

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 March 2015

Public Authority: North Tyneside Council
Address: Quadrant
The Silverlink North
Cobalt Business Park
North Tyneside
NE27 0BY

Decision (including any steps ordered)

1. The complainant has requested information relating to his late mother while a resident in a sheltered housing complex. The Commissioner's decision is that North Tyneside Council correctly applied the exemption for information provided in confidence at section 41 of the FOIA. He has also decided that, on the balance of probabilities, North Tyneside Council does not hold any further information. He does not require any steps to be taken to ensure compliance with the legislation.

Request and response

2. On 29 September 2014, the complainant wrote to North Tyneside Council ('the council') and requested information in the following terms:

"Myself and my recently deceased Mothers family would appreciate your efforts in forwarding myself as much documented/recorded information that is held by the Directorate of Community Services North Tyneside Homes regarding our Mother. (Part 1)

My Mother was a council resident at [address redacted] (Sheltered Accommodation with onsite Warden).

In particular we are looking for records surrounding an investigation by [name redacted] into anti-social behaviour at my Mothers

address during the month of June 2008, we are also hoping that any records held locally at the Wardens Office Skipsey Court can be accessed and viewed. (Part 2)

My Mother had a male companion residing with her from December 2007 until September 2014 so also any official records regarding council tax and residency would be of value. (Part 3)

A report was made by myself to [name redacted] Senior Social Worker Safe Guarding Adults, Adult Services on 24/09/14 regarding concerns for the safety of residents at Skipsey Court, could you forward me this investigation results as it was my initial complaint and vital to our investigation, any other records held by this department would also be of value." (Part 4)

3. The council did not initially deal with the request under the FOIA. Several emails passed between the council and the complainant and the council refused to provide the requested information due to the duty of confidentiality owed to the complainant's mother and third party personal data considerations.
4. On 14 October 2014, as part of the correspondence referred to above, the complainant made the following request for information:

"I would request in addition to the above that you provide me with a copy of my deceased Mothers signed disclaimer or any other document that you clearly state that North Tyneside Council has evidence of which my Mother allegedly authorised so information would not be disclosed to her immediate family and next of kin." (Part 5)
5. Following the intervention of the Information Commissioner, the council provided a response under the FOIA on 4 November 2014. It refused to provide the requested information under the exemptions at section 41 and section 40(2) of the FOIA. It also said that it does not consider it appropriate or necessary to conduct an internal review.
6. The numbering of the requests into Parts 1 – 5 has been done by the Commissioner for clarity in his investigation and this decision notice.

Scope of the case

7. The complainant contacted the Commissioner on 15 October 2014 to complain about the way his request for information had been handled. He said that he felt that the council is withholding information so that he and his family cannot pursue a more detailed formal complaint with

regards to his mother's care while a resident in a sheltered housing complex.

8. During the Commissioner's investigation, the council provided the Commissioner with a bundle of information separated by the titles below. After reviewing the information and a discussion with the council, it was established that the information can be categorised as follows:
 - House File – mainly within the scope of Part 1 of the request, some within the scope of Part 2 (anti-social behaviour/neighbour nuisance complaints)
 - Council Tax System Notes – within the scope of Part 3 of the request.
 - Sheltered Housing Notes – within the scope of Part 2 of the request (records held locally at the Wardens Office Skipsey Court).
 - Reply to Corporate Complaint – outside the scope of all parts as the information post-dates the request. The Commissioner also notes that the complainant is the recipient of such information.
 - Email re 'wishes' of subject of personal information – outside the scope of all parts as the information post-dates the request. The Commissioner notes that the council provided him with this information as it refers to the wishes of the complainant's late mother.
 - Statement and email from Authority's Caldicott Guardian - outside the scope of all parts as the information post-dates the request. The Commissioner notes that the council provided him with this information as it refers to the wishes of the complainant's late mother.
 - Adult Contact Forms – within the scope of Part 1 of the request.
 - OT Assessment & Caseworker Notes – within the scope of Part 1 of the request.
 - Safeguarding Alert Logs - within the scope of Part 1 of the request.
9. The council applied section 40(2) to third party personal data within the above information and section 41 to information relating to the complainant's late mother.
10. The complainant has said to the Commissioner that the protection of a third party's personal data is understandable and correct. Therefore the

Commissioner has not considered the application of the exemption at section 40(2) to third party personal data.

11. The complainant has also stated that there may be other information not involving a third party or separate to his late mother's 'alleged request'.
12. Therefore, and in accordance with the Commissioner's letter to the complainant outlining the investigation, this decision notice considers the application of section 41 to the information relating to the complainant's late mother and whether any further information is held that does not constitute third party personal data.

