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JUSTICE

Freedom of information guidance

Exemptions guidance

Section 41 – Information provided
in confidence

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Introduction

Section 41 provides an exemption to the right of access under the Freedom of Information Act if release would be an actionable breach of confidence.

This exemption qualifies the right of access under Freedom of Information Act by reference to the common law action for 'breach of confidence'. According to that action, if a person who holds information is under a duty to keep that information confidential (a 'duty of confidence'), there will be a 'breach of confidence' if that person makes an unauthorised disclosure of the information.

The concept of 'breach of confidence' has its roots in the notion that a person who agrees to keep information confidential should be obliged to respect that confidence. However, the law has now extended beyond this: the courts recognise that a duty of confidence may also arise due to the confidential nature of the information itself or the circumstances in which it was obtained.

The concept of 'breach of confidence' recognises that unauthorised disclosure of confidential information may cause substantial harm. For example, the disclosure of a person's medical records could result in a serious invasion of that person's privacy, or the disclosure of commercially sensitive information could result in substantial financial loss. The law protects these interests by requiring the information to be kept confidential: if information is disclosed in breach of a duty of confidence, the courts may award damages (or another remedy) to the person whose interests were protected by the duty.

This exemption only applies if a breach of confidence would be 'actionable'. A breach of confidence will only be 'actionable' if a person could bring a legal action and be successful. The courts have recognised that a person will not succeed in an action for breach of confidence if the public interest in disclosure outweighs the public interest in keeping the confidence. So although the Act requires no explicit public interest test, an assessment of the public interest must be still be made. However, the factors the courts have considered to date and the weight they give to them are not the same as the factors considered by the Tribunal under the public interest test in section 2 of the Act.

If a public authority receives a request for information which it has obtained from another person and that public authority holds the information subject to a duty of confidence, that information will be exempt if providing it to the public would constitute an actionable breach of that confidence.

Three important factors which public authorities must bear in mind when applying this exemption are:

Unlike many of the other exemptions under the Act, public authorities must consider the application of this exemption not only when the disclosure of confidential information is requested under the Act but also whenever it obtains information which may be confidential. The Code of Practice¹ issued under section 45 of the Act limits the circumstances in which a public authority should agree to hold information in confidence.

Special considerations apply if information is also personal information relating to an individual in their private capacity. Further, specific guidance in relation to private, personal information can be found at Annex A.

If this exemption is incorrectly applied and information is wrongly released, a public authority may (in some circumstances) be exposed to a common law action for breach of confidence. If information is wrongly withheld a public authority may face sanctions under the Act.

The application of this exemption is essentially a legal question which calls for the careful interpretation and application of the law of breach of confidence as required by section 41. It will often be essential to seek legal advice where it appears that section 41 may apply to requested information.

You should also note that some documents may be marked 'CONFIDENTIAL' as part of the protective marking system defined in guidance produced by the Cabinet Office, but that does not mean that section 41 will apply to them. Their disclosure may not result in an actionable breach of confidence, and such documents are unlikely to have been received from another person. For guidance on dealing with protectively marked information see the procedural guidance.

What information may be covered by this exemption?

Whether or not a public authority holds information subject to a duty of confidence depends largely on the circumstances in which it was obtained and whether the public authority expressly agreed to keep it confidential. A

¹ Code of Practice on the Discharge of Public Authorities' Functions under Part I of the Freedom of Information Act 2000: www.justice.gov.uk/docs/foi-code-46.pdf

duty of confidence may also arise due to the confidential nature of the information itself.

If a request includes information which may fall within this exemption, three questions must be asked. If the answer to any of the questions is 'no', the information will not be exempt under section 41:

- Was the information obtained by the public authority from any other person?
- Is the information held subject to a duty of confidence (express or implied)?
- Would the disclosure of this information to the public, otherwise than under the Freedom of Information Act, constitute an actionable breach of confidence? This will include consideration of whether there would be a defence to an action for breach of confidence.

Each of these questions is examined below.

Was the information obtained by the public authority from any other person?

Section 41 only protects information which was obtained by a public authority from 'any other person (including another public authority)'. The origin of the information could be an individual, or a group of individuals or an organisation.

