

Freedom of Information Act 2000 Decision Notice

Date: 29 March 2011

Public Authority: Department of Health, Social Services and
Public Safety
Address: Room A3.9, Castle Buildings
Stormont, Belfast
BT4 3SQ

Summary

The complainant requested information from the Department of Health, Social Services and Public Safety ("DHSSPS") regarding the Independent Review on Autism. The DHSSPS refused to disclose the requested information as it stated that it was exempt under section 41(1) of the Act. The Commissioner finds that the exemption in section 41(1) of the Act (information provided in confidence) is engaged in relation to part of the requested information. The Commissioner therefore requires the DHSSPS to disclose the remainder of the requested information which it holds. The Commissioner also finds that the DHSSPS has breached sections 1(1) and 10(1) of the Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 20 July 2009 the complainant made a request to the DHSSPS for minutes of meetings held by the Independent Review on Autism, i.e. those of the internal steering group meetings.

3. The DHSSPS provided a response to the complainant on 18 August 2009, stating that there was no internal steering group attached to the Independent Review of Autism Services, therefore the requested information was not held by the DHSSPS. It also informed her that any request for the minutes held by the Independent Review on Autism, including all correspondence and evidence given by external groups and individuals, would be exempt from disclosure under section 41 of the Act (information provided in confidence).

4. The complainant requested clarification of the DHSSPS' refusal on 22 September 2009, with the following queries:

1. "The Independent Review of Autism Services was set up by the Minister for Health and Social Services and the secretarial and administrative support was provided by M. Swann from and by DHSSPS. There was also some ongoing input and liaison with L. Brown and M. Briscoe from DHSSPS. The members of the Independent Review of Autism Services were all employees of DHSSPS or HPSS apart from Lord Maginnis. At what point (on what grounds) can this Review be classified as "external"... "with no input from any Departmental groups"?

I therefore repeat my request for all minutes of meetings and discussions held by the Review team in closed or open sessions when they met together as the Review team – notes taken by M. Swann included.

2. I understand that minutes of evidence from external groups is outside the remit of this Freedom of Information request. However, notes taken by the Review team or M. Swann regarding the outcome of these meetings would be available?"

5. The DHSSPS provided clarification to the complainant on 9 October 2009 and referred her back to its previous response. The complainant requested an internal review on 21 November 2009. The DHSSPS provided her with the result of that internal review on 8 January 2010. That letter stated that the Review of Autism was totally independent of the DHSSPS, however the DHSSPS holds some information relating to the review, which would be exempt from disclosure under section 41 of the Act.

6. The Commissioner considers that the complainant's request of 22 September 2009 is a repeat of her original request, albeit that it provides further clarification about its scope. For the purposes of this Decision Notice, when the Commissioner refers to the complainant'

request, it is the request of 22 September 2009 which is the subject of the Commissioner's decision.

The Investigation

Scope of the case

7. On 30 December 2009 the complainant contacted the Commissioner to complain about the way her request for information had been handled and to ask the Commissioner to review the DHSSPS' decision not to disclose the requested information.
8. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.
9. As a result of the Commissioner's intervention, the complainant on 19 November 2010 received some of the requested information. Therefore, throughout this Notice, "the withheld information" refers to the remainder of the requested information which was not disclosed to the complainant at that time and to which the Commissioner has not referred below.
10. The Commissioner has clarified with the DHSSPS that it only holds minutes of some of the meetings held by the Independent Review. It does not hold any minutes in an official capacity as the review is independent of the DHSSPS, however one of the DHSSPS staff was present at some of the meetings in an administrative capacity and holds the minutes of those meetings accordingly.
11. The DHSSPS also holds notes relating to meetings with external steering groups, however, since the complainant has not requested these as she said she understood that they would be outside the remit of her request, the Commissioner has deemed these not to be within the scope of this complaint.

Chronology

12. On 7 January 2010 the Commissioner wrote to the complainant acknowledging safe receipt of her complaint. He informed the DHSSPS of her complaint on 15 January 2010 and requested clarification as to the status of both the complainant's requests. The DHSSPS provided the Commissioner with a copy of the letter it had sent to the complainant on 8 January 2010. That letter was the result of the internal review of the complainant's request of 22 September 2009.

