

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 27 November 2007

Public Authority: Trafford Metropolitan Borough Council
Address: Trafford Town Hall
Talbot Road
Stretford
Greater Manchester
M32 0TH

Summary

The complainant asked Trafford Metropolitan Borough Council ("the Council") for information about the course of action it followed after it was notified of a GP's concerns about injuries sustained by her deceased mother, who was in the care of a third party. The Council interpreted this as a general request to view the deceased's social services records and refused to disclose the information, stating that it was confidential. The Information Commissioner ("the Commissioner") asked the Council to reconsider its response in light of the Freedom of Information Act 2000, and it subsequently claimed that the information was exempt from disclosure under sections 40, 41 and 44. The Commissioner considered that the exemptions under sections 40 and 41 applied in respect of the requested information. However he also considered that by taking more than 20 working days to supply a refusal notice, and by not providing sufficient information about exemptions and appeal rights in the notice, the Council breached section 17.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant had not been in contact with the deceased during her final years and learned of her death, in 2002, by chance. On 29 March 2006 the complainant wrote to the Council, explaining that she had discovered that the

deceased's GP had noted that she had sustained possible non-accidental injuries while in the care of a third party in July 2002. She wrote:

"I consider it necessary for my 'closure', to be informed of how the GP's written alert...was dealt with by 'Social Services'."

3. The complainant and the Council then had several telephone conversations, the details of which were not documented. The Council issued a refusal notice on 19 May 2006. It explained that all the information it held about the deceased was provided to it in a context which made it confidential, and that there was no reason to believe that the deceased would not have wished it to remain confidential after her death. It also commented:

"In response to your specific question concerning the procedures followed by Trafford Social Services after receiving the GP's directions, I can inform you that the Council followed the Vulnerable Adults Protection Pathway ["VAPP"] which was in use at the time.

4. The complainant responded on 22 May 2006 arguing that it was in the public interest that the information about the deceased's care be made available. She explained:

"I consider that for the benefit of elderly people, living or deceased, and their relatives, the public need to be assured that in the case of suspected neglect/abuse the necessary procedures of investigation are followed. That is – a full report to include circumstances and outcomes of investigation. This document then to be made available for public scrutiny."

5. The complainant referred to her rights under the Freedom of Information Act 2000 and asked that her request be reviewed by the Council, with a view to the Council advising the following:

"(1) How procedures were followed in this particular case, using the 'VAPP Guidelines'

(2) The outcome of the subsequent enquiry.

Also – for all documentation surrounding this directive from the GP 8.7.02 to be made available"

6. The complainant wrote to the Council again on 8 June 2006, apparently to complain about the general level of service she had so far received in pursuing the matter, however a copy of this letter was not supplied to the Commissioner.

7. The Council responded on 21 July 2006. It addressed the complainant's service level complaints, conceding that some of them were justified. In particular, it acknowledged that it had not dealt with the request under the Act and accepted that it should have done.

8. The Council went on to explain that it had now reviewed the request under the Act and that it upheld its initial refusal to supply the information. It cited the exemption in respect of confidentiality at section 41 and the prohibitions on disclosure at section 44 (in particular the right to privacy afforded by Article 8, given effect by the Human Rights Act 1998) as supporting this view. It explained that when reaching its decision it had discounted the complainant's identity and relationship to the deceased and had considered the disclosure as though it were to be made to the world at large.
9. The Council set out the complainant's rights of appeal. It also outlined her right to complain to the Commissioner, and supplied the Commissioner's contact details.
10. The complainant responded on 26 July 2006, indicating dissatisfaction with the outcome. She maintained that disclosure of the information was in the public interest and asked for a copy of the VAPP Guidelines (which the Council duly supplied). She concluded by stating her intention to pursue the matter through the Commissioner.

The Investigation

Scope of the case

11. On 27 July 2006 the complainant contacted the Commissioner (who was already investigating a similar complaint from her, against a separate public authority) to complain about the way her request for information had been handled by the Council. The complainant specifically asked the Commissioner to help her gain access to information about the injury referred to in the GP's note and any subsequent investigation into it. The Commissioner therefore investigated whether the Council was right to withhold the information in question, namely the information held about the GPs written alert and the Council's subsequent course of action.
12. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

13. The complainant wrote to the Commissioner several times prior to the Commissioner commencing the investigation into her complaint. She also continued to pursue the matter on her own and with the aid of solicitors.
14. On 8 November 2006 the complainant wrote, via her solicitors, to the Council. The letter set out her grounds for concern about the care received by the deceased. She repeated her claim that it was in the public interest that she be permitted access to the deceased's care record. She also argued that it was in the public interest that she see the information so as to establish whether the

Council had complied with its VAPP guidelines. The complainant also indicated she wished the Council to review the matter again.