While this exemption may apply where a duty of confidence is owed by one public authority to another, it **will not** apply where both of those public authorities are government departments. Although government departments are treated as separate persons for the purposes of freedom of information (section 81(1)), a government department cannot claim that the disclosure of any information by it would constitute a breach of confidence actionable by any other government department (section 81(2)).

The same applies between Northern Ireland departments but not between a Northern Ireland department and a UK department: a UK department can claim that the disclosure of information by it would constitute a breach of confidence owed to a Northern Ireland department, and vice versa.

For example, the Ministry of Justice could not claim that information is exempt by virtue of section 41 because its disclosure would breach a duty of

confidence which it owes to the Department for Transport. On the other hand, section 41 may apply where the Ministry of Justice owes a duty of confidentiality to the Office of the First Minister and the Deputy First Minister of Northern Ireland. Similarly, the exemption could be engaged in relation to communications between a Government department and an organisation that it works closely with, but which remains separate. There might, for example, be a duty of confidence in information sent by the Law Commission to the Ministry of Justice.

The phrase, 'by another person', will usually require the information to have been obtained from outside the department and not from an employee. However, this will not always be the case. Section 41 may apply where disclosure would breach a duty of confidence which a public authority owes to an employee in their private capacity (other exemptions may also apply, in particular section 40 – personal information). On the other hand, if the information is disclosed in the course of employment, when an employee is acting on behalf of the public authority and solely in the capacity of employee, there will be no duty of confidentiality for the purposes of section 41.

For example, person A works for a regulatory public authority and a member of his family, person B, informs him of certain malpractices of which he has become aware. Person A 'whistle-blows' by passing this information to his employer public authority, in the expectation that it will be kept confidential. Person A has provided the information in a private capacity and, in public law terms, the information has been obtained from 'another person'. The fact that A also has an 'official' capacity does not mean that section 41 will not protect the information: his confidence will be protected in the same way as a non-employee who 'whistle-blows'.

The person from whom the information was obtained may not be the same person whose confidence is being protected; the information may have passed through the hands of another person before reaching the public authority.

For section 41 to apply, the public authority does not have to have obtained the information with the active involvement of another person. For example, if a public authority takes a photograph and that photograph includes confidential information about the subject of the photograph (for example, if it shows where that person is receiving medical treatment), section 41 may apply even though the subject of the photograph did not provide the information in an active sense or even know that the photograph had been taken.

Is the information held subject to a duty of confidence?

Public authorities routinely hold information which has been obtained from other public bodies, private organisations and individuals to which obligations of confidence are likely to attach. For example: frank exchanges of views with other public authorities; information which is commercially sensitive; and the personal, private information of individuals.

Information will only be held subject to a duty of confidence if it has the 'necessary quality of confidence'². This means that it must be information which is worthy of protection – someone must have an interest in the information being kept confidential. For example, even if a commercial contract states that everything in the contract is 'confidential', any useless or trivial information cannot be confidential and no duty of confidence will arise in relation to that information.

For information to be 'confidential' it must also be 'inaccessible' in the sense of not being in the public domain or a matter of public knowledge. Whether information is in the public domain is a question of degree; it will depend on the circumstances and the extent of public knowledge at the time when disclosure is requested. Information relating to an act which is done in a public place may still be private information and, equally, an activity is not necessarily private simply because it is not done in public.

For example, in *Campbell v MGN Limited*³, the House of Lords found that publication of a photograph of the claimant leaving a narcotics anonymous meeting could be a breach of confidence. Even though the claimant had been in a public place, the photograph enabled the location of the claimant's treatment for her addiction to be identified.

The courts will recognise that a person holds information subject to a duty of confidence in two types of situations:

- **where that person expressly agrees or undertakes to keep information confidential: there is an express duty of confidence**

² *Coco v AN Clark (Engineers) Ltd* [1969] R.P.C.41

³ [2004] 2 All ER 995

- **where the nature of the information of the circumstances in which the information is obtained imply that the person should keep the information confidential: there is an implied duty of confidence**

These two types are discussed below.

Where that person expressly agrees or undertakes to keep information confidential

Where a public authority expressly agrees to keep information confidential there is an express duty of confidence, provided that the information has the necessary quality of confidence. For example, where a public authority signs a contract which contains a confidentiality clause or agrees in correspondence that, if information is provided, it will be kept confidential.

