

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 June 2014

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

Decision (including any steps ordered)

1. The complainant has requested records held by the council relating to care provided to her mother at the home. The council applied section 41 to the information.
2. The Commissioner's decision is that Norfolk County Council has correctly applied section 41 in this instance.
3. The Commissioner does not require the authority to take any steps.

Request and response

4. On 8 October 2013 the complainant visited the council and dictated a request for information to a member of staff. The Commissioner does not hold a copy of the request however the council's later refusal notice stated that it was for access to information regarding her late mother". Subsequent correspondence clarifies that the request was for care records relating to her mother at a particular care home.
5. The council responded on 10 October 2013. It refused the request on the basis that section 41 was applicable.
6. Following an internal review the council wrote to the complainant on 6 January 2014. It upheld its original decision.
7. The Commissioner notes that a request is not a valid request under the Act where the request is not made in writing. In this case the complainant has said that she dictated her request to a council officer who wrote the request on a form during a conversation in County Hall. The Council then treated the complaint as a freedom of information complaint. The request for review was made in writing.
8. Neither party disputes these points, so the Commissioner is satisfied that the request was made in writing to the authority, although it appears that no record of that is now held. The council has treated the request as valid under the Act and the description of the events supports the evidence that a valid request was made.

Scope of the case

9. The complainant contacted the Commissioner on 27 January 2014 to complain about the way her request for information had been handled.
10. The Commissioner considers that the complaint is that the council refused to provide care records relating to the complainant's deceased mother to her.

Reasons for decision

11. Section 41 of FOIA states 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."*

Was the information received from another person

12. The Commissioner accepts that in the case of care records, the records do represent information obtained from another person for the purposes of section 41.

Is the information held in confidence

13. For the purposes of s41 the criteria for information to be held in confidence is taken from the case of *Coco v A.N.Clark (Engineers) Ltd* [1969] R.P.C. 41:
- i. the information has the necessary quality of confidence;
 - ii. the information was imparted in circumstances importing an obligation of confidence; and
 - iii. there was an unauthorised use of the information to the detriment of the confider (the element of detriment is not always necessary).
14. i) The Commissioner has considered whether the information had the necessary quality of confidence. The information in question is the care records of the deceased person. It concerns sensitive information regarding the medical and other care received from care services shortly before the individual's death. The information is therefore not trivial.
15. The complainant has not provided evidence that there has been a public inquiry or a court case which may have put some of the withheld information into the public domain. The Commissioner is not therefore aware that the information is otherwise in the public domain. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.
16. It is worth noting that even where such a disclosure had taken place the confidence would only be lost on the information which had been disclosed into the public domain, such as the cause of death. In such cases the authority concerned is likely to be able to rely upon section 21 (information already accessible to the applicant) to exempt the information from disclosure under the Act.

17. ii) The information was provided to the authority as part of the care provided to the individual. The Commissioner is satisfied that there would have been a clear expectation both parties that information received by the authority would be held under a duty of confidence by the authority. The Commissioner is satisfied that this is a general expectation where care is provided to an individual by a health or care service.
18. The Commissioner is therefore satisfied that the information has the necessary obligation of confidence.
19. iii) The third part of the test is whether a disclosure of the information would be an unauthorised use of the information to the detriment of the provider of the information.
20. In individual cases is it not always necessary to demonstrate that a detriment to the individual would occur. The courts have accepted that the loss of privacy which would occur if the confidential information is disclosed is a detriment in itself. It is not therefore always necessary to demonstrate detriment in cases involving personal confidences. In this case, due to the nature of the information the Commissioner is satisfied that a disclosure of the information would breach the general privacy under which a person's medical records are expected to be held. The detriment would be a loss of privacy.

Does confidence extend beyond a person's death?

21. In *Bluck v IC and Epsom & St Helier University Hospitals NHS Trust EA/2006/0090* the Tribunal confirmed that even though the person to whom the information relates may have died; action for a breach of confidence could be taken by the personal representative of that person, and that therefore the exemption continues to apply. The Tribunal stated that:

"In these circumstances we conclude that a duty of confidence is capable of surviving death of the confider and that in the circumstances of this case it does survive" (para 21)."

22. The death of the person concerned does not therefore dissipate the duty of confidence for cases relating to medical or social care records.