13. On 16 February 2010 the DHSSPS provided the Commissioner with a copy of the withheld information. On 14 April 2010 the Commissioner wrote to the DHSSPS requesting its detailed submissions as to why the remainder of the requested information is not held by it and as to its application of the section 41 exemption to the withheld information. On the same date the Commissioner wrote to the complainant to inform her that he had requested those details from the DHSSPS.
14. On 13 May 2010 the DHSSPS wrote to the Commissioner with its detailed submissions as to why the withheld information is exempt from disclosure under section 41 of the Act.
15. On 16 March 2011 the Commissioner contacted the DHSSPS to clarify some further points. The DHSSPS responded on 17 March 2011.

Analysis

Exemptions

16. The DHSSPS has argued that the withheld information is exempt from disclosure on the basis of section 41 because it was provided to it in confidence by third parties. The Commissioner has considered the application of this exemption to the withheld information.

Section 41 – Information provided in confidence

17. This section states that:

'41-(1) 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.'

18. Therefore for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a

third party **and** the disclosure of that information has to constitute an actionable breach of confidence.

19. The DHSSPS has argued that the withheld information was provided to it by the Independent Review on Autism, which was made up of several contributors and therefore meets the requirements of section 41(1)(a). The Commissioner has reviewed this information and is satisfied that this is the case.
20. With regard to section 41(1)(b) the approach adopted by the Commissioner in assessing whether disclosure would constitute an actionable breach of confidence in this case is to follow the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415 (the *Coco* test).

This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:

- Whether the information had the necessary quality of confidence;
 - Whether the information was imparted in circumstances importing an obligation of confidence; and
 - Whether an unauthorised use of the information would result in detriment to the confider.
21. The DHSSPS has provided the Commissioner with detailed submissions to support its position that the three criteria above are met. The Commissioner has considered these submissions and also set out his conclusions in relation to their merit.

Does the information have the necessary 'quality of confidence'?

22. The DHSSPS has argued that it is clear from the subject matter of the withheld information that it has the necessary quality of confidence.
23. The Commissioner believes that information will have the necessary quality of confidence if it is not otherwise accessible to the requestor, is more than trivial and is of importance to the confider. Information will not have the necessary quality of confidence if it is already in the public domain.
24. The Commissioner has cross-referenced the withheld information with the final report produced by the Review and has ascertained that a large part of the information is contained in the final report and is

already in the public domain. Therefore that information does not have the necessary quality of confidence.

25. The Commissioner considers part of the withheld information, such as dates of the next Review meeting, to be innocuous. It is therefore not "more than trivial" and so does not have the necessary quality of confidence.
26. Having considered the remaining information the Commissioner is satisfied that it has the necessary quality of confidence: it is clear that information is more than trivial and of significant importance to those who contributed to the Review. He is also satisfied that information is not otherwise accessible to the public. Therefore, he has gone on to consider whether it was imparted in circumstances importing the necessary obligation of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

27. The Commissioner recognises that an obligation of confidence may be expressed explicitly or implicitly. Whether or not there is an implied obligation of confidence may depend on the nature of the information itself, and/or the relationship between the parties.
28. In the circumstances of this case the DHSSPS has argued that, at the beginning of the Independent Review process, members of the Review Team enquired as to the confidentiality of the process. They were given assurances by the Chair of the Review that the review was completely independent of the DHSSPS and that any material arising from the Review would not be made public without consulting its members. According to the DHSSPS an assurance of confidentiality was specifically sought because of the following factors;
 - "Their need to be able to give personal opinions as well as any opinions as well as any opinions and policies held by the organisations or countries in which they worked.
 - Their wish to protect their personal opinions from subsequent challenge by others. Many of the views expressed were subjective.
 - Their view that the more open and forthcoming they were in private as part of the Review the better informed the process would become, and the more honest and reliable the subsequent Report."

