

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 13 September 2016

**Public Authority:** Cumbria County Council  
**Address:** County Hall  
Kendal  
Cumbria  
LA9 4RQ

#### Decision (including any steps ordered)

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1. The complainant has requested information from Cumbria County Council ("the Council") about the social care of a now deceased person. The Council refused the request under section 41(1) of the Freedom of Information Act ("the FOIA").
2. The Commissioner's decision is that the Council has correctly withheld the information under section 41(1). However in applying the exemption outside the time for compliance the Council breached section 17(1).
3. The Commissioner does not require any steps to be taken.

#### Request and response

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4. On 30 October 2015, the complainant wrote to the Council and requested "*the records of their deceased blood relative*" under the terms of the FOIA.
5. The Council responded on 3 November 2015. It stated that it was unable to proceed with the request but did not cite under which exemption provided by the FOIA.
6. The complainant subsequently disputed the Council's response by both email (23 December 2016) and letter (4 January 2016).
7. The Council issued a refusal notice under the terms of the FOIA on 8 January 2016 in which it withheld the requested information under section 41(1).

8. The complainant requested an internal review on 17 February 2016.
9. The Council provided the outcome of its internal review on 16 March 2016. In this it maintained the application of section 41(1).

### **Scope of the case**

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10. The complainant contacted the Commissioner on 4 April 2016 to complain about the Council's refusal of the request.
11. The Commissioner considers the scope of this case to be the determination of whether the Council has correctly withheld the requested information under section 41(1).

### **Reasons for decision**

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

12. Section 41(1) states:

*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.*

13. The Commissioner has issued specific guidance<sup>1</sup> for public authorities in relation to requests for information about deceased persons. This guidance explains the particular relevance of section 41(1) to social care records.

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

14. Social care records relate to the care of a particular individual, and are likely to take the form of assessments and notes created by professionals involved in providing the individual's care. Notwithstanding

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1202/information-about-the-deceased-foi-eir.pdf>

this, the Commissioner considers that the information contained within such records derives from the individual under care.

15. Having viewed a proportion of the withheld information, in addition to the submissions of the Council, the Commissioner is satisfied that the information withheld in this case was obtained from the deceased person, either directly or through professionals involved in providing care.
16. The Commissioner therefore accepts that the withheld information was obtained from another person for the purposes of section 41(1), and has proceeded to consider whether the disclosure of this information would constitute an actionable breach of confidence.

Would disclosure constitute an actionable breach of confidence?

17. The Commissioner has taken the view, in line with the decision reached by the Information Tribunal ("the Tribunal") in the case of *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 circumstances of the *Bluck* case, the appellant had been appointed to act as the personal representative of her deceased daughter and was seeking the disclosure of her daughter's medical records under the terms of the FOIA. However, the daughter's next of kin, her widower who was also the daughter's personal representative, objected to this disclosure. In *Bluck*, the Tribunal confirmed that even though a person to whom 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) can therefore continue to apply to that information. The Commissioner's view is that such action would be likely to 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.
18. It is the Commissioner's view that in determining whether disclosure would constitute an actionable breach of confidence, it is not necessary to establish whether the deceased person has a personal representative who would be able to take action. This is because it is not reasonable that a public authority should lay itself open to legal action because, at the time of an information request, it is unable to determine whether or not a deceased person has a personal representative.
19. As the Commissioner accepts that a duty of confidence is capable of surviving a person's death, he has gone on to consider the confidence test set out in *Coco v Clark [1969] RPC 41*, which provides that a breach of confidence will be actionable if:

- a. The information has the necessary quality of confidence;
- b. The information was imparted in circumstances importing an obligation of confidence; and
- c. There was an unauthorised use of the information to the detriment of the confider.

*The 'necessary quality of confidence' (a.)*

20. Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.
21. The Commissioner is satisfied that social care records are personal, sensitive, and important to the confider, and are therefore more than trivial. This is in accordance with the conclusions reached in decision notice FS5010567, in which the Commissioner found that social care records were of the same sensitivity and relevance to the deceased person as medical records.
22. However, as stated above, this alone is not sufficient to indicate that the material has the necessary 'quality of confidence'. The Commissioner has therefore proceeded to consider whether the information is otherwise accessible.
23. Information which is known only to a limited number of individuals cannot be regarded as being generally accessible to the general public. The Commissioner is aware that social care records are generally not made publically accessible, and there is no evidence to suggest otherwise for the withheld information in this case.
24. The Commissioner is therefore satisfied that the withheld information in this case has the necessary quality of confidence required to sustain an action for breach of confidence, and as such considers that this limb of the confidence test is met.

