

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 June 2020

Public Authority: Darlington Borough Council
Address: Town Hall
Feethams
Darlington
County Durham DL1 5QT

Decision (including any steps ordered)

1. The complainant has requested information held by the social care department within Darlington Borough Council (the council) about his deceased mother.
2. The Commissioner's decision is that the council is entitled to withhold the information that has been requested under section 41(1) of the FOIA-information provided in confidence.
3. However, the Commissioner has found that the council has breached section 17(1) of the FOIA as it failed to issue a refusal notice within the prescribed 20 working days.
4. The Commissioner does not require the council to take any steps as a result of this decision notice.

Request and response

5. On 10 November 2019 the complainant wrote to the council and requested information in the following terms:

I'd like to make a freedom of information request relating to my deceased mothers social care records.

I'm happy for any information that might identify other individuals to be redacted and I know she had no actual care but a social worker did come to see her at her then home address of [address redacted].

Her date of birth was [date redacted].

If you are claiming an exemption against providing this information then please let me know sooner rather than later in order that I can challenge it.

6. On 11 November 2019, the council contacted the complainant to request confirmation of his mother's name; he then supplied this information on the same date.
7. On 12 February 2020, the council issued a refusal notice to the complainant. It advised that the information that he had requested was personal data, as defined by the Data Protection Act 2018 (the DPA 2018), and that its disclosure would breach the first data protection principle. The council stated that, given this, the information was to be withheld under section 40(2) of the FOIA.
8. The Commissioner does not hold a copy of the complainant's request for an internal review; however, she does have the council's response to this dated 10 March 2020, and this sets out the details of the complainant's internal review request (aside from the date that it was submitted).
9. The complainant questioned the decision taken by the council to withhold the information that he had requested. He also complained about the time it had taken the council to notify him of this decision.
10. The complainant also provided further explanation to the council about why he was asking for the information. He referred to contact that was made with the council, by another party, about his mother. He stated that he required details of the information that was provided by the third party, stating that he did not require names, but wanted '*to know what the record shows*'.
11. The council's internal review response apologised for failing to respond to the complainant's request within the statutory time scales set out within the FOIA.
12. The council also confirmed that, upon review, it accepted that it was not entitled to rely on section 40(2) of the FOIA when refusing the complainant's request. However, it stated that it was still satisfied that it had been correct to withhold the information. This was because it regarded section 41(1) of the FOIA to be engaged.

13. The council went on to explain that the information that was held which was relevant to the request was provided by the complainant's mother, and those professionals that were involved in her care. It believed that its disclosure would constitute an '*actionable breach of confidence*' for the following reasons:

- *The information has the necessary quality of confidence in that it is an individual's social care record that is neither generally accessible nor trivial and as such there is an obligation of confidence.*
- *As was found in *Bluck v Information Commissioner and Epsom St Helier University NHS Trust EA/2006/0090*¹ [the Tribunal case] a duty of confidence is capable of surviving the death of the confider and an action for breach of confidence could still be taken by the personal representative of that person.*
- *There would be detriment to the deceased person if there was an unauthorised use of the information particularly given the fact that the disclosure under the Act is a disclosure to the world at large.*
- *Your mother has not consented to disclosure; and*
- *Disclosure is not required by law.*

14. The council went on to say that whilst the exemption was not subject to the public interest, it was aware that it has been recognised by the courts that there is a public interest defence to breaches of confidence. It stated that this, in effect, meant that if the public interest in disclosure outweighs the public interest in maintaining the confidence, then section 41(1) would not apply. The council concluded that there would not be any public interest defence available, should it disclose the information because there was no '*evidence of wrongdoing during the period of the council's caring role*'.

