

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 14 December 2010

Public Authority: City of York Council

Address: The Guildhall
York
YO1 9Q

Summary

The complainant made a request for the social services file of his late father. The City of York Council provided some information and following internal review further information was provided although the complainant remained dissatisfied. Following the intervention of the ICO the Council reviewed what had been provided and decided to revisit the request completely. Following this review it determined what information it considered could be released and unsuccessfully attempted to send the information to the complainant by recorded delivery. After this failed attempt at disclosure the Council reevaluated its decision and decided that it was prepared to make a disclosure on a discretionary basis to the complainant but refused disclosure under the Freedom of Information Act 2000 (the "Act") relying on the exemption provided by section 41. The Commissioner has investigated and found that a small amount of the information is the complainant's personal data and therefore exempt under section 40(1) of the Act. In respect of the majority of the information the Commissioner found that section 41(1) applied. He also found that the Council had breached section 17(1) & 17(1)(c). 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 Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 30 July 2009 the complainant requested the following information:

"Can you please let me know how I would go about obtaining a copy of the Social Services file of my late father?"
3. The Council responded on 20 August 2009 and provided some information from the file as requested.
4. On the same day the complainant wrote to the Council expressing his dissatisfaction with the information provided.
5. On 18 September 2009, following the intervention of the Commissioner, the Council reviewed its response and provided further information.
6. On 22 September 2009 the complainant wrote again to the Commissioner expressing his dissatisfaction with the information provided.
7. The complainant explained to the Commissioner that he has an on-going dispute with the Council involving a series of complaints surrounding the Council's actions with regard to his parents. This situation has complicated the clarity of the correspondence between the two parties.

The Investigation

Scope of the case

8. On 20 August 2009 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 the matter of documents considered to be missing from the information supplied to him.
9. In the specific circumstances of this case and for the sake of clarity the Commissioner decided to consider the complainant's initial request for his father's Social Services file not only any perceived missing documents. This Decision Notice focuses on whether the Council has complied with the Act in terms of the information it seeks to withhold, i.e. the whole Social Services file of the complainant's late father. The

Commissioner would like to stress that the focus of a disclosure under the Freedom of Information Act is to the public at large, not a restricted disclosure to one individual.

10. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

11. During November and December 2009 the Commissioner corresponded with the Council in order to establish the appropriate paperwork before proceeding with the case.
12. On 11 December 2009 the Council provided the Commissioner with a copy of the requested case file.
13. On 4 February 2010 the Commissioner contacted the Council to clarify exactly what information, within the scope of this specific request, had been provided to the complainant. The Council explained that there was confusion surrounding this case due to staff absence and changes in responsibilities. The Council was unsure what information had been provided.
14. On 5 February 2010 the Council confirmed to the Commissioner that despite enquiries it was unable to confirm what information had been provided. However the Council provided the Commissioner with documentation which it referred to as the 'missing notes as referred to by' the complainant, with 'third party information redacted'.
15. On 9 February 2010 the Council agreed to revisit the request and determine the information which should have been provided in response.
16. Between 9 March 2010 and 12 May 2010 the Council attempted to resolve the matter with the complainant through a discretionary disclosure, however, when this proved unsuccessful the Council resorted to applying section 41 to the whole file.

Analysis

Exemptions

Section 40(1)

17. Section 40(1) provides that information is exempt from disclosure under the Act if it constitutes personal data of which the applicant is the data subject. This is because personal data of which the applicant is the data subject should be handled under the provisions of the Data Protection Act 1998 (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.
18. The Council did not apply this exemption to any of the information being withheld however the Commissioner considered that in these circumstances in his role as regulator of the DPA it was appropriate for him to consider its application.
19. The Commissioner has inspected the information comprising the social care record of the complainant's father and was satisfied that a small amount of the withheld information is the complainant's personal data. He therefore considers that this information was exempt under section 40(1) of the Act.
20. The Commissioner has advised the complainant to make a subject access request to the Council if he wishes to receive this information.

Section 41(1) – Information obtained in confidence

21. The majority of the information being withheld in the records is the personal information about the complainant's father. The Commissioner has therefore considered whether this information was exempt under section 41(1) of the Act.
22. 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 Act.

Was the information obtained from another person?

23. 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 complainant's deceased father, 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?

24. 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 *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. Although the *Bluck* case involved medical records the Commissioner finds that this position can also cover social care records.
25. 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 be able to take action. This is because it should not be the case that a public authority should lay itself open to legal action because at the time of a request it is unable to determine whether or not a deceased person has a personal representative.
26. 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.

However, as the Tribunal noted in *Bluck*, this statement of English Law must now be read in the context of the European Convention on Human Rights which has direct effect in English law as a result of the Human Rights Act 1998.

27. 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. 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. The Commissioner has examined the relevant records in this case and considers them to be of a sensitive nature.
28. 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.
29. 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.
30. 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 to the public would cause detriment to the deceased. The Commissioner wishes to follow the findings of the Tribunal in the case of Bluck:

14. The Appellant's case is that, as there can be no detriment to the deceased in the event that the Medical Records are disclosed and that, as this is an essential ingredient of the action for breach of confidence, no claim could be sustained were the Trust to disclose the information other than under FOIA.

