

Decision Notice 052/2022

Social care records and care policies

Applicant: The Applicant

Public authority: South Lanarkshire Council

Case Ref: 202100908



Scottish Information
Commissioner

Summary

The Council was asked for information regarding the Applicant's late mother, and the policies and practices in a named care home.

The Council responded to four of the 26 requests and withheld the information on the grounds that disclosure would constitute an actionable breach of confidence.

The Commissioner investigated and found that Council had partially breached FOISA in responding to the requests. It had correctly withheld information on the grounds that disclosure would constitute an actionable breach of confidence, but it failed to respond to the remaining requests for recorded information in line with the requirements of FOISA.

The Commissioner required the Council to carry out a review of the remaining requests for recorded information, and provide the Applicant with the outcome of its review.

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); 10(1) (Time for compliance); 20(3) and (5) (Requirement for review of refusal etc.); 21(1) (Review by Scottish public authority); 36(2) (Confidentiality)

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

Background

1. On 24 November 2020, the Applicant made a request for information to the Council. The Applicant's request sought information about her mother's death in a care home, including information regarding her mother's care and information about the care home's policies and practices. There were 26 separate requests, and the first four requests were seeking information that covered a specific week:
 - 1) All records relating to staff visitations into her mothers' room, including the date, the staff member, the time and their reason for being there.
 - 2) All checks on her mothers' vitals observations including blood pressure, temperature, oxygen levels and heart rate. Again, the date, time, staff member and the readings from these.
 - 3) All the meals provided to her mother and what quantity she consumed.
 - 4) All contact made to medical professionals, whether a doctor, nurse, NHS 111 or 999 calls. The staff member who made them, including the time and date of the call, the reason for the call and the outcome of the call.
2. The request is set out in full in Appendix 2, at the end of this Decision Notice.
3. On 3 December 2020, the Council notified the Applicant that it would be responding to requests 5 to 26 under the Social Work Resources Complaints Handling Procedure, and that requests 1 to 4 had been forwarded to the appropriate department.

4. The Council responded to requests 1 to 4 on 7 December 2020. It notified the Applicant that it was withholding the information under section 36(2) of FOISA, as it considered disclosure would constitute an actionable breach of confidence.
5. On 30 December 2020, the Applicant wrote to the Council and requested a review of its handling of requests 5 to 26, on the grounds that she was dissatisfied with its failure to provide her with a response to these requests.
6. On 13 January 2021, the Applicant wrote to Council and requested a review of its handling of requests 1 to 4, on the grounds that she was not satisfied that the exemption in section 36(2) of FOISA applied to the information captured by these four requests.
7. The Council notified the Applicant of the outcome of its review on 9 February 2021. It maintained that the exemption in section 36(2) of FOISA applied to requests 1 to 4. The Council did not provide a review outcome in relation to requests 5 to 26.
8. On 27 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 any of the information she had requested.

Investigation

9. 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.
10. 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.
11. 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 reasons for withholding information under 36(2) of FOISA, and its failure to respond to requests 5 to 26 (or such of them as comprised requests for recorded information).

Commissioner's analysis and findings

12. 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

13. 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.

14. 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

15. 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.
16. The Council explained that a range of information was captured by requests 1 to 4, including information contained within the deceased's daily care diary notes maintained by staff at her care home, as well as a care and support plan, seniors communication report, fluid intake and wellbeing check records.
17. All of these documents contain information that was 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.
18. 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

19. 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.
20. 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:
 - a) the information must have the necessary quality of confidence;
 - b) the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
 - c) unauthorised disclosure must be to the detriment of the person who communicated the information.

Necessary quality of confidence

21. The Council contended that the information it was withholding 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.
22. 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.
23. 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.

