

**Freedom of Information Act 2000 (FOIA)**  
**Decision notice**

**Date:** 20 August 2013

**Public Authority:** South Eastern Health & Social Care Trust  
**Address:** Lough House  
Church Street  
Newtownards  
BT23 4AS

**Decision (including any steps ordered)**

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The complainant has requested information from the Trust relating to his application for the registration of a day nursery. The Trust refused to disclose the requested information, citing the exemptions under sections 40(2), 41(1) and 42(1) of FOIA as a basis for non-disclosure. The Commissioner's decision is that the Trust has correctly applied section 41(1) of FOIA to the requested information. As section 41(1) applies to the entirety of the requested information, the Commissioner has not gone on to consider the Trust's application of sections 40(2) and 42(1) of FOIA. The Commissioner orders no steps to be taken.

**Request and response**

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1. On 10 April 2012 , the complainant wrote to the Trust and requested information relating to his application for registration of a day nursery, in the following terms:  
  
"Can you forward a copy of the correspondence that was sent to the Department from [name redacted]. You may treat this as a formal request under the Freedom of Information Act."
2. The Trust responded on 9 July 2012. It stated that it was withholding the requested information, citing section 42 of FOIA (information subject to legal professional privilege) as a basis for non-disclosure.

3. Following an internal review the Trust wrote to the complainant on 17 August 2012. It stated that the reviewer was upholding the original decision and that it had now decided that the exemptions under sections 40 (personal information) and 41 (information provided in confidence) of FOIA were also applicable to the requested information.

### **Scope of the case**

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4. The complainant contacted the Commissioner on 28 November 2012 to complain about the way his request for information had been handled.
5. The Commissioner has considered the Trust's handling of the complainant's request, in particular its application of the relevant exemptions.

### **Reasons for decision**

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#### **Section 41 of FOIA**

6. Section 41 of FOIA provides that:-

(1) 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.

(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.

#### **Was the information obtained from another person?**

7. In this case, the withheld information consists of correspondence and reports from a number of individuals. The information contains details relevant to ongoing litigation and to the complainant's application for the registration of a day nursery. The information was provided to the Trust by third parties as part of its procedures in respect of the

application for registration of the day nursery. The Commissioner accepts therefore that the information was obtained from third parties. Therefore, the requirement of section 41(1)(a) is satisfied.

**Would disclosure constitute an actionable breach of confidence?**

8. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider 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 to the detriment of the confider.

The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.

9. The Trust provided the Commissioner with copies of the withheld information. It contains information about individuals relating to ongoing legal proceedings and to the complainant's application to register a day nursery. Given the nature of the information the Commissioner is satisfied that the information is not trivial. He is also satisfied that it is not accessible by other means. The Commissioner is therefore satisfied that the withheld information has the necessary quality of confidence.
10. The Commissioner has gone on to consider whether the information was imparted in circumstances importing an obligation of confidence.
11. The information relates to both ongoing legal proceedings and the complainant's application to the Trust to register a day nursery. The Trust has a statutory role to investigate all applications by those wishing to register as providers of day care. The requested information consists of information provided in confidence by individuals to the Trust as part of that investigation. The Trust made it clear that this was done so with the expectation that the information would not be disclosed to third parties. The Commissioner is satisfied that an obligation of confidence is created by the very nature of the information and by the clear expectations of the individuals who provided that information, and that the duty of confidence is therefore implicit.
12. The Commissioner went on to consider whether disclosure of the information would be to the detriment of the confider. The loss of

privacy can be a detriment in its own right.

13. In this case, the Commissioner considers that disclosure would be contrary to the reasonable expectations of those who provided the information. These individuals would expect that confidentiality would be maintained in respect of their private information, which includes their personal views and opinions. He therefore considers the absence of detriment would not defeat a cause of action. The Commissioner considers that the knowledge that confidential information has been passed to those to whom the confiders would not willingly convey it, may be sufficient detriment.
14. As section 41(1) is an absolute exemption there is no public interest test. 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. The Commissioner has therefore gone on to consider whether there would be a defence to a claim for breach of confidence.
15. The Commissioner generally recognises there is always some public interest in the disclosure of information held by public authorities to bring about more accountability and transparency however in this instance he does not necessarily accept that this is the case. Whilst the information may be of interest to the complainant it is difficult to see there would be any wider public interest in the release of the requested information.
16. In considering this case the Commissioner has been mindful of the wider public interest in preserving the principle of confidentiality. It is in the public interest that the duty of confidentiality between confiders and confidants is preserved and the Commissioner considers that any information provided to a public body as part of that body's statutory duty to carry out an investigation, is generally accepted to be confidential.
17. The Commissioner considers that there is a strong public interest in preserving confidentiality and that disclosure of the requested information may result in the perception that the Trust does not treat information provided to it in confidence appropriately and this in turn may deter individuals from coming forward to provide such information in the future.
18. Taking into account all the circumstances of the case, the nature of the

relationships between the parties and the content of the withheld information the Commissioner considers that the Trust would not have a public interest defence for breaching its duty of confidence. The Commissioner cannot conclude that there is a strong enough public interest argument to disclose the requested information. Therefore the Commissioner finds that the requested information is exempt under section 41 and the Trust was correct to withhold this information.

19. As he has accepted that section 41 is engaged and provides a valid basis for refusing the request, the Commissioner has not gone on to consider the Trust's application of sections 40(2) or 42(1) to the requested information.

## Right of appeal

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20. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

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

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

21. 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.
22. 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 .....**

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**