

Decision Notice 051/2022

Deceased person's care records

Applicant: The Applicant

Public authority: South Lanarkshire Council

Case Ref: 202100900



Scottish Information
Commissioner

Summary

The Applicant asked the Council for records relating to the care of her late mother. The Council considered the information to be exempt from disclosure on the basis that it was confidential. The Commissioner investigated and found that the records were confidential and could not, in this case, be disclosed under FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(c) (Effect of exemptions); 36(2) (Confidentiality)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 22 April 2021, the Applicant made a request for information to South Lanarkshire Council (the Council). The information requested was:
“... full details of all covid tests which were carried out in respect of my mum and other data/information which you hold and are willing to disclose to family in relation to my mum”
2. The Council responded on 22 April 2021. It noted the request for information and referred to previous correspondence, but did not provide the Applicant with the information she had asked for.
3. On 21 June 2021, the Applicant wrote to the Council and asked it to review its decision not to release information regarding her mother’s covid test results.
4. On 26 July 2021, the Applicant wrote to the Council again, noting that more than 20 working days had passed since she made her requirement for review and asking the Council for an update.
5. The Council notified the Applicant of the outcome of its review on 26 July 2021. It referred the Applicant to a review it carried out on 9 February 2021, in response to a previous information request. This review notified her that it was withholding her mother’s care records under section 36(2) of FOISA.
6. On 26 July 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of the Council’s review because it had refused to provide her with the information she had requested.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
8. On 9 September 2021, the Council was notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.

9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and to answer specific questions. These related to its decision to withhold the information under section 36(2) of FOISA.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

Section 36(2) - Confidentiality

11. Under section 36(2) of FOISA, information is exempt from disclosure if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure by the authority so obtaining it to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA. However, it is generally accepted in common law that an obligation of confidence will not apply if the disclosure of the information is necessary in the public interest.
12. Section 36(2) contains a two-stage test, both parts of which must be fulfilled before the exemption can be relied upon.

Information obtained from another person

13. The first test is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.
14. The Council submitted that the information captured by the request is information contained within the deceased's daily care diary notes maintained by staff at her care home.
15. The Council provided the Commissioner with a description of this information. The Commissioner notes that it includes spreadsheets which record Covid-19 test results as well as daily communications sheets and a communications report. These documents contain information exchanged between third parties (care home staff) and the Council's social work department about the deceased's care. It is clear that all of the withheld information has been communicated to the Council by another person.
16. In the circumstances, the Commissioner is satisfied that the withheld information was obtained by the Council from other persons (either directly or indirectly) and that the first part of the section 36(2) test has therefore been fulfilled.

Actionable breach of confidence

17. The second part of the test is that the disclosure of the information by the public authority must constitute a breach of confidence actionable either by the person who gave the information to the public authority or by any other person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled.
18. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:

- (i) the information must have the necessary quality of confidence;
- (ii) the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
- (iii) unauthorised disclosure must be to the detriment of the person who communicated the information.

Necessary quality of confidence

- 19. The Council contended that the withheld information had the necessary quality of confidence. It explained that the information was given to Social Work by the client and third parties (such as care home staff) and that it was held on files which were not accessible to the public.
- 20. The Commissioner notes that it is information relating to an individual's care and support needs and includes information provided in confidence by third parties (care home staff) to social work to inform decisions relating to the individual's care.
- 21. Having considered the nature of the information requested and the explanation put forward by the Council, the Commissioner is satisfied that it fulfils the criteria of having the necessary quality of confidence. The information is not common knowledge and could not readily be obtained by other means.

Obligation to maintain confidentiality

- 22. The Council submitted that correspondence regarding the Applicant's mother's care had been based on information communicated in circumstances importing an obligation of confidence.
- 23. The Council argued that the information was received as part of an ongoing relationship between a social worker and their client (even where the source of the information was not the client herself). The Council contended that the person who provided the information to Social Work Resources, whether in a professional or private capacity, would have done so in the expectation that this information would have remained confidential and could have a claim for breach of confidence were their views and information to be made public.
- 24. The Council referred to a previous decision issued by the Commissioner, *Decision 150/2012 Mr M and South Lanarkshire Council*¹, where the Commissioner accepted that it might be possible for surviving relatives (other than the Applicant) to raise an action for breach of confidence if information relating to their mother was released under FOISA.
- 25. In previous decisions, the Commissioner has accepted that the relationship between client and social worker is one in which a duty of confidentiality is implicit, and that the duty of confidence is one which can exist even after the death of the client. As explained in *Decision 029/2008*², in this respect the Commissioner agrees with the view taken by the Information Tribunal in the case of *Bluck v Information Commissioner and Epsom and St Helier University NHS Trust* (paragraphs 17-21)³. The Commissioner therefore accepts that the Council has an ongoing duty of confidence to its former client, the Applicant's late mother.

