

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 November 2017

Public Authority: Cumbria County Council

Address: Cumbria House
117 Botchergate
Carlisle
Cumbria
CA1 1RD

Decision (including any steps ordered)

1. The complainant has requested the social care records relating to a deceased person. Cumbria County Council ("the Council") withheld the requested information under sections 41(1), 40(2) and 40(1) of the Freedom of Information Act ("the FOIA").
2. The Commissioner's decision is that the Council has correctly withheld the requested information under sections 41(1), 40(2) and 40(1).
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 27 February 2017, the complainant wrote to the Council and submitted a clarified request:

Our request is to view ALL SOCIAL WORK RECORDS regarding [deceased person].

5. The Council wrote to the complainant on 15 March 2017 and acknowledged the clarified request as being for "*All social work records regarding the Late [deceased person]*".
6. The Council responded to the clarified request on 27 March 2017. The Council withheld the requested information under the exemption provided by section 41(1).

Scope of the case

7. The complainant has previously made a similar request, to which the Council withheld the requested information under section 41(1). The Commissioner subsequently issued a decision notice which upheld the Council's refusal notice (FS50613789). Following an appeal to the First-tier Tribunal ("the Tribunal"), and on the basis that the request was unclear in its scope, the Tribunal directed the Council to clarify the scope of the request with the requestor, and to issue a fresh response (EA/2016/0237).
8. Following the Council's fresh response, the complainant contacted the Commissioner on 21 July 2017 to complain about the Council's application of section 41(1).
9. During investigation, the Council informed the Commissioner that it also considered part of the withheld information would fall under the exemptions provided by sections 40(2) and 40(1).
10. The Commissioner therefore considers the scope of this case to be the determination of whether the Council has correctly applied the exemptions provided by sections 41(1), 40(2) and 40(1).

Reasons for decision

Section 41(1) – information provided in confidence

11. 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.*

12. The Commissioner has issued specific guidance¹ 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?

13. 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.
14. The clarified request seeks all social work records relating to a deceased person. In requesting its submissions, the Commissioner therefore asked the Council to confirm the timescale that the records are held for (with reference to the fact that the complainant sought records relating to 'the whole lifetime' of the deceased person). The Commissioner also asked the Council to provide copies of all held records.
15. The Council subsequently confirmed the timescale for which records are known to be held, and provided the Commissioner with a copy of the records in their entirety.
16. The Council further confirmed that the withheld information includes the following categories of information: support plans; supported assessment questionnaires, special factor notes, referrals, common assessment tool documents, and historic provision documents.
17. Having viewed the withheld information, in addition to the submissions of the Council, the Commissioner is satisfied that the information (with the exception of that which the Commissioner will consider separately under sections 40(2) and 40(1)) was obtained from the deceased person, either directly or through professionals involved in providing care.
18. The Commissioner therefore accepts that the withheld information was obtained from another person for the purposes of section 41(1)(a), and has proceeded to consider whether the disclosure of this information would constitute an actionable breach of confidence.

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

Would disclosure constitute an actionable breach of confidence?

19. The Commissioner has taken the view, in line with the decision reached by the Tribunal in the case of *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 circumstances of the *Bluck* case, 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. As the Commissioner accepts that a duty of confidence is capable of surviving a person's death, she 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.)

22. Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.
23. 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 FS5010567, in which the Commissioner found that social care records were of the same sensitivity and relevance to the deceased person as medical records.

24. 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.
25. 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.
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. 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.)

29. 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.
30. 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.

31. 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.
32. 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?

33. 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.
34. 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.
35. 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.
36. 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.

37. 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.
38. 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.
39. In considering the specific circumstances of this case, it is understood by the Commissioner that the complainant is a member of the deceased person's family, and that they hold various concerns about the quality of the deceased person's social care, the legality of the Lasting Power of Attorney held by two third parties, and the terms of the deceased person's will.
40. The Commissioner recognises that it is in the public interest to expose any 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. However, having considered the detailed submissions made by the complainant, there is no immediate evidence available to the Commissioner of any malpractice on the part of the Council, and it is further noted that any appropriate review of the concerns held by the complainant would need to be undertaken by independent bodies with the jurisdiction to consider such issues.
41. In light of the above, there is no evidence available to the Commissioner that suggests there is sufficient wider public interest in the information being disclosed. The complainant's wish to access this information is based on personal need, and the Commissioner considers it reasonable to consider that there are proper routes for the complainant to have their concerns addressed. 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.

