Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **10 October 2013**

Public Authority: **Kent County Council**
Address: **Sessions House**
County Hall
Maidstone
Kent
ME14 LXQ

Decision (including any steps ordered)

1. The complainant has requested information about a debt owed to the council by her mother's estate following the death of her mother. The council has refused to provide the information on the grounds that section 41 of the Act applies (information held under a duty of confidence).

2. The Commissioner's decision is that Kent County Council has correctly applied section 41 to the information.

3. The Commissioner does not require the council to take any steps.

Request and response

4. On 1 February 2013, the complainant wrote to Kent County Council and requested information in the following terms:

   "*I was informed by your solicitor….. that Kent County Council is a creditor of the estate of the above deceased……. Under the Freedom of Information Act I would like to know if this debt has been included in KCC's 2011/12 accounts which are already in existence. If not I would like to know if the debt will be included in the 2012/13 accounts. Please also inform me of the amount of debt owed.*"

5. The council responded on 1 March 2013. It stated that as regards whether the debt would be raised, if a debt had been owed in 2011/2012 the debtor would have been raised. If not then it would be

included at the end of the 2012/13 financial year. The Commissioner understands this to mean that if information on the debt had not been included in the last financial years accounts then it would appear in the next. As regards the amount owed the council said that this was exempt under section 41.

6. Following an internal review the council wrote to the complainant on 28 March 2013. It stated that the exemption in section 41 of the Act applied to all of the complainant's requests.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way her request for information had been handled.

8. The Commissioner considers that her complaint is whether the council was correct to apply the exemption in section 41 of the information or whether the council should have disclosed the information she asked for to her.

Reasons for decision

9. Section 41(1) of the Act states that Information is exempt information if-

> *"it was obtained by the public authority from any other person (including another public authority), and 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."*

10. The Commissioner considers that are a number of elements to the application of section 41. These are:

a) That the information was received from another person.

b) That the information was provided in circumstances which created a duty of confidence.

c) That a disclosure of the information would be an actionable breach of that duty of confidence.

a) Was the information received from another person?

11. The information was obtained from the complainant's mother. The information relates to a debt owed by her mother to the council as regards the overpayment of care home fees. The fees were paid on her behalf as she had failed to declare a half interest in a property. When she died this debt became owed from her estate to the council.

12. Technically the withheld information has not passed to the council as information regarding the level of debt and whether it had been repaid would be information generated by the council itself. However the information relates to the financial support provided to the deceased for her social care, and all information on this would be calculated from the information provided in the application forms for financial support. These would have been completed by the complainant's mother or on her mother's behalf. This information would have been provided under a duty of confidence, and that duty would extend to details of any overpayment and whether that had been recovered or not. The information was therefore received by the council from another person.

b) Was the information provided under a duty of confidence

13. In order to show that a duty of confidence exists the council needs to show that the information meets the following requirements

- the information was imparted in circumstances importing an obligation of confidence; and

- the information has the necessary quality of confidence;

14. As stated, if a person receives financial help from the council in order to pay care home fees that information would be held under an implied or express duty of confidence. In effect, even where the confidentiality of the information has not been discussed there would be an understanding between the parties that the information would not be disclosed to other people or other organisations which are not entitled to it. Individuals who claim financial support from authorities would have no expectation that exact details of the support they have claimed for, and the details they have provided in support of that claim would be disclosed beyond that necessary to administer and pay the benefit or others parties who are legally entitled to it.

15. The Commissioner therefore considers that the information was provided under circumstances which gave rise to an obligation of confidence.

16. The information is not widely known. The information in paragraph 33 below is relevant to this consideration. The information is also not trivial. It relates to an overpayment of financial benefits paid to an elderly

person in care. It is also details of whether those overpayments have been recovered by the council.

17. The Commissioner therefore considers the information has the necessary quality of confidence.

c) Would a disclosure give rise to an actionable breach of confidence

18. The question which the Commissioner must consider is whether a disclosure of the information would be actionable.

19. The complainant has argued that there would be no one who would take action in the event of a disclosure. A disclosure of the information would however be actionable by her mother's representatives.

20. The next question is whether there would be a defence in law to a breach of confidence if the information were to be disclosed.

21. The main defence which the council might employ to avoid action being taken against it if it breached the duty of confidence is the public interest defence.

The public interest

22. The courts have previously found that where the public interest in disclosing the information outweighs the public interest in maintaining the duty of confidence then the law will prevent action being taken against the person breaching the confidence. Historically however there have had to be very strong arguments for breaching a duty of confidence prior to the courts accepting that the public interest would prevent action being taken for a breach of a duty of confidence. In response to FOIA the level of weight prebuilt into the public interest in maintaining a duty of confidence has been weakened to an extent in some cases where information is held by public authorities, however it still retains a high degree of weight. The Information Tribunal has found that the test to be applied is if the public interest in maintaining the exemption is equal to, or greater than the public interest in the information being disclosed then the information should be withheld.

