

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 August 2017

Public Authority: Coventry City Council
Address: Council House
Earl Street
Coventry
West Midlands
CV1 5RR

Decision (including any steps ordered)

1. The complainant has requested notes and minutes regarding a safeguarding investigation carried out by the council after the death of her father in care. The council responded by applying the exemption in section 41(1) of the Act (information provided in confidence).
2. The Commissioner's decision is that the council was correct to apply the exemption in section 41(1) to the information.
3. The Commissioner does not require the council to take any steps.

Request and response

4. Following earlier requests, on 12 January 2016 the complainant wrote to the council and requested information in the following terms:

"[name of client redacted] is asking that a copy of the notes regarding the Safeguarding investigation into [name redacted]'s death be released to her, to include a copy of the minutes of her meeting with the social worker [name redacted] which took place at the start of May 2015."
5. The council responded on 17 February 2016. It said that the information was exempt under Section 41(1) (information provided in confidence). Further to this it said that no minutes were taken during the meeting with the social worker as it was an informal meeting.
6. Following an internal review the council wrote to the complainant on 4 August 2016. It upheld its previous decision.

Scope of the case

7. The complainant contacted the Commissioner 29 November 2016 to complain about the way her request for information had been handled.
8. The Commissioner considers that the complaint is that the council has wrongly relied upon section 41 to withhold the requested information.

Reasons for decision

9. Section 41(1) of the FOIA states that information is exempt from disclosure 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."
10. The Commissioner has issued specific guidance for public authorities in relation to requests for information about deceased persons which is

available at <https://ico.org.uk/media/for-organisations/documents/1202/information-about-the-deceased-foi-eir.pdf>. This guidance explains the particular relevance of section 41(1) to social care records.

11. Section 41 specifies that the information to be withheld must have been obtained by the authority from another person.

Was the information obtained by the council from any other person?

12. 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.
13. In this case the withheld information relates to a safeguarding review. This was a discussion surrounding the events that had occurred which led to the death of an individual, and an attempt to identify any lessons which could be learnt by the service as a whole.
14. The withheld information therefore draws from the assessment notes, but also goes into the history of the actions taken by the various services during the care of the individual, both before and after the incident. As such the panel members all provided details of the actions that each different service had taken prior to the incident and analysed whether things may have been done better. Some of the information therefore relates to information provided by the council as well as information provided by the other services. It all however draws from the history of the care provided to the individual.
15. Having viewed the withheld information, in addition to the submissions of the Council and the complainant, 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. Alternatively it was provided by other services to the review to consider whether anything might have been done better.
16. The Commissioner therefore accepts that the withheld information was obtained from another person for the purposes of section 41(1). She has therefore considered whether the disclosure of this information would constitute an actionable breach of confidence.

Does the information have the necessary obligation 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 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 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 FS50101567, 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. There have been stories run in local media about the death of the individual but the Commissioner recognises that there is a significant difference between details of the incident and the information reported in the safeguarding notes. She accepts therefore that the information is not publically known.
24. The Council believes that this information has the necessary quality of confidence as it was clearly produced for the Safeguarding Conference meeting, for a specific purpose, and contains both sensitive information relating to the deceased, and information about the incident in question and issues surrounding this. The information was only made available to a limited number of people and there are clear instructions for it only to be disclosed in specific situations. The council stressed that these documents are not generally made available to the public.
25. Further it argues that whilst no-one has as yet sought letters of administration or probate in respect of the deceased's estate, a disclosure of this information would constitute an actionable breach of confidence if someone were to do so at a later date. The Commissioner does however note the complainant's argument here that there is no personal representative as there was no specific reason for any person to do so. However as noted in paragraph 18 the Commissioner's position is that it is not the council's duty to research whether it is possible for a personal representative to be appointed or arise at some point in the future when making their decision.

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. The council has outlined that there was both a written and an oral expression of the confidentiality of the information communicated at the meeting and the notes confirm this. Therefore those taking part in the conference believed and understood that their contribution would be in confidence unless specified situations occurred such as a public inquiry or a police investigation. Neither of these issues was a factor in this case.
29. The nature of the information itself also lends itself to this understanding. The details are personal and private to the deceased and it would be understood that the issues should not be discussed unless specific situations required it.
30. Additionally, 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. Although in this case the client was deceased, the matters discussed related to his care and the Commissioner considers that the obligation of confidence extends to matters discussed within the safeguarding conference even though this was held after the incident had occurred and the individual had died.
31. 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)

32. 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 any of the parties who confided the information.

33. The council argues that a disclosure of the information would affect the full and frank exchange of information and affect the investigation process which is set in place to ensure that mistakes are learnt from and the best possible service is provided. If a disclosure were to affect the candour with which the individuals shared what had occurred this would detrimentally affect the process of analysing and identifying how things could have been done better by the services involved in providing care. Individuals may not be as full and frank when describing the issues and actions which led to the incident if they believed that the information they were providing might be disclosed. The Commissioner recognises that these arguments relate generally to all parts of the service provided, including the council. However, if all parties are unable to speak freely without fear that the information they are providing will be disclosed then there is a detriment to the service as a whole. Information which may identify ways of providing a better service in the future may not be shared.
34. The council also provided arguments regarding detriment to the client which the Commissioner has considered further. 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, she 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.
35. 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.
36. Having considered the above factors, the Commissioner therefore finds that as regards the deceased person there would be no specific detriment beyond the general loss of privacy and dignity to be found in the circumstances of this case.

Public interest defence

37. 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.
38. 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.
39. 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.
40. 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.
41. 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 client 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.
42. The Commissioner has also outlined above the councils arguments in respect of the various services 'ability to have confidential, full and frank discussions surrounding the care provided to individuals, and to be able to identify where things might have been done better.

43. 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.
44. 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 father received. Her complaint to the Commissioner outlined that she was told that the investigation found shortcomings in the service provided to her father and she has concerns that these may have implications for the other residents at the home. The Commissioner recognises that it is in the public interest to expose negligence or 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 should they wish to do so.
45. The Commissioner has taken account of the complainant's arguments regarding how this might impact upon current clients of the service. Having considered the withheld information she recognises that there is a public interest in the information being disclosed to the public, however this needs to be balanced against the strong public interest in the confidences being maintained, and in the ability of the joint services to discuss what occurred in a full and frank manner.
46. Although there is some merit to the complainant's argument regarding the wider public interest in the information being disclosed, the complainant's wish to access this information is generally based on personal need. The Commissioner considers it reasonable to consider that there are proper routes for the complainant to have her concerns addressed. The Commissioner does note however the complainant's argument that in this case there is no person designated as a personal representative or administrator for the deceased, and therefore at present there are no parties who are legally able to have access to the information under the Access to Medical Records Act 1990. Whilst she sympathises with the complainant's situation the Commissioner is limited to considering whether section 41 has been applied correctly in this case.
47. The Commissioner considers that the public interest in preserving the principle of confidentiality is stronger than that in disclosing the information in this case and she considers that there would be no public interest defence available should the Council disclose the information. There are only limited public interest arguments for a wider disclosure of the information to the public as a whole. Balanced against the detriment

to the individual, and against the detriment to the services' ability to analyse what occurred in a full and frank manner she considers that the public interest weighs in favour of confidences being maintained in this case.

48. As such, she accepts that section 41(1) has been correctly engaged. The Commissioner's decision is therefore that the council was correct to apply section 41(1) to the information in this case.

Right of appeal

49. 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

50. 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.
51. 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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