

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 19 April 2010**

**Public Authority:** Derbyshire County Council  
**Address:** Rutland Mill  
Market Street  
Ilkeston  
Derbyshire  
DE7 5RU

### Summary

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The complainant requested the Council to answer a number of questions and to release information concerning his late mother's care, which is held in his late mother's social services records. The Council responded releasing copies of the deceased's social services records with a number of redactions. It withheld information relating to the complainant's brother and sisters, as it considered this information to be third party personal data. It also chose to withhold a number of documents under the Act, as it felt these documents were legally professionally privileged. Although no specific exemptions were cited by the Council, the Commissioner has considered whether sections 40(2) and 41(1) of the Act apply to the remaining information. The Commissioner concluded that the remaining information should be withheld under sections 40(2) and 41(1) of the Act.

### The Commissioner's Role

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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

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2. The Commissioner is aware that the complainant has been corresponding with the Council over the last few years regarding a complaint he raised with the Council concerning the care and treatment his late mother received prior to her death. The complainant's two information requests stem from this complaint and concern information held on his late mother's social services records.

## The Request

3. The complainant contacted the Council on 22 July 2008 to make the following request for information:

"Under the freedom of information act, I am now requesting the following information:

1. When was the vulnerable adults meeting held regarding the abuse by [named redacted] on mum?
  2. Who was involved in this meeting?
  3. Why was the family not informed about the abuse to mum or asked to attend the meeting?
  4. I request the minutes of the above vulnerable adults meeting, also a full report of the outcome. I also request the minutes of any meetings that have taken place, that have involved discussions about mum, between 11 April 2007 and 21 May 2007, and a full report on the outcome of these meetings. I also request a full list of people involved in the above meetings."
4. The Council responded on 11 August 2008 offering an explanation in answer to the above questions.
  5. As he remained dissatisfied following the Council's response of 11 August 2008, the complainant made a further request for information on 21 August 2008. He requested:
    - "1. Details and copies of all community care assessments and care plans completed for the periods up to and involving [the name of the deceased redacted] care and support, of which Derbyshire County Council should still have retained.
    2. Details of and copies of all communication, social workers/care coordinators/community nurses contact sheets which will record telephone conversations and/or verbal discussion as well as confirming any written correspondence, all letters of correspondence which involved professionals involved in [the name of the deceased

- redacted] care and support through multiagency working. These should be available on [the name of the deceased redacted] personal file.
3. Details of and copies of all multiagency meetings or case conferences that were held and recorded involving the care and support of [name of deceased redacted] whilst Derbyshire Social Services were responsible for coordinating the care and support of [name of the deceased redacted].
  4. Copies of the recorded telephone conversation you stated that you were involved in with the police in relation to the vulnerable adults telephone strategy, and subsequent recorded telephone conversations which you had in relation to the incident involving [the name of the deceased redacted]. Information, which should be retained as part of the Vulnerable Adults Strategy Procedure.
  5. Written confirmation and clarification of why the family were not informed by [the named of the deceased redacted] Social Worker or a member of the Social Service Department of the incident at Rutland Manor Home which resulted in the vulnerable adults telephone strategy.
  6. Details and written confirmation of Derbyshire Social Services actions taken by the Commissioners within the organisation with regard to the Provider (Rutland Manor Home) during the period in which the incident involving [name of the deceased redacted] was being investigated. In particular, can you please confirm if admissions to this home were suspended pending the outcome of the police investigation and were other commissioners outside the Local Authority informed of this. Can you also confirm the involvement of CSCI and provide details of your correspondence with regard to the involvement of CSCI in relation to [name of the deceased redacted] care and support at Rutland Manor."
6. The Council acknowledged receipt of this further request on 1 October 2008 and advised the complainant that it would respond within 40 days.
  7. Further letters dated 3 December 2008, 26 January and 12 February 2009 were then issued by the Council advising the complainant that it was proceeding to copy his late mother's social services files and would provide these in due course.
  8. The Council wrote to the complainant on 16 March 2009 enclosing a copy of his late mother's social services files. It advised that some information had been redacted, as it was third party personal data.
  9. The complainant wrote to the Council on 22 April 2009, as he remained dissatisfied with the information provided. In addition to raising issues

