

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 December 2009

Public Authority: Coventry City Council
Address: Council House
Earl Street
Coventry
CV1 5RR

Summary

Coventry Law Centre ("CLC"), acting on behalf of the complainant, made an information request for copies of social services files relating to the complainant and her husband, who was deceased. The Council considered that the request for the complainant's file was a subject access request under the Data Protection Act 1998 ("the DPA") and it provided this information. However, it refused to provide any of the information held on the complainant's husband's file because it considered that this information was exempt under section 41(1) of the Freedom of Information Act 2000 ("the FOIA"). When the Commissioner began investigating, the Council also claimed that section 38(1)(a) was engaged in respect of all of the information and sections 30, 31 and 42(1) in respect of some of the information. The Commissioner found that a significant amount of the information was actually the complainant's personal data and was therefore exempt under section 40(1) of the FOIA. In respect of the remaining information, the Commissioner found that section 41(1) had been correctly applied. He also found that the Council had breached section 10(1), 17(1) and 17(1)(c). The Commissioner requires no steps to be taken.

The Commissioner's Role

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 FOIA. This Notice sets out his decision.

The Request

2. On 15 February 2007, CLC wrote to the Council and requested information in the following terms:

"We refer to the above and request sight of the Social Services files in relation to [name of complainant and her deceased husband]"
3. The Council replied to CLC on 22 February 2007 acknowledging receipt of a request for information under the DPA.
4. On 27 April 2007, the Council wrote again stating that it had enclosed the information that it was able to disclose under the DPA. It stated that it had redacted some of the information. It clarified that it was dealing with the request for sight of the files relating to the complainant's deceased husband separately as this request could not be considered under the DPA.
5. On 1 May 2007, CLC wrote to acknowledge receipt of the documentation relating to the complainant.
6. CLC wrote again on 20 June 2007 asking when it could expect to receive the complainant's husband's records as well.
7. The Council wrote to CLC on 19 June 2007 apologising for the delay. It stated that before it could continue to process the request, it needed to know why the complainant wanted to see the information and whether she wished to make a complaint.
8. CLC wrote to the Council on 29 June 2007. It explained why the complainant wished to access the information.
9. The Council replied on 9 July 2007 noting that previous correspondence had referred to a particular report. It asked to be provided with a copy of this report. It stated that it was still considering the request for information.
10. On 27 July 2007, CLC provided a copy of the report requested by the Council.
11. On 13 September 2007 the Council wrote to CLC noting that the complainant had indicated that she wished to pursue a claim and this was why she required the information. It stated that it had therefore asked its claim handlers to deal with the matter.
12. On 19 September 2007, the Council wrote to CLC again stating that the claim handlers had declined to become involved as no claim had been submitted. It stated that the request had therefore been passed back to the Council's Information Governance Team to deal with.

13. On 27 September 2007, CLC wrote to the Council complaining about the serious delay and expressing the view that it had become obvious that the Council had no intention of providing the information.
14. On 28 September 2007 the Council wrote to CLC and stated that it had now considered the request and was preparing the information for release.
15. On 8 October 2007, the Council's solicitor wrote to CLC stating that it would address the points raised in CLC's letter on 27 September 2007 shortly.
16. CLC replied on 11 December 2007. It asked to be provided with the information requested in view of the fact that the Council had previously said that it was preparing the information for release.
17. On 11 and 20 December 2007 the Council's solicitor wrote to CLC asking it to confirm that it was seeking access to the information under the FOIA.
18. On 29 December 2007 CLC wrote to the Council stating that it had understood that the Council was willing to provide the information.
19. The Council wrote to CLC on 23 January 2008 explaining that the request had been passed to the legal department for further consideration following its letter on 28 September 2007. It stated that it could not disclose the information requested under the FOIA because it was exempt under section 41(1).
20. On 4 March 2008 CLC wrote to request an internal review of the refusal to provide the information. CLC stated that the complainant was her husband's personal representative¹ and had administered his estate following his death. It stated that the Council could not maintain that disclosure would result in an actionable breach of confidence as the only person who could bring such a claim would be the complainant.
21. On 21 April 2008 the Council replied stating that an internal review panel was being assembled and it would be in touch in due course.
22. On 20 May 2008 the Council wrote to CLC stating that it required further time to consider the appeal.
23. The outcome of the internal review was sent to CLC on 8 July 2008. The Council maintained that section 41(1) had been correctly applied.

¹ For clarity the personal representative of the deceased is the person (or persons though no more than four) who is entitled to administer the deceased person's estate by virtue of a grant of probate or a letter of administration.

