

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 10 January 2011

**Public Authority:** New Forest District Council  
**Address:** Appletree Court  
Beaulieu Road  
Lyndhurst  
Hampshire  
SO43 7PA

### Summary

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The complainant requested information relating to the investigation of an alleged benefit fraud. New Forest District Council released some of the requested information but withheld the remainder citing the exemption under section 41(1) of the Act on the grounds that it was information provided in confidence. The Commissioner finds that the exemption at section 41(1) was correctly applied in this case, and requires no steps to be taken.

### The Commissioner's Role

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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

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2. On 14 January 2010 the complainant made a request to New Forest District Council (the Council) for the following information:

*"I should like to see your file"* (relating to the reporting of an alleged benefit fraud).

3. On 18 January 2010 the Council responded to the complainant, providing some of the requested information. The Council advised that

it was withholding some information under section 41(1) of the Act on the grounds that it was information provided in confidence. The Council also advised that it was withholding the signature and National Insurance number of a deceased individual, although it did not cite an exemption under the Act in relation to this information.

4. On 20 January 2010 the complainant confirmed that she did not require the signature or National Insurance number of the deceased individual. However the complainant indicated that she still required the remainder of the withheld information.
5. On 29 January 2010 the Council responded to the complainant. The Council confirmed that an internal review had been carried out and that a decision had been taken to uphold the original decision of 18 January 2010.
6. On 31 January 2010 the complainant sent further correspondence to the Council. The Council responded on 8 February 2010 advising that its response to her request remained as at 29 January 2010.

## The Investigation

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### Scope of the case

7. On 23 February 2010 the complainant contacted the Commissioner to complain about the way her request had been handled. The complainant explained that she specifically required access to the *'information provided by a third party dated 15.11.01'* which had been withheld under section 41(1) of the Act.
8. During the course of the Commissioner's investigation the complainant sought to introduce a number of other issues. The complainant also advised the Commissioner that she required the withheld information in relation to legal proceedings that she had instigated. However the Act provides a means for information to be disclosed into the public domain, and a requester's motives for requesting information ought not to be a consideration. The Commissioner is required to make a decision as to whether a public authority has dealt with a particular request in accordance with the Act.
9. Accordingly the scope of the Commissioner's investigation was to determine whether or not the Council correctly applied the exemption at 41(1) to the withheld information. The withheld information in this case is third party information provided to the Council by two individuals in 2001. One of these individuals is now deceased.

## Chronology

10. On 25 May 2010 the Commissioner wrote to the Council requesting clarification on a number of matters in relation to how the request was handled and the application of exemptions.
11. The Commissioner also indicated that some of the requested information appeared to constitute personal information of the complainant and therefore should have been considered under the Data Protection Act 1998 (the DPA). This information would be exempt from disclosure under the Act by virtue of section 40(1) of the Act. In view of this the Commissioner also sought representations from the Council in this respect.
12. The Council responded to the Commissioner on 15 June 2010 addressing each of the points that had been raised. The Council advised the Commissioner that it did not hold any information to which the Commissioner had referred as the personal information of the complainant.
13. The Commissioner wrote to the Council on 17 June 2010 with a number of further enquiries. The Council responded to the Commissioner on 25 June 2010.

## Analysis

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### Exemptions

#### **Section 40(1) – Personal data of which the applicant is the data subject**

14. Section 40(1) provides that information is exempt from disclosure under the Act if it constitutes personal data of which the applicant is the data subject. This is because this information should be handled under the provisions of the DPA. Section 7 of the DPA gives individuals the right to request access to personal data held about them by a data controller. This is referred to as the right of subject access.
15. Although the Council did not apply this exemption to any of the information being withheld, the Commissioner considered that it was appropriate for him in his role as regulator of the DPA to consider its application in these circumstances.