15. On 11 December 2006, the Council wrote to the complainant, referring to her letter of 30 October (copy not supplied to the Commissioner) and setting out the dates on which the deceased had come within the scope of its care between 2000 and 2002 (during which time she had moved in and out of the borough several times).
16. The complainant wrote to the Commissioner on 29 January 2007 and 12 February 2007, reiterating her concerns and enclosing correspondence with the Council (most of which had already been provided).
17. On 14 February 2007 the complainant wrote to the Commissioner enclosing a letter from the Council to her solicitors dated 8 February 2007, which appeared to be in response to her letter of 8 November 2006. It stated that the Council had reviewed the handling of her complaint and had concluded that it would not be conducting a further review.
18. The Council also expanded on its use of exemptions as set out below.
19. **Section 41 – information provided in confidence:** The Council explained that the information requested by the complainant had been provided to it by the deceased in the expectation that it would be held confidentially. Thus, its disclosure could be regarded as misuse and could amount to an actionable breach of confidence. It acknowledged that the deceased would be unable to bring about such an action, but considered that a third party could.
20. **Section 44 – prohibitions on disclosure:** The Council referred to the right to private life, established in the Human Rights Act 1998. It claimed that the disclosure of the requested information would be an intrusion on the privacy of the deceased's relatives and would therefore be prohibited by this legislation.
21. The Council explained that as sections 41 and 44 are absolute exemptions, there was no obligation upon it to consider the public interest in reaching its decision.
22. The Council went on to suggest that the following exemptions might also be applicable in respect of the request for the information. It reserved the right to invoke them once it had had the opportunity to consider them in more detail.
23. **Section 36 – prejudice to effective conduct of public affairs:** The Council argued that if the expectation of confidence between a client and a social services department was eroded this would have a profound impact on the provision of care. This would be a direct result of a failure by clients to provide appropriate information due to fear of potential disclosure. This would arguably prejudice the conduct of public affairs and would in general terms not be in the public interest.
24. **Section 40 – personal information:** Much of the information that the complainant had requested would identify and be about third parties, and its

- disclosure would contravene their rights under the Data Protection Act 1998 (the "DPA").
25. The Council informed the complainant that if she remained dissatisfied with the outcome she could complain to the Local Government Ombudsman or the Commissioner and gave contact information for both.
 26. On 12 April 2007 the complainant wrote to the Commissioner advising that she had made a complaint about the Council's treatment of the deceased to the Local Government Ombudsman.
 27. On 17 April 2007 the Commissioner wrote to the complainant explaining that he was commencing the investigation of her complaint. The Commissioner explained that the investigation would restrict itself to whether the Council had complied with the Act in declining to release information, and would not consider questions of whether it had acted correctly in the care of the deceased.
 28. On 17 April 2007 the Commissioner wrote to the Council outlining the complaint against it and asking for a copy of the information covered by the complainant's request.
 29. On 8 May 2007 the Council telephoned the Commissioner and asked for a meeting to discuss the case. The Council explained that it was willing to let the Commissioner see the withheld information, but felt that it would be beneficial, given the sensitivity of the material, to provide some sort of context to the matter. The Commissioner agreed to a meeting.
 30. The Commissioner met with the Council on 21 May 2007 and the entire case file for the deceased was handed over. The Council set out its reasons for withholding the information in broad terms, and cited exemptions at sections 36, 40, 41 and 44. The Commissioner explained that the Council needed to demonstrate more specifically how the exemptions it referred to applied in respect of the requested information and the Council agreed to go away and review its response.
 31. On 16 August 2007 the Council emailed the Commissioner a detailed synopsis of the deceased's case file. It set out its claim that the exemptions at section 40, 41 and 44 applied in respect of the information requested by the complainant, and went through the documents in the case file, explaining how the exemptions applied in respect of each one.
 32. The Commissioner considers that the complainant's request was for any information held in respect of the GP's alert over possible non-accidental injuries and any follow up action taken by the Council. He therefore considers that the majority of the social services file, which details the deceased's general care needs, is irrelevant to the request and the Council's arguments in respect of that information have not been examined.
 33. The remainder of the file comprises observational notes about the deceased and her living arrangements, as well as meeting records, correspondence, care needs

reports and assessment forms between the date of the GP's alert (July 2002) and the deceased's death (October 2002). It is these items which the Commissioner has considered in reaching his decision.