The Investigation

Scope of the case

24. On 10 September 2008, CLC contacted the Commissioner to complain about the way the request for information had been handled. It stated that it was acting on behalf of the complainant. It specifically asked the Commissioner to consider the following matters:
- Whether the Council had correctly relied upon the exemption under section 41(1) of the FOIA in the circumstances of this case.
 - The considerable length of time taken by the Council to consider the request.
 - Whether the Council's internal review procedure was sufficiently impartial as the same officers who refused the request were also involved in the internal review.

Chronology

25. On 25 September 2008, the Commissioner wrote to the Council advising it of the complaint and asking to be provided with a copy of the withheld information. It also wrote to CLC on the same day acknowledging receipt of the complaint.
26. The Council replied in a letter dated 26 September 2008 and stated that as the information was extensive, it would prefer to discuss the request with the allocated caseworker in due course.
27. On 14 August 2009, the Commissioner telephoned the Council to discuss whether there was any scope for informal resolution of the complaint. The Council agreed to consider this and contact the Commissioner again as soon as possible with its response. The Commissioner sent a letter to the Council on the same day following this conversation in which he set a deadline for the response.
28. On 17 August 2009, the Commissioner wrote to CLC to explain that the Commissioner was currently exploring whether there was any possibility of informal resolution of this complaint with the Council. It also asked CLC to explain to the complainant that any disclosure under the FOIA would be a public disclosure and he asked CLC to check with the complainant whether she would still wish to pursue disclosure under FOIA in view of this.
29. On 2 September 2009, CLC telephoned the Commissioner and confirmed that it had contacted the complainant and she had confirmed that she fully understood that any disclosure would be public and still wished to proceed.
30. On 11 September 2009, the date that the Commissioner had asked the Council to provide its response, the Council sent an email stating that it was considering the merits of the Commissioner's proposal and would keep the Commissioner informed of any developments.
31. The Commissioner replied to the Council on 11 September 2009 and pointed out that the Council had failed to meet the specific deadline it had been set and had

- not provided any explanation for this. The Commissioner set a new deadline and warned the Council of his powers to issue Information Notices under section 51 of the FOIA.
32. On 16 September 2009, the Council sent an email to the Commissioner stating that it was preparing the file but would appreciate a discussion with the Commissioner because it had some concerns about disclosure of the information.
 33. On 22 September 2009, the Commissioner discussed the case with two of the Council's officers over the telephone. The Council explained to the Commissioner why it was particularly concerned about the disclosure of the information. The Commissioner pointed out during this conversation that it appeared to him that some of the information was likely to represent the complainant's personal data. The conversation ended with the Council agreeing to provide the withheld information to the Commissioner for inspection. The Commissioner also wrote to the Council on 22 September 2009 setting out the information that was required.
 34. The Council wrote to the Commissioner on 2 October 2009 providing copies of the withheld information. This consisted of six social services files.
 35. On 12 October 2009, the Council wrote to the Commissioner confirming that it continued to believe that section 41(1) was engaged. It provided more rationale in support of its position and stated that it had not been provided with evidence that the complainant was the legally appointed personal representative. It stated that it considered that there was a risk that a subsequently appointed personal representative could take action against the Council for breach of confidence. The Council also stated that it wished to rely on additional exemptions under sections 30, 31, 38(1)(a), and 42(1). On the subject of whether any of the information constituted the complainant's personal data, the Council stated that it considered that the information about the complainant within her husband's files was "unstructured" and it then added that it considered that the information could not be disclosed under the DPA and provided rationale.
 36. On 14 October 2009, CLC telephoned for an update. The Commissioner explained that the Council had applied a number of additional exemptions which the Commissioner might need to consider. He also explained that the Council had asked for proof that the complainant was the legally appointed personal representative of her husband. He asked whether CLC would be able to obtain any such evidence. CLC agreed to look into this as soon as possible.
 37. On 29 October 2009, CLC telephoned the Commissioner explaining that its attempts to contact the complainant had been unsuccessful because she was currently in hospital due to ill health. CLC stated that it understood that the complainant's husband had died intestate but it was not sure whether the complainant was the legally appointed personal representative.
 38. On 28 October 2009, CLC wrote to the Commissioner stating that the complainant had informed it that she had been acting as her husband's personal representative.

