

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 27 October 2009**

**Public Authority:** Lancashire County Council  
**Address:** PO Box 100  
County Hall  
Preston  
PR1 0LD

### Summary

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The complainant requested care records relating to her deceased relative. The public authority responded that it did not hold the requested information as it had been lost. The complainant asked the Commissioner to consider whether the records were held. The Commissioner has determined that on the balance of probabilities the information is no longer held by the public authority. However, he did find a procedural breach of section 10(1). He does not require any remedial steps to be taken in this case.

### 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.

### Background

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2. The complainant has been in correspondence with the public authority for a number of years seeking access to the requested information and asking for explanations about why it is no longer held. The original request for records that the complainant referred to the Commissioner predated the Act. When this was explained to the complainant she made a new request for these records on 9 June 2009. The Commissioner has used his discretion to investigate the case without an internal review being conducted given the history between the parties. The key correspondence relating to the request made by the complainant on 9 June 2009 and the Commissioner's subsequent investigation is set out in the Chronology section of this Notice.

3. The Local Government Ombudsman has investigated complaints regarding the missing files. It found that the Council had lost the files and that this constituted maladministration. The Council donated £250 to a charity as compensation and informed the complainant that it was moving to introduce electronic records in order to prevent similar losses from happening in the future.

## The Request

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4. On 9 June 2009 the complainant requested the following information:

*'I have not been provided with the information in [named Individual A's] care files for 1995-1997.*

*The purpose of this letter is to make the new request for the information. If the response is likely to be the same you provided for Greg Pope (MP), I must also ask the Council to conduct a new internal review and send the internal review response to me.'*

5. On 5 August 2009 the public authority provided a response explaining that, as the complainant was aware, the information was in missing files and that it had still not been located. It also explained that given the circumstances of the case it did not consider it necessary to carry out an internal review.

## The Investigation

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### Scope of the case

6. On 11 August 2009 the complainant contacted the Commissioner to confirm that she wanted to complain about the way her request for information had been handled.
7. On 14 September 2009, the Commissioner wrote to the complainant to explain that his investigation and decision would focus on the request dated 9 June 2009. He has established that the information sought by the complainant in fact relates to her relative's care at one particular location (referred to below as **[residential home B]**) from mid 1996 to June 1997. The Commissioner has therefore confined his investigation and decision to whether, on a balance of probabilities those files were held by the public authority at the date of the request.
8. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act. In particular the Commissioner does not have the remit to investigate issues about whether fees connected with the complainant's relative's care have been illegally charged or to determine the consequences of the records being missing. He also cannot discuss the care received by **[named Individual A]**.

## Chronology

9. The complainant contacted the Commissioner on 23 June 2009 to notify him that no response had been provided by the public authority to her request of 9 June 2009. The Commissioner responded on 25 June 2009 to confirm that public authorities have 20 working days to respond to a request. He asked the complainant to contact him again if she did not receive a response within that time
10. On 11 August 2009 the complainant forwarded the response she had received from the public authority to the Commissioner. She said that her complaint was about the lost records.
11. On 14 August 2009 the Commissioner responded to the complainant and set out the scope of his investigation. He asked for the complainant to confirm she was content with the scope of his investigation.
12. On 19 August 2009 the Commissioner wrote to the public authority and asked it to respond to ten detailed enquiries. These enquiries were focussed on the legal requirements, nature of searches, records management policies and to confirm the public authority's position in this case.
13. On 31 August 2009 the complainant confirmed to the Commissioner that she was content with the scope of his investigation.
14. The public authority provided a response to the Commissioner's enquiries on 17 September 2009. The Commissioner understands the public authority's position is that it no longer holds the requested information. The enquiries and the responses received are discussed in the Analysis section of this Notice below.
15. The Commissioner understands that the complainant also made requests for the same information to a Primary Healthcare Trust because it was possible that the missing files had been transferred to it. On 14 September 2009 the complainant wrote to the Commissioner to inform him that the information was not held by that Primary Healthcare Trust. She commented that she believed there was no sustainable account for what happened to the relevant information.

## Findings of fact

16. The Commissioner has established the following facts when considering this case:

**[Named Individual A]** died in 2004.

The missing files are those that relate to the deceased's care between 1996 and 1997.

