

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 10 May 2010

**Public Authority:** Cornwall Council  
**Address:** County Hall  
Treyew Road  
Truro  
TR1 3AY

### Summary

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The complainant submitted a request to Cornwall Council ('the Council') for details regarding the decision to place an individual (since deceased) into care. The Council provided some information but refused to disclose other information on the basis that it constituted part of the deceased's health records. It informed the complainant that the information would be available to specific individuals under the Access to Health Records Act 1990 rather than the Freedom of Information Act 2000 ('the Act'). The Commissioner decided that section 41 of the Act was engaged and that the information should not be disclosed. The Commissioner also found a number of procedural breaches in the Council's handling of the request but requires no steps to be taken.

### 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.

### The Request

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2. On 7 July 2008 the complainant submitted a request to the Council asking that its rejection of his previous request under the Freedom of

Information Act be reconsidered, since the circumstances surrounding the request had radically changed. The complainant wanted to know:

*"..the reasons for [named individual] being taken into care..."*

3. The complainant informed the Council that since the named individual had recently died he believed that the release of the requested data no longer infringed any clauses of "the Act" (presumably the Data Protection Act).
4. The Council responded on 2 September 2008 and disclosed some information to the complainant. However, the Council also identified the following seven documents as falling within the scope of the request. All of the documents were either joint assessments of care between the Council and Cornwall and Isles of Scilly Primary Care Trust ('CIOSPCT') or were provided by third parties:
  1. Care Plan jointly prepared by Social Services and Health dated 9th February 2005.
  2. Joint Health Assessment Care Plan dated 4th January 2005.
  3. Medical Report by doctor dated 1st August 2005.
  4. NHS Continuing Care Health Assessment – Nursing Needs Assessment.
  5. West of Cornwall PCT Continuing NHS Healthcare Assessment – Registered Nursing Care Contribution dated 17th November 2004.
  6. West of Cornwall PCT Continuing NHS Healthcare Assessment – Registered Nursing Care Contribution dated 30th December 2004.
  7. West of Cornwall PCT Continuing NHS Healthcare Assessment-Registered Nursing Care Contribution dated 5th May 2005.
5. The Council informed the complainant that in order to consider disclosure of these documents it was consulting with any third parties who may have an opinion on the release of the information.
6. On 7 September 2008 the complainant contacted the Council expressing dissatisfaction with its response stating that not one of the documents disclosed:

*"...actually explains why [named individual] was taken into care and the process employed in arriving at this decision."*
7. On 20 February 2009 the Council contacted the complainant via email and attached a copy of its letter and enclosures of 2 September 2008.

8. Following a number of emails from the complainant requesting a response to his letter of 7 September 2008, the Council contacted the complainant on 11 May 2009 enclosing the information it had previously disclosed on 2 September 2008 and 20 February 2009.
9. On 18 May 2009 the complainant expressed further dissatisfaction with the Council's response.
10. On 25 June 2009 the Council communicated the outcome of its internal review to the complainant. The Council confirmed that it held relevant information but explained that the information constituted part of the named individual's health records. It explained that access is allowed under the Access to Health Records Act 1990 rather than the Freedom of Information Act 2000.

## **The Investigation**

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### **Scope of the case**

11. On 28 June 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically expressed concern that none of the documents disclosed by the Council were relevant to the decision to place the deceased into care.

### **Chronology**

12. On 17 September 2009 the Commissioner contacted the Council to inform it that he had received a complaint about its handling of this request for information. The Commissioner asked for a copy of the withheld information which was provided by the Council on 29 September 2009.

### **Analysis**

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#### **Exemptions**

13. The full text of the relevant provisions of the Act referred to in this section is contained within the legal annex.
14. The Commissioner notes that in its refusal of the request, the Council did not cite an exemption but referred the complainant to the Access to

Health Records Act 1990 (the AHRA). However, the Commissioner has used his discretion to determine whether it is appropriate to take the exemption into account. In doing so, the Commissioner has paid particular regard to the nature of the information itself which consists of medical information about an individual (since deceased). As a responsible regulator the Commissioner's view is that it is appropriate to exercise his discretion in view of the nature of the disputed information.