- regarding his late mother's care (which will not be addressed in this Notice for reasons explained in paragraph 20 below) he advised the Council that he had not received a sufficient response to the questions he raised in his information requests dated 22 July and 21 August 2008. The complainant sent a further letter to the Council in April 2009 (specific date unknown) to complain about the way his information requests had been handled and the significant delays he had experienced in receiving the information provided.
10. Although the Council's investigation continued, the complainant referred his complaint to the Commissioner on 21 May 2009.
  11. The Council wrote to the complainant on 29 May 2009 to offer him the opportunity to attend a meeting to address his outstanding concerns.
  12. The Commissioner wrote to the Council on 10 July 2009. He informed the Council that it had not to date issued an adequate Refusal Notice in accordance with section 17 of the Act and requested that it do so within 10 working days.
  13. The Council responded directly to the Commissioner on 20 July 2009. It advised that it was now attempting to release all information to the complainant. It confirmed that it was in the process of redacting any third party personal data and would send the redacted version of the requested information to the complainant shortly.
  14. Further redacted versions of the complainant's late mother's social services records were forwarded to the complainant on 17 August 2009.
  15. As the complainant remained dissatisfied, he contacted the Commissioner on 5 October 2009 to discuss what further action could be taken against the Council. The Commissioner's remit was explained to the complainant and he was asked to contact the Council direct to request an internal review.
  16. As requested, the complainant contacted the Council on 8 October 2009 to request that it undertake an internal review.
  17. The Council responded on 28 October 2009 advising the complainant that an internal review had already been carried out as part of the independent investigation that was undertaken into his complaint concerning his late mother's care.

## The Investigation

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### Scope of the case

18. On 28 October 2009 the complainant contacted the Commissioner to complain about the way his requests for information had been handled. Specifically, he remained dissatisfied with the information provided, the length of time it had taken the Council to respond and with the redactions made to his late mother's social services records.
19. This Notice will address the remaining elements of the complainant's late mother's social services records and whether this information should be released under the Act. It will also address the Council's handling of these requests and whether the Council met its obligations under the Act.
20. The complainant also raised the following issues:
  1. concerns with regards to his late mother's care and treatment whilst under the care of the Council;
  2. a complaint with regards to alleged inaccuracies in his late mother's social services records;
  3. a complaint that he had not to date received adequate explanations to questions he raised concerning his late mother's care.

These issues will not be addressed in this Notice because they are not requirements of Part 1 of the Act.

### Chronology

21. The Commissioner wrote to the Council on 5 November 2009 to request a copy of the withheld sections of the complainant's late mother's social services records.
22. The Council contacted the Commissioner on 16 December 2009 to inform him that further recorded information had been released to the complainant. It therefore confirmed that it would send a revised copy of the withheld information.
23. The Commissioner received a copy of the withheld information on 16 December 2009. Although no specific exemptions were cited, the Commissioner understood from the wording used by the Council that all remaining elements had been withheld under sections 40 and 42 of the Act.

24. The Commissioner contacted the Council by telephone on 8 February 2010 to establish the approach taken by the Council when redacting these records. The Council confirmed that it had redacted any information which related to the complainant's brother or sisters, as this was third party personal data. It also chose to withhold a selection of documents, as it felt these were legally professionally privileged and exempt from disclosure under the Act.
25. During this telephone conversation, the Commissioner drew the Council's attention to other Decision Notices he had issued regarding information requests for medical or social services records and asked whether it had considered applying section 41 of the Act to the remaining information. The Council confirmed that it had not and although the majority of the records in this case had been released to the complainant under the Act, this decision was only made and considered appropriate due to the complainant's relationship with the deceased.
26. The Commissioner returned the complainant's late mother's social services records to the Council on 8 February 2010.
27. The Commissioner wrote to the complainant on 15 February 2010 to outline his assessment of the complaint. The Commissioner advised the complainant that disclosure under the Act would be a disclosure to the general public rather than just to him and would effectively mean that any other member of the public could have access to his late mother's social services records on request. On this basis, the Commissioner informed the complainant that he had already received more information from the Council than he would be entitled to under the Act. He referred the complainant to the Decision Notice he issued in respect of case reference FS50213781 (available on the Commissioner's website) which outlines clearly the Commissioner's view that social services records in their entirety are exempt from disclosure under sections 40 and 41 of the Act.
28. The complainant was asked to consider withdrawing his complaint in light of the Commissioner's assessment. The complainant responded on 24 February 2010 confirming that he wished to pursue the complaint to a Decision Notice under section 50 of the Act.

## Analysis

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### Exemptions

29. As explained in paragraph 23 above, the Council did not state or clearly explain which exemption(s) it relied on for the non disclosure of the remaining information.
30. In the Tribunal hearing of *Dr Peter Bowbrick v ICO and Nottingham City Council (EA/2005/0006)* the Tribunal confirmed that the Commissioner is entitled to consider exemptions not referred to by the public authority in appropriate cases. Due to the Council's apparent limited understanding of the Act, the implications of disclosure of this type of information under Act and other cases considered by the Commissioner involving requests for access to the same type of information (FS50213781 as an example) where it has been decided that sections 40 and 41 of the Act apply, the Commissioner considers it would be appropriate in this case to apply these two exemptions on the Council's behalf.