Reasons for decision

Section 41(1) Information Provided in Confidence

14. 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?

15. 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.
16. Having viewed the withheld information and discussed with the council, the Commissioner considers that the information is the complainant's late mother's adult social care record which includes details of her health. Having regard to the decision of the First Tier Tribunal in *William Thackeray v Information Commissioner (EA/2011/0043)*, the Commissioner considers that the scope of this exemption includes information created by the council on the social care record which is based on confidential information obtained from third parties.
17. Social care 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 care activity) despite the fact that much of it is likely to be the assessment and notes of the professionals involved in the case.
18. As the Commissioner accepts that the information within the scope of this case was obtained from the deceased, and other third parties external to the council, he has therefore gone on to consider whether the disclosure would constitute an actionable breach of confidence.

Actionable claim for breach of confidence

19. The Commissioner has taken the view, in line with the Information Tribunal's decision in *Pauline Bluck v the Information Commissioner and Epsom and St Helier University NHS Trust (EA/2006/0090)* that a duty of confidence is capable of surviving the death of the confider. In the *Bluck* case, the appellant had been appointed to act as the personal representative of her deceased daughter and was seeking the disclosure of her daughter's medical record. 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.
20. In this case, the council has not provided details of who the complainant's late mother's next of kin is but has said that its records do not show the complainant as the next of kin. 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.
21. As the Commissioner accepts that a duty of confidence is capable of surviving a person's death, he has gone on to consider the test set out in *Coco v Clark [1969] RPC 41* which stated 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.

Necessary quality of confidence

22. Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.

23. The Commissioner is satisfied that the social care records are more than trivial as they are clearly personal and sensitive and are important to the confider. This is in accordance with the conclusions in the decision notice for the case FS50101567 (East London and The City Mental Health NHS Trust) where he considered that the information was of the same sensitivity and relevance to the deceased as his medical records.
24. However, as stated above, this alone is not sufficient to indicate that the material has the necessary 'quality of confidence'. The Commissioner has therefore also considered whether the information is otherwise accessible.
25. 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 aware that social care records, for obvious reasons, would not have been made generally accessible.
26. The Commissioner is satisfied that the social care records have the necessary quality of confidence required to sustain an action for breach of confidence and therefore considers that this limb of the confidence test is met.

Obligation of confidence

27. 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 care 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.
28. In addition, the council provided the Commissioner with emails and a statement from the Caldicott Guardian to demonstrate that the complainant's late mother had verbally indicated that she would not want her personal data to be disclosed to her family and that she gave information to social services on the basis that it would remain confidential. It confirmed that there was no 'signed disclaimer' as referred to by the complainant in the request.

Detriment to confider

29. Having concluded that the information in this case was imparted in circumstances giving rise to a duty of confidence, and had the necessary

quality of confidence, the Commissioner considered whether unauthorised disclosure could cause detriment to the deceased.

30. 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 an infringement of her privacy and dignity as the disclosure would not only be to the complainant, her son, but to the general public. In other words, the loss of privacy can be a detriment in its own right. This is supported by the decision in the aforementioned Bluck case at paragraph 15.
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 applies in this case.

Public interest defence

32. Although section 41(1) is an absolute exemption which is not qualified by the public interest test under section 2 of the FOIA, 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. Therefore the Commissioner also considered whether there would have been a public interest defence available if the council had disclosed the information. 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 maintained.

34. In the circumstances of this particular case, the Commissioner's view is that it is important that social care 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 care 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 to his mother while a resident in a sheltered housing complex and wishes to pursue a formal complaint.
38. 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 it is likely that the complaint could be reviewed by other independent bodies with the jurisdiction to consider such issues. The Commissioner highlights that the focus of a disclosure under the FOIA is to the public at large, not a restricted disclosure to one individual and in any event, it would not be a proportionate way forward to make all the information available to the general public.

39. 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 information is a matter that the Commissioner can sympathise with but it is nonetheless a personal need. He also considers that there are proper routes for the complainant to make his complaint. 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.
40. As discussed above, the Commissioner's view is that a duty of confidence would be capable of surviving the complainant's mother's death. The Commissioner is also 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 does not consider that there would be a public interest defence in the circumstances. As such, he accepts that section 41(1) is engaged in this case.

Section 1 – Is further information held?

41. Section 1 of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds the information and if so, to have that information communicated to him.
43. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and argument. He will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held, he is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.
44. The complainant has indicated that there may be other information not involving a third party or separate to his late mother's 'alleged request'. The Commissioner considered that it may be possible that such information could be held within the scope of parts 2 ('...records surrounding an investigation by [name redacted] into anti-social behaviour at my Mothers address during the month of June 2008...') and 4 ('...investigation results...') of the request.