¹ <https://www.itspublicknowledge.info/decision-1502012>

² <https://www.itspublicknowledge.info/decision-0292008>

³

<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i25/mrspbluckvinformationcommissioner17sept07.pdf>

26. For the reasons outlined above, the Commissioner is satisfied that information withheld from the Applicant was received in circumstances which imposed an obligation on the Council to maintain confidentiality.

Unauthorised disclosure which could cause detriment

27. The third requirement is that unauthorised disclosure of the information must be to the detriment of the person who communicated it. The damage need not be substantial and indeed could follow from the mere fact of unauthorised use or disclosure in breach of confidence.
28. The Council argued that detriment is not restricted to financial loss. It submitted that it can also refer to a situation where a person's private details and personal affairs are disclosed to people whom the individual would prefer not to know, even if the disclosure would not be harmful in any way. It noted that, while it was impossible to consult the Applicant's deceased mother, the Council was satisfied that, generally, such clients would not wish their information disclosed to the public. Furthermore, the Council argued that third parties who provided information would certainly not wish the information they provided to be made available to the public.
29. The Council referred to four previous decisions issued by the Commissioner, which considered care records of deceased persons, and which upheld that section 36(2) applied to such information. The cases were *Decision 165/2007 Mr S and Edinburgh City Council*⁴, *Decision 029/2008 Mrs G and Aberdeen City Council*⁵, *Decision 001/2012 Ms F and Glasgow City Council*⁶, and *Decision 150/2012 Mr M and South Lanarkshire Council*⁷.
30. The Commissioner recognises that the disclosure of information held within a social work record and containing information provided by or on behalf of any given client may be of detriment to the interests of that individual, even after their death, as information may be disclosed in relation to their actions, support needs, opinions or vulnerabilities that they would not have wished to be disclosed into the public domain (which would be the effect of disclosing the information in response to the request).
31. The Commissioner accepts that, when others provided information with regard to the Applicant's mother, they would have done so in the expectation that this information would be treated confidentially and not disclosed into the public domain in response to an information request under FOISA. In previous cases, the Commissioner has accepted that the confidential relationship between client and social worker will extend to other people providing information to the social worker in relation to the client.
32. The Commissioner is therefore satisfied that the tests for an actionable breach of confidence are met in this case, in relation to the information being withheld under section 36(2) of FOISA.
33. Having found that all the tests for the exemption in section 36(2) of FOISA have been met, and the exemption is properly engaged, the Commissioner must now go on to consider whether the public interest would justify disclosure of the information.

⁴ <https://www.itspublicknowledge.info/decision-1652007>

⁵ <https://www.itspublicknowledge.info/decision-0292008>

⁶ <https://www.itspublicknowledge.info/decision-0012012>

⁷ <https://www.itspublicknowledge.info/decision-1502012>

Public interest defence - section 36(2)

34. As noted above, the exemption in section 36(2) of FOISA is an absolute exemption in terms of section 2(2) of FOISA and not subject to the public interest test in section 2(1)(b). However, the law of confidence recognises that, in certain circumstances, the strong public interest in maintaining confidences may be outweighed by the public interest in disclosure of the information. In deciding whether to enforce an obligation of confidentiality, the courts are required to balance these competing interests, but there is no presumption in favour of disclosure. This is generally known as the public interest defence.
35. The courts have identified a relevant public interest defence in cases where withholding information would cover up serious wrongdoing, and where it would lead to the public being misled on, or would unjustifiably inhibit public scrutiny of, a matter of genuine public concern.
36. In its submissions to the Commissioner, the Council argued that it did not believe the public interest defence extended to disclosure of this information to the public. The Council argued that it had permitted the sharing of information with the Applicant personally, but this would not apply to disclosure under FOISA.
37. In this case, the Commissioner agrees that there are no compelling reasons, in the public interest, for the content of the records held by the Council relating to its involvement in the care of the Applicant's late mother to be disclosed into the public domain.
38. In conclusion, the Commissioner finds that the Council was correct to withhold information under section 36(2) of FOISA.

Decision

The Commissioner finds that, in the respects specified in the application, South Lanarkshire Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or the Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Margaret Keyse
Head of Enforcement

28 April 2022

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

- (a) the provision does not confer absolute exemption; and

...

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (c) section 36(2);

...

36 Confidentiality

...

- (2) Information is exempt information if-

- (a) it was obtained by a Scottish public authority from another person (including another such authority); and

- (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

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