

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

### **Decision notice**

**Date:** 17 June 2020

**Public Authority:** North Yorkshire County Council  
**Address:** County Hall  
Northallerton  
North Yorkshire  
DL7 8AL

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

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1. The complainant has requested proof held by the council that her late mother informed the council that it should not provide her with information on her care. The council did not respond to the request on the basis it had responded to a similar request previously. She therefore complained that the council did not respond to her request for information. She also complained that the council was withholding information on the basis that section 41 of the Act applies (information held under a duty of confidence).
2. The Commissioner's decision is that the council was correct to apply section 41 to withhold the information from disclosure. She has also decided that the council was correct to apply section 14(2) and refuse to respond to the request as required by section 1(1).
3. The Commissioner does not require the council to take any steps.

## Request and response

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4. Following previous correspondence, on 4 October 2019, the complainant wrote to the council and requested information in the following terms:

*"You have stated that my late mother, [name of individual redacted] did not want me involved in her affairs, however you have provided no documented evidence to support this claim.*

*You have also distributed this information to different Agencies, despite having no proof of this statement, I have requested documented, witnessed and signed evidence of this statement which you have not provided to date."*
5. The council failed to respond to the request. It has subsequently stated to the Commissioner that this was on the basis that it had received a number of previous requests for the same information and had written to the complainant stating that it did not intend to respond over the same issue again.
6. The complainant sent a chaser email to the council on 1 November 2019 asking the council why it had failed to respond to her request for information. When she received no response to this, she subsequently made a complaint to the Commissioner.
7. The council also wrote to the Commissioner on 4 November 2019 providing a copy of an internal review it had sent to the complainant previously, (this was undated). The review decision was that the requested information was subject to section 41(1) (information provided in confidence) as the requested information formed part of the complainant's mother's social care records. The council stated, *"Your mother's consent preferences are part of her care record, so it would not be appropriate to disclose this documentation"*.

## Scope of the case

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8. The complainant contacted the Commissioner 16 January 2020 to complain about the way her request for information had been handled. This initial complaint related to the failure of the council to respond to her request, however she also complained that she had not been provided with the information which she had requested.
9. Following further correspondence, the Commissioner considers that the complaint is that the council has failed to provide the complainant with the requested information.

10. The question for the Commissioner is therefore whether the council was correct to withhold the requested information under the exemption in section 41 of the FOI Act. She will also consider whether the council should have responded to the complainant's request of 4 October 2019.

## Reasons for decision

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### **Section 14(2) – Repeated requests**

11. As noted above, following the receipt of the complainant's chaser email of 1 November 2019, and noting that the complainant had copied her email to the ICO, the council wrote to the Commissioner to explain why it was not responding to the request of 4 October 2019. It explained that it was not responding as it considered the request of 4 October 2019 to be a repeated request for information.

12. Section 1(1) requires that:

*"Any person making a request for information to a public authority is entitled –*

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

*(b) if that is the case, to have that information communicated to him."*

13. However, section 14(2) provides that:

*"(2) Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request."*

14. The initial request for information was received on 2 April 2019. In its response the council refused the request and informed the complainant that it would not respond to this request again. It informed her that:

*"North Yorkshire County Council has decided it would not be appropriate to disclose this information, and we have reviewed that decision. We and the Council will not be communicating further with regards to this request for information. If you are still unsatisfied with this decision please contact the ICO."*

15. The second request, which is the subject of this decision notice, was received on 4 October 2019, which the council did not respond to.
16. Further requests were made following this point which cannot be taken into consideration as they fall after the date of the request under consideration.
17. Given that the request is a repeated request, the question for the Commissioner is whether the interval between requests is reasonable. This can take into account the nature of the information requested, and the likelihood that the information held by the council would have changed or been amended over that interval. In this case, the question is therefore whether consents provided by the complainant's mother, and a best interests decision taken by the council in 2016 following her mother's loss of the capacity to make such decisions, is likely to have changed during the interval between the complainant's request of April 2019 and October 2019.
18. Given the nature of the request there would be little likelihood that any relevant information would have been amended or changed during that period. The complainant's mother died in late 2018/early 2019 and the council had considered the request already since that point. The interval between the refusal of the initial request and the subsequent request of 4 October 2019 is not therefore a reasonable period of time which would be likely to lead to any change to the council's decision, or during which the information which it holds, is likely to have occurred.
19. The Commissioner therefore considers that the council complied with its obligations under section 1(1) by applying section 14(2) to refuse to respond to the request.

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

20. Although the Commissioner has found that the council was not under a duty to respond to the request as section 14(2) was applied correctly by the council, she considers that, under the circumstances of this case, it is helpful to consider the council's response to her earlier request for information in order that the complainant can be assured that the council has acted appropriately in applying the exemption in section 41(1) of the Act.
21. The council applied section 41(1) to withhold the information. 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."*

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

Was the information obtained from another person?

23. The council informed the complainant that the withheld information forms part of the care records relating to her deceased mother. The council also provided evidence to the Commissioner that the withheld information is recorded as part of the individual's care records.
24. Social care records relate to the care of individuals. They 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. It draws from the history of the care provided to the individual.

