

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 May 2022

Public Authority: London Borough of Lambeth
Address: Lambeth Town Hall
Brixton Hill
London SW2 1RW

Decision (including any steps ordered)

1. The complainant has requested information relating to the late Jimmy Rogers' interactions with the London Borough of Lambeth ("LB Lambeth"). It refused to confirm or deny that it held this information and cited section 41 (confidentiality exemption) as its basis for doing so. It upheld this at internal review.
2. The Commissioner's decision is that LB Lambeth is entitled to rely on section 41 as its basis for refusing to confirm or deny whether the requested information is held.
3. No steps are required.

Request and response

4. On 17 October 2020 the complainant requested information of the following description:

"I am making this request in relation to the late Mr Jimmy Rogers of [address provided]. Can you provide me with the following information:
 1. Any correspondence between Lambeth and Mr Rogers between 1st March 2018 and 30th September 2018. I am happy to have any confidential issues redacted.
 2. Any record of meetings or telephone conversations regarding Mr Rogers between 1st March 2018 and 30th September 2018.

3. How many times Lambeth officers met Mr Rogers (either at [address provided] or at the civic centre) between 1st March 2018 and 30th September 2018.
4. On or around 10th September 2018 a Lambeth officer visited Mr Rogers whilst he was in hospital. Can you please tell me the reason for the visit."
5. On 10 November 2020 LB Lambeth responded. It refused to confirm or deny that it held the requested information and cited section 41 (confidential information) as its basis for doing so.
6. The complainant requested an internal review on 11 November 2020. He argued that any correspondence sent to Mr Rogers from LB Lambeth would not be information which is provided by a third party and therefore not caught by section 41. He also argued that section 41 did not prevent LB Lambeth from disclosing the number of times its officers had met with Mr Rogers or the purpose of any meeting when Mr Rogers was in hospital.
7. LB Lambeth sent him the outcome of its internal review on December 15 2020. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 21 December 2020 to complain about the way his request for information had been handled. He complained about LB Lambeth's use of section 41 in respect of all of his requests and reiterated his view that section 41 cannot apply to the third and fourth requests.
9. The Commissioner has considered whether LB Lambeth is entitled to rely on section 41 as its basis for refusing to confirm or deny it holds any information within the scope of the complainant's four requests.

Reasons for decision

Background

10. The complainant has drawn attention to concerns about how the late Jimmy Rogers, a famous basketball coach and popular community figure, was allegedly treated by LB Lambeth towards the end of his life. He provided links to local reporting in support of this.¹ Mr Rogers was a key figure in UK basketball and is known for having brought much to his local community as coach of the Brixton Top Cats, one of the UK's top teams. He also played an important part in developing the talent of NBA star Luol Deng OBE at the start of that famous basketball player's career. The Commissioner notes Mr Rogers' obituary in The Guardian newspaper and its reference to the lives of the many people that Mr Rogers changed for the better.²

Section 41 – Information provided in confidence

11. Section 41(1) states: Information is exempt information if-
- (a) it was obtained by the public authority from any 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.
12. Section 41(2) states that:
- The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.
13. Section 1(1)(a) requires public authorities to provide confirmation or denial as to whether requested information is held. If it can rely on an exemption, it is not obliged to do so.

Would the requested information, if held, have been obtained by the public authority from another person?

¹ [NBA star Luol Deng steps in to stop ex-coach's Brixton eviction | London Evening Standard | Evening Standard](#) and <https://www.brixtonbuzz.com/2018/10/brixton-topcats-basketball-legend-jimmy-rogers-dies-at-the-age-of-78/>

² [Farewell to father of British basketball who discovered Luol Deng | Basketball | The Guardian](#)