**[Named Individual A]** began this period in **[residential home A]**. She was then transferred to **[residential home B]** in mid 1996 and then to **[named Hospital]** in June 1997. She was then discharged from there to

**[named care unit]** in July 1997. The Commissioner has used this information to inform his questions about the searches that have been conducted and where relevant information may have been held.

## Analysis

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### Substantive Procedural Matters

#### Section 1(1)(a)

17. The Commissioner asked the public authority to clarify the nature of the records sought by the complainant. He was told that records for the period 1996 to 1997 would be paper files and they would include the following detail:

*'Personal File which would include –*

*Contact Details.*

*Wishes at Death.*

*Social Worker Assessments*

*Terms and Conditions of Residence.*

*Service Level Agreements.*

*Any signed Disclaimers*

*Medical Information.*

*Any correspondence re resident.*

*Financial Information*

*Confidential Information re GP Visits of other professionals.*

*Completed Daily Diary Sheets.*

**Care Plan** which would include:

*Residents Details*

*Plan of Care*

*Care Plan Agreement*

*Bathing Records*

*Weight Records.*

*Risk Assessments*

*Any Assessments carried out at the home.*

**Other records**

*Saving Records Fin 85 Residential Savings (if resident has savings)*

*Daily Diary Sheets – when full these are transferred to the resident's personal file.'*

18. The Commissioner understands that there are two types of care files, primary and secondary. Primary files contain key information regarding an individual's care. When an individual moves between facilities, including residential care homes and hospitals, the primary file is transferred with them to facilitate their care.
19. Secondary files are those maintained by the home or facility providing the care. The Commissioner understands that the care files requested by the complainant constitute secondary files. It is also relevant to clarify that the public authority has

not denied ever holding the requested files. It accepts that the files were created and held between 1996 and 1997. The issue is that the records can no longer be located and in the public authority's view, on a balance of probabilities they are no longer held.

**Was relevant recorded information held by the public authority at the date of the request for information?**

20. An important initial point to make is that the Commissioner is limited to considering whether or not recorded information existed at the time of the request for information. The date of the request in this case was 9 June 2009.
21. When investigating cases such as this one, which involve a disagreement as to whether or not information is in fact held by a public authority, the Commissioner has been guided by the approach adopted by the Information Tribunal in the case of *Linda Bromley & Others and Information Commissioner v Environment Agency (EA/2006/0072)*. In that case the Tribunal indicated that the test for establishing whether information was held by a public authority was not one of certainty, but rather the balance of probabilities.
22. In order to reach a decision in this case the Commissioner has considered the following:
  - What, if any, legal obligations the public authority was under to hold the requested information?
  - Whether the public authority's records management policies require it to hold the requested information?
  - What searches the public authority has carried out to locate the requested information?

*What, if any, legal obligation was the public authority under to hold the requested information?*

23. The public authority explained that, until 2001, there was no specific legal requirement for Local Authority Social Services Departments to hold the type of information found in secondary files about care users for a specified time period once care services at a particular facility had ceased.
24. The Residential Care Homes Regulations 2001, which came into force on 1 April 2002 (when the Care Standards Act 2000 was enacted), imposed an obligation to keep secondary care records for not less than three years from the date of last entry. As the Regulations did not come into force until 1 April 2002 they did not apply to the information sought by the complainant which pertains to the period 1996 to 1997.
25. The public authority also provided information about the statutory requirements and regulatory environment in which it was operating between 1996-1997. It specifically referred to the following:

National Assistance Act 1948 (which imposes a duty of local authorities to provide residential accommodation for elderly persons in need of care and attention).

Local Authority Social Services Act 1970 (which establishes Social Services).

Registered Home Act 1984 and Registered Home Act Regulations 1984.

Department of Health (1995) NHS Responsibilities for Meeting Continuing Health Care Needs HSG (95)5, February 1995.

Regulation of Residential Care Homes, LAC (95) 12.

NHS and Community Care Act 1990.

Community Care (Residential Accommodation) Act 1992.

26. The Commissioner has considered the legislation above and can find no evidence to suggest that it imposed any obligation on care homes to retain secondary files after services had ceased. He therefore accepts that there was no legal obligation on the public authority to retain the records about the complainant's relative when she ceased to receive services from **[residential home B]** in 1997.

