

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 23 July 2014

**Public Authority:** Wrexham County Council  
**Address:** The Guildhall  
Wrexham  
LL11 1AY

#### Decision (including any steps ordered)

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1. The complainant has requested various items of information in respect of POVA (Protection of Vulnerable Adults) strategy meetings concerning his late father. Wrexham County Council ('the Council') refused the request on the basis of section 31(1)(g) and section 41(1) of the FOIA. The complainant was not satisfied with the Council's reliance on the exemptions or that it had provided all information falling within the scope of his request. The Commissioner's decision is that the Council has complied with its obligations under section 1(1) of the FOIA and correctly relied on section 41 in respect of the requested information. The Council did however breach section 17(1) of the FOIA in its failure to provide a refusal notice to the complainant within the statutory timescale provided for under the FOIA. The Commissioner does not require the Council to take any steps.

#### Request and response

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2. On 3 September 2013, the complainant wrote to the Council and requested the following information:

*"In March 2013 I issued a formal complaint with WCBC Social Services Department over [named] Nursing Homes abuse of my father whilst in their care. Since that date there have been three formal POVA strategy meetings and several internal meetings attended by officers from WCBC*

*on this matter. I require copies of all information to which I have the legal right to view."*

3. The Council responded on 11 October 2013. It confirmed that it does not hold information in relation to internal minutes or notes. It also refused to provide the minutes of the POVA strategy meetings by virtue of section 31(1)(g) and section 41(1) of the FOIA.
4. Following an internal review the Council wrote to the complainant on 25 November 2013. It stated that the Council remained satisfied that both exemptions apply. It also confirmed that it was satisfied that no further information was held falling within the scope of his request.

### **Scope of the case**

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5. The complainant contacted the Commissioner on 27 November 2013 to complain about the way his request for information had been handled.
6. The complainant informed the Commissioner that as he raised the complaint on behalf of his late father that led to the POVA investigation, he believes that he has the right to assess the accuracy of the minutes relating to the strategy meetings that were held during the course of the investigation.
7. The complainant has also raised concerns regarding whether the Council has identified all information falling within the scope of his request.
8. The Commissioner's investigation will therefore include a consideration of whether the Council has complied with its obligations under section 1(1) of the FOIA in addition to its reliance on the exemptions cited.

### **Reasons for decision**

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#### **Section 1 – Right of access to information held**

9. Under section 1(1) of the FOIA, in response to a request for information a public authority is only required to provide recorded information it holds and is not therefore required to create new information in order to respond to a request.
10. In his consideration of this case, the Commissioner is mindful of the former Information Tribunal's ruling in EA/2006/0072 (Bromley) that there can seldom be absolute certainty that additional information relevant to the request does not remain undiscovered somewhere within the public authority's records. When considering whether a public

authority does hold any additional information therefore, the normal standard of proof to apply is the civil standard of the balance of probabilities.

11. The Commissioner's judgement in such cases is based on the complainant's arguments and the public authority's submissions and where relevant, details of any searches undertaken. The Commissioner expects the public authority to conduct a reasonable and proportionate search in all cases.
12. In this particular case, the complainant queried whether the Council has accounted for all information falling within the scope of his request. He has questioned whether the Council's statement that it holds no records of internal minutes is correct. In his complaint to the Commissioner he has referred to a document in his possession entitled 'confirmation of other meetings'. He has explained that it is a copy of an email he received from [named officer A] and named officer B was copied in. The complainant believes that this confirms other meetings were held into his complaint and that due to the nature of this complaint, notes and memos must have also been made. This is based on his assertion that there is a stipulation within the POVA process for all issues relating to the investigation to be documented.
13. The Commissioner raised these concerns with the Council who has confirmed that following the request was referred to the Adult Social Care Departmental Link Officer in accordance with the Council's procedures for dealing with FOIA requests. The Link Officer circulated the request to [named officer A], [named officer C] and [named officer B] as officers involved in the POVA process.
14. [Named officer A] was one of those involved in dealing with the application and the person co-ordinating the complaint from the complainant and as the complainant had also stated that he had dealt with [Named officer B], Head of Policy and Performance, both officers were asked if they held any relevant information. Both confirmed that they provided all the information that they had relating to the request and they held no further notes of meetings. The Council has informed the Commissioner that it has previously explained to the complainant that any handwritten notes made of meetings between officers were not kept once the actions agreed had been confirmed by email. Any notes were then destroyed.
15. The Council has further confirmed that the complainant received copies of all relevant emails and there were no notes held. The Council has informed the Commissioner that its search did not extend to other departments as no other departments were involved in the POVA investigation.

16. The Commissioner has considered the concerns expressed by the complainant and whilst he acknowledges that it would be reasonable to assume that additional information would be held, he considers that the Council has conducted a reasonable and proportionate search. He also considers the Council's explanation regarding the destruction of handwritten notes is reasonable and as such, he is satisfied that based on the balance of probabilities, that no further information is held. The Commissioner has therefore concluded that the Council has complied with its obligations under section 1(1) of the FOIA.

**Section 41(1) – information provided in confidence**

17. Section 41(1) of the FOIA states that information will be exempt from disclosure 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."*

**(a) Was the information obtained from another person?**

18. For section 41 to apply, the information must have been obtained by the public authority from another person. A person may be an individual, a company, a local authority or any other 'legal entity'. The exemption does not therefore cover information which the public authority has generated itself, although it may cover documents generated by the public authority if these contain confidential information provided by a third party. It is the information itself, and not the document or other form in which it is recorded, which needs to be considered.
19. The Council has informed the Commissioner that the POVA procedures charge the local authority with co-ordinating arrangements for the protection of vulnerable adults, which involves a number of different authorities with complementary functions including CSSIW, (Care and Social Services Inspectorate Wales), health bodies, the police, the Health & Safety Executive and others.
20. It has confirmed that although the strategy meeting minutes were written by the Council, the information contained within these documents includes a record of the contribution made by representatives of the various authorities attending. The Commissioner is therefore satisfied that the information was provided from another person.

