

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 June 2017

Public Authority: Lancashire County Council
Address: County Hall
Preston
Lancashire
PR1 8XJ

Decision (including any steps ordered)

1. The complainant has requested information from Lancashire County Council about the social care of a now deceased relative. The Commissioner's decision is that Lancashire County Council has correctly withheld the requested information under the exemption for information provided in confidence at section 41 of the FOIA. The Commissioner does not require any steps to be taken.

Request and response

2. On 20 July 2016, the complainant wrote to Lancashire County Council ('the council') and requested information in the following terms:

"Our relative [names individual] (deceased) was a resident of Woodlands, Warwick Avenue, Clayton-Le-Moors, Nr Accrington, Lancashire, a Lancashire County Council care home. He was a resident there for several months, prior to his death in April 1985. We are his only living relatives and also were his only living relatives in 1985. We understand that it was arranged for him to be put in the care home by an associate of the family.

We require details from Lancashire County Council regarding: 1) Name of the person who arranged for him to be put in the care home. 2) What legal means was used to do this."
3. The council responded on 21 July 2016 and refused to provide the requested information citing the exemption for personal data at section 40(2) of the FOIA, the exemption for information provided in confidence

at section 41(1) of the FOIA, and the exemption where disclosure would, or would be likely to, prejudice the effective conduct of public affairs at section 36(2)(c) of the FOIA.

4. On 16 September 2016, the complainant requested an internal review.
5. The council provided an internal review on 20 October 2016 maintaining its original position.

Scope of the case

6. The complainant wrote to the Commissioner on 5 January 2017 to complain about the way his request for information had been handled.
7. The Commissioner has considered whether the exemption at section 41(1) of the FOIA applies to the requested information.
8. As the Commissioner has decided that section 41(1) of the FOIA applies, she has not considered the application of section 40(2) or section 36(2)(c).

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 has stated that the information is the complainant's late relative'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 another person, she 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.
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, she 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 she 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.
23. 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, she is satisfied that an obligation of confidence is created by the very nature of the relationship.

Detriment to confider

24. 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 will now consider whether unauthorised disclosure could cause detriment to the deceased.
25. In many cases, it may be difficult to argue that disclosure of information would result in the confider suffering a detriment in terms of any tangible loss. As the complainant's relative is now deceased, the Commissioner does not consider that the disclosure would cause him any tangible loss but she 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 relative, 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.
26. 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

27. 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.
28. 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.

29. 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.
30. 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 she 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.
31. 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.
32. The Commissioner has considered the circumstances of this case. The complainant has stated that he had a legal right to be informed of the information at the time it took place and that it is a statutory requirement that three relatives should be informed. The Commissioner is not aware of the precise statutory requirement that the complainant refers to. And has informed the complainant that her jurisdiction only extends to consideration of rights under the FOIA.
33. 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 she also notes that if the complainant is pursuing a

claim, information may be accessible through court disclosure rules. The Commissioner highlights that the focus of a disclosure under the FOIA is to the public at large, not a restricted disclosure to individuals.

34. 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 the requested information is a matter that the Commissioner can sympathise with but it is nonetheless a personal need. The Commissioner therefore takes the view that the public interest in preserving the principle of confidentiality is stronger in the circumstances of this case and that there would be no public interest defence available if the council had disclosed the information.
35. As discussed above, the Commissioner's view is that a duty of confidence would be capable of surviving the complainant's relative'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. She does not consider that there would be a public interest defence in the circumstances. As such, she accepts that section 41(1) is engaged in this case.

Right of appeal

36. 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

37. 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.
38. 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

Deborah Clark
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