29. The DHSSPS has further argued that the Review members spoke with a number of other parties during the Review process, such as community and voluntary organisations and carers of those with ASD. Those parties were provided with assurances that their input was on a confidential basis.
30. The Commissioner enquired as to whether any formal confidentiality agreement existed between the Review and any third parties involved. The DHSSPS confirmed that no such agreement existed, however the parties had been provided with assurances as outlined in paragraphs 28 and 29 above.
31. The Commissioner is satisfied that in this case, in relation to any opinions that are attributed in the meeting notes to specific individuals, an expectation of confidence arose by way of those assurances being provided. He is therefore satisfied that any such withheld information was communicated in circumstances giving rise to an obligation of confidence. However, he has also taken into account the circumstances in which the assurance of confidentiality was sought and given, namely that ultimately the results of the Review would feed into a publicly available report. In light of this he does not accept that all the information within the notes was imparted in circumstances giving rise to an obligation of confidence. In the Commissioner's view notes of the general discussions of the review group that are not attributable to specific individuals do not amount to information imparted in circumstances giving rise to an obligation of confidence.
32. In relation to the argument set out at paragraph 30 above, the Commissioner accepts that where the meeting notes attribute comments or opinions to third parties, such as members of community and voluntary organisations, then such views were provided in circumstances importing an obligation of confidence.

Would disclosure be detrimental to any party?

33. Where information is purported to have been imparted in confidence the Commissioner considers that there would have to be a detrimental impact to the confider for this limb of the *Coco* test to be engaged.
34. The DHSSPS has explained that this part of the withheld information consists of the personal and professional opinions of others in relation to all aspects of ASD and how it is managed. It has stated to the Commissioner that those opinions, on what is a very subjective and sensitive matter, were provided in a forum which those who expressed them believed to be confidential. If they were disclosed into the public domain this would leave them open to challenge by others and could

- call into question the professional and personal reputations of those who expressed them.
35. The Commissioner has considered the DHSSPS' assertion that disclosure of the personal and professional opinions of these parties would cause detriment to the parties.
 36. The Commissioner accepts that disclosure of personal opinions on such a sensitive subject may cause detriment to the personal or professional reputation of those who expressed them, especially as they would have believed themselves to be expressing those opinions in a private forum and would not have expected them to be made public.
 37. He has therefore gone on to consider whether disclosure of the information would constitute an actionable breach of confidence.

Would disclosure of the withheld information be actionable?

38. An actionable breach of confidence is not just one that is arguable but one that would, on the balance of probabilities, succeed. The Commissioner has considered whether disclosure of the withheld information would constitute an actionable breach of confidence.
39. Thus, to establish an 'actionable' breach of confidence, the public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed i.e. considering whether or not all three limbs of the test of confidence can be established and whether or not the public authority has a public interest defence to the claim.
40. Since the Commissioner is satisfied that part of the information engages all three limbs of the test of confidence, he has considered whether the DHSSPS would have a defence to a claim for breach of confidence.

Would the DHSSPS have a defence to a claim for breach of confidence based on the public interest in disclosure of the information?

41. Although section 41 is an absolute exemption the law of confidence does contain 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.
42. When weighing up the public interest arguments in favour of upholding an obligation of confidence, the Commissioner considers the wider public interest in preserving the principle of confidentiality and the

impact that disclosure would have on the interests of the confider. The weight of the consideration will depend on the context.

43. The consequence of any disclosure of confidential information will be, to some degree, to undermine the principle of confidentiality which is really to do with the relationship of trust between confider and confidant. Individuals would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected. In the case of *Bluck v Epsom & St Helier University NHS Trust* (17 September 2007) the Tribunal quoted from *Attorney General v Guardian* "...as a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence..."
44. In this particular case those who provided opinions to the Review in both a personal and professional capacity did so because they had been assured by the Chair of the Review that those opinions would be kept confidential. This would have established a relationship of trust between those individuals and the members of the Review. The Commissioner believes that, if the Chair of the Review went back on those assurances of confidentiality it would deter individuals from contributing to future such independent reviews and therefore a valuable source of information would be lost, which would obviously not be in the public interest.
45. The Commissioner has considered whether there would be any particular public interest in disclosing the information. The Commissioner accepts that there is always a public interest in knowing the "full picture," rather than limited amounts of information being disclosed. He also accepts that where individual opinions help to inform decisions or actions that impact upon the wider public there will be a public interest in knowing the content of those individual opinions. However, the Commissioner considers that the majority of the withheld information is available to the public by way of the final report. He does not feel that the additional disclosure of the individual views would add significantly to the information in that report and he considers that the benefit of knowing exactly who said what would be outweighed by the detrimental impact on future reviews.
46. The Commissioner, having weighed up the public interest arguments in both disclosure of the information and in maintaining the confidentiality of the information, has concluded that there is no overriding public interest in disclosure of the information and that therefore this would not be a defence to any action for breach of confidence taken as a result of disclosure.

