

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 January 2023

Public Authority: Stockport Metropolitan Borough Council
Address: Town Hall
Edward Street
Stockport
SK1 3XE

Decision (including any steps ordered)

1. The complainant requested from Stockport Metropolitan Borough Council (the Council) information it holds with Social Services and partner bodies regarding the complainant's deceased relative [name redacted]. The Council withheld the requested information and cited section 40(2) (personal information) and section 41 (information provided in confidence) of FOIA.
2. The Commissioner's decision is that the Council is entitled to rely on sections 40(2) and 41 of FOIA to refuse to provide the information requested. Therefore, the Commissioner does not require the Council to take any steps as a result of this decision.

Request and response

3. On 13 January 2022, the complainant wrote to the Council and requested information in the following terms:

"I write to you to request all information held with Social Services and partner bodies. Under the Freedom of Information Act. I would be grateful if you would supply this information in the form of a hard copy, all information which you hold in the form of paper and electronic records including emails."

4. On 30 March 2022 the Council responded. It refused the request and cited section 40(2) (personal information) and section 41 (information provided in confidence) of FOIA.
5. On 31 March 2022 the complainant asked for an internal review. The Council provided its internal review response on 4 July 2022. It maintained its original position to withhold the information under the exemptions cited.

Reasons for decision

6. The following analysis focuses on whether the Council was entitled to withhold the requested information under section 40(2) and section 41 of FOIA.

Section 40(2) – personal information

7. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
8. Section 3(2) of the Data Protection Act 2018 defines personal data as:
“any information relating to an identified or identifiable living individual.”
9. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
10. In this case, the complainant requested information the Council holds with Social Services and partner bodies concerning the complainant’s deceased relative [name redacted]. The Commissioner accepts this exemption has not been applied in terms of the deceased but that the Council applied it to any third party living individuals referenced.
11. The Commissioner is satisfied that the requested information relates to the personal data of a third party and would identify the individuals referenced. He therefore considers the requested information falls within the definition of ‘personal data’ in section 3(2) of the DPA.
12. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on principle (a), which states:
“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”

13. In the case of an 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, fair and transparent.
14. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.
15. The Commissioner considers that in this case, the complainant is pursuing a legitimate interest as the request concerns details held with Social Services (and partner bodies) about her deceased relative. The complainant said that she is "in the process of looking at failings" which she believes took place involving various agencies. The Commissioner accepts disclosure of the requested information is necessary to meet that legitimate interest. However, he considers the individuals - Social Services and partner bodies, would not expect that private information about themselves to be made public under FOIA without their consent.
16. The Commissioner has determined there is insufficient legitimate interest to outweigh the fundamental rights and freedoms of the third parties referenced. Therefore, he deems that there is no legal basis for the Council to disclose the requested information and to do so would be in breach of principle (a).
17. The Commissioner's decision is that the Council is entitled to rely on section 40(2) of FOIA to refuse to provide the requested information.

Section 41 – information provided in confidence

18. Section 41(1) states information is exempt information if it was obtained by the public authority from any other person (including another public authority), and, if its disclosure to the public by the public authority holding it would constitute an actionable breach of confidence by that or any other person.
19. The Council relied on this exemption to withhold the social care records concerning [name redacted] the complainant's deceased relative. The Commissioner accepts this information would have been received by the Council by another party, and having accepted this he must determine whether disclosure of that information would constitute a breach of confidence.

20. The three elements required to bring an action for a breach of confidence (set out by Judge Megarry at the High Court of Justice in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415) are:
- The information must have the necessary quality of confidence,
 - It must have been imparted in circumstances importing an obligation of confidence, and
 - There must have been an unauthorised use of the information to the detriment of the confider.
21. Information will have the necessary quality of confidence if it is not already in the public domain and it is not trivial. In this instance the information is clearly not trivial as it relates to social care records of an individual. The Commissioner is aware that social care records concern the care of an individual, and the information can be considered to be obtained from the individual receiving the care. This will include assessments and notes of the professionals involved in providing the care, as well as information provided directly by the individual.
22. The Council explained that due to the nature of the records, it determined that they have the necessary quality of confidence. The Council said "there is an implicit expectation that information relating to social care records would be kept confidential by professionals."
23. The Commissioner acknowledges that some of this information will be known to the complainant due to her relationship with [name redacted], and also due to the fact that material is already in the public domain through newspapers and documents disclosed by the coroner. However, the Commissioner recognises these records contain information beyond that which was already in the public domain, (a tribunal decision is given as an example which illustrates this point and details are within the Commissioner's section 41 guidance¹). Therefore, the Commissioner considers the withheld information will retain the necessary quality of confidence owed to [name redacted] the deceased relative.

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

24. Within its internal review response, the Council said section 263 of the Health and Social Care Act 2012 defines confidential information as "information in a form which identifies any individual, to whom the information relates or enables the identity of such an individual to be ascertained or any other information in respect of which the person who hold it owes a duty of confidence." The Council explained that this requires the practitioner to keep a confidence between themselves and the patient as part of good care practice. The Council said "the practitioner should not tell anyone what a patient has said and their details, other than those who need to know. This confidentiality continues after death."
25. The Council further explained that all information contained in these social care records, relates to information either provided by the individual to the professional or created by the professional but revealing confidential information obtained from the patient.
26. The Commissioner is satisfied that the social care records of the individual in question would contain information imparted in circumstances importing an obligation of confidence.
27. With regard to the third element required to bring an action for a breach of confidence, the Commissioner considers there would be detriment to the deceased person if there was an unauthorised use of the information. Also, there was no public interest defence available to the Council had it disclosed the information, as there was no evidence of wrongdoing during the period of the authority's caring role.
28. Section 41 is an absolute exemption and is not subject to the public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that a public authority should not disclose the information unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence.
29. The Commissioner is satisfied that disclosure of the requested information into the public domain would not be within the public interest. He considers there is greater public interest in the Council being able to maintain good relationships with Social Services and partner bodies and retaining trust in not revealing sensitive/confidential information. There is not sufficient public interest in this case to warrant the Council breaking the obligation of confidence.
30. The Commissioner is satisfied that the requested information meets the conditions under section 41(1) of FOIA. Therefore, the Council was entitled to rely on this exemption to withhold the information.

Right of appeal

31. 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@justice.gov.uk.

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

32. 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.
33. 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

Phillip Angell
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