Analysis

Procedural matters

34. The Commissioner considered whether the refusal notice issued by the Council complied with section 17 of the Act.
35. The Council responded to the complainant's request of 29 March 2006 by sending a refusal notice on 19 May 2006 (although the letter does indicate that in the interim period there was some telephone contact between the two parties). The refusal notice was therefore issued after the 20 working day period for response provided by the Act.
36. The refusal notice did not specify the exemptions that the Council considered applied in respect of the requested information. It did not advise the complainant of its internal review procedures or advise her of her right to complain to the Commissioner. (The Commissioner accepts that this information was eventually supplied to the complainant in the Council's letter of 21 July 2006.)

Exemption

37. In considering whether exemptions are valid the Commissioner has taken into account the fact that the Act is designed to be applicant blind, and that disclosure should be considered in the widest sense (that is, to the public at large). In view of this, the Commissioner has not taken into account the unique circumstances of the complainant. If the information were to be disclosed under the Act it would, in principle, be available to any member of the public.
38. When examining the arguments in favour of disclosure of the information requested and the maintenance of the exemption, the Commissioner has taken into account evidence gathered from a number of sources. Particular heed has been paid to the arguments put forward by the complainant and the Council, as well as advice provided during internal discussions and legal advice.

Section 40

39. The Commissioner considered whether the Council was correct to apply the exemption under section 40 of the Act, in respect of the requested information. Section 40 applies in respect of information which constitutes personal data. It allows, amongst other things, that personal data may be withheld if its disclosure would be to someone other than the data subject and the disclosure would contravene any of the Data Protection Principles of the DPA.

40. The information contained in the deceased's records identifies the deceased, her primary carer and several social services and health authority employees. The DPA ceases to apply in respect of deceased persons, and so the exemption cannot apply in respect of information about and which identifies the deceased. The Council recognises this, and has only invoked the exemption in respect of the information about and which identifies the primary carer. The information comprises assessments of the deceased's care arrangements and requirements, correspondence with the primary carer, visit reports, observational notes, administrative notes and inter-agency correspondence about the deceased and her carer.
41. The requested information falls within the definition of "data", set out at section 40(3)(a) of the Act. As an excerpt from the Council's Social Services file, it is an "accessible record" as defined under section 68 of the DPA. The exemption at section 40 therefore has the potential to apply where the information involved constitutes personal data about the primary carer.
42. The Commissioner has therefore firstly considered whether the information contained in the file constitutes personal data about the primary carer.
43. Section 1(1) of the DPA defines personal data as data which relate to a living individual who can be identified from that data alone or in conjunction with other information in the possession of or likely to come into the possession of the data controller (in this case, the Council) It includes any expression of opinion about the individual and any indication of intention of towards them.
44. Having examined the information outlined in paragraph 40 the Commissioner has noted that much of the information about the deceased takes account of the carer's particular circumstances when determining courses of action. Because of the level of care provided by the carer (virtually twenty four hour) information about the deceased is inextricably linked with that of the carer, both explicitly and also by implication. The records also express opinions on the primary carer and note intended action in respect of care plans. They include references to the primary carer's personal circumstances, health and financial arrangements. The Commissioner is therefore satisfied that the majority of the information referred to in paragraph 40 does constitute personal data in respect of the primary carer.
45. The remainder, which the Commissioner does not consider to be exempt under section 40, comprises two assessment forms, two letters, a GP's letter and handwritten note and a transfer report sheet.
46. The Commissioner then went on to consider whether disclosure of the personal data would contravene any of the Data Protection Principles.

First Principle

47. The First Data Protection Principle requires, amongst other things, that personal data be processed fairly and lawfully.

