

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 31 January 2019

**Public Authority:** Neath Port Talbot County Borough Council

**Address:** [foi@npt.gov.uk](mailto:foi@npt.gov.uk)

### Decision (including any steps ordered)

---

1. The complainants requested various information from Neath Port Talbot County Borough Council in respect of a Protection of Vulnerable Adult (POVA) investigation into the death of their mother. The Council initially refused the request in reliance on section 31 (Law Enforcement) of the FOIA, however during the course of the Commissioner's investigation withdrew its reliance on this exemption in favour of sections 40(2) and 41 of the FOIA. The Commissioner's decision is that Neath Port Talbot Council was entitled to rely on sections 40(2) and 41 of the FOIA. The Commissioner does not require the public authority to take any steps.

### Request and response

---

2. On 19 October 2016, the complainant wrote to Neath Port Talbot Council ('the Council') and requested the following information relating to the POVA investigation of their deceased mother:

*"During the course of the investigation we were interviewed by the designated officers....We would like to receive a copy of the notes of this interview which was recorded at this time.*

*We understand that these notes comprises of part of the investigation report that was recently completed.*

*In regards to the POVA investigating report, we would like to receive a copy of the report and realise that this may need to be redacted...*

*Finally, we are seeking a copy of the minutes from the last two POVA meetings where our mother's case was discussed. A redacted version of these meetings would suffice..."*

3. The Council responded on 29 November 2016. It stated that the investigation report and the subsequent POVA meetings were convened in accordance with the Council's statutory duties to investigate allegations of abuse or maladministration by professionals, in accordance with the All Wales POVA Policy and refused to provide these items of the request under section 31(1) and 31(2) of the FOIA.
4. Following an internal review the Council wrote to the complainant on 1 December 2017. It stated that the scope of its review was purely in respect of the POVA investigation report as the notes of the interview between the Council and complainants had previously been provided, and it understood that the complainants were not now seeking the minutes of the POVA meetings. The Council confirmed that it was satisfied that the investigation carried out in this case was of a type which falls within section 31(1) and (2) of the FOIA and the public interest in all the circumstances of the case favours maintaining the exemption.

### **Scope of the case**

---

5. The complainants contacted the Commissioner on 20 February 2018 to complain about the way their request for information had been handled. They were not satisfied with the Council's reliance on section 31(1) and (2) of the FOIA and wished to challenge this decision.
6. The Commissioner considers that the information within the scope of her investigation is as stated in paragraph 4 of this notice, namely a copy of the POVA investigation report into the death of their mother.
7. The Commissioner also notes that during the course of her investigation, the Council offered to provide the complainants with a copy of the report with personal data redacted as per the terms of their original request. On receipt of a copy of the redacted report, the complainants would then be able to request the specific appendices they were wished to see, which could in turn be considered by the Council. The complainants were not however satisfied with this approach and asked the Commissioner to make a formal ruling on the matter.
8. Having revisited the request, the Council withdrew its reliance on section 31(1) and (2) in favour of section 40(2) for that part of the report containing personal data and section 41 in respect of information provided to the Council in confidence. In respect of the Appendices, the Council confirmed that it would only be prepared to disclose the following Appendices 3, 20-22 and 25-28(b) in their entirety but would

either disclose redacted copies of the reminder under section 40(2) or withhold in their entirety by virtue of section 41.

9. The scope of the Commissioner's investigation is therefore to consider the Council's reliance on section 40(2) and section 41 FOIA in respect of the POVA report and its appendices.