39. On 5 November 2009, the Commissioner sent an email to CLC asking it to confirm clearly whether the complainant was the only personal representative of her husband and to provide any evidence that was available.
40. On 17 November 2009, CLC wrote to the Commissioner stating that it now understood that nobody had ever been appointed as personal representative in this case as this had not seemed necessary. CLC stated that it did not consider that this altered its position that section 41(1) was not engaged because it still maintained that there was nobody who could or would bring a claim for breach of confidence in the circumstances of this case. It stated that the complainant's family supported her "in her case against the authority" and that it could provide written confirmation of this if necessary.
41. On 20 November 2009, the Commissioner telephoned the Council to discuss its correspondence. The Commissioner said that he would like the Council to explain more clearly what information it considered was exempt under section 38(1)(a). The Council confirmed that it considered this exemption applied to all of the information and it explained why. The Commissioner also raised again the issue of the personal data about the complainant that was clearly part of the information being withheld. The Council stated that it did not consider that this was the complainant's personal data because it was contained within a file about her husband. The Commissioner explained that this was not the correct position to take although the Council did not appear to accept this.

Analysis

Exemptions

Section 40(1)

42. Section 40(1) provides that information is exempt from disclosure under the FOIA if it constitutes personal data of which the applicant is the data subject. This is because personal data of which the applicant is the data subject 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 public authorities. This is referred to as the right of subject access.
43. The Council did not apply this exemption to any of the information being withheld however the Commissioner considered that in these circumstances it was appropriate for him to consider its application.
44. When the Commissioner suggested to the Council that it was likely it was withholding the complainant's personal data, the Council appeared to acknowledge that the files contained information about the complainant although it referred to this information as "unstructured" in its letter to the Commissioner dated 12 October 2009. It then went on to cite reasons why the information could be withheld under the DPA. When the Commissioner questioned the Council

about this response, it stated that it did not accept that the information was the complainant's personal data because it was contained within her husband's file.

45. The above position taken by the Council is incorrect. Personal data is defined by the DPA as any information relating to a living and identifiable individual. It is incorrect to say that the information ceases to be the complainant's personal data because it is held in a file about her deceased husband. Having inspected the relevant files, the Commissioner was satisfied that a significant amount of the information being withheld is the complainant's personal data although not all of it. He therefore considers that this information was exempt under section 40(1) of the FOIA.

Section 41(1) – Information obtained in confidence

46. As stated above, not all of the information being withheld in the files represented the complainant's personal data. The Commissioner has therefore considered whether this information was exempt under section 41(1) of the FOIA,
47. 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 FOIA.

Was the information obtained from another person?

48. 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.
49. 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. As the Commissioner accepts that the information in the files was obtained from the deceased, he has therefore gone on to consider whether the disclosure would constitute an actionable breach of confidence.

Would the disclosure have constituted an actionable breach?

50. 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, but 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) 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. It should be noted however that there is no relevant case law to support this position.

51. CLC has advised the Commissioner that it understands that nobody was ever appointed to act as the personal representative for the deceased because it was not considered necessary as he died intestate with little possessions. However, the Commissioner has taken the 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. Even if there was not a personal representative appointed at the time of the request, there is always the potential for one to be appointed in the future and for the breach to therefore become actionable. As the Commissioner accepts that if there was a duty of confidence, it would be capable of surviving the confider's death, he has gone on to consider the test set out in *Coco v A N Clark (Engineers) [1968] FSR 415* concerning an actionable breach of confidence.
52. 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
53. 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. Information which was important to the confider cannot be considered to be trivial. The Commissioner is satisfied that social services records have the necessary quality of confidence required to sustain an action for breach of confidence as they are clearly very personal and sensitive and for obvious reasons, would not have been made generally accessible.
54. Further, 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 the consideration of Article 8 which provides for a right to privacy. In relation to the triviality of information, the High Court found at paragraph 33 that:

"It is beyond question that some information, especially information in the context of personal matters, may be treated as private, even though it is quite trivial in nature and not such as to have about it any inherent 'quality of confidence'".

55. 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. When a social services client is under the care of professionals, the Commissioner accepts that they would expect that the information produced about their care 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 and the duty is therefore implicit. To further support this, the Council stated that the deceased had explicitly asked that the information he gave to carers was not disclosed to anybody else.
56. Having satisfied himself that the information had the quality of confidence and was imparted in circumstances giving rise to a duty of confidence, the Commissioner considered whether unauthorised disclosure would cause detriment to the deceased. In many cases, it may be difficult to argue that disclosure of confidential information would result in the confider suffering a detriment in terms of any tangible loss. As the complainant's husband is now deceased, the Commissioner does not consider that the disclosure would cause him any tangible loss but he considers that the real consequence of disclosing the information would be that it would be an infringement of his privacy and dignity as the disclosure would not only be to the complainant, his wife, 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".
57. Further to the above, 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.
58. 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 FOIA. 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.
59. 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.