While it will usually be a question of fact whether a public authority has agreed to or undertaken a duty of confidence, there are important policy considerations involved in the question of whether it is appropriate for a public authority to agree to a duty of confidence. As explained above, public authorities must consider the application of this exemption not only when disclosure of confidential information is requested but also when potentially confidential information is obtained. If information does not need to be kept confidential but a public authority expressly agrees to keep it confidential when it is obtained, this may result in the information being exempt from the Act under section 41. In light of the public interest in open government and freedom of information, public authorities must consider carefully whether it is appropriate to agree to keep information that it receives confidential.

Part V of the Code of Practice issued under section 45 of the Freedom of Information Act deals with the circumstances in which a public authority should accept information in confidence:

...There will be circumstances in which such [confidentiality] obligations will be an appropriate part of the acquisition of information from third parties and will be protected by the terms of the exemption provisions of the Act. But again, it will be important that both the public authority and the third party are aware of the limits placed by the Act on the enforceability of expectations of confidentiality, and for authorities to ensure that such expectations are created only where to do so is consistent with their obligations under the Act.

This Code has considerable force: it is one of the duties of the Information Commissioner to promote its observance and there is a legitimate expectation that public authorities will adhere to it. It is also likely that a court would take its provisions into account when determining whether a public authority has complied with the Freedom of Information Act.

When considering whether to agree to hold information subject to a duty of confidentiality, you should consider:

- the nature of the interest which is to be protected and whether it is necessary to hold the information in confidence in order to protect that interest
- whether it is possible to agree to a limited duty of confidentiality, for example by clearly stating the circumstances in which a public authority would disclose information
- whether the information will only be provided on the condition that it is kept confidential and, if so, how important the information is in relation to the functions of that public authority
- the nature of the person from whom the information is obtained and whether that person is also a public authority to whom freedom of information and the Code of Practice applies (where the person supplying the information is also a public authority, departments must be particularly cautious in agreeing to keep the information confidential)

If it is necessary and justifiable for a public authority to agree to keep the information confidential, that public authority should take practical steps to respect the confidential nature of the information (see Annex B). Ensuring that the circulation of confidential information is controlled and that the confidential status of that information is regularly reviewed will assist with responding to future freedom of information requests.

Where the nature of the information or the circumstances in which the information is obtained imply that the information should be kept confidential

An implied duty of confidence can arise even though a public authority has no pre-existing relationship with the person to whom the duty is owed, or has not agreed to keep the information confidential.

Some information which is obtained by a public authority will be manifestly confidential; by its very nature it will be clear both that substantial harm could be caused by its disclosure and that the public authority should not disclose it to members of the public. For example, a public authority obtains the medical records of an individual: in most circumstances, it will be clear that disclosure of that information to the public could cause substantial harm and offence to that individual. In this type of situation, the law may step in to imply a duty of confidence: the public authority may be obliged, by virtue of the very nature of the information, to keep it confidential. Whether the nature of the information concerned means that it is held subject to a duty of confidence is a question of degree and will, to a certain extent, depend on the circumstances at the time that disclosure is requested.

The circumstances in which information was obtained may impose an implied duty of confidence in relation to information which is not obviously of a confidential nature (i.e. where the public authority may not be immediately aware of its confidential nature). For example, if a public authority has statutory powers of compulsion, that is to say if it can legally oblige people to provide information for certain purposes, a duty of confidentiality will often arise in relation to that information and the public authority may be prohibited from disclosing the information in other contexts.⁴

This may also apply where information is provided under 'threat of compulsion' – where a person provides information to a public authority in the knowledge that, if they did not do so, the public authority would use its powers to compel disclosure. Additionally, when a public authority obtains information for a particular purpose, a duty of confidentiality may arise which prevents that information being used for a different purpose. For example, confidentiality attaches to information which is given to the police during the

⁴ For example, section 20(2)(j) and (k) of the Health and Safety at Work Act 1974 and section 2(1) of the Criminal Justice Act 1987.

course of a criminal investigation, whether it is given by a suspect under caution or by a potential witness.⁵

Other factors which may be relevant to ascertaining whether information is held subject to an implied duty of confidence could include the following:

- Whether there is a longstanding, consistent and well-known practice on the part of the public authority of protecting similar information against disclosure and the supplier of the information could reasonably have expected this to continue.
- Whether the information is provided gratuitously or for consideration (in the latter case, it is less likely that an obligation of confidence would arise).

