

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 12 December 2011

**Public Authority:** Hampshire County Council  
**Address:** Chief Executive's Department  
The Castle  
Winchester  
Hampshire  
S023 8UJ

#### Decision (including any steps ordered)

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1. The complainant requested the social care records of his late mother from Hampshire County Council ("the council"). Some information was disclosed prior to the Commissioner's investigation. The council relied on the exemption under section 41(1) of the Freedom of Information Act 2000 ("the FOIA") in relation to the remaining information during the Commissioner's investigation.
2. The Commissioner's decision is that the council correctly withheld the information using section 41(1) of the FOIA, apart from some information that represented the complainant's personal data which ought to have been considered separately in accordance with the rights of subject access provided by the Data Protection Act 1998 ("the DPA"). Procedurally, the Commissioner considers that the council handled the request poorly because it failed to deal with it in accordance with its obligations under the FOIA. He requires no steps to be taken.

#### Request and response

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3. Following a previous request for information that has resulted in the disclosure of some information under the DPA, on 22 June 2010, the complainant requested information from the council in the following terms:

*"We write on behalf of our client, [name], the son of the deceased, regarding a previous request to your department made on 27 August 2009 for information relating to the late [mother's name]."*

*In response to our request, you forwarded to us some 53 pages of social care records relating to [Mother's name] on 3 December 2009, while an unknown quantity of other records were withheld.*

*We formally request the disclosure of all of the social care records of the late [mother's name] under the Freedom of Information Act 2000".*

4. The council replied on 29 June 2010 referring to the request as a "subject access request". It said that it would not release the records as it considered that they were confidential.
5. The complainant wrote to the council to request a review on 2 August 2010.
6. The council responded on 5 November 2010 and said that it considered that it had correctly refused to provide the information. It said that it was going to process the request under the Access to Health Records Act.
7. The council wrote again on 16 January 2011 and said that in respect of records about the complainant's mother's time in a private nursing home, the complainant would need to contact the home directly as the council did not hold that information. It referred to the information already provided and said that in the absence of a court order, it was not able to provide any more information.

## **Scope of the case**

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8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular, he asked the Commissioner to consider whether the council had correctly withheld information and how it had handled the request procedurally.
9. For the avoidance of any doubt, this notice does not consider any information that has already been disclosed.
10. The notice also does not concern information contained within the withheld information that the Commissioner determined represented the personal data of the complainant. Personal data such as this is exempt from the scope of the FOIA and must be considered in accordance with the rights of subject access under the DPA. The Commissioner has completed a separate assessment relating to this matter.
11. The Commissioner would also like to highlight that this notice does not deal with the Access to Health Records Act as that matter falls outside the scope of the Commissioner's jurisdiction which in this instance, is limited to the consideration of access to information via the FOIA.

Information disclosed under the FOIA is to the wider public rather than just the requester.

## **Reasons for decision**

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### **Section 41(1) Information Provided in Confidence**

12. This exemption 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.

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

13. 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.
14. 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 that has been withheld in this case was obtained from the deceased, he has therefore gone on to consider whether the disclosure would constitute an actionable breach of confidence.

### **Would disclosure constitute an actionable breach?**

15. The Commissioner has taken the view, in line with the Information Tribunal's decision in *Pauline Bluck v the Information Commissioner and Epson 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. However, 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) 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.

16. In this case, the complainant has stated that his late mother left a will appointing his brother as the executor of the estate. The complainant wishes to challenge the will and he believes that access to his mother's social services records may assist him to do this. The Commissioner understands that the complainant and his brother do not have a good relationship. In view of this background, the Commissioner 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. As the Commissioner accepts that if there was a duty of confidence, it would be capable of surviving a person'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.
17. The test in the latter case states that a breach of confidence 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
18. 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 the 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 generally accessible.
19. Further, following the decision of the High Court in *Home Office v BUAV and ICO* [2008] EWHC (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. 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'".*
20. Even if information is to 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 of confidence 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 case 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.

21. 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 could cause detriment to the deceased. In many cases, it may be difficult to argue that a disclosure of information would result in the confider suffering a detriment in terms of any tangible loss. As the complainant's mother is now deceased, the Commissioner does not consider that the disclosure would cause her any tangible loss but he considers that the real consequence of disclosing the information would be that it would be an infringement of her privacy and dignity as the disclosure would not only be to the complainant, her son, 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...in any positive way".
22. Further to the above, Article 8 of the HRA recognises the importance of individuals having the privacy of their affairs respected and in line with this an invasion of privacy such as this would be a sufficient detriment to the confider.
23. 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.
24. 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.

25. 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 them from making 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.
26. 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.
27. 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.
28. The Commissioner has considered the circumstances of this case. The complainant has advised the Commissioner that he wishes to challenge the validity of his late mother's will. The Commissioner recognises that there is a public interest in allowing individual's to access information which may be of use in considering the pursuit of a legal claim. However, the Commissioner notes that if such a claim was brought in this case, information may be accessible through court disclosure rules. In any event, it would not be a proportionate way forward to make all of this information available to the general public.
29. 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 indicating that there is sufficient wider public interest. The complainant's wish to access this file is a matter that the Commissioner can sympathise with but it is nonetheless a personal need. He also considers that the proper route for the complainant to challenge the will would be through the courts. The Commissioner 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 be no public interest defence available if the council had disclosed the information.

### **Procedural issues**

30. Section 17(1) states that when a request for information is refused under the FOIA in reliance on an exemption, the public authority must state that fact, specify the exemption in question and explain why it applies if it would not otherwise be apparent. It must issue the response within 20 working days of a request. That refusal should contain particulars of the right to appeal to the Commissioner and the public authority's internal review procedure, if there is one.
31. The Commissioner considers that the council handled the request poorly because it failed to handle the request properly in accordance with its obligations under the FOIA. The Commissioner recommends that the council reviews guidance available on the Commissioner's website at [www.ico.gov.uk](http://www.ico.gov.uk) and ensures that it has adequate procedures and training in place to ensure that its staff can recognise and deal with requests for information appropriately.

## Right of appeal

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32. 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,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

33. 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.
34. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Signed .....**

**Andrew White**  
**Group Manager – Complaints Resolution**  
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