## Reasons for decision

---

### Section 40 – personal information

10. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3) or 40(4) is satisfied.
11. In this case as the council's refusal of the request was after 25 May 2018, the date the new Data Protection Act 2018 (DPA 2018) and General Data Protection Regulation (GDPR) legislation came into force, the Commissioner considers that the DPA 2018/GDPR applies. As such, the relevant condition is contained in section 40(3A)(a)<sup>1</sup> of the FOIA. This applies where disclosure of information to any member of the public would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') ('the DP principles').
12. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA 2018. If it is not personal data then section 40 FOIA cannot apply.
13. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

#### *Is the information personal data?*

14. Section 3(2) of the DPA 2018 defines personal data as:-

*"any information relating to an identified or identifiable living individual".*

---

<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) of the Data Protection Act 2018

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
17. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
18. The Commissioner has viewed the information withheld under section 40(2) of the FOIA and notes that it comprises of the names/initials of the care owner and the two other members of staff at the care home.
19. Having considered the withheld information, the Commissioner is satisfied that it comprises 'personal data' as set out in section 3 DPA. However, the fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the data protection principles.
20. The Commissioner found that the most relevant data protection principle is principle (a).

*Would disclosure contravene the first data protection principle?*

21. Article 5(1)(a) GDPR states that:-

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

22. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful (i.e. it would meet one of the bases of lawful processing listed in Article 6(1) GDPR as well as being generally lawful), be fair, and be transparent.

*Lawful processing: Article 6(1)(f) GDPR*

23. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" bases listed in the Article applies. One of the bases in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.

24. The Commissioner considers that the bases most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:-

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, ...<sup>2</sup>.*

25. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under FOIA it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

26. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

### *Legitimate interests*

27. In considering any legitimate interest(s) in the disclosure of the requested information to the public under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.

---

<sup>2</sup> Article 6(1) goes on to state that:-

*"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".*

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".*

28. Legitimate interests may range widely. They can be the requester's own interests or the interests of third parties, commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
29. The Commissioner notes that in their request for an internal review, the complainants set out the following arguments in support of their legitimate interests in disclosure of a copy of the report. They stated that they are seeking a copy of the non-criminal adult safeguarding report as it concerns the death of their mother, and that such investigations in Wales are conducted under the auspices of the All Wales Policies and Procedures for the Protection of Vulnerable Adults which does not prohibit the victim and/or their families from accessing the investigation reports.
30. The complainants further stated in their request for an internal review that in practice, local authorities in Wales have long disclosed such reports to victims and/or their families and they cannot understand why the investigation report into their mother's death is any different. The complainants went on to question how they could they be assured that the safeguarding investigation was conducted in line with accepted practice without sight of the report which limits their ability to challenge the authority via various organisations including the Public Services Ombudsman for Wales, and potentially evades proper scrutiny.
31. The complainants further queried why the Council's attempt to mitigate its refusal to disclose the report by offering to share an outline of the process in a case conference, was subsequently withdrawn or why it did not appear to consider disclosing a redacted copy of the report.
32. The Commissioner therefore accepts that the complainants clearly have a legitimate interest in seeing the report and has gone on to consider whether this is necessary in order to meet their legitimate interest.

*Is disclosure necessary?*

33. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, meaning that disclosure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
34. The Commissioner notes that during the course of her investigation the Council offered to disclose a redacted copy of the report, something the complainants had stated as acceptable in their original request and subsequent correspondence to the Council.

35. The Commissioner also notes that the only information now being withheld by virtue of section 40 are the names of the care home owner and its two members of staff. Names which the Council has confirmed are known to the complainant but not to the world at large. The Commissioner considers the disclosure of the full unredacted report is not necessary in order to meet the legitimate interest in providing scrutiny of the investigation process and demonstrating that accepted practices have been followed. However it is apparent that the complainants consider there is a legitimate interest in the disclosure of these names.
36. Additionally, if the report is generally provided to the victim and/or their families, the complainants potentially have other, less intrusive avenues of accessing the information.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

37. In balancing the legitimate interests in disclosure against the data subject(s)' interests or fundamental rights and freedoms, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
38. As stated previously in this notice, disclosure under the FOIA is made in effect to 'the world' and can be published more widely. The Commissioner considers that such publication would be an intrusion on the rights and freedoms of the persons named and when balanced against her conclusion that disclosure of the withheld information is not necessary for the complainants' legitimate interests.
39. Based on the above factors, the Commissioner decided that the legitimate interest in disclosure, while real and of substance, is insufficient to outweigh the intrusion that disclosure would make on the fundamental rights and freedoms of the individuals in question, and that the disclosure of the information would not therefore be lawful.
40. Given the conclusion the Commissioner has reached above on lawfulness, she did not consider it necessary to go on to determine whether or not disclosure would be fair and transparent. The Commissioner has therefore decided that the Council were entitled to withhold the information under section 40(2) FOIA, by way of section 40(3A)(a) FOIA.

