

Freedom of Information Act 2000 ('FOIA')

Decision notice

Date: 28 February 2013

Public Authority: Lancashire County Council
Address: P O Box 78
County Hall
Preston
PR1 8XJ

Decision (including any steps ordered)

1. The complainant has requested from Lancashire County Council ('the council') all information held on his late uncle. The council applied the exemptions at section 36(2)(c), section 40(2) and section 41(1) of the Freedom of Information Act ('FOIA') to the requested information. The Commissioner's decision is that the council correctly withheld the information using section 41(1) of the FOIA. The Commissioner does not require any steps to be taken.

Request and response

2. On 3 September 2012 the complainant wrote to the Social Services department at the Fylde and Wyre Locality Team within the council and requested information in the following terms:

"REQUEST FOR COPY OF INFORMATION HELD ON [named individual] (Dec'd) UNDER FREEDOM OF INFORMATION ACT 2000.

Ref A. Letter of 9 Feb 2012 (to [named individual])

Ref B. Letter of 7 Aug 2012 (to [named individual])

References A & B contained requests for copies of the information you hold on my late uncle. This FINAL request is for copies of all information (written or electronic) for the period 13 August 2008 to 28 Dec 2011."

3. The council responded on 24 September 2012 stating that the information is exempt from disclosure under sections 40(2), 41(1), 44(1)(a) and 36(2)(c) of the FOIA.
4. The complainant requested a review of this decision on 2 October 2012. The council provided its internal review response on 5 October 2012. It withdrew its reliance on section 44(1)(a) but maintained the application of the exemptions at sections 36(2)(c), 40(2) and 41(1) of the FOIA.

Scope of the case

5. The complainant contacted the Commissioner on 18 October 2012 to complain about the way his request for information had been handled.
6. The Commissioner has considered whether the exemption at section 41(1) of the FOIA applies to the requested information.
7. As the Commissioner has decided that section 41(1) of the FOIA applies, he has not considered the application of section 40(2) or section 36(2)(c).
8. This decision notice does not consider information that the Commissioner has identified may represent the personal data of the complainant. Personal data such as this is exempt from the scope of the FOIA. The Commissioner has therefore requested that the council deal with any information within the scope of the request which constitutes the complainants personal data in accordance with his rights under the subject access provisions of the DPA.

Reasons for decision

Section 41(1) Information Provided in Confidence

9. This exemption provides that information is exempt if it was obtained by the public authority from any other person and the disclosure would constitute an actionable breach of confidence.

Was the information obtained from another person?

10. 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.
11. The council have stated that the information is the complainant's late uncle's social services records. Having regard to the decision of the First

Tier Tribunal in *William Thackeray v Information Commissioner* (EA/2011/0043), the Commissioner considers that the scope of this exemption includes information created by the council on the social service record which is based on confidential information obtained from third parties.

12. Social services records are about the care of a particular individual and the Commissioner therefore accepts that such information may be considered to be information obtained from another person (i.e. 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.
13. As the Commissioner accepts that the information within the scope of this case was obtained from the deceased, he has therefore gone on to consider whether the disclosure would constitute an actionable breach of confidence.

Actionable claim for breach of confidence

14. The Commissioner has taken the view, in line with the Information Tribunal's decision in *Pauline Bluck v the Information Commissioner and Epsom 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 *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 record. However, the daughter's next of kin, her widower who was also the daughter's personal representative, objected. In *Bluck*, the Tribunal confirmed that even though the person to whom the 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) continues to apply. The Commissioner's view is that this action would most likely 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.
15. It is the Commissioner's view that in determining whether disclosure would constitute an actionable breach of confidence, it is not necessary to establish that, as a matter of fact, the deceased person has a personal representative who would be able to take action. This is because it should not be the case that a public authority should lay itself open to legal action because at the time of a request it is unable to determine whether or not a deceased person has a personal representative.

16. As the Commissioner accepts that a duty of confidence is capable of surviving a person's death, he has gone on to consider the test set out in *Coco v Clark* [1969] RPC 41 which stated that a breach of confidence will be actionable if:

- The information has the necessary quality of confidence;
- The information was imparted in circumstances importing an obligation of confidence; and
- There was an unauthorised use of the information to the detriment of the confider.

Necessary quality of confidence

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

18. The Commissioner is satisfied that the social services records are more than trivial as they are clearly very personal and sensitive and are important to the confider. This is in accordance with the conclusions in the decision notice for the case FS50101567 (East London and The City Mental Health NHS Trust) where he considered that the information was of the same sensitivity and relevance to the deceased as his medical records.