45. The Commissioner enquired as to whether relevant information has ever been held, the scope, quality, thoroughness and results of the searches carried out by the council, whether information had ever been held but deleted and whether copies of information may have been made and held in other locations.
46. In relation to the anti-social behaviour in June 2008 (Part 2), the council explained there was an incident in June 2008 that was dealt with by the named individual who worked within the Housing Patch team in North Shields Neighbourhood Office. It said that it was more of a nuisance complaint and was referred through a telephone call from the warden of the sheltered scheme but did not require further investigation as it had been dealt with by the warden and a standard letter was sent recording the complaint and advising the tenant. The record of the telephone conversation and the standard letter were provided to the Commissioner and considered exempt under section 41. The council said that a search of the tenancy records for the property was carried out as any such information would be found within the tenancy record and explained that the sheltered housing scheme did not at that time keep its own records, although they do now. It said that any information on such a matter that was held electronically would be restricted to emails or correspondence (word documents) to the property, copies of which would be held on the physical file and that any searches of data records would be carried out using the tenant's name, address of property or the officer's name who dealt with the matter. It also clarified that no information had ever been held which had since been deleted or destroyed or held in other locations.
47. In relation to the investigation results (Part 4), the council explained that where an individual makes a safeguarding referral, they are usually only informed that the issues raised have been explored and whether the investigation found reason for concern or whether no further action is to be taken (there being no evidence for a need for concern). It said that the referral made by the complainant was investigated and no evidence of a safeguarding issue was found. This was discussed with the complainant on 26 September 2014 in a phone call from the safeguarding team, where it was explained to that the detail of the issues raised could not be discussed with him as it was about other individuals. The record of the telephone call and the investigation were provided to the Commissioner and considered exempt under section 41. The council informed the Commissioner that the complainant's referral was actually just one aspect of a complaint made about his mother's tenancy and her partner and that the correct procedure for corporate complaints was followed on 19 November 2014 and that the complainant received a response on 16 December 2014. The council said that a search of the social care records of the complainant's late mother

and of the Safeguarding log was carried out as the social care information is held within a central system. It explained that as the referral was made verbally and recorded as so, there was no use of emails and that no manual records would be held as no further action was necessary.

48. In reaching a decision as to whether further requested information is held, the Commissioner also enquired whether there was any legal requirement or business need for the council to hold the information. In relation to the anti-social behaviour in June 2008 (Part 2), the council said that records of reported anti-social behaviour would be kept as part of a tenancy record for tenancy compliance and enforcement where necessary but there is no specific statutory requirement other than a requirement to keep a record of a tenant's tenancy. In relation to the investigation results (Part 4), the council said that records of any report of a safeguarding issue would initially be recorded in an electronic log and if the initial investigation showed it was a matter which required full investigation, a case file would be created. It explained that it has a duty of care to all vulnerable adults where a safeguarding issue is identified.
49. The Commissioner also considered whether the council had any reason or motive to conceal the requested information but he has not seen any evidence of this. Therefore he has not identified any reason or motive to conceal the requested information.
50. In the circumstances, the Commissioner does not consider that there is any evidence that would justify refusing to accept the council's position that it does not hold any further information relevant to this request. The Commissioner is therefore satisfied that on the balance of probabilities, the information is not held by the council. Accordingly, he does not consider that there was any evidence of a breach of section 1 of the FOIA.

Other matters

51. The Commissioner notes that the council did not initially deal with the request under the FOIA. The council should recognise that any letter or email asking for information is a request for recorded information under

the FOIA. He draws the council's attention to 'The Guide to Freedom of Information'¹, particularly the following section:

"Any letter or email to a public authority asking for information is a request for recorded information under the Act."

52. This doesn't mean every enquiry has to be treated formally as a request under the FOIA. It will often be most sensible and provide better customer service to deal with it as a normal customer enquiry under the usual customer service procedures, for example, if a member of the public wants to know what date their rubbish will be collected, or whether a school has a space for their child. The provisions of the FOIA need to come into force only if:
 - the requested information cannot be provided straight away; or
 - the requester makes it clear they expect a response under the Act.
53. When a public authority receives a request it has a legal responsibility to identify that a request has been made and handle it accordingly. Therefore staff who receive customer correspondence should be particularly alert to identifying potential requests.
54. The council should also be aware of other legislation covering access to information, including the Data Protection Act 1998, Environmental Information Regulations 2004, and sector specific legislation that may apply to your authority, such as the Access to Health Records Act, the Local Government Acts, and the Education (Pupil Information) Regulations.

¹ https://ico.org.uk/media/for-organisations/documents/1642/guide_to_freedom_of_information.pdf

Right of appeal

55. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

56. 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.
57. 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
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF