

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 25 May 2022

Public Authority: Gateshead Council

Address: informationrights@gateshead.gov.uk

Decision (including any steps ordered)

1. The complainant requested various pieces of information relating to the care of their late Aunt. Gateshead Council (the Council) refused to disclose the information requested but did not cite any specific exemptions. During the course of the Commissioner's investigation, the Council confirmed that it had provided the complainant with personal data relating to themselves and that it considered the remaining information held exempt under section 40(2) (third party personal data) and 41 (information provided in confidence) of the FOIA. The Commissioner's decision is that the withheld information is exempt under sections 40(2) and 41. The Commissioner has however determined that the Council breached section 17(1) of the FOIA in failing to issue a valid refusal within the appropriate timescale. The Commissioner does not require any steps to be taken.

Request and response

2. On 3 March 2021, the complainant wrote to the Council and requested various information about their late aunt in the following terms:
 - i. "I would like the documentary evidence that this meeting took place and the record of the decision my Aunt gave to the hospital social worker when asked if she wanted to go into a care home The decision my aunt gave to the hospital social worker, regarding her desire to remain in her own home and also her confirmation that she agreed I should be present to witness the meeting, as next of kin.

- ii. Why was I refused an inspection of the proposed care home on the morning of the meeting and also refused my request to speak to my aunt prior to the meeting. I want any documentation, discussion and records of this meeting and events leading up to the meeting.
- iii. I want to request all documentation related to and surrounding the alleged "Protection Order" being made upon my Aunt. This includes any suggestions, written or otherwise, of a protection order being mentioned; the reasons why a protection order may or may not have been implemented or proposed; why I was refused access to my Aunt prior to the meeting; which public, local authority, police or care agencies might have been or were involved in the implementation of the alleged Protection order and also why I wasn't informed about this matter. I want to know if Social care, Social workers, care home staff or any other agency were notified that my Aunt might be in need of protection? I would like documentary and other evidence associated with the alleged order, even if it was only suggested as a proposal and also, I want any records of any discussion which took place with my Aunt on the need for her be protected by the alleged Protection Order. C.I would also like any information on the discussions which took place with my Aunt, on the implications of her moving into a care home, rather than returning to her own home, which is in fact, what she wanted to do.
- iv. I would like any information related to my Aunt which the social worker has. in particular but not exclusively, related to the incident I described above and also any notes or documentation related to me. This should include any information, discussions or meetings around why my Aunt's request for a key to her own home, whilst she was staying in the care home in mid 2019, was refused. She made the request to me and I asked on her behalf.
- v. All records, documents, meetings, discussions etc, relating to the sale of my Aunt's house. This must include confirmation of my Aunt's wish that her house be sold. a detailed breakdown of monies owed, necessary fees etc and how much was left after these charges were paid. I know the cost of charges at the care home but would like a breakdown of the charges and money spent. I would also like a detailed breakdown of how her own money, not included as the result of the sale of her home, was used to contribute towards the cost of her residence at the care home. Her income would include a state pension, a work pension from her late husband, savings state benefits etc, there are no exclusions to the information I am asking under the Freedom of Information request.

- vi. I also would like copies of all emails, messages, requests, documentation; discussion etc, related to any of the above, from the care home; Powers of Attorney, Social workers; Gateshead Adult Safeguarding team, etc".
3. The complainant subsequently provided the Council with a copy of a letter dated 31 August 2019 signed by their aunt in which she had asked that the complainant be added as her next of kin.
4. The Council responded on 25 March 2021 and stated that it was unable to accept the letter in support of the complainant's assertion that their aunt would have consented to release of her personal information if she was still alive. The Council explained why it was unable to rely on the letter as evidence that the complainant had been provided with consent to access their late aunt's social care records. The Council also advised the complainant to make a subject access request for their own personal data contained within their aunt's records. No exemptions under the FOIA were cited within this refusal notice.
5. On 28 April 2020 the complainant requested an internal review of the Council's handling of the request.
6. The Council provided the outcome of its internal review on 25 May 2021 and upheld its position that it was unable to disclose the information requested under the FOIA. The Council advised the complainant that their own personal data was exempt under the FOIA. The Council also referred the complainant to its policy on accessing a deceased person's records¹. However, again, no exemptions under the FOIA were cited as the basis to refuse disclosure within the internal review response.

Scope of the case

7. The complainant initially contacted the Commissioner on 30 March 2021 to express their dissatisfaction with the Council's handling of the request. The complainant contacted the Commissioner again following the internal review response to confirm that they remained dissatisfied with the Council's refusal to disclose the information requested.
 8. Prior to commencing his investigation, the Commissioner wrote to the complainant to advise that, even though the Council had not cited any specific exemptions under the FOIA to withhold the information, it was
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¹ <https://www.gateshead.gov.uk/article/17828/Accessing-a-deceased-person-s-records>

his preliminary view that the information requested was not suitable for disclosure into the public domain due to the personal nature of the information. The Commissioner referred the complainant to his guidance on information about deceased individuals².

9. The complainant responded to the Commissioner advising that they considered the information requested not just to be of interest to themselves as an interested party but there was a wider public interest in knowing the circumstances surrounding the care of their late relative as they considered that proper procedures had not been followed.
10. In light of the complainant's response the Commissioner commenced his investigation into the complaint and wrote to the Council to ascertain the basis on which it had refused the request. The Council confirmed that it considered the information held relevant to the request to be exempt under sections 40(1), 40(2) and 41. The Council also confirmed that it had provided the complainant with the information requested that constituted their own personal data as a subject access request.
11. The scope of the Commissioner's investigation into this complaint is to determine whether the information held relevant to the request should be disclosed.

Reasons for decision

Section 40(1) and section 40(5A): personal data of the requester

12. Section 40(1) of FOIA states that:

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

13. Section 40(5A) of FOIA states that:

"The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1)."

14. Section 2(2) of the Data Protection Act 2018 (the DPA) defines personal data as:
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² [Information about the deceased](#)

"any information relating to an identified or identifiable living individual"

15. An identifiable living individual is one who can be identified, directly or indirectly. This may be by reference to an identifier such as a name, an identification number, location data, an online identifier. Or it may be by reference to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
16. 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.
17. The Council advised the Commissioner that, in light of the personal nature of the request, some of the information held comprises the personal data of the complainant and other third parties which is considered to be inextricably linked. The Council referred to the Commissioner's guidance on section 40 and pointed out that it was not required to consider or determine whether the rights of one data subject outweighs those of other data subjects as they should be "given equal standing and should be dealt with under subject access provisions". The Council confirmed that it had identified the personal data of the requestor and provided them with the information they were entitled to, taking into account any relevant exemptions under the DPA.
18. In this case the Commissioner is satisfied that some of the requested information relates to the complainant. The complainant is named in some of the documents and it comprises information, opinions and concerns put forward by the complainant about their aunt and her care. This information is clearly the complainant's own personal data within the meaning of section 2(2) of the DPA; therefore the exemption at section 40(1) of FOIA is engaged. Section 40(1) provides an absolute exemption and the Commissioner is not required to consider the public interest.

Section 40(2) – third party personal data

19. Section 40(2) of 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.
20. The Council has withheld various information relating to third parties contained within the withheld information. Specifically, the names of individuals involved in the care of the complainant's aunt contained within care plans/reports relating to the deceased. In addition, the Council has applied section 40(2) to information relating to other relatives of the deceased referred to within the care plans/reports.

21. The Council has also applied section 40(2) to communications about the deceased with her personal representative, comprising of notes of discussions and letters sent to the personal representative concerning financial information.
22. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to identifiable individuals. He is satisfied that this information both relates to and identifies the identifiable individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
23. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
24. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

25. 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".

26. 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.
27. 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.

Lawful processing: Article 6(1)(f) of the UK GDPR

28. The Commissioner considers that the lawful basis most applicable to a disclosure under FOIA is Article 6(1)(f) of the UK GDPR which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child³".

³ Article 6(1) goes on to state that:-

29. In considering the application of Article 6(1)(f) in the context of a request for information under FOIA, it is necessary to consider the following three-part test:
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
30. The Commissioner further considers that these tests should be considered in sequential order, meaning that if the legitimate interest is not met then there is no need to go on to consider the necessity test, and so on.

Legitimate interests

31. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
32. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
33. The Council acknowledges that the complainant has an interest in the information requested as it relates to their relative. The Council pointed out that the substance of the complainant's requests is not the actions of the Council itself but of others, including the care home, hospital staff and another relative of their aunt. The Council considers that the nature of the personal data sought "is of a highly sensitive nature".

