

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 March 2017

Public Authority: Bath and North East Somerset Council
Address: The Guildhall
High Street
Bath
Somerset
BA1 5AW

Decision (including any steps ordered)

1. The complainant has requested information from Bath and North East Somerset Council ("the Council") about the social care of her now deceased son, including any statement about their wishes for the disclosure of their social care records. The Council withheld the requested information under section 41(1) of the Freedom of Information Act ("the FOIA"). The complainant subsequently contested the Council's application of this exemption.
2. The Commissioner's decision is that the Council has correctly applied the exemption provided by section 41(1).
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. The request took place following extended correspondence between the complainant, her living son, and a social care provider throughout 2015. The Commissioner understands that the social care provider declined to provide the complainant with privileged access to the social care records for her deceased son.

5. On 31 May 2016 the complainant therefore wrote to the Council, as the commissioner of the social care provider, to request that the following information be disclosed (by way of her living son):

"...[redacted deceased son's name]'s social care records and [redacted social care provider]'s records to do with his care..."

6. The Council responded on 7 July 2016. It refused to disclose the information.
7. The complainant wrote to the Council on 28 July 2016 to request clarification of the basis on which the information was withheld.
8. The Council responded on 12 August 2016. It confirmed that it was withholding the requested information under section 41(1) of the FOIA.
9. On 16 August 2016 the complainant requested an internal review.
10. Following an internal review the Council wrote to the complainant on 25 August 2016. It upheld the application of section 41(1).

Scope of the case

11. The complainant initially contacted the Commissioner on 23 August 2016 to complain about the way her request for information had been handled. Following the Council's internal review outcome, she maintained her complaint.
12. The Commissioner considers the scope of this case to be the determination of whether the Council has correctly applied the exemption provided by section 41(1).
13. The complainant has raised matters that fall outside the terms of the FOIA, including privileged access to the withheld information under the Access to Health Records Act 1990 ("the AHRA"). Matters under the AHRA do not fall within the Commissioner's jurisdiction, and therefore are not addressed in this decision notice.

Reasons for decision

Section 41(1) – Information provided in confidence

14. Section 41(1) of the FOIA states 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.

15. The Commissioner has issued specific guidance¹ 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?

16. 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 this, the Commissioner considers that the information contained within such records derives from the individual under care.
17. Having viewed a proportion of the withheld information, in addition to the submissions of the Council and the complainant (who has clearly stated that they are seeking the social care records of her deceased son), 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 their care.
18. 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?

19. 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 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 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

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

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.

20. 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.
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 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.)

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 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 FS50101567, in which the Commissioner found that social care records were of the same sensitivity and relevance to the deceased person as 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 proceeded to consider whether the information is otherwise accessible.

25. 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.
26. 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.)

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.
28. 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.)

29. 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.
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 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.
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, 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.

32. 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

33. 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.
34. 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.
35. 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.
36. 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.

37. 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.
38. 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.
39. In considering the specific circumstances of this case, it is understood by the Commissioner that the complainant holds various concerns about the quality of the social care that her deceased son received. The complainant also contests that her deceased son gave specific permission for his social care records to be shared with her, and has challenged the Council to provide conflicting proof that he did not wish for his social care records to be disclosed.
40. 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 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. Although the complainant contests that her deceased son gave permission for the privileged disclosure of their records, the determination in this case is whether the withheld information can be disclosed to the general public, rather than the requestor in isolation.
41. 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.

42. 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.

Right of appeal

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

Website: 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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