**(b) Would disclosure constitute an actionable breach of confidence?**

21. In considering whether disclosure of the withheld information would constitute an actionable breach of confidence the Commissioner has considered the following:
- whether the information has the necessary quality of confidence;
  - whether the information was imparted in circumstances importing an obligation of confidence; and
  - whether disclosure would be an unauthorised use of the information and to the detriment of the confider.

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

22. Information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. Information which is known only to a limited number of individuals will not be regarded as generally accessible and information which is of importance to the confider should not be considered trivial.
23. The Council has informed the Commissioner that it follows the practitioner's handbook entitled '*Interim Policy & Procedures for the Protection of Vulnerable Adults from Abuse*' and that all parties agree that professionals in attendance at any meetings held as part of the adult protection process should sign up to and adhere to the following confidentiality statement which is reaffirmed at the start of each meeting:

*"This meeting/conference is held under the Wales Procedures for the Protection of Vulnerable Adults.*

*The issues discussed are confidential to the members of the meeting/conference and the agencies they represent. They will only be shared in the best interests of the vulnerable adult.*

*Minutes of the meeting/conference and circulated on the strict understanding that they will be kept confidential and stored securely."*

24. The Commissioner agrees that the disputed information is not otherwise accessible and is clearly more than trivial and has therefore concluded that it possesses the necessary quality of confidence.

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

25. The Commissioner is also satisfied from the requirements outlined in paragraph of 23 of this notice that the information was imparted in circumstances importing an explicit obligation of confidence.

*Would disclosure be an unauthorised use of the information and to the detriment of the confider?*

26. Based on the information referred to in paragraph 23 of this notice, the Commissioner acknowledges that disclosure of this information would be contrary to the policies and procedures established to protect vulnerable adults and would therefore be unauthorised.
27. However, he must also consider whether such an unauthorised disclosure could cause detriment to the confider. In his consideration of this matter, the Commissioner notes that it used to be the case that for disclosure to constitute a breach of confidence, there had to be a detrimental impact on the confider. However, that is not always the approach taken in more recent case law. The courts now recognise that in many cases it may be difficult to argue disclosure will result in the confider suffering a detriment in terms of any tangible loss. The real consequence of disclosure is an infringement of the confider's privacy.
28. The Commissioner notes the explicit obligation and expectation of confidence regarding the information provided at the POVA strategy meetings and that the subject matter was extremely sensitive. He therefore considers that disclosure of the disputed information would constitute an infringement of the confiders' privacy and as such is sufficient detriment for the confider to pursue an actionable breach of confidence.

### **Public interest in confidence**

29. Since section 41 is an absolute exemption there is no requirement for an application of the conventional public interest test. However, disclosure of confidential information where there is an overriding public interest is a *defence* to an action for breach of confidentiality. The Commissioner is therefore required to consider whether the Council could successfully rely on such a public interest defence to an action for breach of confidence in this case.
30. Whereas in the case of qualified exemptions, the public interest operates in favour of disclosure unless exceeded by the public interest in maintaining the exemption, the reverse is the case in respect of the they duty of confidence public interest test, as it is assumed that information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.
31. The Commissioner acknowledges that the courts have taken the view that the grounds for breaching confidentiality must be valid and very strong since the duty of confidence is not one which should be overridden lightly. In weighing the public interest in keeping the

information confidential, the Commissioner has therefore been mindful of the wider public interest in preserving the principle of confidentiality.

32. As the decisions taken by the courts have shown, very serious public interest matters must be present in order to override the strong public interest in maintaining confidentiality, such as where the information concerns misconduct, illegality or gross immorality.
33. The Commissioner acknowledges that the complainant has a personal interest in seeing the information as the minutes concern the investigation into his complaint regarding the treatment of his late father. He is however, mindful that disclosure under the FOIA is to the world at large.
34. The Commissioner also acknowledges that there is a public interest in ensuring that concerns regarding the treatment of a vulnerable adults are investigated and treated appropriately. However, that does not necessarily include the disclosure of the minutes of confidential meetings convened as part of the investigation process itself. The Commissioner has seen no evidence of illegality, misconduct or gross immorality which would warrant the disclosure of the information or which could form the basis of a public interest defence against breach of confidentiality. He therefore considers that the public interest in maintaining the duty of confidence outweighs the public interest in disclosure in this case and that the Council was correct to withhold the information under section 41 of the FOIA.
35. As the Commissioner has found that section 41 applied to all the withheld information, he has not gone on to consider the application of section 31(1)(g).

### **Section 17 – Refusal of the request**

36. Section 17 of the FOIA concerns the refusal of a request, with section 17(1) stipulating that any public authority relying on a claim that any provision of Part II is exempt must, within the time for complying with section 1(1) of the FOIA give the applicant a notice stating its decision.
37. The times frame for complying with section 1(1) of the FOIA is 20 working days. However, the Commissioner notes that although the request is dated 3 September 2013, the Council did not issue its refusal notice until 11 October 2013. The Council has therefore breached section 17(1) of the FOIA.



## **Right of appeal**

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38. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

39. 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.
40. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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**Cheshire**  
**SK9 5AF**