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks". However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

34. The complainant considers that, as well as their own interest, there is a wider legitimate interest in the information requested as, in their opinion, procedure was not followed by the Council's Adult Social Services. The complainant also referred to the Council's refusal to accept a letter signed by their Aunt as evidence that she wanted the complainant to be kept informed of her welfare and care.
35. The Commissioner accepts that the complainant has a personal interest in accessing the information. However, due to the personal nature of the withheld information he has been unable to identify any wider legitimate interest in accessing the information.

Necessity test

36. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures; so, confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
37. The Council advised that it considered whether there was a pressing social need to disclose the third party personal data. Given the personal nature of the request and the lack of wider transparency or accountability, the Council does not consider that the test for necessity is met in this case.
38. The Commissioner accepts the information requested would not normally be in the public domain. Whilst the Commissioner does not consider that the information in question has any wider interest he accepts that disclosure of the withheld information would be necessary to meet the interest identified.

Balance of legitimate interests and the data subject's interests

39. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
40. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;

- whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
41. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
42. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
43. The Commissioner is satisfied that the individuals concerned would have no reasonable expectation that their personal data would be disclosed into the public domain. He is also satisfied that disclosure would be likely to result in unwarranted damage or distress to the individuals concerned. Furthermore, he accepts that disclosure of the withheld information risks invading the privacy of the individuals concerned.
44. Based on the above, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
45. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's decision

46. The Commissioner has therefore decided that the Council was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Section 41 – information provided in confidence

47. Section 41(1) provides that:
"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”.

48. The Commissioner has issued specific guidance⁴ for public authorities in relation to requests for information about deceased persons. This guidance explains the particular relevance of section 41(1) to social care records.

Was the information obtained form another person

49. The Council has withheld information contained care plans/reports about the deceased individual under section 41. The Council has also withheld information relating to a financial assessment in respect of the deceased individual under section 41.
50. The Council referred to the Information Tribunal case of *Pauline Bluck v Information Commissioner and Epsom & St Helier University Hospitals NHS Trust* (EA/2006/0090, 17 September 2007), where the Tribunal confirmed that information contained in medical records will generally be confidential and that even though the person to whom the information relates may have died, action for a breach of confidence could be taken by the personal representative of the deceased person. The exemption would therefore continue to apply.
51. The Council also referred to the Commissioner’s guidance on section 41⁵ which confirms that information contained within in a social care record of a deceased person is likely to have the necessary quality of confidence for the exemption to apply (as long as the other aspects are met).
52. The Council advised the Commissioner that, although it actually generated the care plans/reports it considers that only parts of the reports constitute information which has been provided by a third party, and therefore exempt under section 41. The Council stated that it had not applied section 41 to entire documents and considered that some of the information could be disclosed. As mentioned earlier in this notice, the Council has also applied section 40(1) and 40(2) to parts of the care plans/reports.

⁴ <https://ico.org.uk/media/for-organisations/documents/1202/information-about-the-deceased-foi-eir.pdf>

⁵ [information-provided-in-confidence-section-41.pdf \(ico.org.uk\)](https://ico.org.uk/media/for-organisations/documents/1202/information-about-the-deceased-foi-eir.pdf)

53. On viewing the information within the care plans/reports which the Council has not applied any exemptions to, the Commissioner considers that, with the exception of general information which forms the standard forms themselves, the information takes the form of assessments and notes created by professionals involved in providing the individual's care. The Commissioner considers that this information derives from the individual under care and therefore would fall within the scope of section 41. As such, even though the Council has not applied any exemptions to some information contained within the care plans/reports the Commissioner does not consider it to be suitable for disclosure into the public domain, due to the personal nature of the information. The Commissioner has therefore used his discretion and considered whether section 41 also applies to the information.
54. The Commissioner is satisfied that all of the information which has been added to the care forms/reports by the Council, which is not exempt under section 40(1) and section 40(2) was obtained from the deceased person, either directly or through professionals involved in providing care. The Commissioner also accepts that the financial assessment information was also obtained from another person, either the deceased individual or their personal representative. The Commissioner therefore accepts that the information was obtained from another person for the purposes of section 41(1)(a) and he has gone on to consider whether the disclosure of this information would constitute an actionable breach of confidence.

Would disclosure constitute an actionable breach of confidence?