Obligation to maintain confidentiality

24. The Council submitted that correspondence regarding the Applicant's mother's care was based on information communicated in circumstances importing an obligation of confidence.
25. 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.
26. The Council referred to a previous decision issued by the Commissioner, *Decision 150/2012*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.
27. 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.
28. 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

29. 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.
30. The Council argued that detriment is not restricted to financial loss. It submitted that it also refers 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.
31. 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

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>

to such information. The cases were *Decision 165/2007*⁴, *Decision 029/2008*⁵, *Decision 001/2012*⁶, and *Decision 150/2012*⁷.

32. The Commissioner recognises that the disclosure of information held within a social work record and containing information provided by 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.
33. 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.
34. 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.
35. 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 where the balance of public interest lies in disclosure of the information.

Public interest defence - section 36(2)

36. 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.
37. 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.
38. In its submissions to the Commissioner, the Council argued that it did not believe the public interest defence extended to the disclosure of this information to the public. The Council argued that it had permitted the sharing of information with the Applicant personally, but that it did not apply to disclosure under FOISA.
39. In this case, the Commissioner agrees that there are no compelling reasons 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.
40. In conclusion, the Commissioner finds that the Council was correct to withhold information falling within the scope of requests 1 to 4 under section 36(2) of FOISA.

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>

Handling of request/timescales

41. The Applicant expressed dissatisfaction with the Council's failure to provide a response to requests 5 to 26.
42. The Applicant provided the Commissioner with a copy of an email she sent the Council on 30 December 2020, in which she notes that she is still awaiting a response to the outstanding questions in her request of 24 November 2020, and asking the Council when it will respond to those requests.
43. The Commissioner notes that this email refers to the original information request, sets out the Applicant's dissatisfaction (the Council's failure to respond to requests 5 to 26) and was made more than 20 working days after the original information request. It meets all the relevant requirements in section 20 of FOISA. Given this, he is satisfied that the Applicant's email of 30 December 2020 can be considered a valid requirement for review, in relation to requests 5 to 26.
44. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.
45. Section 21(1) of FOISA gives authorities a maximum of 20 working days after receipt of the requirement to comply with a requirement for review, again subject to qualifications which are not relevant in this case.
46. The Council emailed the Applicant on 3 December 2020, and notified her that it would be responding to requests 5 to 26 under its Social Work complaint handling procedures. In its submissions to the Commissioner, it argued that the Applicant's email of 30 December 2020 was not a requirement for review but was a request for an update on the progress of her complaint. The Council acknowledged that it did not respond to all of the questions posed by the Applicant as requests for information in terms of FOISA, but it maintained that it did respond.
47. The Commissioner has reviewed the complaint outcome that was provided to the Applicant on 21 January 2021. He notes that, while this response tries to address the general concerns of the Applicant, it does not respond to the specific requests for information that were made in her original information request.
48. The Commissioner would note that, while not all of the numbered requests contained in the Applicant's email of 24 November 2020, were seeking recorded information (some were seeking views or explanations) in requests 5 to 26, there were at least 11 requests that were seeking recorded information. The Council did not provide a valid FOI response to these requests.
49. The Commissioner would stress that a request for recorded information must be responded to in line with the requirements set out in FOISA. Authorities cannot choose to disregard FOISA in order to respond to the requester under another mechanism, such as complaint handling. Authorities may choose to handle a request for recorded information as a complaint if they consider that would better address the requester's overall concerns, but a response must also be made under FOISA, unless the requester explicitly withdraws their information request or otherwise states that they do not want the authority to process the request under FOISA.

50. It is a matter of fact that the Council did not provide a response to requests 5 to 26 (to the extent that they comprised requests for recorded information) of the Applicant's request for information (24 November 2020) and requirement for review (30 December 2020), thereby missing the 20 working day deadline for each one of these.
51. In the circumstances, the Commissioner must find that the Council failed to comply with sections 10(1) and 21(1) of FOISA in this case.
52. The Commissioner now requires the Council to carry out a review of requests 5 to 26 (to the extent that they comprise requests for recorded information) and provide the Applicant with the outcome of this review.

Decision

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

The Commissioner finds that by correctly withholding information falling under the scope of requests 1 to 4, under section 36(2) of FOISA, the Council complied with Part 1.