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<sup>1</sup> <https://ico.org.uk/media/fororganisations/documents/1202/information-about-the-deceased-foeir>. Pdf

25. The council provided some of the withheld information to the Commissioner to consider. This is a copy of minutes from a multi-disciplinary meeting which led to a 'best interests' decision being discussed and recorded.
26. The Commissioner notes that a decision by the Local Government and Social Care Ombudsman also relates to the matter. His decision refers to the potential for other information to be held by the council which would fall within the scope of the complainant's request for information. Whilst the Commissioner was not provided with this information by the council, under the circumstances of the case, she notes that this information would all be held as part of the social care package which was provided by the care home and the council, which ultimately derived from the process of caring for the complainant's mother. It may also be held in relation to a subsequent but unrelated matter relating to her representative, but which still relates ultimately to the care which was provided.
27. The Commissioner also notes that the Ombudsman's investigation considered whether the council had acted inappropriately in refusing the complainant's request to access proof of her mothers recorded statement. His decision was that under the circumstances, and based upon the evidence he had been provided, it had not.
28. The Commissioner also notes that the nature of the request ensures that the requested information *must* have been provided by the complainant's mother to the council. The request is for a statement made by the complainant's mother to the council or her care providers indicating her consent as regards the sharing of her personal care information.
29. 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 complainant's mother, either directly or through professionals involved in providing her care.
30. 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.

Would disclosure constitute an actionable breach of confidence?

31. 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.

32. 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 a deceased person has a personal representative.
33. The Commissioner 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 she 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.)*

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

35. The Commissioner noted above that the information is held as part of the individual's social care records. Therefore, disclosing the specific information requested by the complainant will disclose part of the social care records held by the council in respect of her mother. The Commissioner therefore has no option but to treat the information falling within the scope of the request as a request for access to part of her mother's care records.
36. The Commissioner is satisfied that social care records are personal, sensitive, and important to the confider, and are therefore more than trivial. The Commissioner considers that social care records are of the same sensitivity and relevance to the deceased person as medical records.
37. 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.
38. 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 publicly accessible, and there is no evidence to suggest otherwise for the withheld information in this case.
39. The complainant has said that she considers that this information was also passed on to other agencies. The Commissioner is not aware of the full extent of this allegation; however, she is aware that this information would have been passed to the Local Government and Social Care Ombudsman as part of his investigation, and the police were also aware of this due to the issues with her former representative. A limited disclosure of information for relevant purposes is not a waiver of confidentiality, and as the council is the confidante in this situation it is not able to unilaterally waive its duty of confidentiality without a valid reason to do so. Additionally, neither of these potential disclosures, if they occurred, would be anywhere near as widespread as the global level of disclosure which responses to FOI requests are considered to be.
40. 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.)*

41. 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.
42. 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 who are not responsible for providing their care 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.)*

43. 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.
44. 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.
45. 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.

46. 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, and she is satisfied that this would occur should the information be disclosed.

*Is there a public interest defence?*

47. 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.

48. 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.

49. 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.

50. In the circumstances of this case, the Commissioner considers it important that a social care client has confidence that sensitive information about them will not be made publicly 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.

51. 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.

52. 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.
53. In considering the specific circumstances of this case, the complainant contests that section 41(1)(b) should not apply to the withheld information. She argues that there had previously been irregularities with the actions of a person responsible for the deceased persons interests, including the suggestion that the individual was guilty of an abuse of position, and that there were financial irregularities relating to their actions.
54. The complainant argues that the individual may have facilitated a position where she was excluded from finding out details of her mother's care. She argues therefore that the record of her mother's wishes is unsafe and says that her mother denied to her that she had ever said that she should be excluded from being given access to information relating to her care.
55. The Commissioner has also borne in mind that the complainant, at least insofar as this request is concerned, is only seeking information which directly impacts upon her, and which only forms part of the complainant's care and health records insofar as it is information which was provided to carers during the course of providing care. It is not information which specifically relates to the health issues which her mother was suffering from, nor the care that was provided to manage those issues. Effectively, the complainant is seeking to understand if this statement is correct and verifiable. She is concerned that the statement may potentially have been made as a result of an adverse influence being applied. However, the Commissioner also notes that the content of the information has already been provided to the complainant, albeit that the actual record which is held has not been disclosed.
56. 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 there is no suggestion of wrongdoing against the Council, and that the information is sought only in respect of the specific evidence which the council is relying upon to withhold the individuals wider care records from disclosure.

57. The Commissioner has also noted the Local Government and Social Care Ombudsman's previous decision on this issue above. Again, this found that the council had handled the request for information on her mother's care appropriately. He also found that the council had acted appropriately as regards the issue of the former representative who was alleged to have mishandled her mother's finances.
58. Considering the above, the evidence available to the Commissioner suggests that there is insufficient public interest in the information being disclosed. The complainant has not supplied sufficient evidence to suggest that her mother was either coerced into, or persuaded into, saying that her daughter should not have access to details about her care. In effect, she has only been able to present this as a possibility. The Commissioner is not able to place weight on this when making her decision.
59. The Commissioner therefore takes the view that the public interest in preserving the principle of confidentiality outweighs that in the information being disclosed, and that there would be no public interest defence available should the Council disclose the information.
60. 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

61. 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's decision is that the council was correct to apply section 41(1) to withhold the information.

## Right of appeal

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62. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

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

63. 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.
64. 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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