

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 02 August 2012

**Public Authority:** Norfolk County Council  
**Address:** County Hall  
Martineau Lane  
Norwich  
Norfolk  
NR1 2DH

#### Decision (including any steps ordered)

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1. The complainant has requested from Norfolk County Council ('the council') the social care records of his late mother. The council relied on the exemption at section 41(1) of the Freedom of Information Act ('FOIA') that the information cannot be disclosed as it would constitute an actionable breach of confidence.
2. During the Commissioner's investigation, the council also relied on the exemption for personal data under section 40(2) for part of the requested information and the exemption where disclosure would prejudice the effective conduct of public affairs under section 36(2).
3. The Commissioner's decision is that the council correctly withheld the information using section 41(1) of the FOIA, apart from some information that represents the complainant's personal data which ought to have been considered separately in accordance with the rights of subject access provided by the Data Protection Act 1998 ('the DPA').
4. Procedurally, the Commissioner considers that the council handled the request poorly because it failed to deal with it in accordance with its obligations under the FOIA.
5. The Commissioner does not require any steps to be taken.
6. As the Commissioner has decided that section 41(1) of the FOIA applies, he has not considered the application of section 40(2) or section 36(2).

## Request and response

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7. On 3 August 2011 the complainant wrote to the council using its subject access request form and requested information in the following terms:

“What was N.C.C. Adult Social Care plan of action and responses to the above patient who at 92½ was under your care from the 3<sup>rd</sup> of October 2010 until the 9<sup>th</sup> of October 2010. Letter sent to [named individual] (Complaints Case Manager) on 4<sup>th</sup> July 2011. Attendance Notes and Rapid Response records required.”
8. The council wrote to the complainant on 24 August 2011 stating that as the request had been made under the DPA which only applies to living individuals, the request will be dealt with under the common law of confidentiality. It stated that it is bound to uphold the confidence of all its users and this confidence extends beyond death and therefore any information released to the complainant as next of kin is provided in confidence. The council informed the complainant that the file had been requested and the request would be processed as soon as possible.
9. On the 20 October 2011 the council wrote to the complainant stating that the file had been reviewed and discussed with the social worker and as the complainant's late mother had told the social worker she did not want her information to be shared with the complainant, the council has a duty of confidentiality which remains after death. Therefore, in view of the wishes expressed by the complainant's mother, the council is unable to provide the information.
10. The council received a letter requesting a review of this decision on 14 November 2011. It provided a response on 10 January 2012 in which it stated that the information was exempt under section 41 of the Freedom of Information Act 2000. It also stated that the information in question is of a personal nature and the council would not release this into the public domain.

## Scope of the case

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11. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
12. The Commissioner considers whether the exemption at section 41(1) of the FOIA applies to the requested information.
13. This decision notice does not consider information that the Commissioner has identified represents the personal data of the

complainant. Personal data such as this is exempt from the scope of the FOIA. The Commissioner has therefore requested that the council deal with the complainants personal data in accordance with his rights under the subject access provisions of the DPA.

## Reasons for decision

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### Section 41(1) Information Provided in Confidence

14. 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?**

15. 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.
16. The council have stated that the information is the complainant's late mother's social care record involving details of her mental and physical health during the final part of her life and is based on information provided by various people including NHS staff, Police, Medicom, home care agency staff, the complainant's late mothers herself and the complainant. The council stated that in considering this, it has had regard to the recent decision of the First Tier Tribunal in *William Thackeray v Information Commissioner (EA/2011/0043)* and considers that the scope of this exemption includes information created by the council on the file, but based on confidential information obtained from third parties. The Council has concluded this applies to the whole of the withheld information.
17. 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.
18. As the Commissioner accepts that the information within the scope of this case was obtained from the deceased, he has therefore gone on to consider whether the disclosure would constitute an actionable breach of confidence.