1

[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i25/mrspbluckvinformat
ioncommissioner17sept07.pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i25/mrspbluckvinformat
ioncommissioner17sept07.pdf)

Scope of the case

15. The complainant contacted the Commissioner on 10 March 2020 to complain about the way his request for information had been handled.
16. He has raised concerns about the reasons which the council has provided for withholding the information, which he does not believe to be adequate. In addition, the complainant is unhappy about the time that it took the council to deal with his request.
17. The council revised its position at the time of the internal review, stating that it now believed that the information was exempt from disclosure under section 41(1), rather than section 40(2), of the FOIA.
18. The Commissioner accepts that the internal review process is an opportunity for a public authority to revise its position and correct any errors. Given this, she only intends to consider whether the council is entitled to rely on section 41(1) of the FOIA when withholding the information which is relevant to the complainant's request.
19. In addition, the Commissioner will consider the timeliness of the council's original response to the complainant's request.

Reasons for decision

Section 41(1) – Information provided in confidence

20. Section 41(1) states:

Information is exempt information if-

- (a) it was obtained by the public authority from any 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.*

Was the withheld information obtained by the public authority from another person?

21. The complainant has specified that he requires all the information held by the council's social care department about his mother. He has also referred to information that was provided to the council about his mother by 'another person'.

22. The council confirmed to the complainant that it holds information that was provided by his mother, and the professionals that were involved with her care. Whilst the council does not go on to explicitly confirm that it also holds the information provided by a third party that was referred to in the complainant's request, the Commissioner has assumed this to be the case, and that the focus of such information is also on the complainant's mother. She has therefore taken this information into account when considering the council's application of section 41(1) in response to the complainant's request.
23. The Commissioner's published guidance² (the guidance) on section 41(1) of the FOIA states that if the requested information contains a mixture of both information created by the public authority itself, and information that was given to it by another person(s) then, in most cases, the exemption will only cover the latter information i.e., only that information which has been given to the public authority by another person(s).
24. However, the guidance then goes on to say that the public authority should consider whether the disclosure of the information that it created would also reveal the content of that information which it obtained from another person. If it would, then the exemption may also extend to that information which it has generated itself.
25. With direct reference to social care (and medical) records, the Commissioner's guidance states that information about the symptoms of a client, and any professional's assessment/ report created as a consequence of those symptoms, may be deemed to have been obtained from the client for the purposes of section 41(1)(a) of the FOIA.
26. Given the above, the Commissioner is satisfied that, in the circumstances of this case, the information created by the professionals in the council's social care department about the complainant's mother may be '*deemed to have been obtained*' from her.
27. The Commissioner therefore accepts that all the information that has been withheld in response to the complainant's request can be regarded to have been obtained from another person for the purposes of section 41(1)(a).

² <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

Would disclosure constitute an actionable breach of confidence?

28. With regard to any information relevant to the request that may have been provided to the council by a third party, the Commissioner accepts that this has not been obtained by the council directly from the complainant's mother.
29. However, the Commissioner is still satisfied that, in this particular instance, this information should be considered with the remainder of the information that is held that is relevant to the request, and not in complete isolation.
30. It would appear from the information provided by the complainant that details provided by the third party formed the basis of the contact by the social care department with his mother. The Commissioner regards all the information held that is relevant to the request to be inextricably linked; it all forms part of one record that directly relates to the complainant's mother and her involvement with the council's social care department during a particular period of time.
31. The Commissioner, when considering whether the disclosure of the information requested would constitute an actionable breach of confidence, has, in line with the decision reached in the Tribunal case referred to previously in paragraph 13 of this decision notice, taken the view that a duty of confidence is capable of surviving the death of the confider.
32. In the circumstances of the Tribunal case, the appellant had been appointed to act as the personal representative of her deceased daughter, and she was seeking the disclosure of her daughter's medical records under the terms of the FOIA.
33. 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.
34. The Commissioner believes 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.
35. 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.