14. The complainant argued that information caught by the scope of his third and fourth requests could not be information that was obtained from another person. The third request seeks the number of visits and the fourth seeks the reason for a particular visit.
15. The Commissioner's published guidance³ on section 41(1) of the FOIA states that if the requested information contains a mixture of both information created by the public authority itself, and information that was given to it by another person(s) then, in most cases, the exemption will only cover the latter information i.e., only that information which has been given to the public authority by another person(s).
16. However, the guidance then goes on to say that the public authority should consider whether the disclosure of the information that it created would also reveal the content of that information which it obtained from another person. If it would, then the exemption may also extend to that information which it has generated itself.
17. With direct reference to social care (and medical) records, the Commissioner's guidance states that information about the symptoms of a client, and any professional's assessment / report created as a consequence of those symptoms, may be deemed to have been obtained from the client for the purposes of section 41(1)(a) of the Act. If LB Lambeth held information such as those described in the requests, the Commissioner is satisfied that they would be obtained from social care records. The Commissioner is therefore satisfied that all the information described in the request would, if held, be information obtained from another person. This includes the number of visits (as described in the third request) and the reason for a visit as described in the fourth request. As noted above, the complainant had specifically queried whether the information described in the third and fourth requests could, if held, be confidential information caught by section 41. Section 41(1)(a) is therefore satisfied.
18. Having concluded that section 41(1)(a) is satisfied, the Commissioner has proceeded to consider the confidence test set out in *Coco v Clark* [1969] RPC 41, which provides that a breach of confidence will be actionable if the following three elements are met: a) The information has the necessary quality of confidence; b) The information was imparted in circumstances importing an obligation of confidence; and c) there was an unauthorised use of the information to the detriment of the

³ [information-provided-in-confidence-section-41.pdf \(ico.org.uk\)](https://ico.org.uk/information-provided-in-confidence-section-41.pdf)

confider. The Commissioner will refer to this as the "*Coco vs Clark* test" or the "test".

19. The Commissioner intends to consider each of the three elements of the test in turn:

Would the requested information, if held, have the necessary quality of confidence?

20. In support of its position, LB Lambeth drew attention to the following extract from a recent decision notice published by the Commissioner⁴:

"49. When a social care client is under the care of professionals, the Commissioner accepts that the client would not expect information produced about their case to be disclosed to third parties without their consent. As such, the Commissioner is satisfied that an obligation of confidence is created by the very nature of the relationship between client and professional.

50. With regard to any information that may have been provided by a third party, consideration has to be given not only to the expectations of the third party who provided the information, but also to the complainant's mother, whom the information was about. The Commissioner is satisfied that the information would have been supplied with the expectation that it would be treated in confidence. Given this, the Commissioner is satisfied that this limb of the test is met."

21. The Commissioner believes the above comments also apply to this case. The relationship between a person receiving social care and those providing the care is such that there would be a wholly reasonable expectation that information about their interaction would be held in confidence. Therefore, if such information is held in this case, it would have the necessary quality of confidence due to the nature of and subject of such interaction.

Would the information, if held, have been imparted in circumstances importing an obligation of confidence?

22. When a social care client is under the care of professionals, the Commissioner accepts that the client would not expect information

⁴ [ICO Decision Notice FS50916721](#)

produced about their case to be disclosed to third parties without their consent. As such, the Commissioner is satisfied that an obligation of confidence is created by the very nature of the relationship between client and professional. The Commissioner is satisfied that the information would have been supplied with the expectation that it would be treated in confidence. Given this, the Commissioner is satisfied that this second element of the test is met.

23. This includes ensuring that the existence of such a relationship is kept confidential. The provision of confirmation or denial that the requested information is held would, in itself, provide information about that relationship contrary to the reasonable expectation of confidentiality.

Would confirmation or denial result in detriment to the confider?

24. The Commissioner accepts that a duty of confidence is capable of surviving a person's death, and further accepts that FOIA does not impose a duty upon LB Lambeth to verify the status of the requestor as a 'personal representative' of the deceased person.
25. FOIA constitutes an applicant and motive-blind right of access to recorded information. The only identifiers which a public authority may expect to receive from a requestor is a name and address for correspondence (section 8(1)(b)).
26. Similarly, it does not impose upon LB Lambeth the duty to identify who might be Mr Rogers' personal representative. The Commissioner is satisfied that section 41 can apply whether or not a personal representative of the deceased person is identified.
27. LB Lambeth also argued:

"With regards to the detriment which could be caused if the information were to be confirmed/denied as held, we consider that it would be detrimental to the trust individuals have in Lambeth to provide information given in these circumstances.

We also note the Commissioner's comments in the above case [see note 4]:

52. Disclosure to the general public (which is what disclosure under the terms of the FOIA represents) would be an infringement of the deceased person's privacy and dignity. Such a loss of privacy and dignity can be a detriment in its own right.

We further consider that hypothetically, any personal representative of Mr Rogers could request an injunction prohibiting our disclosure of the

information. We therefore consider providing confirmation/denial under FOIA could lead to an actionable breach of confidence”.