The public interest in the information being disclosed

23. The complainant has raised two issues in support of the information being disclosed. She argues that the debt is owed to the public purse and there should therefore be transparency about whether the money has been retrieved by the council or not. A disclosure of the amount owed to the council would also provide greater clarity on any decision it may have taken not to recover the money.

24. The complainant argues that there is a public interest in knowing whether the council has recovered the money it is owed or whether it has made a decision not to recover the debt. She argues that if the council has chosen not to retrieve the funds this would be a loss to the public purse. Clearly if the amounts owed are substantial this strengthens the argument that information on a decision not to recover the funds should be disclosed.

25. Additionally the complainant argues that such a decision would be unfair to individuals who have provided accurate information on their financial standing and as a result have had to sell their property in order to pay for care.

26. She further argues that the information should be disclosed due to the circumstances surrounding how her mother came to a decision not to declare her interest in the property. She says that she had initially agreed with her mother to buy her share of the property at a particular sum. However her mother then decided not to sell the property to her. Subsequently the complainant found out that she had not declared her interest in the property to the council. She says that this turn of events followed her mother taking advice from a charity, which she says subsequently became the executors of her mother's estate. She also alleges that one of the executors is the sole beneficiary of her mother's estate. She argues that there is a public interest in the information she has asked for being disclosed as it may help to shed light on what had occurred.

The public interest in confidence being maintained

27. The Commissioner does not consider that a disclosure of the information would shed any light on to why her mother chose not to sell her interest in the property to her, why she chose not to disclose information on her interest in the property to the council or why she named the charity as executors, and one of the executors as the sole beneficiary of her will. The information is merely a financial figure together with information as to whether the debt has been recovered and included in the council's accounts. He can therefore place little weight on this argument.

28. The Commissioner agrees that there are strong reasons for the council to be transparent about its decisions as regards whether to retrieve debts which are owed to the public purse in such circumstances. He considers however that these arguments would have much more weight when considering information on the overall loss to the public purse by the council's decisions in such situations, rather than details of one individual decision not to recover funds (if that is what the council has in fact done).

29. There may also be arguments in favour of the council disclosing details of policies it has in place regarding when it will or won't take action to retrieve funds owed to the public purse in such scenarios. Having said this however it is possible that this information would be sensitive as its disclosure might provide insight to individuals minded to escape such charges on how to escape sanction for failing to declare all of their financial interests. It may in fact lead to less people declaring their full financial details in the future.

30. There are also likely to be situations where it would cost the council more in legal fees to seek to recover funds owed to it than the value of the overpayment itself. In any event, however this is not the information which the complainant has asked for in this instance.

31. The complainant has submitted arguments to the Commissioner that significant amounts of information have already been disclosed to her by the council and other authorities regarding her mother. She argues that she does not believe that the council can claim now that the information retains its confidentiality given the information it has disclosed to her in the past. She also considers that, as with other authorities, the council should make a voluntary and pro-active exception to its rules and provide her with the information in this case.

32. In the case of requests under the Act, information which is disclosed is considered to be to the whole world rather than one individual, regardless of whether the person who has asked for the information has a strong personal reason for receiving that information or not. The fact that the complainant is the individual's daughter does not factor into the Commissioner's decision as to whether a disclosure of the information would be an actionable breach of confidence.

33. The Commissioner considers that information provided to a next of kin in response to questions about her mother is an entirely different matter to whether information should be disclosed to the whole world in response to an FOI request. The Act is applicant blind, and the Commissioner cannot take into account the complainant's own personal interests in obtaining this information. As stated, a disclosure in response to FOI requests is considered to be to the whole world.

34. The Commissioner therefore discounts the argument that the information provided to her previously by the council can override the duty of confidence which the council owes generally. The complainant may have a perfectly legitimate argument that she personally should be given information on her mother's affairs, and the council and other authorities may take this into account and provide some information to her. However the Act is applicant blind in this respect and so her

relationship cannot be taken into account as a public interest factor in deciding whether the information should be disclosed to the whole world in response to a request under the Act.

35. The Commissioner's conclusion is that the public interest would not provide a defence to the disclosure of the information in this case. The public interest in the disclosure of this information does not outweigh the public interest in maintaining the duty of confidence in this case. The council was therefore correct to apply section 41 in this instance.

Right of appeal

36. 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
    Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

37. 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.

38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed .....

Andrew White
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