55. The Commissioner has taken the view, in line with the decision reached by the First-tier Tribunal (Information Rights) (the Tribunal) in the case of *Pauline Bluck v the Information Commissioner and Epsom and St Helier University NHS Trust (EA/2006/0090)* that a duty of confidence is capable of surviving the death of the confider. In the circumstances of the Bluck case, the appellant had been appointed to act as the personal representative of her deceased daughter and was seeking the disclosure of her daughter's medical records under the terms of the FOIA. In Bluck, the Tribunal confirmed that even though a person to whom information relates has died, action for breach of confidence could still be taken by the personal representative of that person, and that the exemption under section 41(1) can therefore continue to apply to that information. The Commissioner's view is that such action would be likely to take the form of an application for an injunction seeking to prevent the disclosure of the information.
56. It is the Commissioner's view that in determining whether disclosure would constitute an actionable breach of confidence, it is not necessary to establish whether the deceased person has a personal representative who would be able to take action. This is because it is not reasonable

that a public authority should lay itself open to legal action because, at the time of an information request, it is unable to determine whether or not a deceased person has a personal representative.

57. As the Commissioner accepts that a duty of confidence is capable of surviving a person's death, he has gone on to consider the confidence test set out in *Coco v Clark [1969] RPC 41*, which provides that a breach of confidence will be actionable if:
- a. The information has the necessary quality of confidence;
 - b. The information was imparted in circumstances importing an obligation of confidence; and
 - c. There was an unauthorised use of the information to the detriment of the confider.

The 'necessary quality of confidence'

58. Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.
59. The Council considers that the medical and financial information should be regarded as more than trivial and it is information that would not be available from another source. As such, the information is worthy of protection from disclosure to the world at large. In addition the Council stated that information given to the Social Worker by the complainant's aunt was personal to their family circumstances and was important to them, thus creating the necessary quality of confidence.
60. The Commissioner is satisfied that social care records and associated financial assessments are personal, sensitive, and important to the confider, and are therefore more than trivial. The Commissioner is therefore satisfied that the withheld information in this case has the necessary quality of confidence required to sustain an action for breach of confidence, and as such considers that this limb of the confidence test is met.

The 'obligation of confidence'

61. Even if information is to be regarded as confidential, a breach of confidence will not be actionable if it was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.
62. The Council contends that the restriction on disclosure of medical and financial information provided to it is implicit in the circumstances. Receiving such information within the deceased individual's social care assessments would create an expectation of confidentiality and there

would be no expectation that such information would be disclosed into the public domain.

63. When a social care client is under the care of professionals, the Commissioner accepts that the client would not expect information produced about their case to be disclosed to third parties without their consent. As such, the Commissioner is satisfied that an obligation of confidence is created by the very nature of the relationship between client and professional.
64. With regard to any information that may have been provided by a third party, consideration has to be given not only to the expectations of the third party who provided the information, but also to the complainant's aunt, whom the information was about. The Commissioner is satisfied that the information would have been supplied with the expectation that it would be treated in confidence. Given this, the Commissioner is satisfied that this limb of the test is met.

The 'detriment of the confider'

65. Having concluded that the information withheld in this case has the necessary quality of confidence, and was imparted in circumstances giving rise to an obligation of confidence, the Commissioner has proceeded to consider whether unauthorised disclosure could cause detriment to the deceased person.
66. In many cases, it may be difficult to argue that a disclosure of information would result in the confider suffering a detriment in terms of any tangible loss. As the person is now deceased, the Commissioner does not consider that the disclosure of the withheld information would cause any tangible loss. However the Commissioner does consider that disclosure to the general public (which is what disclosure under the terms of the FOIA represents) would be an infringement of the deceased person's privacy and dignity. Such a loss of privacy and dignity can be a detriment in its own right. This position is supported by the Tribunal's decision in the aforementioned *Bluck* case.
67. Further to the above, and following the decision of the High Court in *Home Office v BUAV and ICO* [2008] EWHC 892 (QB), the Commissioner recognises that with the introduction of the Human Rights Act 1998 (HRA), all domestic law, including the law of confidence, must be read in the context of the HRA. In relation to personal information, this involves consideration of Article 8, which provides for a right to privacy.
68. Article 8 of the HRA recognises the importance to individuals of having their privacy respected, and in this context the Commissioner must consider that the invasion of the complainant's mother's privacy would also represent a detriment to his mother as a confider. This, in the

Commissioner's view, also extends to that information which may have been provided by the third party about the complainant's aunt.

69. Having considered the above factors, the Commissioner therefore finds that no specific detriment, beyond the general loss of privacy and dignity, needs to be found in the circumstances of this case. He is therefore satisfied that the third element of the test is met.

Is there a public interest defence?