*Did the public authority's records management policies require it to hold the records?*

27. The public authority has explained that, although it was not legally required to retain information of the nature requested until the aforementioned Regulations came into effect in 2002, it nevertheless applied its own records management policies from the date the requested information was created, in line with best practice and business need.
28. In order to reach a view in relation to this factor it is necessary to consider the records management policies that applied in 1996 when the records were created as well as subsequent policies adopted by the public authority which may have resulted in the information being destroyed.
29. The Commissioner understands that the requested files were secondary files that were recorded and maintained by **[residential home B]** where the complainant's relative resided between 1996 and 1997.
30. The public authority confirmed that it has had records management policies and procedures since the 1980s. However there has not been a single overarching policy in operation since 1995 due to amendments that have been required as a result of the changing regulatory environment.
31. The Commissioner understands that in 1997 the complainant's relative left **[residential home B]** and the requested files became closed service user records. They may have been retained by the relevant care home though there

- was no formal requirement for it to do so. It is therefore possible that they were destroyed once the complainant's relative left **[residential home B]**.
32. The public authority explained that it established a Records Management Service (RMS) in 1983. The Social Services Department began to use RMS in 1993 for records it was required to keep by law for extended periods. However this did not include records of the nature requested by the complainant.
  33. The first specific policy related to the retention of closed service user records was introduced in March 1999. This was entitled the '*Policy and Procedures for the Retention And Destruction of Service User Records*' and was produced for the Social Services Directorate. This specified that there was a three year retention period from the death of a service user, or five years from loss of contact, whichever was earlier. The Council explained that this would have applied retrospectively to both manual records within District Offices and electronic data within the Integrated Social Services Information System (ISSIS). Therefore assuming that the files related to **[residential home B]** were retained when the complainant's relative left that facility and were still in existence in 1999 the policy would have been applied to those records. The complainant's relative did not pass away until 2004 and therefore the loss of contact criteria would have applied to the requested records. Given that the complainant's relative left **[residential home B]** in June 1997 the records management policy required the files to be retained until June 2002 at which point they could have been destroyed.
  34. However, the Commissioner is aware that other records relating to the complainant's relative for **[named care facility]** and also dating from 1997 have been supplied to the complainant since she first raised concerns with the public authority in 2003. This suggests that not all records from 1997 were in fact destroyed according to the 1999 policy. If this were the case the **[named care facility]** records would have been destroyed in 2002 but in fact they were still available in 2003. It is possible that some records may have been managed more closely in accordance with records management policies than others.
  35. However given that some records from 1997 were retained the Commissioner has considered the records management policies that would have applied after 2002.
  36. The public authority explained that administrative and financial records for residential and non-residential adult service users were first transferred to the RMS in 2002. By 2004 all District Offices were transferring closed service user files into the system. The Commissioner considers that it is unlikely that the files requested by the complainant were ever transferred to the RMS. However if they had been it is likely that this transfer would have occurred by the time the complainant made the request in 2009. Furthermore if the files had been received a record logging their entry would have been available. The public authority explained that of out of 66,639 deceased service user files transferred to the RMS to date, only 38 had closure dates earlier than the end of 1997 (0.057%). This suggests that most information in files from that period has in fact been destroyed.

37. Finally the public authority explained that it subsequently introduced new records management policies in May 2003 that specified a retention period of 3 years from date of death or cessation of service. If the requested files had still existed in 2003 when the new policy was introduced they would probably have been destroyed once they were located because the complainant's relative left **[residential home B]** in 1997, i.e. over 3 years previously.
38. At the date of the request under consideration the complainant's relative had been deceased for 5 years. According to the records management policy applicable at the date of her death in 2004 service user records were to be retained for 3 years. Therefore if any 1997 files were still held at that point and if the public authority decided to retain them for a 3 year period post the relative's death, instead of from the date of cessation of service, they still would have been due for destruction in 2007 according to the policy.
39. However the Commissioner is aware that as a result of the complainant's concerns originally raised in 2003, the public authority suspended the destruction period until 2010. It also placed a flag on its records management system to ask staff to contact the access to information team if the files were located. The Commissioner understands that to date the files have not been found.
40. In view of all of the above, the Commissioner considers it likely that the files requested by the complainant were destroyed in line with policies introduced in 1999 and prior to her raising concerns with the public authority in 2003. If the files still existed and had been transferred to the RMS there would have been a record of receipt.
41. The Commissioner has considered the complainant's submissions that she had been told that the retention period was twelve years and finds that she has been told this erroneously. He has reviewed the records management policies supplied by the public authority and can see no evidence to support this assertion.