However, by failing to respond to requests 5 to 26, to the extent that they comprised requests for recorded information, the Council failed to comply with section 10(1) and 21(1) of FOISA.

The Commissioner therefore requires the Council to carry out a review of its response to requests 5 to 26 to the extent that they comprise requests for recorded information, and provide the Applicant with the outcome of this review by 17 June 2022.

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.

Enforcement

If the Council fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Council has failed to comply. The Court has the right to inquire into the matter and may deal with the Council as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

3 May 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);

...

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or

- (b) in a case where section 1(3) applies, the receipt by it of the further information.

...

20 Requirement for review of refusal etc.

...

- (3) A requirement for review must-

- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);

- (b) state the name of the applicant and an address for correspondence; and

- (c) specify-

- (i) the request for information to which the requirement for review relates; and
- (ii) the matter which gives rise to the applicant's dissatisfaction mentioned in subsection (1).

...

- (5) Subject to subsection (6), a requirement for review must be made by not later than the fortieth working day after-
- (a) the expiry of the time allowed by or by virtue of section 10 for complying with the request; or
 - (b) in a case where the authority purports under this Act-
 - (i) to comply with a request for information; or
 - (ii) to give the applicant a fees notice, a refusal notice or a notice under section 17(1) that information is not held,
- but does so outwith that time, the receipt by the applicant of the information provided or, as the case may be, the notice.

...

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

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.

Appendix 2: Full details of information request of 24 November 2020

As a family, we would like the following information regarding the sudden death of [redacted] who was in your care. We are requesting information from the 09th to the 15th of November 2020: -

1. All records relating to staff visitations into her room including the date, the staff member, the time, and their reason for being there.
2. All checks on her vitals observations including blood pressure, temperature, oxygen levels and heart rate. Again, the date, time, staff member and the readings from these.
3. All the meals provided to her and what quantity did she consume?
4. All contact made to medical professionals whether that be a doctor, nurse, NHS 111 or 999 calls. The staff member who made them include the time and date of the call, the reason for the call and the outcome of the call.

[Redacted] expressed she felt very unwell on the [date] during skype calls, due to [redacted]'s concerns regarding [redacted]'s decline in health due to her physical appearance, [redacted] contacted a GP, social work and [redacted] from the care commission. We would like to know: -

5. Did Meldrum care receive any calls from [redacted], GP or social services? If so, what was the outcome of these conversations?
6. As [redacted] had been visibly feeling unwell and had difficulty swallowing food and medication, was this considered a health concern by the care home? If so, how was this documented? What action was taken by the care home regarding [redacted] decline in health?
7. Was a COVID test not considered as a precautionary measure when [redacted] would have had difficulty expressing [redacted] symptoms?

During the COVID pandemic is Meldrum receiving: -

8. Updates from a government body, if so which? And how often? How is this information relayed to staff members?
9. Can we have a copy of the regulations that you currently follow and any new updates from the 10th to the 15th?
10. Is oxygen available within Meldrum care home?

For information purposes only, this extract is taken from the Scottish Government, publications advice and guidance dated 09/11/2020. Coronavirus (COVID-19): interim guidance on the extended use of face masks and face coverings in hospitals, primary care, wider community care and adult care homes: -

“Version 2.1, pg. 1 COVID-19: INTERIM GUIDANCE ON THE EXTENDED USE OF FACE MASKS AND FACE COVERINGS IN HOSPITALS, PRIMARY CARE, WIDER COMMUNITY CARE AND ADULT CARE HOMES”

“2. Across health and social care, the fundamental principles of infection prevention and control (IPC) are essential for preventing the spread of COVID-19. Compliance with hand hygiene, respiratory etiquette, ventilation, and physical distancing has been and will always continue to be critical in all settings. This guidance does not replace these measures but aims to supplement them.”