70. Although section 41(1) is an absolute exemption, and is not qualified by a public interest test under section 2 of the FOIA, as the council explained in its internal review response to the complainant, 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.
71. The Commissioner has therefore considered whether there is a public interest defence available, should the Council disclose the information.
72. The duty of confidence public interest defence assumes that the information should be withheld, unless the public interest in disclosure exceeds the public interest in maintaining the confidence.
73. The Commissioner takes the view that a duty of confidence should not be overridden lightly, particularly in the context of a duty owed to the confider. In this instance this is relevant to the information which was obtained from the deceased individual, and the third party.
74. Disclosure of any confidential information undermines the principle of confidentiality, which itself depends on a relationship of trust between the confider and the confidant. It is the Commissioner's view that people would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected. It is therefore in the public interest that confidences are maintained.
75. In the circumstances of this particular case, the Commissioner also considers it important that a social care client has confidence that sensitive information about them will not be made publicly available following their death. A breakdown in the trust between parties in such a situation would be counter to the public interest, as it could endanger the health of social care clients and prejudice the effective functioning of social services.
76. In addition to the wider public interest in preserving confidentiality, there is also a public interest in protecting the confider from detriment. The Commissioner has already established that it would be a sufficient detriment to the confider to infringe their privacy and dignity. As already

noted, the importance of a right to privacy is further recognised by Article 8 of the HRA.

77. However, there is a competing human right in Article 10 which provides for a right to freedom of expression, which includes the freedom to receive and impart information, and the general test for an actionable breach of confidence provides that if there is a public interest in disclosure that exceeds the public interest in preserving confidentiality, the breach will not be actionable.
78. In considering the specific circumstances of this case, the complainant has suggested that the Council did not follow proper procedures in respect of decisions made concerning their aunt, and information it provided to the care home about their aunt. The complainant has alleged that the Council incorrectly advised the care home that another individual had Lasting Power of Attorney (LPA) in respect of their aunt's finance **and** health and welfare. The complainant contends that if proper checks had been carried out by the Council it would have revealed that the individual had LPA for finance only.
79. The Commissioner recognises that it is in the public interest to expose any malpractice on the part of public authorities, and that it is also in the public interest for individuals to have access to information to help them to conduct a legal challenge. However, having considered the detailed submissions made by the complainant, there is no immediate evidence available to the Commissioner of any malpractice on the part of the Council, and it is further noted that any appropriate review of the concerns held by the complainant would need to be undertaken by independent bodies with the jurisdiction to consider such issues.
80. In light of the above, there is no evidence available to the Commissioner that suggests there is sufficient wider public interest in the information being disclosed. The complainant's wish to access this information is based on personal need, and the Commissioner considers it reasonable to consider that there are proper routes for the complainant to have their concerns addressed. The Commissioner therefore takes the view that the public interest in preserving the principle of confidentiality is much stronger than that in disclosing the information, and that there would be no public interest defence available should the Council disclose the information.
81. As discussed above, the Commissioner's view is that a duty of confidence would be capable of surviving the person's death. The Commissioner is also satisfied that the withheld information has the necessary quality of confidence, was imparted in circumstances giving rise to an obligation of confidence, and that disclosure would result in detriment to the confider. Having considered the circumstances of this case, the Commissioner does not consider that there would be a public

interest defence in disclosing the information, and as such, accepts that section 41(1) has been correctly engaged.

82. In summary, the Commissioner considers that all of the substantive information held relevant to the request is exempt under sections 40(1), 40(2) and 41(1). Redaction of all the exempt information would render the information meaningless as it would essentially comprise of blank standard forms used by the Council.

Section 17 – refusal notice

83. Section 1(1) of the FOIA states that:

“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.

84. Section 17(1) of the FOIA states that when a public authority wishes to withhold information or to neither confirm nor deny holding information it must:

“within the time for complying with section 1(1), give the applicant a notice which—

- (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.
- (3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—
- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
 - (4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.
- 85. In this case, despite the initial request being cleared marked as a request under the FOIA, the Council's initial response dated 25 March 2021 did not meet the requirements of section 17 of the FOIA as no exemptions were cited as the basis to refuse the request. In its internal review response the Council explained that the FOIA did not apply to the complainant's own personal data but again it failed to cite any exemptions in respect of other information held relevant to the request. It was only after the Commissioner commenced his investigation that the Council cited any exemptions.
- 86. In light of the above the Commissioner finds that the Council breached section 17(1) in its handling of the request.

Right of appeal

87. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

88. 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.

89. 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

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