

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 17 December 2014

**Public Authority:** Worcestershire County Council

**Address:** County Hall  
Spetchley Road  
Worcester  
WR5 2NP

#### **Decision (including any steps ordered)**

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1. The complainant has requested reports and documents related to an incident which occurred involving his mother. Worcestershire County Council refused the request on the basis that the information was provided in confidence and was also third party personal data and therefore engaged section 40(2) and 41 of the FOIA.
2. The Commissioner's decision is that Worcestershire County Council has correctly applied section 41 to withhold the information identified as within the scope of the request. The Commissioner therefore requires no steps to be taken.

#### **Request and response**

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3. On 26 June 2014, the complainant wrote to Worcestershire County Council ("the Council") and requested information relating to an incident that occurred on 7 March 2014 involving his mother. The complainant asked for:

*"copies of all reports filed and any other supporting documentation from that day, please, as a matter of urgency."*

4. The Council responded on 8 July 2014. It stated that it could not provide care or medical information relating to the complainant's deceased mother as it was exempt on the basis of section 41 of the FOIA. The Council also considered some of the information would be third party personal data and therefore exempt under section 40(2) of the FOIA.

5. This response also explained if the complainant was unhappy with the way his enquiry had been handled he could contact the Council's Customer Relations Department. It also provided contact details for the Information Commissioner's Office. As the complainant did not want to complain about the way his enquiry had been handled but was seeking a review he contacted the Commissioner directly. Due to the length of time that has passed between the request being made and the complainant bringing this to the Commissioner's attention and the somewhat unclear instructions in the refusal notice, the Commissioner agreed to proceed with his investigation without the Council having undertaken an internal review of its decision.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 16 September 2014 to complain about the way his request for information had been handled.
7. The Commissioner considers the scope of his investigation to be to determine what information is held within the scope of the request and to establish whether the section 41 and 40(2) exemptions provide a valid basis for refusing the request.

### **Reasons for decision**

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#### **Section 41 – information provided in confidence**

8. The Council has identified one document containing relevant information within the scope of the request and this is a case note relating to a social care record from the date in question. The Council confirmed it considered this information to be exempt under section 41.
9. Section 41 applies to information obtained from a third party whose disclosure would constitute an actionable breach of confidence. This exemption is absolute and therefore it is not subject to a public interest test.
10. 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."*

11. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
  - Whether the information has the necessary quality of confidence;
  - Whether the information was imparted in circumstances importing an obligation of confidence; and
  - Whether disclosure would be an unauthorised use of the information and to the detriment of the confider.
12. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. It is well established that medical and social care records contain information obtained from third parties, often the deceased or the social care worker or medical staff. As such the requirement of section 41(1)(a) is satisfied.
13. The Commissioner notes that the information in this case is an account of the visit that took place to the complainant's mother on the date in question. This information was provided by the individuals who conducted the visit and neither the Council nor the complainant has provided any evidence to suggest this information is in the public domain in any way for example, via a press release or as part of published findings of an investigation. The Commissioner is therefore satisfied the information is not otherwise accessible.
14. The information was provided to the Council as part of the assessment of the individual's care needs and constitutes a social care record of the deceased individual. Given the nature of the information and events in question the Commissioner is satisfied that the information is not trivial and therefore has the necessary quality of confidence.
15. The Commissioner has gone on to consider whether the information was imparted in circumstances importing an obligation of confidence. The Council considers that there would have been a clear expectation from both parties that information received by the Council as part of the assessment of care needs be held under a duty of confidence. The Commissioner agrees that there is a general implied expectation of confidence for information relating to an individual's social or medical care. As such the Commissioner accepts the information was imparted in circumstances importing an obligation of confidence.