*The 'obligation of confidence' (b.)*

25. 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.
26. When a social care client is under the care of professionals, the Commissioner accepts that the client would not expect information produced about their case to be disclosed to third parties without their consent. As such the Commissioner is satisfied that an obligation of

confidence is created by the very nature of the relationship between client and professional.

*The 'detriment of the confider' (c.)*

27. Having concluded that the information withheld in this case has the necessary quality of confidence, and was imparted in circumstances giving rise to an obligation of confidence, the Commissioner has proceeded to consider whether unauthorised disclosure could cause detriment to the deceased person.
28. 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 person is now deceased, the Commissioner does not consider that the disclosure of the withheld information would cause any tangible loss. However the Commissioner does consider that disclosure to the general public (which is what disclosure under the terms of the FOIA represents) would be an infringement of the deceased person's privacy and dignity. Such a loss of privacy and dignity can be a detriment in its own right. This position is supported by the Tribunal's decision in the aforementioned *Bluck* case.
29. 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, must 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 of having the privacy of their affairs respected, and in this context the Commissioner must consider that the invasion of the deceased's privacy of affairs would also represent a detriment to the deceased as a confider.
30. Having considered the above factors, the Commissioner therefore finds that no specific detriment, beyond the general loss of privacy and dignity, needs to be found in the circumstances of this case.

**Public interest defence**

31. Although section 41(1) is an absolute exemption, and does not need to be qualified by a 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.
32. The Commissioner has therefore considered whether there is a public interest defence available should the Council disclose the information.

The duty of confidence public interest defence 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 the confider. Disclosure of any confidential information undermines the principle of confidentiality, which itself 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 considers it important that a social care client has confidence that sensitive information about them will not be made publically available following their death. Should this not be the case, it may discourage clients from providing necessary information to those providing their care. This would ultimately undermine the quality of care that social services are able to provide, and may even lead to some people choosing not to engage with such services. This situation would be counter to the public interest, as it could endanger the health of social care clients and prejudice the effective functioning of social services.
35. In addition to the wider public interest in preserving confidentiality, there is also a public interest in protecting the confider from detriment. The Commissioner has already established 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 further 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 of confidence provides that if there is a public interest in disclosure that exceeds the public interest in preserving confidentiality, the breach will not be actionable.
37. In considering the specific circumstances of this case, it is understood by the Commissioner that the complainant is a member of the deceased person's family, and that they hold various concerns about the quality of the deceased person's social care, the legality of the Lasting Power of Attorney held by two third parties, and the terms of the deceased person's will.

38. The Commissioner recognises that it is in the public interest to expose any malpractice on the part of public authorities, and that it is also in the public interest for individuals to have access to information to help them to conduct a legal challenge. However, having considered the detailed submissions made by the complainant, there is no immediate evidence available to the Commissioner of any malpractice on the part of the Council, and it is further noted that any appropriate review of the concerns held by the complainant would need to be undertaken by independent bodies with the jurisdiction to consider such issues. The Commissioner would emphasise to the complainant that disclosure under the terms of the FOIA is to the general public, rather than the requestor in isolation, and that regardless of the validity of the complainant's concerns, the publication of the withheld information to the general public would not be a proportionate manner to proceed.
39. In light of the above, there is no evidence available to the Commissioner that suggests there is sufficient wider public interest in the information being disclosed. The complainant's wish to access this information is based on personal need, and the Commissioner considers it reasonable to consider that there are proper routes for the complainant to have their concerns addressed. The Commissioner therefore takes the view that the public interest in preserving the principle of confidentiality is much stronger than that in disclosing the information, and that there would be no public interest defence available should the Council disclose the information.
40. As discussed above, the Commissioner's view is that a duty of confidence would be capable of surviving the person's death. The Commissioner is also satisfied that the withheld 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. Having considered the circumstances of this case, the Commissioner does not consider that there would be a public interest defence in disclosing the information, and as such, accepts that section 41(1) has been correctly engaged.

### **Section 17(1) – refusal of request**

41. Section 17(1) specifies that a refusal notice must be provided no later than 20 working days after the date on which the request was received.
42. In this case the Council issued its refusal notice outside 20 working days, and therefore breached section 17(1).

## Right of appeal

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43. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

44. 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.
45. 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**  
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**Information Commissioner's Office**  
**Wycliffe House**  
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