Whether an implied duty of confidence arises is essentially a question of law. If a public authority has not expressly agreed to keep information confidential but suspects that a duty of confidence may be implied, it will often be necessary to seek legal advice.

Would the disclosure of this information to the public, otherwise than under the Freedom of Information Act, constitute an actionable breach of confidence?

Unauthorised disclosure

For a disclosure to breach a duty of confidence it must be unauthorised. Unauthorised disclosure could take place where disclosure runs contrary to the express wishes of the person to whom the duty is owed or where a department does not have the consent of the person concerned. If a person has sanctioned disclosure of the information, for example if they have expressly consented to disclosure, section 41 will not apply as disclosure would not be a breach of confidence actionable by that person.

⁵ *Frankson and others v Home Office; Johns v Home Office* [2003] 1 WLR 1953, in particular per Scott Baker LJ at 35. NB: The weight to be attached to the confidentiality will depend very much on the particular circumstances in which the material sought was obtained.

See the section below on consultation of third parties and when this will be appropriate. If a person has not responded to consultation or has objected to disclosure, this will not determine the application of section 41.

Public interest test

The courts have recognised that disclosure will not constitute an actionable breach of confidence if there is a public interest in disclosure which outweighs the public interest in keeping the information confidential. When considering the application of section 41, departments must consider whether the public interest in disclosure of the confidential information concerned means that it would not constitute an actionable breach of confidence to disclose that information to the public. The following principles must be applied when conducting this balancing test:

- Where a duty of confidence exists, there is a strong public interest in favour of keeping that confidence.
- There is no general public interest in the disclosure of confidential information in breach of a duty of confidence. If the public interest in keeping the confidence is to be outweighed it will be necessary to identify a specific interest in favour of disclosure.
- There is a public interest in ensuring public scrutiny of the activities of public authorities. If disclosure would enhance the scrutiny of the activities of public authorities then this will be a factor in the balancing exercise. However, where the interests of a private person are protected by a duty of confidence (whether an individual or an organisation), the general interest in public scrutiny of information held by a public authority is unlikely in itself to override the public interest in keeping the confidence.
- The Freedom of Information Act itself has no influence on the weight which attaches to the public interest in the disclosure of information for the purposes of section 41. This is emphasised by the words 'otherwise than under this Act': the fact that the Freedom of Information Act would require disclosure were it not for section 41 is irrelevant.
- The courts have traditionally recognised that the defence to breach of confidence in the public interest applies where disclosure would protect public safety, or where there has been wrongdoing, such as

misfeasance, maladministration, negligence or other iniquity on the part of the public authority.

- When considering the balance of interests, public authorities must have regard to the interests of the person to whom the duty of confidence is owed; the public authority's own interests in non-disclosure are not relevant to the application of this exemption.
- No regard may be had to the identity of the person who is requesting the information nor to the purpose to which they will put the information. The question is whether disclosure 'to the public' would be a breach of confidence, and not whether disclosure to the particular person requesting the information would be a breach. A request for information from a journalist or pressure group must be treated in the same way as a request from a person who is conducting historical research.

If this exemption is wrongly applied and information is incorrectly withheld, a public authority may face sanctions under the Act for not complying with the duty to provide information. However, if the exemption is wrongly applied and information is incorrectly disclosed, a public authority may, in some circumstances, face an action for breach of confidence. In balancing the relevant public interests, the question to be asked is what conclusion would a court come to if the information were disclosed to the public and an action for breach of confidence was brought? That is to say:

- If a court would conclude that the public interest in disclosure to the public outweighed the public interest in keeping the confidence then the information will not be exempt under section 41: unless another exemption applies, the information must be disclosed.
- If a court would conclude that the public interest in disclosure did not outweigh the public interest in keeping the confidence, the information will be exempt and the request should be refused on the basis of section 41 (see '**Disclosing information outside of the Freedom of Information Act**' on page 16).