11. Can you please explain what Meldrum care home's respiratory etiquette is?

12. What are your regulations regarding residents having difficulty breathing?

[Redacted] informed [redacted] on [date] that [redacted] was asymptomatic. Which seems an odd statement to make, since [redacted] had been experiencing symptoms of feeling extremely unwell since the previous Tuesday!

13. As [redacted] was visibly unwell and had difficulty swallowing, was this considered a health concern by the care home? If so, how was this documented? Was any action taken by the care home?

14. How was her condition monitored, and what processes were followed to give an asymptomatic diagnosis?

15. How do Members of staff record any decline in residents if there are no symptoms present?

16. How often are COVID 19 positive residents checked?

We are also perplexed as to why antibiotics were given for a COVID 19 positive patient when antibiotics are used to treat a bacterial infection, not viral. I can only conclude that this was not a chest infection but in fact, a symptom of respiratory difficulties due to COVID 19.

17. Please explain the details surrounding this, and we would appreciate the doctor's name who diagnosed [redacted] with a chest infection.

18. How this was diagnosed, e.g. face to face, telephone, or video call?

19. Was the doctor aware that [redacted] was COVID 19 positive during the diagnosis?

[Redacted] noticed [redacted]'s laboured breathing, short and shallow breaths which meant she was unable to speak during the 10-minute compassionate visit on [date] at [time].

20. Why did the care home staff not notice or act on her clear discomfort? [Redacted] reassured [redacted] that medical interventions were deemed unnecessary. What evidence did [redacted] base this diagnosis on?

21. What help did [redacted] receive by the care home staff in the hours leading up to her death to aid or comfort her?

22. Why was she left sitting in a chair, alone to die?

23. [Redacted]'s visit meant she was already exposed to COVID -19, did the timescale she was there matter once she entered the room? Why when she had already been exposed to the virus, was she ordered to leave after 10 minutes? She also expressed that if there was to be any deterioration in [redacted]'s health, she wanted to be informed, so that she could be with [redacted]. Why was this wish not granted?

24. We are requesting a copy of the care homes guidance on end of life through COVID-19 with respect to family members contact with their loved ones.

[Redacted] and [redacted] both received a call at approximately [time], informing them that if they wanted to see [redacted], they would need to visit the care home that evening. This gave the family a false impression that they would see [redacted] alive. While we understand and respect your regulations of not informing a family member that their loved one has passed away over the phone, we believe the words used were misleading. We could have been asked to attend the care home that evening to discuss [redacted]'s condition without saying we could see her. [Redacted],

however, did take her daughter along to say goodbye, subjecting her to possible Covid transmission, when we were already too late to say goodbye.

As a family we were shocked as to how [redacted] was presented to us, we took no reassurance from [redacted], who after stating to us that [redacted] was not a nurse, claimed that [redacted] did not suffer and was not in any discomfort before [redacted] passed. [redacted] was unaware of the precise time [redacted] passed away. Both [redacted] and [redacted] asked for a time of death, the response firstly to [redacted], was [redacted] asking [redacted] what time the family received the call? [redacted] then responded with possibly between [time] and [time]. When [redacted] arrived and asked for a time of death she was informed it was [time], [redacted] advised this would have been impossible as this is when the call to inform her took place. It was then changed to roughly 10 mins earlier.

25. Why was her jaw left wide open for a family viewing? This gave the appearance she died gasping for breath.

26. Why was her mouth not closed for a more peaceful expression? Had Rigor Mortis already set in before she was moved to the bed?

As [redacted] passed away prematurely, in the most awful of circumstances, the family need to gain a better understanding of the events leading up to [redacted] untimely passing. It would also be helpful to us, to understand how [redacted] managed to contract Covid when Lanarkshire has been in a local lockdown since 12 September? A final point to note. On leaving the unit, [redacted] asked how she should dispose of her used PPE. A member of staff informed that could leave the used PPE inside an open bin located at the end of a trolley which housed unused PPE. The bin was overflowing, and it was not possible to add the used PPE without using your hands to squash down used PPE already placed in the bin. This raises serious concerns about cross-contamination.

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