16. Having inspected the withheld information, the Commissioner is satisfied that some of it is the complainant's personal data. He therefore considers that this information is exempt under section 40(1) of the Act. The Commissioner has written to the Council separately regarding consideration of this aspect of the request under the DPA.

### **Section 41(1)**

17. The Council claimed that all of the withheld information was exempt under section 41(1) of the Act. In light of the above, the Commissioner has considered this exemption in relation to the withheld information which does not fall under the exemption at section 40(1).
18. Section 41(1) 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. The exemption is absolute and therefore not qualified by the public interest test set out in section 2 of the Act.

### **Was the information obtained from another person?**

19. The withheld information in this case comprises information provided by two individuals. Therefore the Commissioner is satisfied that the information was obtained by the Council from another person. The Commissioner has therefore gone on to consider whether disclosure of this information would constitute an actionable breach of confidence.

### **Would the disclosure have constituted an actionable breach?**

20. In this particular case and for the purposes of section 41(1), the Commissioner considers that it is appropriate to adopt the test set out in *Coco v A N Clark (Engineers)* [1968] FSR 415 that a breach 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.
21. However, as the Information Tribunal noted in *Bluck v the Information Commissioner and Epsom and St Helier University NHS Trust* (EA/2006/0090), this statement of English law must now be read in the context of the European Convention on Human Rights which has direct effect in English law as a result of the Human Rights Act 1998 (the HRA).

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

22. Information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. 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.
23. The Commissioner notes that the withheld information in this case comprises information provided in relation to an investigation into alleged benefit fraud. Having inspected the withheld information the Commissioner is satisfied that it has the necessary quality of confidence as it is both personal and sensitive, and would not have been made generally accessible.

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

24. Even if information might otherwise 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 may be expressed explicitly or implicitly.
25. As noted above the withheld information was obtained during an investigation into alleged benefit fraud. The Commissioner accepts that there would be an expectation that any information provided in these circumstances would not be disclosed to third parties without the consent of the provider. In other words, he is satisfied that an obligation of confidence is created by the very nature of the relationship and the duty is therefore implicit.

**Detriment**

26. Having satisfied himself that the information provided by both parties had the quality of confidence and was imparted in circumstances giving rise to a duty of confidence, the Commissioner considered whether unauthorised disclosure of the requested information would cause detriment to the confiders.
27. It is often stated that for a disclosure to constitute a breach of confidence there has to be a detrimental impact on the confider. However this is not always the approach taken by the courts which sometimes find that detriment is not in fact a prerequisite of an actionable breach of confidence. Furthermore an invasion of an individual's privacy can be viewed as a detriment in its own right.
28. The Commissioner considers that disclosing the withheld information in this case would infringe the privacy and dignity of the living confider as

the disclosure would not only be to the complainant but to the general public. This is supported by the fact that in *Attorney General v Guardian Newspapers [1990] 1AC 109*, Lord Keith of Kinkel found that it would be a sufficient detriment to the confider if information given in confidence was disclosed to persons whom the confider, "...would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way".

29. In relation to the confider who is now deceased, the Commissioner is assisted by the Tribunal's comments in *Bluck*:

*"15. We have already set out extracts from the judgments in both Coco v Clark and AG v Guardian which questioned the requirement for detriment as an essential ingredient of the cause of action in all circumstances. In Ash v McKennitt the Court of Appeal, after explaining the role to be played by Article 8 in the English law of confidence (see paragraph 10 above), went on to apply the law to the facts of the case before it, which involved private information about an individual. It expressly approved the part of the decision of the Judge at first instance to the effect that relatively trivial information about the interior of the Claimant's home fell within the protection afforded by Article 8. It did not require any detriment to be established beyond the fact that there had been an invasion of the Claimant's privacy and home life. We believe that the principle to be drawn from this is that, if disclosure would be contrary to an individual's reasonable expectation of maintaining confidentiality in respect of his or her private information, then the absence of detriment in the sense apparently contemplated in the argument presented on behalf of the Appellant, is not a necessary ingredient of the cause of action."*

30. Although *Bluck* dealt with medical records, the Commissioner considers the Tribunal's comments relevant because the withheld information in this case relates to an investigation, and is therefore also sensitive and personal in nature.
31. In addition, as indicated above the Commissioner recognises that 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, as outlined in other case law, applies in this case.