48. The Commissioner firstly considered whether disclosure of personal data about the primary carer would be unfair. In addressing this question he has considered the following:
- Would the disclosure cause unnecessary or unjustified distress or damage to the person who the information is about?
 - Would the third party expect that his or her information might be disclosed to others? Is disclosure incompatible with the purposes for which it was obtained?
 - Had the person been led to believe that his or her information would be kept secret?
 - Has the third party expressly refused consent to disclosure of the information?
 - Does the legitimate interest of a member of the public seeking information about a public authority, including personal information, outweigh the rights, freedoms and legitimate interests of the data subject?
49. The Commissioner has considered these points in light of the information provided by both the Council and the complainant. He considers that the disclosure of the information, much of which is of a sensitive nature, would be likely to cause unjustified distress to the primary carer. He is aware that she has objected to the release of similar information held by another public authority, to the complainant (this being the subject of a separate complaint to the Commissioner). He considers that the primary carer would have had a quite reasonable belief that her interaction with the Council was confidential and that information about her would only have been disclosed for the purposes of service provision by the Council, in line with its stated disclosure policy. In view of this he considers that the legitimate interests of the complainant to request the information do not, in this instance, outweigh the primary carer's rights, freedoms and legitimate interests. He is therefore satisfied that the disclosure of personal data about the primary carer, without her consent, would be unfair.
50. The Commissioner also considers that a disclosure of personal data would be unlawful if it constitutes a breach of confidence. The Council has argued that much of the information provided by clients and their carers is sensitive (some of it within the definition of "sensitive personal data" contained at section 2(e) and (g) of the DPA) and given in the expectation that it will not be disclosed. The Commissioner therefore considers that disclosure of such information could involve a breach of a duty of confidence (this point is expanded under the arguments in respect of section 41) in respect of the primary carer and be unlawful.
51. The Commissioner therefore considers that the exemption applies in respect of the information outlined in paragraph 40, apart from the information outlined in paragraph 45.

Section 41

52. The Commissioner considered whether the Council was correct to apply the exemption under section 41 of the Act. Section 41 applies in respect of information which was obtained by a public authority from another person, the disclosure of which would constitute an actionable breach of confidence. The exemption is “absolute” and therefore not subject to the public interest test.
53. The Commissioner firstly considered the specific items of information which are not covered by the exemption at section 40, outlined in paragraph 45 above.
54. The Commissioner accepts that the information contained in these records was obtained from third parties, namely the deceased and her primary carer, her GP and her local health authority. He therefore considers that the information satisfies the first part of the exemption at section 41, requiring that it be obtained from another person.
55. Turning to the exemption's second requirement, the Commissioner is satisfied that the records, which constitute a portion of the deceased's social services file, have the necessary quality of confidence required to sustain an action for breach of confidence. The Council has explained that individuals enter into social services care arrangements with the expectation that the information they provide (both directly and indirectly) will only be used in connection with the provision of that care and will not otherwise be disclosed to third parties without their consent (except in very limited circumstances). The Commissioner accepts that this expectation of confidence is the cornerstone of the Council's relationships with its clients and is vital for successful service provision. The Commissioner accepts that the threat of onward disclosure of such information could inhibit the relationship between it and its clients, in that concerns that private information may subsequently be open to public scrutiny may cause clients to be unwilling or to refuse to disclose important information.
56. The Commissioner has gone on to consider whether the duty of confidence can survive the death of the individual to whom it is owed. The argument is considered on the basis of both principle and authority.
57. The argument of principle is that the breach of confidence would affect the conscience of the defendant. Where the disclosure of such information could be said to be unconscionable, it may be restrained by the Court even where it would not damage the confider. The Commissioner finds the argument of principle to be a reasonable one, particularly given the fact that the disclosure under the Act is disclosure to the world at large.
58. Having considered the argument of principle, the Commissioner has examined the argument of authority. While this may be less powerful than the argument of principle, there would appear to be no binding authority against the argument of principle. In view of this, the Commissioner is satisfied that the duty of confidence attached to social services records can survive the death of the person to whom the records relate. In reaching this view the Commissioner follows the Tribunal's

finding in EA/2006/0090 *Bluck v IC and Epsom and St Helier University NHS Trust*.

