

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 25 July 2018

**Public Authority:** Lancashire County Council  
**Address:** PO Box 78  
County Hall  
Preston  
Lancashire  
PR1 8XJ

#### **Decision (including any steps ordered)**

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1. The complainant has requested the social care records relating to a now deceased person. Lancashire County Council ("the Council") refused to provide the requested information under the exemptions provided by sections 36(2)(c), 40(2), and 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).
3. The Commissioner does not require the Council to take any steps.

## Request and response

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4. On 17 May 2017, the complainant wrote to the Council and requested information (about the deceased person) in the following terms:

*You previously and kindly provided records to our Agent, UK Independent Medicals, up to about September 2013. We would be obliged now for a full updated copy to date of death 10th July 2016.*

5. The Council responded on 19 July 2017. It stated that the information was withheld under sections 36(2)(c), 40(2), and 41(1).
6. The complainant asked for an internal review of this response on 10 August 2017.
7. Following an internal review the Council wrote to the complainant on 24 November 2017. It stated that its original response was correct.

## Scope of the case

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8. The complainant contacted the Commissioner on 10 January 2018 to complain about the way the request for information had been handled, and specifically that the Council had incorrectly withheld the information.
9. The complainant has clarified to the Commissioner that the records sought by the request are "*all relevant and available Care Home and GP/Medical records*" that relate to the deceased person.
10. The Commissioner understands that the complainant has previously requested, and received, such records in 2013 when the person was living. The Commissioner notes that this disclosure would be privileged and under the terms of the Data Protection Act 1998 ("the DPA 1998"). However, the DPA 1998 relates only to living individuals; a public authority must handle any general request for information about a deceased person under the terms of the FOIA, under which any disclosure is into the public domain.
11. Whilst the complainant has argued that they have a privileged right of access to the information under the 'National Framework and 2012 SHA Guidance', the Commissioner reminds the complainant that her jurisdiction in this decision is limited only to the terms of the FOIA, for which the Commissioner is the regulator. The Commissioner is not able to determine whether the complainant may have a privileged right of access under any other legislation or process.

12. The Commissioner therefore considers the scope of the case to be the determination of whether the Council has correctly withheld the information under section 41(1) of the FOIA.

## Reasons for decision

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### Section 41(1) – Information provided in confidence

13. 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.*

14. 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?

15. The Council has informed the Commissioner that the withheld information represents social care records relating to the deceased 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 sample of the documents that compose the withheld information, in addition to the submissions of the Council and the complainant (who has clearly stated that they are seeking the social

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

care records relating to the deceased person), 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)(a).

Would disclosure constitute an actionable breach of confidence?

19. The Commissioner has taken the view, in line with the decision reached by the First-tier Tribunal (Information Rights) ("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. 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. In the specific circumstances of this case, the complainant contests that section 41(1)(b) cannot apply to the withheld information. This is because the request has been made by a personal representative of the deceased, and no action would therefore be taken for breach of confidence.
22. Whilst the Commissioner has noted the complainant's position, the Commissioner's view (as outlined in paragraph 20) is that a public authority is not required to establish whether or not a deceased person has a personal representative, but instead must reach a hypothetical conclusion on whether it is possible.

23. Although the Commissioner recognises that the request in this case may have been made by personal representative, the FOIA, which provides the public with an applicant and motive-blind right of access to recorded information, does not impose an obligation or expectation upon the Council to take steps to verify this fact. The only identifiers which a public authority may expect to receive from a requestor is a name and address for correspondence (section 8(1)(b)).
24. The Commissioner therefore accepts that a duty of confidence is capable of surviving a person's death, and further accepts that the FOIA does not impose a duty upon the Council to verify the status of the requestor as a 'personal representative' of the deceased person. On this basis the Commissioner has proceeded 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.)*

25. Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.
26. 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.
27. 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.
28. 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.

29. 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.)*

30. 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.
31. 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.)*

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 the deceased person.
33. 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.
34. Further to the above, and 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.

35. 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.

Is there a public interest defence?

36. 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.
37. 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.
38. 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.
39. 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.
40. 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.

41. 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.
42. In considering the specific circumstances of this case, the complainant has informed the Commissioner that the information is needed to make an application to the NHS Clinical Commissioning Group for a retrospective assessment of the deceased person's eligibility for NHS Continuing Healthcare. The complainant argues that the Council's refusal to disclose the information is prejudicing the proper assessment of eligibility. The complainant has also raised concerns about how part of the withheld information is being stored (which the complaint believes is in a place where access is restricted due to asbestos).
43. Whilst the Commissioner has noted the complainant's purpose in seeking the information, it is reasonable for the Commissioner to interpret this as representing a private interest. It is also relevant that the complainant has clarified (when asking for an internal review) that there is no allegation of wrongdoing against the Council, and that the information is sought only in respect of the sought assessment. Although the complainant may seek the information for a legitimate reason, the Commissioner must consider that there are proper routes for this private interest to be addressed without recourse to the FOIA, under which any disclosure is to the public.
44. The Commissioner has also noted the complainant's concerns about the storage of the information; however this matter falls outside the terms of the FOIA, and does not add any discernible weight to a public interest defence.
45. In light of the above, the evidence available to the Commissioner suggests that there is not sufficient public interest in the information being disclosed. 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.
46. The Commissioner therefore accepts that the disclosure of the information to the public would constitute an actionable breach of confidence for the purposes of section 41(1)(b).



### The Commissioner's conclusion

47. 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. On this basis the Commissioner finds that section 41(1) has been correctly engaged, and does not need to consider the application of sections 36(2)(c) and 40(2).

## Right of appeal

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48. 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)

49. 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.
50. 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**  
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**SK9 5AF**