### Section 40(2) – third party personal data

31. This exemption provides that third party personal data cannot be disclosed under the Act if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act 1998 ('DPA').
32. The Commissioner inspected the withheld sections of the deceased's social services records prior to these being returned to the Council and also obtained a detailed explanation from the Council concerning the specific sections withheld from the complainant. The Council explained that information relating to the complainant's brother and a particular telephone conversation with the complainant's sisters had been withheld. The Commissioner is satisfied that this specific information is the personal data of the complainant's siblings.
33. The Commissioner is of the view that the relevant Data Protection Principle here is the first Data Protection Principle. This states that personal data should 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.
34. The Council explained to the Commissioner that it felt it would be inappropriate to disclose these specific details to the complainant and



to the world at large because they contain some sensitive information relating to the deceased's care and the data subjects as individuals.

35. 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 the information. The information in this case clearly relates to the complainant's siblings and their personal lives as private individuals. The Commissioner accepts that as the information is of a personal and sensitive nature the complainant's siblings would have the reasonable expectation that the information they provided would remain confidential and private and would not be disclosed to the public.
36. The Commissioner acknowledges that the complainant has a legitimate interest in this information, as he is trying to pursue a complaint against the Council in respect of the care and treatment his late mother received. However, it is the Commissioner's view that access to this information via the Act in order to pursue this interest would prejudice the rights and freedoms of the data subjects concerned (the complainant's siblings) for the reasons explained above and this would be unwarranted.
37. To conclude, the Commissioner is satisfied that disclosure of the information would be unfair and therefore that section 40(2) of the Act is engaged. As section 40 of the Act is an absolute exemption there is no requirement to consider the public interest test.

### **Section 41(1) – information provided in confidence**

38. The Commissioner will now consider whether the remaining information, correspondence considered to be privileged by the Council, is exempt from disclosure under section 41(1) of the Act.
39. Section 41(1) of the Act provides that information is exempt from disclosure 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 Act.

#### Was the information obtained from another person?

40. In deciding whether the 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.



41. The Commissioner notes that social services records will not only contain information obtained from the subject of the record but also information obtained from social workers, other healthcare professionals and possibly from family members which in this case are the complainant's siblings.
42. Although the Commissioner accepts that social services records will also contain assessments and notes of the professionals involved in the individual's care, for the purposes of the Act it is his view that social services records in their entirety can be considered to be information obtained from one or more persons.
43. As the Commissioner is satisfied that the remaining information is information obtained from another person, it is now necessary for him to consider whether disclosure of the remaining information would constitute an actionable breach of confidence.

Would disclosure constitute an actionable breach of confidence?

44. It is the Commissioner's view that a duty of confidence is capable of surviving the death of the confider. This is in line with the Information Tribunal's decision in *Pauline Bluck v the Information Commissioner and Epsom and St Helier University NHS Trust* 9EA/2006/0090). 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 records, 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 had 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.
45. In this case the Commissioner is not aware whether the complainant and/or any of his siblings were appointed personal representatives of their late mother or whether any of his siblings object to the disclosure. He does not consider that it is a necessity to establish these facts in this case for the following reasons. If any of the complainant's siblings were personal representatives and objected to disclosure they could bring a claim for breach of confidence if this information were disclosed. If they are not already appointed personal representatives they or other persons could be appointed in the future and bring a claim for breach of confidence if this information were disclosed. 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.

46. The Commissioner considers the test set out in *Coco v A N Clark (Engineers) [1968] FSR 415* is the appropriate test to apply in this case. This test states 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.
47. 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 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 of breach of confidence as they are clearly very personal and sensitive and for obvious reasons, would not have been made generally available.
48. Considering the second element to this test, it is the Commissioner's view that the information was obtained in circumstances importing an obligation of confidence. An obligation can 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 remain confidential and would not be disclosed to third parties without their consent. He is satisfied that an obligation of confidence is created by the very nature of the social worker/client relationship and the duty is therefore implicit.
49. It is now necessary to consider whether unauthorised disclosure would cause detriment to the deceased. The Commissioner considers that, 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 tangible loss. As the complainant's mother is now deceased, the Commissioner does not consider that the disclosure would cause her any tangible loss. He considers the real consequence of disclosing the information would be that it would be an infringement of the deceased's privacy and dignity and therefore of Article 8 of the Human

Rights Act 1998 ('HRA'), as disclosure would not only be to the complainant 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 sufficient detriment to the confider if information given in confidence was disclosed to persons whom the confider, "...would prefer not to know it, even though the disclosure would not be harmful to [her] in any positive way".