42. As discussed above, 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, and as such, accepts that section 41(1) has been correctly engaged.

Section 40(2) – Personal data of third parties

43. Section 40(2) states that:

Any information to which a request for information relates is also exempt information if–

- (a) it constitutes personal data which do not fall within subsection (1), and*
(b) either the first or the second condition below is satisfied.

44. Section 40(3) provides that:

The first condition is–

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene–

- (i) any of the data protection principles...*

Is part of the withheld information personal data?

45. Personal data is defined by section 1 of the Data Protection Act ("the DPA") as:

...data which relate to a living individual who can be identified–

- (a) from those data, or*
(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the data controller or any person in respect of the individual...

46. In order for the exemption to apply the information must constitute personal data as defined by section 1 of the DPA. In this instance the Commissioner has reviewed the withheld information, and has identified that a proportion of it will be the personal data of third parties who are

not professionals involved in the care of the individual. This personal data includes descriptions of the third parties' relationships with the deceased person, and of their personal circumstances.

Would disclosure breach the data protection principles?

47. The data protection principles are set out in schedule 1 of the DPA. The Commissioner considers that the first data protection principle is most relevant in this case. The first principle states that personal data should only be disclosed in fair and lawful circumstances, the conditions of which are set out in schedule 2 of the DPA.
48. The Commissioner's considerations below have focused on the issues of fairness in relation to the first principle. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the data subject and any potential consequences of the disclosure against the legitimate public interest in disclosing the information.

Reasonable expectations of the data subject

49. When considering whether the disclosure of personal data is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the data subject. However, their expectations do not necessarily determine the issue of whether the disclosure would be fair. Public authorities need to decide objectively what would be a reasonable expectation in the circumstances.
50. Having considered the circumstances of this case, the Commissioner does not consider that any of the third parties would have a reasonable expectation of their personal data being publically disclosed. The personal data was collated as part of the Council's social care responsibilities, and it is reasonable for the Commissioner to consider that the third parties would have had a strong expectation that such information was held by the Council only for the purpose of providing social care, and would not be disclosed into the public domain under the terms of the FOIA.

The consequences of disclosure

51. The Commissioner must consider that the disclosure of the third parties' personal data, which includes details about their home circumstances, may cause personal distress.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

52. There is always some legitimate public interest in the disclosure of any information held by public authorities. This is because disclosure of

information helps to promote transparency and accountability amongst public authorities. This in turn may assist members of the public in understanding decisions taken by public authorities and perhaps even to participate more in decision-making processes.

53. However, in the circumstances of this case the information was recorded and held for the purposes of providing social care, and there is no indication that the individuals would have expected such information to be disclosed into the public domain.
54. Having considered these factors, the Commissioner has concluded that the disclosure of the personal data would not be fair, and that the information has been correctly withheld under section 40(2).

Section 40(1) – Personal data of the requestor

55. Section 40(1) states that:

Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

56. Section 40(1) of provides an exemption for information when it represents the personal data of the requestor. This exemption is absolute; no consideration of the data protection principles is necessary when considering this subsection and it requires no public interest test to be conducted.

Is any of the withheld information personal data?

57. As detailed in paragraph 45, the definition of personal data is provided in section 1 of the DPA. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, or has them as its main focus or else impacts on them in any way.
58. Having considered the withheld information, in conjunction with the submissions of the Council, the Commissioner recognises that a proportion of the withheld information is likely to represent the requestor's personal data. The Commissioner recognises that any such information will therefore be exempt from disclosure under section 40(1).
59. Whilst an individual may request their personal data under the terms of the DPA, any such request must be undertaken and considered under the terms of the DPA and not FOIA.

Right of appeal

60. 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

61. 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.
62. 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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