Section 40(2) – personal data of third parties

47. The Commissioner, as the regulator of the Data Protection Act 1998 (DPA) in the UK, has considered whether some of the information which consists of names of individuals should be disclosed. In this respect he has considered whether disclosure of these names would breach any of the Data Protection principles and in particular, whether disclosure would be fair to the individuals concerned.
48. A large proportion of the names mentioned within the withheld information are already available in the public domain by virtue of the final published report. In relation to these names the Commissioner considers that they are already linked to the findings of the Review group and that it would not be unfair to them to disclose their names in the context of these meeting notes. He considers that there is a legitimate public interest in knowing more about the context in which the individuals were involved in the Review and that this would not be an unwarranted intrusion into their privacy.
49. In relation to the names of third parties who have not been publicly linked to the findings of the Review group via the published report, the Commissioner has consulted with the DHSSPS. The DHSSPS has advised the Commissioner that “these people were a mixture of administrative staff, qualified individuals, academics, voluntary and community sector representatives HSC staff and practitioners who may have been invited to comment on ideas for inclusion in the independent review of ASD. We see no reason to withhold this information as it is understood that all those identified were acting in their professional capacity.” The Commissioner notes that the DHSSPS has already stated, in relation to its application of section 41, that personal and individual views as well as organisational views were sought. However, as the Commissioner has already upheld section 41 in relation to any attributed individual views, he accepts the DHSSPS view that disclosure of these names would not be unfair to the individuals concerned. He considers that there is a legitimate public interest in knowing the context in which these third parties names arose in relation to the Review and that revealing this would not be an unwarranted intrusion into their privacy.
50. The Commissioner has also considered whether there is a DPA schedule 2 condition to justify the disclosure of the names within the withheld information. The Commissioner has concluded that condition 6 of schedule 2 has been met. This provides a condition for processing personal data where;

"The processing is necessary for the purposes of the legitimate interests pursued by the data controller or by a third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

51. The Commissioner accepts that the processing of this data is necessary in the interests of transparency and accountability, to further inform the public about the extent and context in which the named individuals were connected to the Review.

Procedural Requirements

52. The Commissioner considers that the DHSSPS breached section 1(1)(b) of the Act in that it failed to communicate to the Complainant the information specified in his request which did not fall within any of the absolute exemptions from the right of access nor within any of the qualified exemptions under which the consideration of the public interest in accordance with section 2 would authorise the public authority to refuse access.
53. The Commissioner also considers that the DHSSPS breached section 10(1) of the Act in that it failed to communicate the information to the complainant within 20 working days following the date of receipt of the complainant's request.

The Decision

54. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
 - it correctly applied section 41 to some of the withheld information

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- it incorrectly applied section 41 to some of the withheld information
- it breached section 1(1)(b) of the Act
- it breached section 10(1) of the Act.

Steps Required

55. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

To disclose to the complainant all information falling within the scope of the request which has not already been disclosed, apart from the information detailed in the confidential annex to this notice.

56. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

57. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

58. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 29th day of March 2011

Signed

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

Legal Annex

Freedom of Information Act 2000

1 - General right of access to information held by public authorities.

- (1) 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.

10 -Time for compliance with request.

- (1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

40 – personal data of third parties

- (2) 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.
- (3) 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, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
 - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the

exemptions in section 33A(1) of the **M2**Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

41- Information provided in confidence.

- (1) 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.

Data Protection Act 1998

4 - The data protection principles.

- (1) References in this Act to the data protection principles are to the principles set out in Part I of Schedule 1.
- (2) Those principles are to be interpreted in accordance with Part II of Schedule 1.
- (3) Schedule 2 (which applies to all personal data) and Schedule 3 (which applies only to sensitive personal data) set out conditions applying for the purposes of the first principle; and Schedule 4 sets out cases in which the eighth principle does not apply.
- (4) Subject to section 27(1), it shall be the duty of a data controller to comply with the data protection principles in relation to all personal data with respect to which he is the data controller.

SCHEDULE 1 – THE DATA PROTECTION PRINCIPLES

PART I THE PRINCIPLES

- 1 - Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—
 - (a) at least one of the conditions in Schedule 2 is met, and

- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.