60. 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 some from making that 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.
61. 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. As already noted, the importance of a right to privacy is recognised by Article 8 of the HRA.
62. 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.
63. The Commissioner has considered the circumstances of this case. It seems from the correspondence that the complainant has been unhappy with the care provided by the Council to her husband. The correspondence suggests that the complainant wishes to acquire a copy of her husband's file to help her to consider whether to pursue a claim against the authority and to consider the outcome of a complaint she made which was investigated by the General Manager of Older People's Services. CLC has explained that the complainant did not accept the outcome of this complaint. 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 he also notes that if the complainant did pursue such a claim, information may be accessible through court disclosure rules. He also notes that it is likely that the complaint could be reviewed by other independent bodies with the jurisdiction to consider such issues.
64. In light of the above circumstances, although the Commissioner can appreciate why the information would be of particular interest to the complainant, there is no evidence available to the Commissioner indicating that there is any wider public interest in disclosing the information. He also considers that the complainant could have pursued her interest in this matter through means other than by seeking public disclosure and that these means may have been more proportionate in the circumstances. 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 had disclosed the information.

Was the information exempt under section 41(1)?

65. As discussed above, the Commissioner's view is that a duty of confidence would be capable of surviving the complainant's husband's death even though it appears that there may not have been any personal representative appointed to manage his affairs. This is because there is always the possibility that a personal representative could be appointed following the disclosure and could take action against the Council for a breach of confidence. The Commissioner was 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 confider. He did not consider that there would be a public interest defence in the circumstances. As such, he accepts that section 41(1) was engaged in this case.

Procedural Requirements

66. The Commissioner notes that the Council failed to confirm or deny whether the information was held within 20 working days in accordance with its obligations under section 1(1)(a). It therefore breached section 10(1) of the FOIA.
67. The complainant requested information on 15 February 2007 but it was not until 23 January 2008 that the Council stated that it was refusing the request under section 41(1) of the FOIA. The Commissioner therefore considers that as the Council failed to issue a refusal notice within 20 working days or by the date of its internal review, it breached section 17(1).
68. The Commissioner also considered that the Council's refusal notice was deficient because it did not properly explain why the exemption was engaged. The Council simply stated that "social services records are confidential". The Commissioner therefore considers that the Council breached section 17(1) for failing to explain why the exemption was engaged within 20 working days of the request. The Commissioner noted that the Council's internal review did provide more explanation about the refusal but it still did not explain in sufficient detail why disclosure would have resulted in an actionable breach. It therefore breached section 17(1)(c) for failing to explain fully the reasons for the refusal by the date of its internal review.
69. During the Commissioner's investigation, the Council sought to rely on a number of additional exemptions that were not claimed in its initial refusal or internal review. This represented a breach of section 17(1) as these should have been claimed within 20 working days of the request and at the very latest by the date of the internal review.

The Decision

70. The Commissioner's decision is that:

- Although the exemption under section 40(1) of the FOIA was not applied by the Council, the Commissioner considers that this exemption was engaged in respect of information in the files which constituted the complainant's own personal data.
- The Council correctly applied section 41(1) to withhold the information requested that did not constitute the complainant's personal data.

71. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the FOIA:

- The Council breached section 10(1) for failing to confirm or deny whether it held the information in accordance with its obligations under section 1(1)(a) within 20 working days of the request.
- The Council breached section 17(1) for failing to cite the exemption under section 41(1) within 20 working days or by the date of its internal review.
- It breached section 17(1) for failing to explain fully why the exemption under section 41(1) was engaged within 20 working days and section 17(1)(c) because this still had not been properly explained by the date of the internal review.
- It breached section 17(1) for seeking to rely on a number of additional exemptions during the Commissioner's investigation.

Steps Required

72. The Commissioner requires no steps to be taken.

Other matters

73. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.

Request handling

74. Paragraph 14 of the introduction to the FOIA section 45 Code of Practice ("the Code") states:

"All communications in writing to a public authority, including those transmitted by electronic means, may contain or amount to requests for information within the meaning of the Act, and so must be dealt with in accordance with the provisions of the Act. While in many cases such requests will be dealt with in the course of normal business, it is essential that public authorities dealing with correspondence, or which otherwise may be required to provide information, have

in place procedures for taking decisions at appropriate levels, and ensure that sufficient staff are familiar with the requirements of the Act and Codes of Practice issued under its provisions. Staff dealing with correspondence should also take account of any relevant guidance on good practice issued by the Commissioner. Authorities should ensure that proper training is provided in this regard. Larger authorities should ensure that they have a central core of staff with particular expertise in Freedom of Information who can provide expert advice to other members of staff as needed”.

