. It is therefore in the public interest that confidences are respected.
46. In the circumstances of this particular case, the Commissioner's view is that it is important that social services clients have confidence that the professionals caring for them will not disclose to the public sensitive information about them once they have died as this may discourage some from making that information available. This would ultimately undermine the quality of care that social services are able to provide or may lead to some people not becoming involved with social services in the first place. This is counter to the public interest as it could endanger the health of social services clients and prejudice the effective functioning of social services.
47. Aside from the wider public interest in preserving confidentiality, there is a public interest in protecting the confider from detriment. The Commissioner has already established that he considers that it would be a sufficient detriment to the confider to infringe their privacy and dignity. As already noted, the importance of a right to privacy is recognised by Article 8 of the HRA.
48. However, there is a competing human right in Article 10 which provides for a right to freedom of expression, which includes the freedom to receive and impart information and the general test for an actionable breach also provides that if there is a public interest in disclosing the information that exceeds the public interest in preserving its confidentiality as discussed above, the breach will not be actionable.
49. The Commissioner has considered the circumstances of this case. The complainant has advised the Commissioner that she wishes to understand more about the care of her father to help her to "find justice" and emotional closure and she explained some of her concerns about her father's care. The Commissioner recognises that it is in the public interest to bring to light any wrong-doing on the

part of public authorities and that it is in the public interest for individuals to access information to help them to conduct a legal case, be that against a public authority or any other person. However, the Commissioner notes that if such a claim was brought, information may be accessible through court disclosure rules. He also notes that it is likely that any complaint against the authority could be reviewed by other independent bodies.

50. In light of the above, although the Commissioner can appreciate why the information is of particular interest to the complainant, there is no evidence available to the Commissioner at this time indicating that there is any wider public interest in disclosing the information. The complainant's wish to achieve emotional closure by understanding how her father was cared for by her brother and the authority is something the Commissioner can sympathise with but it is nonetheless a personal need. He also considers that if the complainant wished to pursue any legal claim or complaint, she may have been able to do this or access relevant information through means other than by seeking public disclosure and these means may have been more proportionate in the circumstances. He therefore takes the view that the public interest in preserving the principle of confidentiality is much stronger in the circumstances of this case and that there would therefore be no public interest defence available if the Council had disclosed the information.

Was the information exempt under section 41(1)?

51. As discussed above, the Commissioner's view is that a duty of confidence would be capable of surviving the complainant's father's death and that the complainant's brother or any other personal representative appointed in the future could pursue a claim for breach of confidence if the information was disclosed. The Commissioner was also satisfied that the information had the necessary quality of confidence, was imparted in circumstances giving rise to an obligation of confidence and that disclosure would result in detriment to the confider. He did not consider that there would be a public interest defence in the circumstances. As such, he accepts that section 41(1) was engaged in this case.

Procedural Requirements

52. The Commissioner considers that the Council's refusal notice did not provide sufficient explanation for its reliance on section 41(1) of the FOIA. In particular, the Council did not explain why it considered there would be an actionable breach of confidence if the information was disclosed through the consideration of the relevant issues as discussed in this Notice. In view of this, the Commissioner considers that the Council breached section 17(1) for failing to explain why the exemption under section 41(1) applied within 20 working days of the request. The internal review did not provide any further explanation and as such the Commissioner considers that the Council also breached section 17(1)(c) for failing to explain why the exemption applied by the date of its internal review.
53. The Commissioner also considered the Council's refusal under section 40(2). He did not consider that the refusal sufficiently explained why the exemption applied. In particular he notes that the Council did not explain why disclosure would

breach her brother's rights under the DPA other than to state that he had not consented. The Council later specified that it was relying on the first Data Protection Principle that disclosure would be unfair. In view of this, the Commissioner considers that the Council breached section 17(1) for failing to explain why the exemption applied within 20 working days of the request. As this was not rectified by the date of the internal review, the Council also breached section 17(1)(c).

The Decision

54. The Commissioner's decision is that:

- Section 40(1) was engaged in respect of information which constituted the complainant's own personal data
- The Council correctly relied on the exemption under section 40(2) in respect of information that represented the complainant's brother's personal data
- In respect of any information that was not covered by the exemptions under section 40(1) or 40(2), the Council correctly relied on the exemption under section 41(1).

55. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the FOIA:

- The Council breached section 17(1) and 17(1)(c) for failing to explain properly why the exemptions under section 40(2) and 41(1) were engaged.

Steps Required

56. The Commissioner requires no steps to be taken.

Other matters

57. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.

The complainant's personal data

58. Section 7 of the DPA gives an individual the right to request copies of personal data held about them. This is referred to as the right of Subject Access. The Commissioner notes that some of the information in the social services files should have been dealt with as a subject access request under section 7 of the DPA from the outset and he would encourage public authorities to consider requests under the correct access regime at first instance.

59. The Commissioner will now go on to consider whether or not to make an assessment under section 42 of the DPA. However, this consideration will be dealt with separately and will not form part of this Decision Notice, because any assessment under section 42 of the DPA that might take place would be a separate legal process from the consideration of a complaint under section 50 of the FOIA.

Right of Appeal

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

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

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 22nd day of December 2009

Signed

**David Smith
Deputy Commissioner**

**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 –

- (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.”

The public interest test

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.”

Personal information

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

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.”