

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** **5 March 2020**

**Public Authority:** **Buckinghamshire County Council**

**Address:**  
**County Hall**  
**Walton Street**  
**Aylesbury**  
**Buckinghamshire**  
**HP20 1UA**

#### **Decision (including any steps ordered)**

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1. The complainant has requested from Buckinghamshire County Council ("the Council") information in relation to a report taken during a meeting after a reported safeguarding concern. The Council provided the complainant with her own personal information, extracted from the report, but advised that it was withholding the rest of the information under section 40(2) of the FOIA – personal information, and section 41(1) – information provided in confidence.
2. The Commissioner's decision is that the Council is entitled to rely on section 40(2) of the FOIA and section 41(1) of the FOIA to refuse to provide the requested information. However, in issuing its initial response, the Council breached sections 10(1) and 17(1) of the FOIA respectively, since it issued the response outside the statutory time for compliance and did not correctly cite the exemptions which it was relying on to withhold the information.
3. The Commissioner does not require the Council to take any steps in relation to this complaint.

## Request and response

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4. On 21 December 2018, the complainant wrote to the Council and requested information in the following terms:

*"The information I am requesting is: the file(s) held by Bucks County Council's Adult Social Care team on [redacted], following a request from me to Safeguarding/ASC in March 2018 for urgent intervention and support as [redacted]."*
5. The Council responded on 12 March 2019. It responded to certain points raised in the complainant's letter and confirmed that an electronic care act assessment had been completed on 15 March 2018 which considered the home circumstances of a specific individual. However, it applied section 41(1) of the FOIA – information provided in confidence - to the majority of the report which had been compiled.
6. The Council confirmed in the letter of 12 March 2019 that the notes made at the meeting were contained within the report and that it did not hold any other notes.
7. The complainant contacted the Commissioner on 7 August 2019, advising that she had not received any further information from the Council despite sending several emails asking for an update. The complainant explained that the Head of Safeguarding at the Council had advised her that she should have received notes or a written report from the meeting of 15 March 2018. Therefore, this is what she had been expecting to receive.
8. The Commissioner wrote to the Council on 4 September 2019, advising it that it should complete an internal review.
9. Following an internal review, the Council wrote to the complainant on 8 October 2019. It provided her with an extract from the report, which it considered to be her own personal data.
10. The Council withheld the majority of the report, stating that it still considered it to be exempt. Its position was that the personal information relating to a now-deceased individual was exempt under section 41(1) of the FOIA, as it had previously stated. It also considered that some of the information in the report related to a living individual and was exempt under section 40(2) – third party personal data.

## **Scope of the case**

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11. The complainant contacted the Commissioner on 7 August 2019, to complain about the way her request for information had been handled. At this stage, she was waiting for an internal review to be carried out, as set out above.
12. The Commissioner considers that the scope of this investigation is to determine if the Council is entitled to rely on section 40(2) of the FOIA – personal information – and section 41(1) of the FOIA – information provided in confidence – in relation to the withheld sections of the report.
13. She has also considered the Council's compliance with sections 10(1) and 17(1) of the FOIA in issuing its response.

## **Reasons for decision**

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### **The withheld information**

14. The information in question is a report which was compiled after a specific home visit on 15 March 2018, following the reporting of a safeguarding concern. The Council considered that the report comprised personal information relating to the requester, a now-deceased individual and a living relative of the deceased individual.
15. The Council has already extracted the requester's personal data and provided it to her. However, it considers that the remainder of the report is exempt from disclosure under section 40(2) in the case of the living relative, and under section 41(1) in the case of the deceased individual.

### **Section 40(2) – third party personal information**

16. The Council has explained that this exemption has been applied to parts of the report which relate to a living individual.
17. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

18. In this case, the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
19. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
20. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

### ***Is the information personal data?***

21. Section 3(2) of the DPA defines personal data as:  
*"any information relating to an identified or identifiable living individual".*
22. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
23. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
24. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
25. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information withheld under this exemption identifies and relates to a specific living individual who is not the complainant. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
26. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA

the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

27. The most relevant DP principle in this case is principle (a).

### ***Would disclosure contravene principle (a)?***

28. Article 5(1)(a) of the GDPR states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

29. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
30. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
31. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

### ***Is the information special category data?***

32. Information relating to special category data is given special status in the GDPR.
33. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
34. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include special category data. She has reached this conclusion on the basis that the information concerns the health of the relevant individual.
35. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
36. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.

37. The Commissioner has seen no evidence or indication that the individual concerned has specifically consented to this data being disclosed to the world in response to the FOIA request, or that they have deliberately made this data public.
38. As none of the conditions required for processing special category data are satisfied, there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.
39. The Commissioner's decision is that the Council correctly withheld the parts of the report which relate to the living individual, under section 40(2).

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

40. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person, and disclosure would constitute an actionable breach of confidence.

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

41. Section 41(1)(a) requires that the requested information must have been given to the public authority by another person. The Commissioner's guidance explains that the "*term 'person' means a 'legal person'. This could be an individual, a company, another public authority or any other type of legal entity.*"
42. The Commissioner has viewed the withheld information which, as previously explained, consists of a report that was carried out due to safeguarding concerns. The report contains personal information on specific individuals including that of a person who is now deceased.
43. In cases where information was provided to a public authority by an individual while they were living, and the information would be likely to have been considered to be their personal data while they were living, it is the Commissioner's established view that the public authority can consider withholding the information under section 41(1).
44. In this case, the information withheld under this exemption was provided to the Council, during the meeting of 15 March 2018, by a now-deceased individual.
45. The Commissioner is satisfied that the information, contained within the report, was obtained from another person.

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

46. In the circumstances of this case, the Commissioner is satisfied that the report that the Council holds contains personal data, provided by another person.
47. 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.
48. The Commissioner has issued guidance in relation to requests for information about deceased persons<sup>2</sup>. This makes clear that the exemption at section 41(1) of the FOIA may apply if the information was originally obtained from a deceased person.
49. Specifically, in *Brian Redman v Information Commissioner and Norfolk County Council* (EA/2012/0182, 13 November 2012)<sup>3</sup> the Tribunal found that "*actions for breach of confidence can survive an individual's death and be taken by personal representatives of the deceased person*".
50. The Commissioner has therefore considered the three bullet points above in the context of the circumstances of this case.

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

51. 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.
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<sup>2</sup> <https://ico.org.uk/media/1202/information-about-the-deceased-foi-eir.pdf>

<sup>3</sup>

<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i888/20121113%20Decision%20FINAL%20EA20120182.pdf>

52. The Council has stated that the information contained within the report has the necessary quality of confidence. It has explained that individuals taking part in social care assessments do so with an expectation that the information they provide will not be disclosed to the world at large.
53. Having viewed the withheld information, the Commissioner accepts that the information is not trivial as it contains personal information relating to another individual, including intimate details of their life before they passed away.
54. Given the nature of the information, the Commissioner is satisfied that the information does have the necessary quality of confidence.

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

55. A breach of confidence will not be actionable if the information was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.
56. The test set out in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 is useful:

*...if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence".*
57. In its submission to the Commissioner, the Council has stated that "*such information is invariably communicated in circumstances importing an obligation of confidence...*"
58. The Commissioner notes that the complainant was present while the assessment was taking place on 15 March 2018, and therefore, can be expected to have some knowledge of the contents within the report. However, the Commissioner's role in considering a request for information under the FOIA is to establish whether the information can be disclosed to the world at large. She is satisfied that the assessment on the date in question was carried out in a confidential atmosphere.
59. From the nature of the information, the Commissioner is satisfied that it would have been provided under an expectation of confidence.

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

60. The Council has explained that the information was provided to them by the now-deceased person and that the individual would neither want nor expect an assessment report which concerned their personal circumstances to be disclosed to the world at large.
61. Paragraph 56 of the Commissioner's guidance, referenced previously, makes clear that case law has established that any invasion of privacy resulting from a disclosure of private and personal information can be viewed as a form of detriment in its own right.
62. In this case, the Commissioner agrees that the relatives of the deceased person may suffer distress if information from the social worker's report, in relation to the deceased individual, were to be disclosed to the world at large, and she is satisfied that disclosure would therefore be to their detriment.

***Is there a public interest defence for disclosure?***

63. Section 41 is an absolute exemption and so 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 in disclosure, 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.
64. In weighing the public interest arguments for and against disclosure, the Commissioner is mindful of the wider public interest in preserving the principle of confidentiality. The Commissioner recognises that the courts have taken the view that any grounds for breaching confidentiality must be valid and very strong, since the duty of confidence is not one that should be overridden lightly.
65. The Council has stated that it does not "...believe that there is a sufficient weighty legitimate interest to justify disclosure..."
66. The Commissioner notes that the complainant considered that they were the representative of the deceased person, and as such believes that they would be entitled to the information withheld by the Council. However, the Commissioner reminds the complainant that disclosure under the FOIA, is disclosure to the world at large.
67. The Commissioner is mindful of the need to protect the relationship of trust between confider (or, in the case of a deceased confider, the close relatives of the confider) and confidant, and not to discourage or

otherwise hamper a degree of public certainty that such confidences will be respected by a public authority.

68. The Commissioner considers that the public interest in disclosing the information does not outweigh the public interest in maintaining this trust. In light of all the information at hand, the Commissioner considers that the Council would not have a public interest defence for breaching its duty of confidence. The Commissioner, therefore, cannot conclude that there is a strong enough public interest argument to disclose the requested information.
69. Therefore, the Commissioner finds that the information in the report which relates to the deceased individual is exempt from disclosure under section 41(1) and the Council was correct to withhold it.

### **Section 10(1) and section 17(1) – responding to a request**

#### Section 10(1) – Time for compliance

70. Section 10(1) of the FOI Act states 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."*

71. The request for information was received on 21 December 2018. The Council did not provide a substantive response until 12 March 2019.
72. This falls outside of the 20 working days required by section 10(1). Therefore, the Commissioner's decision is that the Council has not complied with the requirements of section 10(1) of the Act.

#### Section 17 – Refusal of a request

73. Section 17(1) of the FOIA provides that if a public authority wishes to refuse a request it must issue a refusal notice within the 20 working days, citing any relevant exemption(s).
74. The Commissioner considers that the Council breached section 17(1) as it took longer than 20 working days to confirm its reliance on sections 40(2) and 41(1) of the FOIA.

## **Right of appeal**

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75. 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: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

76. 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.
77. 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**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**