19. However, as stated above, this alone is not sufficient to indicate that the material has the necessary 'quality of confidence'. The Commissioner has therefore also considered whether the information is otherwise accessible.

20. Information which is known only to a limited number of individuals will not be regarded as being generally accessible although information that has been disseminated to the general public clearly will be. The Commissioner is aware that social service records, for obvious reasons, would not have been made generally accessible.

21. The Commissioner is satisfied that the social services records have the necessary quality of confidence required to sustain an action for breach of confidence and therefore considers that this limb of the confidence test is met.

Obligation of confidence

22. 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. When a social

services client is under the care of professionals, the Commissioner accepts that they would expect that the information produced about their case would not be disclosed to third parties without their consent. In other words, he is satisfied that an obligation of confidence is created by the very nature of the relationship.

Detriment to confider

23. Having concluded that the information in this case was imparted in circumstances giving rise to a duty of confidence, and had the necessary quality of confidence, the Commissioner considered whether unauthorised disclosure could cause detriment to the deceased.
24. 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 complainant's uncle is now deceased, the Commissioner does not consider that the disclosure would cause him any tangible loss but he considers that the real consequence of disclosing the information would be an infringement of his privacy and dignity as the disclosure would not only be to the complainant, his nephew, but to the general public. In other words, the loss of privacy can be a detriment in its own right. This is supported by the decision in the aforementioned Bluck case at paragraph 15.
25. 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, has to 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 to have the privacy of their affairs respected and in line with this an invasion of privacy would be a sufficient detriment to the confider. The Commissioner therefore finds that no specific detriment needs to be established and the general invasion of privacy applies in this case.

Public interest defence

26. Although section 41(1) is an absolute exemption which is not qualified by the 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. Therefore the Commissioner also considered whether there would have been a public interest defence available if the council had disclosed the information. The duty of confidence public interest test assumes that the information should be withheld unless the public

interest in disclosure exceeds the public interest in maintaining the confidence.

27. The Commissioner takes the view that a duty of confidence should not be overridden lightly, particularly in the context of a duty owed to an individual. Disclosure of any confidential information undermines the principle of confidentiality itself which 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.
28. In the circumstances of this particular case, the Commissioner's view is that 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 once they have died as this may discourage them from making information available. This would 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. This is counter to the public interest as it could endanger the health of social services clients and prejudice the effective functioning of social services. This view was also expressed as part of the Monitoring Officer's statement in relation to the council's application of section 36(2)(c) to care records relating to deceased individuals.
29. Aside from the wider public interest in preserving confidentiality, there is a public interest in protecting the confider from detriment. The Commissioner has already established that he considers 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 recognised by Article 8 of the HRA.
30. 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 also provides that if there is a public interest in disclosing the information that exceeds the public interest in preserving its confidentiality as discussed above, the breach will not be actionable.
31. The Commissioner has considered the circumstances of this case. It seems from the correspondence that the complainant has been unhappy with the care provided by the council to his uncle and with the council's lack of acknowledgement of his uncle's family. There also appears to be a claim against the Department for Work and Pensions which the complainant believes will go to a tribunal. The Commissioner recognises that it is in the public interest to bring to light any wrong-doing on the

part of public authorities and that it is in the public interest for individuals to have access to information to help them to conduct a case. However, it is not apparent to the Commissioner that there has been any proven wrong-doing on the part of the authority and he also notes that if the complainant is pursuing such a claim, information may be accessible through court disclosure rules. He also notes that it is likely that the complaint could be reviewed by other independent bodies with the jurisdiction to consider such issues. The Commissioner highlights that the focus of a disclosure under the FOIA is to the public at large, not a restricted disclosure to one individual and in any event, it would not be a proportionate way forward to make all the information available to the general public.

32. In light of the above, although the Commissioner can appreciate why the information is of particular interest to the complainant, there is no evidence available to the Commissioner indicating that there is sufficient wider public interest. The complainant's wish to access this file is a matter that the Commissioner can sympathise with but it is nonetheless a personal need. He also considers that there are proper routes for the complainant to make his allegations. The Commissioner therefore takes the view that the public interest in preserving the principle of confidentiality is much stronger in the circumstances of this case and that there would be no public interest defence available if the council had disclosed the information.
33. As discussed above, the Commissioner's view is that a duty of confidence would be capable of surviving the complainant's uncle's death. The Commissioner is also satisfied that the 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. He does not consider that there would be a public interest defence in the circumstances. As such, he accepts that section 41(1) is engaged in this case.

Right of appeal

34. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

35. 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.
36. 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

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