59. After reaching this view, it is therefore necessary to establish who would be able to bring the action in the event that the duty of confidence were breached. The Commissioner has sought advice and considered this point at length. While again there would appear to be no binding authority on this point, the Commissioner has reached the view that an action could be brought by the personal representatives of the deceased, namely the executors or administrators of the estate. It would be unlikely that surviving relatives other than the deceased's personal representatives would be able to bring an action based on a breach of the duty of confidence. The Commissioner has seen a signed letter naming the primary carer as the deceased's personal representative, and is also aware that she has objected to the release of similar information held by another public authority, to the complainant. In reaching this view, the Commissioner has followed the thinking of the Tribunal in case EA/2006/0090 *Bluck v IC and Epsom and St Helier University NHS Trust*.
60. Finally in relation to this exemption, the Commissioner has considered whether the breach is 'actionable'. He considers this to be the case, though it is unlikely that damages could be awarded for a breach of the duty of confidence to the deceased, as there is no obvious financial loss. Instead, any action would most likely be in the form of an injunction to prevent publication of the information requested. Again, the Commissioner is mindful of the Tribunal's thinking in case EA/2006/0090 *Bluck v IC and Epsom and St Helier University NHS Trust*.
61. In view of the above, the Commissioner considers that the exemption at section 41 applies to the records identified in paragraph 45 as not being exempt under section 40. He also considers that the remainder of the information described in paragraph 40 is exempt under section 41. He has therefore not gone on to consider the other exemptions raised by the public authority.

The Decision

62. The Commissioner's decision is that the public authority correctly withheld the information using the exemptions under section 40 and 41 of the Act.
63. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

By failing to supply a refusal notice to the complainant within twenty working days, the Council breached section 17(1) of the Act.

By failing to specify in the refusal notice the exemptions that it was relying upon to withhold information, the Council breached section 17(1)(b) of the Act.

By failing to include details of its internal review procedures and failing to include details of the complainant's rights under section 50 of the Act, the Council breached section 17(7) of the Act.

Steps Required

64. The Commissioner requires no steps to be taken.

Other matters

65. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

66. The Council accepted that it had failed to recognise and treat the complainant's initial written approach as a request for information under the Act and it would appear to be this failure which led to the failure to send out an adequate refusal notice within the 20 working day time limit. The Commissioner accepts that the Council subsequently provided details of the complainant's appeal rights and outlined the relevant exemptions. The Commissioner has advised the Council on the importance of ensuring that its staff are aware of the Act and understand how to recognise and handle requests for information, so as to avoid similar problems in the future.

67. The Council also advanced the argument that information about the deceased's primary carer was exempt under section 44 of the Act by virtue of the provisions of the Human Rights Act 2000 in respect of Article 8 of the European Convention on Human Rights (specifically, the right to private and family life, home and correspondence). Whilst it is the case that the Council is obliged to act in a way which is compatible with the Human Rights Act, the Tribunal recently ruled (in case EA/2006/0090 *Bluck v IC and Epsom and St Helier University NHS Trust*) that the Human Rights Act does not elevate the general terms of Article 8 to the level of a directly enforceable legal prohibition. Following the Tribunal's ruling, the Commissioner has therefore disregarded the Council's argument that the information is exempt under section 44.

Right of Appeal

68. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 27th day of November 2007

Signed

**Jane Durkin
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Freedom of Information Act 2000

Time for Compliance

Section 10(1) provides 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.”

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information 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.”

Section 17(7) provides that –

“A notice under subsection (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.

Personal information.

Section 40(1) provides 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.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the DPA, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
- (i) any of the data protection principles...”

Information provided in confidence.

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.”

Prohibitions on disclosure.

Section 44(1) provides that –

“Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.”

Data Protection Act 1998

Basic interpretative provisions

Section 1(1) provides that –

“In this Act, unless the context otherwise requires—

“data” means information which ...

(d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

Meaning of “accessible record”

Section 68(1) provides that –

“In this Act “accessible record” means ...

(c) an accessible public record as defined by Schedule 12.”

Meaning of “accessible public record”

Schedule 12, paragraph 1 provides that -

“For the purposes of section 68 “accessible public record” means any record which is kept by an authority specified—

(a) as respects England and Wales, in the Table in paragraph 2...”

Schedule 12, paragraph 2 provides that –

“The following is the Table referred to in paragraph 1(a). “

TABLE OF AUTHORITIES AND INFORMATION

<i>The authorities</i>	<i>The accessible information</i>
Housing Act local authority.	Information held for the purpose of any of the authority’s tenancies.
Local social services authority.	Information held for any purpose of the authority’s social services functions.

Schedule 12, paragraph 4 provides that -

“Any authority which, by virtue of section 1 or 12 of the [1970 c. 42.] Local Authority Social Services Act 1970, is or is treated as a local authority for the purposes of that Act is a “local social services authority” for the purposes of this Schedule; and information contained in records kept by such an authority is “held

for any purpose of the authority's social services functions" if it is held for the purpose of any past, current or proposed exercise of such a function in any case."

First Data Protection Principle

Schedule 1, part 1 provides that –

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met. “