

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 April 2016

Public Authority: Torfaen County Borough Council
Address: Civic Centre
Pontypool
NP4 6YB

Decision (including any steps ordered)

1. The complainant has requested a copy of two recordings made from her late mother's telephone line on two specified dates. The Council refused the information in reliance on section 40(2) of the FOIA. The Commissioner's decision is that Torfaen County Borough Council has correctly relied on section 40(2) of the FOIA to refuse the requested information. The Commissioner does not require the public authority to take any steps.

Request and response

2. On 5 September 2015, the complainant wrote to Torfaen County Borough Council ('the Council') and requested the following information:

"...a copy of a recording of lifeline conversations made from my late mothers line on 27th and 28th June 2015.... Two calls were made during this time..."

3. The Council responded on 8 September 2015. It stated that:

"Due to Data Protection legislation, the Authority is unable to release third party information without the consent of all individuals concerned. Currently we do not have consent from [named individual A] to release the information and are therefore unable to comply with your request at this time."

4. The Council informed the complainant that it had contacted the individual concerned seeking consent to share this information, and if obtained, it would contact her further.
5. Following an internal review the Council wrote to the complainant on 12 October 2015. It confirmed that it held the information, but refused it by virtue of section 40(2) of the FOIA on the basis that its disclosure would contravene the first principle of the Data Protection Act 1998 ('the DPA').

Scope of the case

6. The complainant contacted the Commissioner on 12 October 2015 to complain about the way her request for information had been handled. She was not satisfied with the Council's reliance on section 40(2) of the FOIA and stated that there was most definitely a legitimate interest in the disclosure of the information.
7. She alleged that the Life Line Service call handlers were being negligent in their duty of care to service users in that they told vulnerable people off for pressing the button, and advised carers to remove the button from them.
8. The complainant further stated that she knew the identity of the individuals in the recording – those of the call handler and [named individual A] [Complainant's step father]. The conversations were regarding the health of another (complainant's mother) and she considered that as her mother's official legal representative, she must have a legitimate interest and right.
9. Finally, the complainant argued that with regard to the adverse effect on the legitimate interests of the individuals concerned, it appeared that the call handler was negligent in advice given to remove the life line, and named individual A was negligent in removing the lifeline, leaving her mother with the no option but to get out of bed, leading to her falling, and as a result her death. She further stated that the Life Line service is advertised and paid for as a protection and comfort for vulnerable people. Finally, she stated that she understands that named individual A has refused consent for her to hear these tapes.
10. The matter before the Commissioner is whether the information subject to this request should be disclosed under the FOIA or whether the Council's reliance on section 40(2) was correct. He would point out that any such disclosure is considered to be into the public domain and therefore available to the world at large.

11. Whilst the Commissioner sympathises with the predicament of the complainant, he must view the request as both applicant and purpose blind, meaning that he can neither take into consideration the identity of the requestor, or the purpose of the request. He would therefore suggest that as the legal representative of the deceased, a more appropriate access regime for the complainant may be via the Access to Health Records Act 1990.

Reasons for decision

Section 40 – personal information

12. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a living third party and its disclosure under the FOIA would breach any of the data protection principles.
13. In order to reach a view regarding the application of this exemption, the Commissioner has firstly considered whether or not the requested information does in fact constitute personal data as defined by section 1(1) of the Data Protection Act 1998 ('the DPA').

Is the requested information personal data?

14. Personal data is defined at section 1(1) of the DPA as:

"personal data means data which relate to a living individual who can be identified-

(a) from those data,

(b) from those data and other information which is in the possession of, or likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."

15. When considering whether the information is personal data, the Commissioner has taken into consideration his published guidance: "*Determining what is personal data*".¹

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http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/what_is_data_for_the_purposes_of_the_dpa.pdf

16. On the basis of this guidance, there are two questions that need to be considered when deciding whether disclosure of information into the public domain would constitute the disclosure of personal data:
- (i) *“Can a living individual be identified from the data, or, from the data and other information in the possession of, or likely to come into the possession of, the members of the public?”*
 - (ii) *“Does the data ‘relate to’ the identifiable living individual, whether in personal or family life, business or profession?”*
17. The Commissioner notes that the information withheld under this exemption is a tape recording of a conversation between the Life Line call centre handler and the husband of the deceased. The Commissioner is satisfied that the calls identify the two living individuals, and as such constitutes their personal data.
18. The Council considers that disclosure of the disputed information would breach the first data protection principle.

Would disclosure contravene the first data protection principle?

19. The first data protection principle requires that the processing of personal data be fair and lawful and,
- a. at least one of the conditions in schedule 2 is met, and
 - b. in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.
20. In the case of personal data, both requirements (fair and lawful processing, and a schedule 2 condition) must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data principle.

Would disclosure be fair?

21. In his consideration of whether disclosure of the withheld information would be fair, the Commissioner has taken the following factors into account:
- a. The reasonable expectations of the data subjects.
 - b. Consequences of disclosure.
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c. The legitimate interests of the public

The reasonable expectations of the data subject

22. The Commissioner's guidance regarding section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life.² Although the guidance acknowledges that there are no hard and fast rules it states that:

"Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned."

23. The Commissioner's guidance therefore makes it clear that where the information relates to the individual's private life (i.e. their home, family, social life or finances) it will deserve more protection than information about them acting in an official or work capacity (i.e. their public life). However, not all information relating to an individuals' professional or public role is automatically suitable for disclosure.

24. The Commissioner considers the seniority of the data subject is an important factor when considering their reasonable expectations, and in his view, the more senior a person is, the less likely it will be unfair to disclose information about him or her acting in an official capacity.

25. However, the Commissioner also recognises that there is a widespread and general expectation that details of a person's employment should be considered confidential.

26. In this particular case, the data subjects are the Life Line call handler and the deceased's husband.

27. The Commissioner has considered the reasonable expectations of named individual A in terms of the tape recordings. The information relates to the individual's private life, and given the sensitivity regarding the

²http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_speculist_guides/PERSONAL_INFORMATION.ashx

nature of the phone call, in his view, the expectation would reasonably be one of confidentiality.

28. In terms of the reasonable expectations of the Life Line call handler, the Council has provided evidence of its Confidentiality Agreement between itself and Life Line. It has also confirmed that the call handler's role within the organisation is relatively junior, and that he does not have responsibility for policy making decisions or the expenditure of resources. It is evident from this therefore, that the call handler would have reasonable expectation of confidentiality.

Consequences of disclosure

29. The Commissioner's notes that named individual A has refused consent for the disclosure of the information. He considers it likely that the disclosure of such highly personal information would cause significant distress to the individual in what must have been a distressing time, both during the telephone calls themselves and in their aftermath.
30. The Commissioner also considers that disclosure of the details of the telephone call outside of his reasonable expectations of confidentiality may cause distress to the Life Line call handler.

The legitimate public interest in disclosure

31. Notwithstanding the data subjects' reasonable expectations, or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
32. The Commissioner notes that the complainant has a personal interest in obtaining this information as it concerns her late mother and suspicions regarding possible negligence on behalf of the parties concerned. However, as stated in paragraph 10 of this notice, the Commissioner must consider whether the information is appropriate for the public domain and does not consider that there is a more compelling public interest in disclosure.
33. In weighing up the balance between the reasonable expectations of the data subject, the consequences of disclosure of the disputed information, against the legitimate public interest in disclosure, the Commissioner considers that the balance is weighted in favour of non-disclosure. Consequently, he is satisfied that the Council appropriately withheld the disputed information on the basis of section 40(2) of the FOIA.

Right of appeal

34. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

36. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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