*What searches have been conducted to locate the requested information?*

42. In cases like this one, where a public authority accepts that it did hold information at one point but at the time of the request it is no longer able to locate it and in all likelihood it has been destroyed, the veracity of the searches it has conducted are an important factor. The Commissioner asked the public authority to detail the searches that it had carried out when determining that it could not find the missing records. The public authority provided details which included information about the searches conducted in relation to earlier requests for the same information. Whilst the public authority did not consider it likely that the information would be held in its electronic records management systems due to its age, it nevertheless carried out searches of those systems as detailed below.
43. The public authority firstly checked in its Records Management Service (RMS). Closed service user records are held by the RMS, which provides secure off-site record storage and retrieval facilities. It now contains 54,000 boxes of records and 950,000 record entries relating to millions of physical and electronic records tracked and audited within it. As explained above RMS was set up in 1983 and the Social Services Department began to use RMS in 1993 for records it was



required to keep by law for extended periods. It started to place administrative and financial records when it became a requirement to do so in 2002. This was connected to its database that is called ISSIS (Integrated Social Services Information System). It stated that if the file had been put on the system then it would be possible to audit it through the authority's Corporate Electronic Records Management System (CERMS).

44. The public authority explained that searches by name (including 'wildcard' terms and spelling variations, etc.), by date of birth, by file dates and across all relevant record types, initially within a computerised database controlling the authority's closed physical records and since 2007 using the CERMS. It provided the Commissioner with screenshots of those searches which contain no evidence that the information is held.
45. The public authority also checked the local Social Services office (Rossendale). It contacted the Office Manager of every single district Social Service offices in the area and asked them to search their premises (in case the file was accidentally transferred within the area). It has also checked Social Services HQ at East Cliff, Preston and prior to its closure in September 2005 [**residential home B**] was searched several times. These were extensive searches that covered all areas of the building including the boiler house and the roof space. It also checked the other places where [**Named Individual A**] had been resident too, noted in the finding of fact section above.
46. The public authority also searched all the manual records from closed care homes that were temporarily held in a storage area before being transferred to the RMS. All the searches above returned nothing.
47. The Commissioner has enquired about whether a retention and disposal schedule had been kept for these records. Considering the detail above and the fact the records have never been on the CERMS, he is content that there is no such schedule held in this instance. It therefore cannot be proved that the records are destroyed.
48. The Commissioner also notes that the investigation of the Local Government Ombudsman found that the missing records had been lost.
49. As noted above, the public authority has suspended the scheduled destruction period for the requested information and placed a flag to staff to alert its access to information team in the event the files are located. Given the extensive searches that have been conducted and the mechanism that have been put in place to alert the access to information team if the files are located the Commissioner considers that if the requested information were held it would have been found and the relevant team notified.
50. Having regard to the answers above and the steps the public authority has informed him it has taken, the Commissioner believes that on the balance of probabilities the information requested by the complainant was not held by the public authority in June 2009. In reaching this conclusion he particularly notes the extensive searches that have been conducted by the public authority and the fact

that there was no legal requirement for **[residential home B]** to retain the information in 1997.

### **Procedural Matters**

51. Section 10(1) requires public authorities to comply with section 1(1)(a) within twenty working days. In this case the public authority took more than twenty working days to inform the complainant that it did not hold the requested information and therefore the Commissioner has found a breach of section 10(1).

### **The Decision**

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52. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

It correctly determined that on the balance of probabilities it did not hold the missing records. It has therefore complied with section 1(1)(a).

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

The public authority failed to respond to the request for information within twenty working days and therefore breached section 10(1).

### **Steps Required**

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54. The Commissioner requires no steps to be taken.

## Right of Appeal

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55. 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](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 27<sup>th</sup> day of October 2009**

**Signed .....**

**Jo Pedder  
Senior FOI Policy Manager**

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

## Legal Annex

### The Freedom of Information Act 2000

#### Section 1 - General right of access to information held by public authorities

(1) 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.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

(3) Where a public authority—

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

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#### Section 10 - Time for compliance with request

(1) 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.

(2) Where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

(3) If, and to the extent that—

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.