## Who could bring an action for breach of confidence?

32. The Commissioner considers that the living individual in question could bring an action for breach of confidence, subject to the analysis below. In relation to the deceased individual, the Commissioner has taken the view, in line with the *Bluck* case, that a duty of confidence is capable of surviving the death of the confider. In the *Bluck* case, the appellant was seeking the disclosure of her daughter's medical record, but the daughter's next of kin, her widower who was 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) therefore continues to apply. The Commissioner's view is that this action would most likely take the form of an application for an injunction seeking to prevent the disclosure of the information.
33. In this case the living individual who provided information had power of attorney for the deceased person while they were alive. The Commissioner accepts that this individual or any other personal representative that may be appointed in the future could bring a claim against the Council for breach of confidence. Therefore the Commissioner considers that this part of the test for an actionable breach of confidence has been met.

## Duty of confidence and the public interest

34. The Commissioner also considered whether there would have been a public interest defence available if the Council had disclosed the information. As section 41(1) is an absolute exemption, there is no public interest test under section 2 of the Act. However, 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. 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.
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 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 respected.

36. In the circumstances of this particular case, the Commissioner considers it important that those assisting the Council with an investigation have confidence that any sensitive information provided by them or about them will not be disclosed to the public, even once they have died, as this may discourage individuals from making that information available. This would ultimately undermine the quality of investigations carried out by the Council and is therefore contrary to the public interest, as it could prejudice the effective functioning of the Council in this respect.
37. 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 he considers that it would be a sufficient detriment to the living confider to infringe his privacy and dignity.
38. The importance of a right to privacy is recognised by Article 8 of the HRA. 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.
39. The Commissioner has considered the circumstances of this case. The complainant has advised the Commissioner that she wishes to gain access to the withheld information to pursue a case through the courts and she explained some of her specific concerns. The Commissioner recognises that it is in the public interest to bring to light any wrongdoing on the part of public authorities and that it is in the public interest for individuals to access information to help them to conduct a legal case, be that against a public authority or any other person. However, the Commissioner notes that if such a claim was brought, information may be accessible through court disclosure rules.
40. 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 at this time indicating that there is any wider public interest in disclosing the information. The complainant's personal wishes are something the Commissioner can sympathise with but are nonetheless a personal need. He also considers that if the complainant wished to pursue any legal claim or complaint, she may have been able to do this or access relevant information through means other than by seeking public disclosure and these means may have been more proportionate in the circumstances.



41. He therefore takes the view that the public interest in preserving the principle of confidentiality is much stronger in the circumstances of this case and that there would therefore be no public interest defence available if the Council did disclose the information.
42. As discussed above, the Commissioner's view is that a duty of confidence would be capable of surviving the deceased's death and that the living individual or any other personal representative appointed in the future could pursue a claim for breach of confidence if the information was disclosed. The Commissioner is also satisfied that the information had 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 living confider. He does not consider that there would be a public interest defence in the circumstances. As such, the Commissioner finds that section 41(1) was engaged in this case.

## **The Decision**

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43. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

## **Steps Required**

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44. The Commissioner requires no steps to be taken.

## Right of Appeal

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45. 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](mailto:informationtribunal@tribunals.gsi.gov.uk).  
Website: [www.informationtribunal.gov.uk](http://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 served.

**Dated the 10<sup>th</sup> day of January 2011**

**Signed .....**

**Andrew White  
Group Manager**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## **Legal annex**

### Personal information

Section 40(1) provides 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.”

### Information provided in confidence

Section 41(1) provides that –

“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.”