## **Section 41 – Information provided in confidence**

41. Section 41(1) of the FOIA states that:

*Information is exempt information if –*

- (a) It was obtained by the public authority from any other person (including another public authority), and*
- (b) The disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person”*

42. Section 41 is an absolute exemption, therefore is not subject to the public interest under the FOIA.

43. In her analysis of whether disclosure of the information would constitute an actionable breach of confidence the Commissioner must consider:

- whether the information has the necessary quality of confidence;
- whether the information was imparted in circumstances importing an obligation of confidence; and
- whether disclosure would be an unauthorised use of the information and to the detriment of the confider.

44. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial.

45. In this case, the disputed information is contained within the POVA investigation report itself, and appendices 1-2, 5, 10-17, 24, and 29-37 in their entirety.

46. The Council has confirmed that the information in question was provided by health professionals in respect of its POVA investigation into the death of the complainants’ mother and it considers that disclosure of this information would constitute an actionable breach of confidence.

47. The Commissioner has seen no evidence that the withheld information has been put in the public domain and accepts the assurances from the Council that the information remains confidential. She is therefore satisfied that the information is not accessible by other means.

48. The Commissioner also notes that the information in question would not be considered trivial to medical professionals.



49. The Commissioner is satisfied that the withheld information has the necessary quality of confidence and has therefore gone on to consider whether the information was imparted in circumstances importing an obligation of confidence.
50. The Council confirmed that there is no formal witness summons requirement or formal documentation which says individuals must give statements/provide evidence. It further confirmed that whilst witnesses are not given an explicit guarantee of confidence, that as the information tends to be medical in nature, there is an implicit obligation of confidence. It is also standard practice that information in relation to POVA investigations remains confidential.
51. The Commissioner has therefore gone on to consider whether disclosure of the information would be to the detriment of the confider.
52. The Commissioner is mindful of the Tribunal's decision in the case of *Bluck v ICO & Epsom and St Helier University Hospital NGHS Trust [EA/2006/0090] paragraph 15* that the loss of privacy can be a detriment in its own right. There is no need therefore for there to be any detriment to the confider in terms of tangible loss in order for it to be protected by the law of confidence other than the loss of privacy in its own right.
53. In this particular case, the Council informed the Commissioner that it considered the detriment in this case would be twofold. Firstly, a general detriment to doctor/patient confidentiality and secondly, from an employment related aspect if it became known individuals had given evidence against their boss.
54. Section 41 is an absolute exemption therefore there is no requirement to consider the public interest test. However, within the Common Law of Confidence, there is a defence to an action for a breach of confidence, if it can be demonstrated there was an over-riding public interest defence. The Commissioner has therefore gone on to consider whether there is a public defence for a breach of confidence.
55. The Commissioner accepts that there may be a public interest in the disclosure of the information and acknowledges that the complainant has a personal interest in this information. However, in weighing this against the public interest in keeping the information confidential, the Commissioner has been mindful of the need to protect the relationship of trust between the confider and the confident; and the need not to discourage or otherwise hamper a degree of public certainty that such confidences will be respected by a public authority.

56. The Commissioner considers that the public interest in disclosing the information does not outweigh the public interest in maintaining that trust. She therefore finds that the Council would not have a public interest defence for breaching its duty of confidence and that the request for information is exempt under section 41 of the FOI. She has therefore concluded that the Council was entitled to rely on section 41 in respect of the information outlined in paragraph 45 of this notice.

## Right of appeal

---

57. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

58. 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.
59. 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 .....**

**Andrew White  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**