36. In the specific circumstances of this case, the complainant has stated that he is an 'executor' which the Commissioner has assumed to be in relation to his mother's estate. As such, she is mindful that he could purport to be her personal representative, and that therefore, no action would be taken for breach of confidence.
37. However, the Commissioner's view (as outlined in paragraph 35) is that a public authority is not required to establish whether or not a deceased person has a personal representative, but instead must reach a hypothetical conclusion on whether it is possible.
38. Although the Commissioner recognises that the request in this case may have been made by a personal representative, the FOIA, which provides the public with an applicant and motive-blind right of access to recorded information, does not impose an obligation or expectation upon the council to take steps to verify this fact. The only identifiers which a public authority may expect to receive from a requestor is a name and address for correspondence (section 8(1)(b)).
39. The Commissioner therefore 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.
40. On this basis the Commissioner 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 the following three elements are met:
 - 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.
41. The Commissioner intends to consider each of the three elements of the test in turn:

The 'necessary quality of confidence'

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

43. The Commissioner is satisfied social care records are personal, sensitive, and important to the confider, and are therefore more than trivial.
44. 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.
45. Information which is known only to a limited number of individuals cannot be regarded as being generally accessible to the general public.
46. The Commissioner is aware that social care records are generally not made available for the public to access, and there is no evidence to suggest otherwise for the information that has been withheld in this instance.
47. 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'

48. 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.
49. 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.
50. With regard to any information that may have been provided by a third party, consideration has to be given not only to the expectations of the third party who provided the information, but also to the complainant's mother, whom the information was about. The Commissioner is satisfied that the information would have been supplied with the expectation that it would be treated in confidence. Given this, the Commissioner is satisfied that this limb of the test is met.

The 'detriment of the confider'

51. Having concluded that the information that has been 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 confider.

52. 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. Where the relevant person is now deceased, the Commissioner does not consider that the disclosure of the withheld information would cause any tangible loss. However, she 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.
53. 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 (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.
54. 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 complainant's mother's privacy of affairs would also represent a detriment to his mother as a confider. This, in the Commissioner's view, also extends to that information which may have been provided by the third party about the complainant's mother.
55. 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. She is therefore satisfied that the third element of the test is met.

Is there a public interest defence?

56. 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, as the council explained in its internal review response to the complainant, 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.
57. The Commissioner has therefore considered whether there is a public interest defence available, should the council disclose the information that has been withheld.

58. 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.
59. 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. In this instance this is relevant to the information which was obtained from the complainant's mother, and the third party.
60. 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.
61. In the circumstances of this particular case, the Commissioner also considers it important that a social care client has confidence that sensitive information about them will not be made publicly available following their death. A breakdown in the trust between parties in such a 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.
62. 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.
63. 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.
64. In considering the specific circumstances of this case, the complainant has indicated that the council's contact with his mother was unnecessary and had caused her significant distress. He states that he needs to understand what allegations were made by a third party which then led to the council contacting his mother, and whether proper processes were followed.
65. Whilst the Commissioner has noted the complainant's purpose in seeking the information, it is reasonable for her to interpret this as

representing a private interest. It is also of relevance that there is currently no evidence of wrongdoing against the council.

66. Although the complainant may seek the information for a legitimate reason, the Commissioner must consider that there are proper routes for this private interest to be addressed without recourse to the FOIA. She regards it be particularly pertinent in her consideration of this matter that disclosure under the FOIA would not be to the requester alone, but to the public at large.
67. In light of the above, the evidence available to the Commissioner suggests that there is not sufficient public interest in the information being disclosed. She 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.
68. The Commissioner's view is that a duty of confidence would be capable of surviving the person's death. She is 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. This is of relevance to the information 'obtained' from the complainant's mother, and that which was provided about her by the relevant third party.
69. 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 finds that section 41(1) has been correctly engaged.

Section 17(1)

70. Section 17(1) specifies that a refusal notice must be provided no later than 20 working days after the date on which the request was received.
71. In this case the complainant made his request on 10 November 2019. The following day the council requested some additional information and the complainant provided a response on the same date. The council did not issue a substantive response to the request until 12 February 2020.
72. The council issued its refusal notice outside 20 working days and has therefore breached section 17(1) of the FOIA.

Right of appeal

73. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

74. 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.
75. 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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