### **Actionable claim for breach of confidence**

19. 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.
20. In this case, the council has informed the Commissioner that the complainant is not his late mother's personal representative and that the complainant is in dispute with the executors of late mothers estate. Therefore, in releasing the information the council would be opening itself to action for breach of confidence by the complainant's late mother's personal representatives. The personal representatives have confirmed that they do not agree to this information being released.
21. As the Commissioner accepts that a duty of confidence is capable of surviving a person's death, he 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**

22. Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.
23. 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 he considered that the information was

of the same sensitivity and relevance to the deceased as his medical records.

24. 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.
25. 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 are not generally accessible and the council has confirmed that the requested information is not in the public domain.
26. 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**

27. 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. 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, he is satisfied that an obligation of confidence is created by the very nature of the relationship.
28. In addition, the council have stated that all service users are informed of their rights under the DPA and are asked to sign a form stating who they will allow information to be shared with. The council provided a copy of this form to demonstrate that the complainant's late mother did not expect her personal data to be disclosed to her son and stated that even without this form the public expect that their social care records will remain confidential and in its view the expectation of confidentiality is therefore both implicit and explicit.

### **Detriment to confider**

29. 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 considered whether unauthorised disclosure could cause detriment to the deceased.

30. 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. As the complainant's mother is now deceased, the Commissioner does not consider that the disclosure would cause her any tangible loss but he considers that the real consequence of disclosing the information would be an infringement of her privacy and dignity as the disclosure would not only be to the complainant, her son, 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.

### **Public interest defence**

31. 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.
32. 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.
33. 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.
34. 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 confider to infringe their privacy and dignity.

35. The complainant has alleged to the Commissioner that whilst under the care of the council's social services department his late mother was not fed or watered and was left by herself without 24 hour care. He also stated that the information would not be placed in the public domain unless the council had something to hide in which case it's conduct would be placed in the public domain via a criminal trial as a result of evidence uncovered about the condition of his late mother's body found during her post-mortem. He believes that release of the requested information under the FOIA would show that 'transparency and justice is seen to be done instead of a bureaucratic injustice which the media would enjoy even after Leveson'.
36. The Commissioner believes that the complainant's arguments are private arguments and does not consider them to be sufficient to outweigh the public interest in the protection of the confidentiality of social care records. He does not consider that the FOIA is the correct mechanism to investigate the complainant's allegations.
37. The council has stated that it appears that the complainant wants the information in order to contest his late mother's will and that this is a personal matter between him and the executors of the will and no public interest would be served in releasing the information into the public domain.
38. The Commissioner recognises that there is a public interest in allowing individual's access to information which may be of use in considering the pursuit of a legal claim. However, the Commissioner notes that if such a claim was brought in this case, information may be accessible through court disclosure rules. In any event, it would not be a proportionate way forward to make all the information available to the general public.
39. 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 this file is a matter that the Commissioner can sympathise with but it is nonetheless a personal need. He also considers that there are proper routes for the complainant to make his allegations and challenge the will. The Commissioner 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 be no public interest defence available if the council had disclosed the information.

40. As the Commissioner has decided that section 41(1) of the FOIA applies, he has not considered the application of section 40(2) or section 36(2).

### **Procedural issues**

41. The FOIA states that a request for information is any reference to a request which is in writing, states the name of the applicant and an address for correspondence, and describes the information requested. It also states that when a request for information is refused in reliance on an exemption, the public authority must state that fact, specify the exemption in question and explain why it applies if it would not otherwise be apparent within 20 working days of a request. That refusal should contain particulars of the right to appeal to the Commissioner and the public authority's internal review procedure, if there is one.
42. The Commissioner considers that the council dealt the request poorly because it failed to handle the request properly in accordance with its obligations under the FOIA. The Commissioner recommends that the council reviews guidance available on the Commissioner's website at [www.ico.gov.uk](http://www.ico.gov.uk) and ensures that it has adequate procedures and training in place to ensure that its staff can recognise and deal with requests for information appropriately.



## Right of appeal

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43. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

44. 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.
45. 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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