15. In his consideration of whether the Council was correct to refuse to provide the disputed information, the Commissioner is mindful of similar cases where the medical information of a deceased person has been requested. Although no longer captured by the Data Protection Act 1998 ('the DPA') (because the DPA only relates to living individuals) or, accordingly, section 40(2) of the Act, there is normally an expectation of patient confidentiality surrounding medical records even after death.
16. Where the applicant is entitled to see the information under the AHRA, the Commissioner's guidance to public authorities is to refuse the request on the basis of section 21 of the Act, which relates to information available to the applicant by other means.
17. However, the Council has confirmed that it did not receive a response from the complainant with evidence that he was either the deceased's personal representative or that he may have a claim arising from the deceased's death. As such, it did not consider that he had provided evidence that he was entitled to access the information under the provisions of the AHRA.
18. In instances where the applicant is not eligible to see the information under the Access to Health Records Act 1990 ('the AHRA'), the Commissioner considers that, as medical information is generally considered to be given in confidence, the exemption provided by section 41 of the Act is relevant. The Commissioner has also had regard for a previous Decision Notice reference number FS50225818 which dealt with a request for the medical records of a deceased patient.

## **Section 41**

19. Section 41 applies to information obtained from a third party where disclosure would constitute an actionable breach of confidence.
20. When considering whether or not a breach of confidence is itself actionable, the Commissioner has decided, in this case, that it is

appropriate to follow the test set out by Megarry J in *Coco v A N Clark (Engineers) Limited* (1968) FSR 415 (*Coco v Clark*) and cited by the Information Tribunal (Tribunal) in *Bluck v The Information Commissioner & Epsom St. Helier University NHS Trust* (EA/2006/0090). According to Megarry J:

*'...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...'* (See paragraph 7 of the Tribunal's decision).

21. Later in the same judgement however, Megarry J made it clear that the element of detriment may not be necessary in every case. In the Commissioner's view, information on personal matters can still be protected under the law of confidence, even if disclosure may not be detrimental in terms of any tangible loss.
22. Although section 41 is an absolute exemption, the law of confidence does contain its own inbuilt public interest in that one defence to an action for breach of confidence is that the disclosure is in the public interest. The Commissioner therefore also considered whether the public authority could rely on a public interest defence so that a breach of confidence in the event of disclosure would not be actionable.
23. Finally the Commissioner has considered whether a breach of confidence can remain actionable after the death of the confider.

*Was the information obtained from any other person?*

24. The Commissioner notes that the Social Services records relate to the care of the deceased based on his/her physical and mental health and therefore accepts that such information may be considered to be information obtained from a third party (i.e. it originated from the deceased person) despite the fact that much of it is likely to be the assessment and notes of the professionals involved in the case.
25. As the Commissioner accepts that the information in the files was obtained from a third party, he has therefore gone on to consider whether the disclosure would constitute an actionable breach of confidence.

*Does the information have the necessary quality of confidence?*

26. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial. For this reason the Commissioner has considered whether the information is otherwise accessible to the public, rather than just to the individual complainant in this case. He has concluded that the information in this case is neither trivial nor otherwise accessible to the public. The Commissioner is therefore satisfied that the medical records requested in this case have the necessary quality of confidence required to sustain an action for breach of confidence.

*Was the information obtained in circumstances importing an obligation of confidence?*

27. The Commissioner considers that when patients submit to treatment or care from doctors and other health professionals, whether that is in surgeries, hospitals or other institutions, they do so with the expectation that the information will 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 doctor/patient relationship and the duty is therefore implicit. This is further supported by the oath taken by doctors guaranteeing to protect doctor/patient confidentiality. He therefore concludes that this information was obtained in circumstances importing an obligation of confidence.

*Would disclosure be to the detriment of the confider?*

28. The Commissioner considers that as medical records constitute information of a personal nature there is no need for there to be any detriment to the confider, in terms of any tangible loss, in order for it to be protected by the law of confidence. He has not therefore considered this issue any further. This is consistent with the previous decision referred to in paragraph 21 of this Notice.

*Would there be a defence to disclosure in the public interest?*

29. In the Commissioners view disclosure will not constitute an actionable breach of confidence if there is a public interest in disclosure which outweighs the public interest in keeping the information confidential.
30. Although the public authority did not provide any public interest arguments in this case, the Commissioner would concur with the comments of the Information Tribunal in *Bluck v the Information Commissioner & Epsom St Helier University NHS Trust (EA/2006/0090)* 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."*

31. The Commissioner has not been presented with any compelling argument, in this case, to demonstrate the existence of a particular public interest in disclosure into the public domain that would be sufficient to outweigh the considerable public interest in maintaining the confidentiality of medical information. He therefore considers the Council would not have a public interest defence for breaching the confidence in this case.

