

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 February 2023

Public Authority: London Borough of Richmond upon Thames

Address: Civic Centre
44 York Street
Twickenham
TW1 3BZ

Decision (including any steps ordered)

1. The complainant requested from London Borough of Richmond upon Thames (the Council) information relating to the complainant's deceased relative. The Council refused the request under section 41(1) (information provided in confidence) and section 40(2) (personal information) of FOIA.
2. The Commissioner's decision is that the Council is entitled to rely on sections 41(1) and 40(2) of FOIA to the refuse to provide the information requested. However, the Council breached section 17(1) of FOIA as its refusal notice was issued outside required timescales.
3. The Commissioner does not require the Council to take any steps as a result of this decision.

Request and response

4. On 5 October 2022 the complainant wrote to the Council and requested information in the following terms:

"Ideally, I would like all the information that you have but would like to know the following:

1. Could you confirm the dates of when [name redacted] was in your care?

2. Can you tell me what condition that [name redacted] was in when he was admitted into your care?
 3. Could you provide dates of certain events relating to [name redacted] care e.g. being transferred into [name redacted] care etc.
 4. Did the council try to find/contact any other relative before [name redacted] passing (e.g. [names redacted] etc.) and if so when?
 5. Was [name redacted] seeking a deputyship court order in for [name redacted] and if so, was this for medical and/or his financial affairs?
 6. Were the Council aware of any letter addressed to [name redacted] that apparently [name redacted] wanted to send whilst he was in [name redacted] Hospital?
 7. Were there any suggestions that [name redacted] had been mistreated in any way? This is because at one point, the funeral directors told a family member that the [name redacted] coroner had been informed but no further information was provided.
 8. Was the council aware that [name redacted] had a cremation plan and/or will in place before his passing? If so, please can you provide details.
 9. Did [name redacted] have any possessions brought with him when he was brought to the hospital? If yes, please can you provide details.
 10. Has the council been contacted by any other family member after his passing to present?"
5. On 22 November 2022 the Council responded and refused the request under section 41(1) (information provided in confidence) and section 40(2) (personal information) of FOIA.
 6. The complainant subsequently asked the Council to "respond to my FOI request under the appropriate legislation and state the relevant legislation for answers that the Council cannot answer." On 29 November 2022, the Council reiterated its original response to the complainant. It considered questions 1 – 10 of the request exempt under section 41(1) of FOIA, and questions 3, 4, 5, 6 and 10 would likely to be exempt as personal information under section 40(2) of FOIA. With regard to question 6, the Council advised [name redacted] to make a Subject Access Request for this information.
 7. Following the complainant's request for an internal review, on 6 January 2023 the Council provided its response It maintained its position to withhold the requested information under the exemptions cited.

Reasons for decision

8. The following analysis focuses on whether the Council was entitled to withhold the requested information under section 41(1) and section 40(2) of FOIA.

Section 41 – information provided in confidence

9. 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.
10. The Council relied on this exemption to withhold the case file/social care records concerning [name redacted], the complainant's deceased relative. The Commissioner accepts this information would have been received by the Council from another party, and having accepted this he must determine whether disclosure of that information would constitute a breach of confidence.
11. 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.
12. 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 the case file 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.
13. The Council explained to the complainant that disclosure of the information is not just to him but deemed to be a disclosure to the public at large. It said that this would breach the duty of confidentiality the Council owes to [name redacted] which survives the death of [name redacted].

14. The Council stated that it assessed [name redacted] social care records as being "information that has the necessary quality of confidence, it would have been imparted in circumstances importing an obligation of confidence and disclosure to the world at large under FOI would amount to unauthorised use of the information to the detriment of the confider." The Council said there is no evidence that it could rely on a public interest defence to a breach of confidence legal claim (such as the disclosure of [name redacted] social care files to the world at large is necessary).
15. The Commissioner notes from the internal review request, the complainant obtained information relating to the request from [name redacted], and that another council answered all the questions which the complainant had asked. However, the Commissioner accepts that [name redacted] may have shared information with the complainant privately, and the information was not shared with the complainant and the world at large, as would be the case if the Council disclosed information in response to the complainant's request under FOIA. The Commissioner recognises that the Council is obliged to use its own discretion in applying FOIA exemptions and is not bound by the actions of other councils' approaches to requests for information.
16. With regard to the complainant's position of the information he obtained from another council, the Commissioner cannot comment on information provided by other public authorities. He can only comment on the circumstances on a case by case basis. The Commissioner considers the withheld information in this instance retains the necessary quality of confidence owed to [name redacted] the deceased relative.
17. The Council explained to the complainant "there is no real right of access to social care records of the deceased." The Council said the right of subject access under GDPR does not continue after death, and for medical records, "there is legislation allowing certain people access, but for social care records, there is nothing." The Council further explained that the estate of the deceased could sue the Council for breach of confidence if information was disclosed. In an attempt to support its position, the Council directed the complainant to our guidance on section 41 of FOIA, and to previous decision notices concerning section 41 cases in relation to deceased people.
18. The Commissioner is satisfied that the case file/social care records of the individual in question, would contain information imparted in circumstances importing an obligation of confidence.

19. 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.
20. Section 41 of FOIA 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.
21. The Commissioner is satisfied that disclosure of the requested information into the public domain would not be in 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.
22. 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.

Section 40(2) – personal information

23. 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.
24. Section 3(2) of the Data Protection Act 2018 defines personal data as:
"any information relating to an identified or identifiable living individual."
25. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
26. In this case, the complainant requested information the Council holds concerning the complainant's deceased relative. 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.

27. 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.
28. 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."
29. 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.
30. 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.
31. The Commissioner considers that in this case, the complainant is pursuing a legitimate interest as the request concerns details held about his deceased relative. The complainant is of the view that there is contradictory information shared by [name redacted] of [names redacted] which he said "poses serious concerns about a lack of duty of care for [name redacted] in regards to connecting him with [name redacted]." The Commissioner accepts disclosure of the requested information is necessary to meet that legitimate interest. However, he considers the individuals, social workers, council employees, would not expect that private information about themselves to be made public under FOIA without their consent.
32. 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).
33. 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.

Procedural matters

Section 17(1)

34. Section 17(1) of FOIA specifies that a refusal notice must be provided no later than 20 working days after the date on which the request was received.
35. In this case, the complainant submitted his request on 5 October 2022 and the Council did not issue a refusal notice until 22 November 2022. As the Council issued its refusal notice outside 20 working days, it has therefore breached section 17(1) of FOIA.
36. Provision of an internal review is not a requirement of FOIA, however, it is a matter of good practice. The FOIA Code of Practice advised that an internal review should be provided within 20 working days of a request. In this instance, the complainant requested an internal review on 29 November 2022 and the Council provided its internal review response on 6 January 2023 which is in excess of the Code of Practice guidance.

Right of appeal

37. 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

38. 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.
39. 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

Joanna Marshall
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