When considering the public interest test, you should not consider the motive for the freedom of information request nor the effect which disclosure to that particular requester would have. However, you must consider the effect that disclosure to the **public** would have. Examples of cases where there may be a public interest in the disclosure of confidential information include:

- information revealing misconduct/mismanagement of public funds
- information which shows that a particular public contract is bad value for money

- where the information would correct untrue statements or misleading acts on the part of public authorities or high-profile individuals
- where a substantial length of time has passed since the information was obtained and the harm which would have been caused by disclosure at the time the information was obtained has depleted

Examples of cases where the public interest is unlikely to favour the disclosure of information may include:

- where disclosure would provoke some risk to public or personal safety
- where disclosure would be damaging to effective public administration
- where there are contractual obligations in favour of maintaining confidence (in such cases legal advice is likely to be essential)
- where the duty of confidentiality arises out of a professional relationship
- where disclosure would affect the continued supply of important information (for example, information provided by whistle-blowers)
- where information was provided under compulsion

These examples are for illustrative purposes only. Decisions on which way the delicate balance of arguments may rest will vary on a case by case basis and will, in most cases, require legal advice.

The public interest where a duty of confidence is owed by one public authority to another

In the public interest test under section 41, there is an important distinction to be drawn between a duty of confidence owed by a public authority to a private person and a duty owed by one public authority to another. There is no general public interest in keeping confidential information which relates to the activities of public bodies, unless another exemption could also be applicable to the information. This applies in particular to 'old' information: there is no public interest in keeping confidential the historical activities of public authorities. (If both public authorities are government departments,

see '**Was the information obtained by the public authority from any other person?**' on page 4.)

If the only interests to be protected by non-disclosure of the requested information are the interests of another public authority (rather than a third party) then the question to ask is:

- Would the public authority to which the duty is owed be able to refuse a freedom of information request for that information?

If the public authority would be able to refuse to disclose the information because another exemption would also apply, it will 'demonstrate the necessary quality of confidence to' be exempt under section 41. If it would not be able to so refuse, section 41 will not apply. If a public authority considers that section 41 may apply by virtue of a duty of confidence which it owes to another public authority, it should consider consulting that authority (see '**Consultation**' on the following page).

Neither confirm nor deny

Under section 41(2) the obligation to confirm or deny that the requested information is held does not arise if such a confirmation or denial would, in itself, represent an actionable breach of confidence.

When ascertaining whether confirmation or denial would constitute an actionable breach of confidence, the same considerations will apply as to the disclosure of the information itself:

- Is the fact that the public authority does or does not hold the information itself information which is held subject to a duty of confidence?
- Would confirmation or denial constitute an actionable breach of that duty of confidence?

Consultation

As explained in the section on ‘Unauthorised disclosure’ above, if the person who supplied the information or the person to whom the obligation of confidence is owed agrees to the disclosure of that information to the public, disclosing it in response to a freedom of information request will not be in breach of confidence and section 41 will not apply. In order to ascertain whether information supplied in confidence can be disclosed in response to a freedom of information request or is exempt under section 41, it may be necessary to consult with the information provider, affected third parties and in some cases other relevant departments, depending on the nature of the information.

Consultation with the person to whom the duty is owed will not release departments from their obligations under the Freedom of Information Act. If a person does not respond to consultation or refuses consent to disclosure, it is still necessary to consider whether section 41 applies.

Part IV of the Code of Practice issued under section 45 of the Freedom of Information Act deals with consultation of third parties in relation to freedom of information requests and provides:

‘There are many circumstances in which:

- requests for information may relate to persons other than the applicant and the authority; or
- disclosure of information is likely to affect the interests of persons other than the applicant or the authority.’

In some cases it will be necessary to consult, directly and individually, with such persons in order to determine whether or not an exemption applies to the information requested, or in order to reach a view on whether the obligations in section 1 of the Act arise in relation to that information. But in a range of other circumstances it will be good practice to do so; for example where a public authority proposes to disclose information relating to third parties, or information which is likely to affect their interests, reasonable steps should, where appropriate, be taken to give them advance notice, or failing that, to draw it to their attention afterwards.

As explained above, the Information Commissioner is responsible for ensuring adherence to the Code of Practice and there is a legitimate expectation that public authorities will comply with it.

Duration of the exemption

The section 41 exemption does not cease to apply after a specified period. However, the passage of time may mean that the information is no longer sufficiently sensitive to be considered 'confidential' or that the public interest in keeping the confidence has been substantially weakened. If you receive a request for information which, although it was confidential when it was obtained, was obtained a long time ago, you should consider carefully whether the disclosure of that information would still constitute an actionable breach of confidence within the meaning of section 41.