*Does the breach remain actionable after the death of the confider?*

32. In *Bluck* the Tribunal confirmed the ICO's position, that even though the person to whom the information relates may have died, action for a breach of confidence could be taken by the personal representative of that person, and that therefore the exemption continues to apply. The Tribunal stated that, *"In these circumstances we conclude that a duty of confidence is capable of surviving death of the confider"*
33. The Commissioner considers that in the circumstances of this case the duty of confidence is similarly capable of surviving the death of the confider. It is the Commissioner's view that in determining whether disclosure would constitute an actionable breach of confidence, it is not necessary to establish that, as a matter of fact, the deceased person has a personal representative who would take action.

*Conclusion*

34. In light of the above the Commissioner concludes that, as section 41 of the Act is engaged, the public authority correctly withheld this information.

## **Procedural Requirements**

### **Section 17 – Refusal of the request**

35. Section 17(1) of the Act places an obligation on any public authority relying on any exemption to disclose to inform the applicant of that fact in writing within 20 working days of receipt of the request. The public authority should provide details of the relevant exemption(s) and state why the exemption applies.
36. The Commissioner notes that the request was dated 7 July 2008 yet the Council did not provide its substantive response until 2 September 2008. He also notes that the response did not contain particulars of the

exemption relied upon or details of why any such exemption applied. The Council's failure to respond within the required timescale, to cite an appropriate exemption and to explain why the exemption applied therefore represents breaches of section 17(1)(a)(b) and (c) of the Act.

37. Section 17(7) of the Act states:

"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."

38. The Commissioner notes that the response did not contain either particulars of the Council's procedure for dealing with complaints of this nature, or the particulars of the right conferred by section 50. The Commissioner therefore finds that the Council breached section 17(7)(a) and (b) of the Act.

## The Decision

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39. 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:

- It appropriately withheld the information detailed in paragraph four of this Notice.

40. However, the Commissioner found that the following elements of the request were not dealt with in accordance with the Act:

- By failing to inform the applicant that the information was exempt in writing within 20 working days of receipt of the request, by failing to provide details of the relevant exemption(s) it was relying on and by failing to state why any such exemption(s) applied, the Council breached sections 17(1)(a)(b) and (c) of the Act.



- By failing to provide details of its procedure for dealing with complaints, or the particulars of the right conferred by section 50, the Council breached sections 17(7)(a) and (b) of the Act.

## **Steps Required**

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41. The Commissioner requires no steps to be taken.

## **Other matters**

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

43. Whilst there are no timescales specified in the Act for the communication of the internal review, the Section 45 Code of Practice recommends that the internal review should be considered promptly.

44. The Commissioner has also produced guidance in relation to this matter and considers 20 working days from the date of the request for a review to be a reasonable time in most cases. He does nevertheless recognise that there may be a smaller number of cases where it may be reasonable to take longer. However, the Commissioner expects the public authority as a matter of good practice to notify the applicant and explain why more time is needed. The Commissioner's view is that no case should exceed 40 working days.

45. The Commissioner notes that the complainant first expressed dissatisfaction with the Council's response to his request for information on 7 September 2008 yet the Council did not communicate the outcome of its internal review until 25 June 2009. Whilst the Council has confirmed that it does not hold a copy of the above letter from the complainant, it did receive emails from him dated 2 and 12 April 2009 and 2 and 18 May 2009 all of which expressed dissatisfaction with its original response. The Commissioner considers that this therefore represents an unacceptable delay and would remind the Council of its obligations in this area.

46. The Commissioner also notes that in its response of 2 September 2008, the Council informed the complainant that it was consulting with relevant third parties with regard to the disclosure of some of the information and would be in touch again shortly. However, the Council failed to send a further response to the complainant.

47. Whilst the Council has confirmed that it had no response from the relevant third party, the Commissioner would have expected it to make the decision independently and inform the complainant of the outcome.

## Right of Appeal

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48. 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 sent.

**Dated the 10th day of May 2010**

**Signed .....**

**Anne Jones  
Assistant Commissioner**

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

## Legal Annex

### **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."

**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."

### **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."