*15. We have already set out extracts from the judgments in both *Coco v Clark* and *AG v Guardian* which questioned the requirement for detriment as an essential ingredient of the cause of action in all circumstances. In *Ash v McKennitt* the Court of*

Appeal, after explaining the role to be played by Article 8 in the English law of confidence (see paragraph 10 above), went on to apply the law to the facts of the case before it, which involved private information about an individual. It expressly approved the part of the decision of the Judge at first instance to the effect that relatively trivial information about the interior of the Claimant's home fell within the protection afforded by Article 8. It did not require any detriment to be established beyond the fact that there had been an invasion of the Claimant's privacy and home life. We believe that the principle to be drawn from this is that, if disclosure would be contrary to an individual's reasonable expectation of maintaining confidentiality in respect of his or her private information, then the absence of detriment in the sense apparently contemplated in the argument presented on behalf of the Appellant, is not a necessary ingredient of the cause of action. As the Medical Records do fall within the meaning of the phrase "private information" the claim for breach of confidence would not in our view therefore be defeated on this ground.

31. Further to the above, 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 consideration of Article 8 which provides for a right to privacy. 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. The Commissioner therefore finds that no specific detriment needs to be established and the general invasion of privacy, as outlined in other caselaw, applies in this case.
32. 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.
33. 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.

34. 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.
35. 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.
36. 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.
37. The Commissioner has considered the circumstances of this case. It seems from the correspondence that the complainant has been unhappy with the care provided by the Council to his father. 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 have access to information to help them to conduct a case. However, it is not apparent to the Commissioner that there has been any proven wrong-doing on the part of the authority and he also notes that if the complainant did pursue such a claim, information may be accessible through court disclosure rules. He also notes that it is likely that the complaint could be reviewed by other independent bodies with the jurisdiction to consider such issues. The Commissioner would stress the point he made above that the focus of a disclosure under the Freedom of Information Act is to the public at large, not a restricted disclosure to one individual.

38. In light of the above circumstances, although the Commissioner can appreciate why the information would be of particular interest to the complainant, there is no evidence available to the Commissioner indicating that there is any wider public interest in disclosing the information. He 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.

Conclusion: Was the information exempt under section 41(1)?

39. As discussed above, the Commissioner's view is that a duty of confidence would be capable of surviving the complainant's father's death. 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

40. The Commissioner notes that although the Council initially responded to the complainant stating that his request would be "dealt with under the Freedom of Information Act"; the Council later explained that it wished to consider any disclosure of information on a discretionary basis in the circumstances of the case. The complainant requested information on 30 July 2009 but it was not until 20 May 2010 that the Council stated that it was refusing the request under section 41 of the Act. The Commissioner therefore considers that as the Council failed to issue a refusal notice within 20 working days of the request or by the date of the internal review, it breached section 17(1). In failing to provide a refusal notice explaining why the exemption applied the Council also breached section 17(1)(c).

The Decision

41. 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:
- Although the exemption under section 40(1) of the FOIA was not applied by the Council, the Commissioner considers that this exemption

was engaged in respect of information in the files which constituted the complainant's own personal data.

- The Council correctly applied section 41(1) to withhold the information requested that did not constitute the complainant's personal data.

42. 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) for failing to cite the exemption under section 41(1) within 20 working days or by the date of its internal review.
- It breached section 17(1) for failing to explain fully why the exemption under section 41(1) was engaged within 20 working days and section 17(1)(c) because this still had not been properly explained by the date of the internal review.

Steps Required

43. The Commissioner requires no steps to be taken.

Other matters

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

Request handling

45. Paragraph 14 of the introduction to the FOIA section 45 Code of Practice ("the Code") states:

"All communications in writing to a public authority, including those transmitted by electronic means, may contain or amount to requests for information within the meaning of the Act, and so must be dealt with in accordance with the provisions of the Act. While in many cases such requests will be dealt with in the course of normal business, it is essential that public authorities dealing with correspondence, or which otherwise may be required to provide information, have in place procedures for taking decisions at appropriate levels, and ensure that sufficient staff are familiar with the requirements of the Act and Codes of Practice issued under its provisions. Staff dealing with correspondence should also take account of any relevant guidance on

good practice issued by the Commissioner. Authorities should ensure that proper training is provided in this regard. Larger authorities should ensure that they have a central core of staff with particular expertise in Freedom of Information who can provide expert advice to other members of staff as needed".

46. In this instance, the Council failed to decide which access regime applied to the request. The refusal notice when issued was deficient, failing to explain fully why the exemption was engaged. We would draw the Council's attention to the Commissioner's guidance which sets out good practice in relation to the issuing of refusal notices which is available on the Commissioner's website at www.ico.gov.uk.

The complainant's personal data

47. 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 a small amount of the information in the social care file should have been dealt with as a subject access request. The Commissioner would encourage public authorities to consider requests under the correct access regime at first instance.

Right of Appeal

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.

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 December 2010

Signed

**Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1(1) provides that -

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

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

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

Section 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.'

S.40 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.'

S.41 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.'*