75. In this instance, the Council repeatedly failed to decide which access regime applied to the request. Even when it appeared to decide that the FOIA was the appropriate regime, the refusal notice was deficient, failing to explain why the exemption was engaged. We would draw the Council’s attention to the Commissioner’s guidance which sets out good practice in relation to the issuing of refusal notices which is available on the Commissioner’s website at www.ico.gov.uk.
76. The Council’s refusal notice was issued on 23 January 2008, some 232 working days after the request was made. This represented an excessive and unacceptable delay. Its responses prior to this demonstrated repeated failures to provide a proper response, despite continuous promptings from the complainant. It appears that the prevarications were a result of the Council’s failure to understand its obligations, indicating that staff members have not been given adequate training.
77. The Commissioner also noted that during the Commissioner’s investigation, the Council sought to rely on a number of additional exemptions under the FOIA. This may suggest that the request was not afforded appropriate consideration before the complaint to the Commissioner.
78. We would expect that, in its future handling of requests, the Council will ensure that it provides appropriate responses within the timescales set by the FOIA.

Internal reviews

79. In relation to internal reviews, paragraph 40 of the Code states:

“Where the complaint concerns a request for information under the general rights of access, the review should be undertaken by someone senior to the person who took the original decision, where this is reasonably practicable. The public authority should in any event undertake a full re-evaluation of the case, taking into account the matters raised by the investigation of the complaint”.

80. Paragraph 45 states:

“Where the outcome of a complaint is that the procedures within an authority have not been properly followed by the authority’s staff, the authority should apologise to the applicant. The authority should also take appropriate steps to prevent similar errors occurring in the future”.

81. The Commissioner's guidance available on the website sets 20 working days as a standard target for completion of internal reviews.
82. In this instance, the internal review was requested on 4 March 2008. The Council's internal review response was issued 86 working days after the complainant's complaint (on 8 July 2008). The review itself does not demonstrate that the issues were properly reconsidered and does not appear to reflect the amount of time taken. The review also fails to acknowledge or apologise for the long delays in the Council's handling of the request. In these respects, the review did not conform to the Code.
83. We expect that in future internal reviews, the Council will observe the recommendations set within the Code and in the Commissioner's own guidance.
84. The issues set out above have been logged by the Commissioner's Enforcement Team. If Enforcement receive further evidence of these or other practice issues, further action might be necessary.
85. The Commissioner also notes that CLC expressed concerns to the Commissioner about the involvement of the original request handler(s) in the review panel. As noted above, the Code recommends that reviews should be undertaken by someone more senior than the original request handler. In this instance the review panel was chaired by (and the review decision was issued by) a more senior officer so, in this respect it did conform to the Code.

The complainant's personal data

86. Section 7 of the DPA gives an individual the right to request copies of personal data held about them. This is referred to as the right of Subject Access. The Commissioner notes that some of the information in the social services files should have been dealt with as a subject access request under section 7 of the DPA from the outset and he would encourage public authorities to consider requests under the correct access regime at first instance.
87. The Commissioner will now go on to consider whether or not to make an assessment under section 42 of the DPA. However, this consideration will be dealt with separately and will not form part of this Decision Notice, because any assessment under section 42 of the DPA that might take place would be a separate legal process from the consideration of a complaint under section 50 of the FOIA.

Right of Appeal

88. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: 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 21st day of December 2009

Signed

**David Smith
Deputy Commissioner**

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

Legal Annex

General Right of Access

Section 1(1) provides that –

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

The public Interest Test

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Refusal of Request

Section 17(1) provides that –

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Investigations and proceedings conducted by public authorities

Section 30(1) provides that –

“Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

- (a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-
 - (i) whether a person should be charged with an offence, or
 - (ii) whether a person charged with an offence is guilty of it,
- (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or
- (c) any criminal proceedings which the authority has power to conduct.”

Section 30(2) provides that –

“Information held by a public authority is exempt information if-

- (a) it was obtained or recorded by the authority for the purposes of its functions relating to-
 - (i) investigations falling within subsection (1)(a) or (b),
 - (ii) criminal proceedings which the authority has power to conduct,
 - (iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or
 - (iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and
- (b) it relates to the obtaining of information from confidential sources.”

Law enforcement

Section 31(1) provides that –

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,

- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment."

Health and safety

Section 38(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to-

- (a) endanger the physical or mental health of any individual, or
- (b) endanger the safety of any individual.”

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.”

Legal Professional Privilege

Section 42(1) provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”