28. The Commissioner agrees with LB Lambeth’s position here for the reasons outlined above and therefore accepts that the third element of the *Coco vs Clark* test is met.

Is there a public interest defence?

29. Although section 41(1) is an absolute exemption, and does not need to be qualified by a public interest test under section 2 of FOIA, case law suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence.
30. The Commissioner has therefore considered whether there is a public interest defence available, should LB Lambeth confirm or deny whether the information is held.
31. The duty of confidence public interest defence assumes that the information should be withheld, unless the public interest in disclosure exceeds the public interest in maintaining the confidence.
32. The Commissioner takes the view that a duty of confidence should not be overridden lightly, particularly in the context of a duty owed to the confider.
33. Disclosure of any confidential information (which, in this case, includes confirming or denying that such information is held) undermines the principle of confidentiality, which itself depends on a relationship of trust between the confider and the confidant. It is the Commissioner’s view that people would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected. It is therefore in the public interest that confidences are maintained.
34. LB Lambeth argued as follows:

“We do not consider that there is any specific public interest in providing confirmation/denial of information in this case. It may be in the public interest to know our processes and responses to social care clients but this can be achieved by viewing our policies; it is not necessary to provide specific information about individuals.”

35. Quoting from the aforementioned decision notice, LB Lambeth also said:

“We further note that:

61. Disclosure of any confidential information undermines the principle of confidentiality, which itself depends on a relationship of trust between the confider and the confidant. It is the Commissioner's view that people would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected. It is therefore in the public interest that confidences are maintained

62. In the circumstances of this particular case, the Commissioner also considers it important that a social care client has confidence that sensitive information about them will not be made publicly available following their death. A breakdown in the trust between parties in such a situation would be counter to the public interest, as it could endanger the health of social care clients and prejudice the effective functioning of social services."

36. As outlined in the "Background" section of this notice, the complainant drew attention to an important point explaining why, in their view, the public interest favoured providing confirmation or denial. There has clearly been widespread concern about the alleged threat of eviction which this important community figure may have endured towards the end of his life whilst also dealing with cancer. The Commissioner recognises that there is a public interest in knowing whether Mr Jackson had any interaction with LB Lambeth near the end of his life and whether that may have caused him distress.
37. The Commissioner notes that it is quite common for individuals to have an interaction with the local authority in their area when they may need additional support because of a serious health-related challenge. This does not undermine the importance of confidentiality in those interactions.
38. In the circumstances of this particular case, the Commissioner considers it important that a social care client has confidence that sensitive information about them will not be made publicly available following their death. A breakdown in the trust between parties in such a situation would be counter to the public interest, as it could endanger the health of social care clients and prejudice the effective functioning of social services.
39. In addition to the wider public interest in preserving confidentiality, there is also a public interest in protecting the confider from detriment. The Commissioner has already established that it would be a sufficient detriment to the confider to infringe their privacy and dignity.
40. The Commissioner also notes the importance of a right to privacy under Article 8 of the Human Rights Act ("HRA"). However, there is a

competing human right in Article 10 which provides for a right to freedom of expression, which includes the freedom to receive and impart information, and the general test for an actionable breach of confidence provides that if there is a public interest in disclosure (which includes disclosing whether or not information is held) that exceeds the public interest in preserving confidentiality, the breach will not be actionable.

41. The Commissioner has considered the compelling arguments of both parties. He has decided that the public interest in preserving the principle of confidentiality is stronger than that in providing confirmation or denial as to whether the requested information is held and that there would be no public interest defence available, should the council provide that confirmation or denial.
42. The Commissioner's view is that a duty of confidence would be capable of surviving the person's death. He is satisfied that the requested information has the necessary quality of confidence, and, if it exists, it would have been imparted in circumstances giving rise to an obligation of confidence. He is also satisfied that any confirmation or denial would result in detriment to the confider. Having considered the circumstances of this case, the Commissioner does not consider that there would be a public interest defence in disclosing the information. He has reached this view by a narrow margin noting the importance to the public interest of knowing more about any challenges faced by an important public figure at the end of his life. However, on this basis the Commissioner finds that section 41(1) has been correctly engaged.

Right of appeal

43. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. 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.
45. 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

Alexander Ganotis
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF