

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 21 August 2012

**Public Authority:** East Sussex County Council  
**Address:** County Hall  
St Anne's Crescent  
Lewes  
East Sussex  
BN7 1UE

#### Decision (including any steps ordered)

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1. The complainants requested information relating to the care records of their deceased sister. East Sussex County Council (the Council) confirmed that it holds a relevant care file but refused to disclose it on the basis that it was provided in confidence - citing section 41 of FOIA.
2. The Commissioner's decision is that the Council was correct to apply section 41(1). He requires no steps to be taken.

#### Request and response

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3. The complainants wrote to the Council on 9 May 2011 and requested information in the following terms:

*"We are writing to ask you to consider our request to have information from our sister's case notes given to us under FOI".*

4. The Council responded on 15 June 2011 citing the exemption at section 41 of FOIA – information provided in confidence. It stated that - as had been the case in March 2009 when the complainants made a related information request - the Council holds relevant information. However, it again refused to disclose it, confirming that it considers that the information is exempt from disclosure on the basis that it is personal information provided to the Council in confidence. The Council also confirmed that the confider "*was most specific in not giving consent to share information with her family*".

5. Following an internal review the Council wrote to the complainants on 15 November 2011 upholding its decision not to disclose the requested information.

### **Scope of the case**

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6. The complainants contacted the Commissioner to complain about the way their request for information had been handled:

*"The information we wish to have disclosed to us is not information about our sister ..... What we are trying to achieve is information regarding the decisions made about her ... as we believe a number of errors and omissions by these people lead to her dying in most disgraceful circumstances. .... We believe it is a matter of public interest that these mistakes are aired".*

7. The Commissioner considers the scope of his investigation to be the Council's citing of section 41.

### **Reasons for decision**

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8. Section 41(1) of FOIA sets out an exemption from the right to know where the information requested was provided to the public authority in confidence. There are two components to the exemption:
  - the information must have been obtained by the public authority from another person; and
  - disclosure of the information would give rise to an actionable breach of confidence (in other words, if the public authority disclosed the information the provider or a third party could take the authority to court).
9. The Commissioner acknowledges that a duty of confidence arises when one person (the 'confidant') is provided with information by another (the 'confider') in the expectation that the information will only be used or disclosed in accordance with the wishes of the confider. If there is a breach of confidence, the confider or any other party affected (for instance a person whose details were included in the information confided) may have the right to take action through the courts.

#### *Continuation of the duty after death*

10. The request in this case relates to information contained in the care records of a deceased individual. The Commissioner is satisfied – and it has been confirmed by the then Information Tribunal – that the duty of

confidentiality continues after the death of an individual to whom that duty is owed. Where there is a legally enforceable duty of confidentiality owed to a living individual, after death it can be enforced by the deceased's personal representative. The Commissioner considers that this principle is of particular relevance to those public authorities holding records about an individual's personal details, such as health records, banking details or the provision of care. He therefore considers it relevant in this case.

11. The request in this case relates to the social services care records of a deceased individual. The Commissioner has addressed the issue of disclosure of such information on previous occasions, for example in decision notices referenced FS50400052 and FS50328160. To the extent to which he considers it appropriate he has taken the arguments in those cases into account when considering the issues in this case.
12. However, while acknowledging the existence of other similar cases having been, or being, investigated, the Commissioner's duty is to decide, on a case-by-case basis, whether a request for information has been dealt with in accordance with FOIA. Therefore, he has focussed on the arguments put forward by the Council and the complainants in this case.
13. In determining whether an obligation of confidence has arisen in this case, the Commissioner has first considered the circumstances under which the information was provided to the authority and secondly the nature of that information.

*The circumstances in which the information was provided to the authority*

14. In deciding whether information has been 'obtained from any other person', the Commissioner will focus on the content of the information rather than the mechanism by which it was imparted and recorded.
15. Social services records are about the care of a particular individual and the Commissioner accepts that such information may be considered to be information obtained from another person (ie the person who is the subject of the social service activity) despite the fact that much of it is likely to be the assessment and notes of the professionals involved in the case.
16. Having viewed the withheld information, the Commissioner is satisfied that it has been obtained in connection with the provision of services by the Council.
17. When a social services client is under the care of professionals, the Commissioner considers that they would expect that the information produced about their case would not be disclosed to third parties without their consent. The Commissioner is satisfied that an obligation of

confidence is created by the very nature of the carer/client relationship and that the duty to respect that obligation of confidence is implicit.

18. Furthermore, in addition to accepting that implied obligation of confidence, the Commissioner is satisfied that, in the circumstances of this case, the confider did not consent for her information to be shared with her family.

*The nature of the information*

19. Information which is protected from disclosure by an obligation of confidence must have the necessary 'quality of confidence'. There are two key elements to this:
- the information need not be highly sensitive, nor can it be trivial; and
  - the information must not be readily available by other means.
20. The Commissioner is satisfied that social care records are as sensitive and relevant to the deceased as medical records and can therefore be exempt under section 41(1). This is in accordance with his conclusions in the decision notice for the case FS50101567 (East London & the City Mental Health Trust).
21. The Commissioner is also satisfied that the withheld information in this case has the necessary quality of confidence in that it is neither generally accessible nor trivial. By its very nature, a social care file contains confidential information.
22. As the Commissioner accepts that the withheld information in this case was obtained from another person and was provided in circumstances giving rise to a duty of confidence, he has gone on to consider whether the disclosure of that information would constitute an actionable breach of confidence.

*Would disclosure constitute an actionable breach?*

23. Whether or not a breach of confidence is actionable is itself dependent on a number of factors. The courts have recognised three broad circumstances in which information may be disclosed in spite of a duty of confidence. These include where the disclosure is consented to by the confider, where disclosure is required by law, and where there is a greater public interest in disclosing the information which overrides any duty of confidence which may be owed.
24. There are no issues surrounding consent or law in this case. This leaves a consideration of the public interest defence.

25. Although section 41 of FOIA is an absolute exemption, the law of confidence contains its own inbuilt public interest test in that one defence to an action for breach of confidence is that the disclosure is in the public interest.
26. Unlike the FOIA public interest test for qualified exemptions (which assumes that information should be disclosed unless the public interest in maintaining the exemption exceeds the public interest in disclosure), the duty of confidence public interest test assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence. The Commissioner must therefore balance the public interest in disclosing the requested information against the public interest in maintaining the duty of confidence, with a view to deciding whether the defence to breach of confidence would succeed.
27. In considering this matter, the Commissioner acknowledges that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong. In the Commissioner's view, a duty of confidence should not be overridden lightly, particularly in the context of a duty of confidence owed to an individual.
28. The Commissioner is also mindful that disclosure under the FOIA means disclosure to the world at large.
29. The Council told the complainants:

*"It is clearly in the interests of service users to have confidence that their care staff will not disclose their sensitive data when they divulge details of their medical history and lifestyle. Without this assurance service users may be deterred from seeking assistance, and without adequate information Adult Social Care staff cannot properly assist service users".*
30. In the Commissioner's view it is important that social services' clients have confidence that the professionals caring for them will not disclose to the public sensitive information about them after they have died as this may discourage them from making information available. He gives weight to the argument that this, in turn, could ultimately undermine the quality of care that social services are able to provide or may lead to some people not becoming involved with social services in the first place. The Commissioner considers that this potential for prejudice to the effective functioning of social services is counter to the public interest.
31. The Commissioner understands that the complainants have been seeking disclosure of the information at issue for some considerable time. Although the Commissioner appreciates that they feel strongly that it is in the public interest for the file to be disclosed, he does not

consider their arguments sufficient to outweigh the public interest in the protection of the confidentiality of social care records.

32. In the circumstances of this case, the Commissioner is satisfied that the social care records at issue are, and should remain, confidential information and that the Council was correct to refuse the complainants' request under section 41(1) of the FOIA.

## Right of appeal

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33. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

34. 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.
35. 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** .....

**Jon Manners**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**