For example, public authority A consults public authority B in relation to the formulation of policy. Public authority B may be under a duty to keep the proposals confidential. However, once A has announced the policy, the disclosure of the information in response to a freedom of information request may no longer constitute an actionable duty of confidentiality.

However, although the policy itself may no longer be confidential after it has been announced, this does not prevent connected information, such as any alternative policy proposals, remaining confidential.

Disclosing information outside of the Freedom of Information Act

Section 41 only applies where disclosure of information **to the public** would constitute an actionable breach of confidence. The courts have recognised that where person A passes confidential information to person B, it will not necessarily be an actionable breach of a duty of confidence for person B to disclose the information to person C, particularly if C is also under a duty to keep the confidence. Indeed, public authorities will often find themselves in the position of person C. However, it is not possible for a public authority to disclose information in response to a freedom of information request subject to a duty of confidence on the part of the applicant. If section 41 applies then the request must be refused.

If information is exempt from the Freedom of Information Act under section 41, public authorities may, in certain circumstances, still be able to disclose the information to the particular applicant concerned without this constituting an actionable breach of confidence at common law. For example, if a public authority considers that there is a strong public interest in a particular

applicant knowing the exempt information and it would be both possible and in the public interest to disclose the information to that person, or if the information could be disclosed subject to an undertaking of confidentiality by the applicant without breaching the duty of confidence, the public authority may still be able to disclose the information even though the request has been refused under the Freedom of Information Act. The circumstances in which this is possible will be limited and will depend heavily on the identity of the applicant, a knowledge of the purposes to which the applicant intends to put the information and the ability of the authority to disclose the information subject to conditions of confidence without breaching the duty of confidence: legal advice should be sought where this is proposed.

Departments must make very clear:

- that the request has been refused under the Freedom of Information Act
- the confidential terms on which the information is disclosed

It should be noted that whether disclosure of confidential information to a particular applicant outside the Freedom of Information Act would be an actionable breach of confidence is separate from the question of whether the public authority has the power to make the disclosure in a public law sense. If information is exempt under the Freedom of Information Act, that Act has no effect on the public authority's power to disclose the information (by section 78 of the Act). If information is exempt from the Freedom of Information Act under section 41, but a public authority is, nevertheless, considering disclosing it to the particular applicant concerned, because it would not be an actionable breach of confidence to do so, that public authority must be satisfied that it has the power to make the disclosure.

Other relevant exemptions

When deciding whether a request for information should be refused on the basis of section 41 it is also important to consider whether the information may also be protected from disclosure under another exemption. Where another exemption may also apply it will be necessary to consult the detailed guidance on that section:

- **Section 40:** If confidential information is personal information, the personal information exemption may also apply (see **Annex A** in relation to personal information and also the guidance on section 40).

- **Section 43:** Where information is confidential because it is commercially sensitive, the commercial interests exemption should be considered.
- **Section 27(3):** If information of a confidential nature has been obtained from a state other than the United Kingdom or from an international organisation or international court, section 27 should be considered (a person outside the UK jurisdiction is unlikely to be able to bring an action for breach of confidence for the purposes of section 41).
- **Section 30:** Where information has at any time been held for the purpose of specified criminal and other investigations or proceedings, or where information relates to the obtaining of information from confidential sources and was obtained or recorded for specified investigations or proceedings, section 30 should be considered.

Aside from the above exemptions which are likely to apply in connection with the confidential nature of the information, a range of other exemptions may also be relevant depending on the content and subject matter of the information. For example, the disclosure of confidential information may, in certain situations, prejudice international relations or the defence of the British Islands. When considering whether information is exempt under section 41, it will also be necessary to consider whether the subject matter of the information means that it also falls within another exemption.

Annex A: Personal information

Private information relating to individuals, such as details of an individual's physical or mental health, is likely to attract greater protection than commercial information or information relating to the functions of public authorities. Private, personal information is more likely to be 'confidential' information by its very nature and to be held subject to expectations of privacy, particularly where disclosure would affect the private and family lives of individuals, as protected by Article 8 of the European Convention on Human Rights. A duty of confidence is more likely to be implied from the nature of the information itself and it is unlikely that personal information will be considered trivial or useless. Such information is also likely to be protected by the Data Protection Act and exempt under section 40 of the Act.