50. Although section 41(1) is an absolute exemption, the law of confidence does contain its own inbuilt public interest test in that one defence to an action for breach of confidence is that the disclosure is in the public interest. 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.
51. The Commissioner accepts the Tribunal's findings in the case of *Bluck* that it is in the interest of "patients to have confidence that medical staff will not disclose sensitive medical data before they divulge full details of their medical history and lifestyle. Without that assurance patients may be deterred from seeking advice and without adequate information doctors cannot properly diagnose or treat patients." Although this particular case dealt with access to medical records under the Act, the Commissioner considers the same argument applies to social services records.
52. It is the Commissioner's view that it is important that social services clients have confidence that the professional 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 or well being of social services clients and prejudice the effective functioning of social services.
53. 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.
54. 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.

55. The Commissioner accepts that the information is of particular interest to the complainant and is required to assist the complainant in pursuing a complaint against the Council concerning his late mother's overall care. Whilst he can sympathise, it is the Commissioner's view that this is a personal need and there is no evidence available at this time indicating that there is any wider public interest in disclosing the information. The Commissioner considers that if the complainant wished to pursue a complaint or a legal claim, he may be able to do this or access relevant information through means other than seeking public disclosure and these means may be more proportionate to the circumstances.
56. The Commissioner has taken the view that the public interest in preserving the principle of confidentiality is much stronger in the circumstances of this case and that there is no public interest defence available warranting the disclosure of this information.
57. In conclusion, it is the Commissioner's view that a duty of confidence would be capable of surviving the complainant's mother's death and that any personal representative already appointed or appointed in the future could pursue a claim for breach of confidence if the information was disclosed. He is satisfied that the information has 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 reached the view that there was no public interest defence in this case and therefore that section 41(1) applies to the requested information.

### **Procedural matters**

58. For the information that was withheld, the Council failed to issue an adequate Refusal Notice to each request within twenty working days of receipt. The Council therefore breached section 17(1) of the Act in this case.
59. Although the complainant received some form of response, the Council's response failed to cite for the information it had withheld which exemption(s) it wished to rely on and why. The Commissioner has therefore concluded that the Council was in breach of section 17(1) of the Act.

60. The Council's response did not inform the complainant of his right to request an internal review and of his right to refer the matter to the Commissioner under section 50 of the Act. The Council therefore breached section 17(7) of the Act in this case.

## **The Decision**

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61. The Commissioner's decision is that:

- section 40(2) applies to the information which constitutes the personal data of the complainant's siblings;
- section 41(1) applies to all remaining information.

62. The Commissioner has also decided that the following elements of the requests were not dealt with in accordance with the Act:

- the Council breached section 17(1) by failing to issue an adequate Refusal Notice within twenty working days of the receipt of each request. It also breached section 17(1) by failing to cite for the information withheld, the exemption(s) it wished to rely on and why in the responses it did issue; and
- the Council breached section 17(7) by failing to inform the complainant of his right to request an internal review and of his right to refer the matter to the Commissioner under section 50 of the Act.

## **Steps Required**

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63. The Commissioner requires no steps to be taken.

## **Other matters**

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64. Although this does not form part of the Notice, the Commissioner wishes to draw the Council's attention to the following:

65. The Commissioner notes that the Council disclosed sections of the complainant's late mother's social services records to the complainant under the Act. Although the Council explained that this decision was only made and considered appropriate due to the relationship between the complainant and the deceased, the Commissioner has concerns

that the Council is unaware of the implications of making such disclosures under the Act. As explained in the body of the Notice, disclosure under the Act is disclosure to the world at large; not just to the applicant. Such a decision effectively means that if a further request was made for this information from any member of the public the information should be released. It is the Commissioner's view that social services records in their entirety are exempt from disclosure under sections 40(2) and 41(1) of the Act. This is the decision reached in this particular case and others already considered by the Commissioner.

## Right of Appeal

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66. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://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 19<sup>th</sup> day of April 2010**

**Signed .....**

**David Smith  
Deputy Commissioner**

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



## **Legal Annex**

### **Freedom of Information Act 2000**

#### **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.”

#### **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, 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.”

#### **Section 17(7)**

Provides that –

"A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50."

### **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."

## **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.”

## **Data Protection Act 1998**

**The first data protection principle provides that:**

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.