Would the breach of confidence be actionable

23. The complainant has said that there is no personal representative as there was none named, no will exists and there was no estate to administer. Although this is the case a disclosure of the information may still be considered to be actionable. The Commissioner's view is 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. Therefore if the information were to be disclosed in breach of confidence it would be actionable on this basis.

24. There are however a number of defences to a disclosure of confidential information.

Defences to a breach of confidence

25. There are established reasons why a breach of confidence will not always be actionable. The relevant reason to consider in this case is whether there would be a public interest defence to the disclosure which would prevent action being taken for the confidence being broken by the disclosure.
26. The duty of confidence public interest test assumes that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.

The public interest

The public interest in the duty of confidence being maintained

27. The Commissioner's view is that a duty of confidence should not be overridden lightly, particularly in the context of a duty of confidence owed to an individual.
28. The consequence of any disclosure of confidential information will be, to some degree, to undermine the principle of confidentiality which is really to do with the relationship of trust between confider and confidant. People would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected.
29. In the *Bluck* case the Tribunal quoted from *Attorney General v Guardian* "...as a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence..."
30. It is clear that in the case of sensitive medical or care details individuals may not wish details to be disclosed even to their direct family or friends. The issues may be sensitive and individuals may be dissuaded from providing information to the medical services which might

subsequently be disclosed, even after their death. This may clearly leave patients reduce the level of care they receive and ultimately leave some patients health at risk.

31. In *Bluck* the public authority's witnesses emphasised the need for patients to have confidence that doctors will not disclose sensitive medical data before they divulge full details of their medical history and lifestyle. Without that assurance patients may be deterred from seeking advice and without adequate information doctors cannot properly diagnose or treat patients (para 19). This is counter to the public interest as it could endanger the health of patients or, in the case of transmissible diseases, the wider community (para 26).
32. The interests of the complainant in accessing the information are purely personal rather than public interests. She wishes greater knowledge of the care provided to her mother. She had not been aware that her mother was receiving care and did not find out about her death until after her mother died. She has said to the Commissioner that she needs access to the information in order to grieve properly as she was not able to be there when her mother died. The Commissioner has sympathy with the complainant in this respect however neither he, nor the council, is able to make a decision to 'override' the duty of confidence on these grounds. The public interest does not generally equate to the personal interests of one person.

The public interest in the information being disclosed

33. The issue in this case also relates to the fact that, although the complainant is the next of kin, she is not the personal representative of her mother, and had no knowledge that her mother was in the care of the authority until after she had died.
34. Although the complainant is the next of kin and may have strong personal reasons for being able to access information relating to her mother's care these personal reasons do not equate to requests under the FOI Act. Disclosures under the Act are considered to be global and so sensitive information on the care provided to her mother would effectively be disclosed to the whole world. In the same way the council is unable to take into account the requestors personal interest in accessing the information when considering requests under the Act. It must consider it as if any member of the public were asking for that information as any disclosure it made would be considered to the whole world.
35. The council has explained to the complainant that she may have a personal right to access the information under the Access to Medical Health Records Act 1990 (the 'AHRA') if she can demonstrate to the

council that she is a personal representative of her mother. The complainant on the other hand has clarified that there is no personal representative, that there was now will and there was no estate to administer in this case.

36. The Commissioner cannot become involved in such discussions and cannot take this into account in his consideration of the application of section 41 by the council. In order for the complainant to access the information she requires it is for her to provide evidence to the effect that she should be able to access the information under the AHRA. This is not a matter for the Commissioner however he has advised her that she may wish to seek legal advice over this.

Conclusions

37. The Commissioner considers that the public interest arguments for the disclosure of the information are not particularly strong. As stated, the complainant may have strong personal reasons for wishing to access the information however these are not relevant to the consideration in this case.
38. Given this the Commissioner is satisfied that the public interest in the disclosure of the information would not override the public interest in the duty of confidence being maintained. The Commissioner therefore considers that the public interest would not act as a defence in the event that the information was disclosed in this case.
39. The Commissioner is therefore satisfied that the exemption in section 41 of the Act was applied correctly in this case.

Right of appeal

40. 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: GRC@hmcts.gsi.gov.uk

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

41. 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.
42. 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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