16. The Commissioner has gone on to consider whether disclosure of the information would be to the detriment of the confider. The Council has argued that due to the nature of the information it considers disclosure of the information would breach the general privacy under which a person's medical or care records are expected to be held. The detriment that would be caused would therefore be a loss of privacy. The Council considered whether confidence extends beyond a person's death and concluded that action for a breach of confidence can still be taken by representatives of the deceased so the duty of confidence does not dissipate after death in relation to medical or social care records.
17. The loss of privacy as a detriment in its own right has previously been confirmed by the Information Tribunal<sup>1</sup> and the Commissioner therefore considers that as social care records constitute information of a personal nature there is no need for there to be any detriment to the confider, in terms of tangible loss, in order for it to be protected by the law of confidence. Following this argument through, the Commissioner recognises that if disclosure would be contrary to the deceased's reasonable expectation of maintaining confidentiality in respect of their private information, the absence of detriment would not mean that there could not still be an actionable breach of confidence.
18. In previous decision notices<sup>2</sup> the Commissioner argued that:

*"The Commissioner considers that while disclosure would cause no positive harm to the confider, knowledge of the disclosure of the deceased's medical records could distress surviving relatives of the deceased. Knowledge that confidential information has been passed to those whom the confider would not willingly or otherwise failed to convey it may be sufficient detriment<sup>3</sup>. It follows then that in determining whether disclosure would constitute an actionable breach of confidence, it is not necessary to establish whether, as a matter of fact, the deceased person has a personal representative who would take action as the complainant argues."*
19. The Commissioner has considered these arguments in the context of this complaint and does accept that there is the potential for an actionable breach of confidence. The Commissioner recognises the Council has a

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<sup>1</sup> *Bluck v ICO & Epsom and St Helier University Hospital NHS Trust* [EA/2006/0090]

<sup>2</sup> FS50416397

<sup>3</sup> *EY v ICO & Medicines and Healthcare Products Regulatory Authority* [EA/2010/0055]

responsibility to take confidentiality seriously, particularly in relation to social care and medical records and as such it would be improper to disclose the information unless there is a public interest defence for a breach of confidence. In the Commissioner's view disclosure will not constitute an actionable breach of confidence if there is a public interest in disclosure which outweighs the public interest in keeping the information confidential.

20. The Commissioner recognises that the Courts have taken a view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly. As the decisions taken by courts have shown, very serious public interest matters must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct or illegality.
21. The complainant has indicated that disclosure of this information would allow for greater insight and understanding into the events of the date in question. However, the Council argues that this is a matter of personal interest rather than one which would serve the wider public interest should the information be disclosed.
22. The Commissioner acknowledges there may be some public interest in the disclosure of information which may show whether or not there was any wrong doing on the part of the individuals involved. However, the Commissioner considers this public interest to be limited as the information itself is quite succinct and is an account of the events of the date in question, not the formal findings of any investigation into what happened on that day.
23. The Council has argued that disclosure would undermine the principle of confidentiality which would not be in the public interest as it could discourage people from confiding in public authorities if they do not believe their confidence would be respected. The Council argues this is particularly true in relation to medical or social care records where the individuals may not want their details to be disclosed even to family members or friends. Service users need to have confidence that care staff will not disclose their information and social care staff provide reports and comments on visitations with individuals on a confidential basis to assess care needs. Undermining the confidentiality in this system would not be in the public interest as it may lead to a decrease in care standards.
24. In determining whether there is a public interest defence to an actionable breach of confidence, the Commissioner has taken into account the arguments presented by both sides and has also considered the inherent public interest in the preservation of the principle of

confidentiality. The Commissioner considers it important to protect the relationship between those who provide care services and the recipients of such services and there is an expectation by the public that these confidences will be upheld.

25. The Commissioner acknowledges the complainant's desire to obtain as much information as possible of the circumstances surrounding his relative's death. He also acknowledges the distress this will have caused to the complainant. However, he is not minded to accept that there are strong public interest arguments for the disclosure of this information and he does not consider that disclosure of this type of information to the world at large is the best manner in which to scrutinise the level of social care provided by the Council or any other public authority providing care services.
26. On this basis, and taking into account the strong public interest in preserving the principle of confidentiality, the Commissioner considers the Council would not have a public interest defence for breaching its duty of confidence. Therefore, the Commissioner finds that the information within the scope of the request is exempt under section 41 and the Council has correctly withheld it.
27. As the Commissioner has found the information to be exempt under section 41 he has not gone on to consider the application of section 40(2) to this information.

## Right of appeal

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28. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

29. 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.
30. 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 .....**

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