The House of Lords in Campbell v MGN considered, in detail, when an action for breach of confidence will arise in relation to personal information, and asked two questions:

1. The first question to ask is: is the information 'private'; is there a private interest which the individual would wish to protect? In other words, would the disclosure of the information give substantial offence to a person of ordinary sensibilities who was placed in similar circumstances? While the fact that an individual is particularly sensitive is not relevant to this question, the circumstances in which that person is placed are relevant.

The European Convention on Human Rights has had a considerable impact in this area: the effect which disclosure of information could have on a person's private and family life, as protected by Article 8, is important. The facts of the Campbell case provide a useful illustration of this: even though the fact that the claimant was an addict and was receiving treatment was public information, details of the treatment which she was receiving and the location of that treatment were private; their disclosure could seriously affect the claimant's private life and the continuation of the treatment.

2. The second question is whether the interest in protecting an individual's privacy, as per Article 8, is outweighed by any other interest. Although personal information enjoys particularly stringent protection under the law of breach of confidence, the public interest in keeping the confidence may in some circumstances be outweighed by countervailing public interests in disclosure. For example, disclosure may be in the interests of freedom of expression (as protected by Article 10 of the European Convention on Human Rights) or in the interests of protecting the rights and freedoms of others. There is a public interest in ensuring scrutiny of the activities of

public authorities and the freedom of information regime enhances the weight to be attached to this interest. However, if information is private, personal information of the type whose disclosure would engage Article 8 (as opposed, for example, to information relating to an individual in an 'official' capacity, for example if that person is a public office holder), it is unlikely that the public interest in open government will outweigh the public interest in keeping the confidence.

Even if there is a legitimate aim which is pursued by disclosure, the effect of the disclosure on the Article 8 rights of the person affected must be proportionate to the legitimate aim. For example, in the case of *Peck v UK*⁶, CCTV footage picked up the applicant walking down a road with a knife in his hand. The applicant had tried to commit suicide. The CCTV operating notified the police who were able to stop him. The CCTV footage was subsequently broadcast, without concealing the identity of the applicant, to demonstrate how its use could assist the police in averting dangerous situations. This interfered with the applicant's Article 8 right to respect for his private and family life. Although the broadcast pursued the legitimate aim of promoting the use of CCTV to prevent and detect crime, the authority could have masked the identity of the applicant or sought his consent. There were not sufficient reasons to disclose the information without taking these steps and the interference with the applicant's Article 8 rights was therefore not proportionate to the legitimate aim.

There are a number of other exemptions which may apply to personal information, in addition to section 41, and departments should consider carefully which exemptions it is appropriate to use in the circumstances.

- **Section 40** exempts information which constitutes personal data and where disclosure would breach the data protection principles. In many situations, confidential personal information will also be personal data within the meaning of the Data Protection Act 1998. If information does not fall within section 41 because its disclosure would not breach a duty of confidence, it may still breach another aspect of the data protection principles. If disclosure would breach a duty of confidence, that disclosure will be unlawful and will breach the first data protection principle.
- **Section 44** exempts information where disclosure is prohibited by or under any enactment, which includes the Human Rights Act 1998. Departments must comply with section 6 of the Human Rights Act 1998 which makes it unlawful for a public authority to act in a way which is incompatible with the Convention rights. If disclosure would breach Article 8 of the ECHR, the information will be exempt under section 44.

⁶ [2003] EMLR 15

Annex B: Handling confidential information – practical guidance

Public authorities should take the following practical steps to respect the confidential nature of the information:

- When receiving the confidential information, public authorities should state explicitly that such information will be held on an understanding of confidence, subject to the requirements of the Freedom of Information Act and other legal requirements;
- Once the information has been supplied, steps should be taken to ensure that the physical handling of the information respects its confidential nature through, for example:
 - Restricting circulation to those who need to see the information.
 - Indicating clearly on the file cover the confidential nature of the contents.
 - Ensuring that hard copies are physically secure in locked cabinets or drawers.
 - Ensuring that electronically held records are adequately protected.
 - Considering whether and at what intervals it will be necessary to review the confidentiality of the information to ensure that only information whose disclosure would still be exempt under section 41 is marked as confidential: the need to keep information confidential is likely to decrease over time.

Adherence to these standards will help the management of confidential information and assist with responding to future freedom of information requests.

