

Decision Notice 098/2021

Deceased person's care records

Applicant: The Applicant

Public authority: Glasgow City Council

Case Ref: 202100151



Scottish Information
Commissioner

Summary

The Council was asked for records relating to the care of the Applicant's late mother. The Council considered the information to be exempt from disclosure on the basis that it was confidential. The Commissioner investigated and found that the records were confidential and could not, in this case, be disclosed under FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), 1(4) and (6) (General entitlement); 2(1)(a) and (2)(c) (Effect of exemptions); 17(1) (Information not held); 36(2) (Confidentiality)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 13 January 2021, the Applicant made a request for information to Glasgow City Council (the Council). The information requested was:
 - 1) *I request a copy of all correspondence including email, letter, telephone records concerning my mother [REDACTED].*
 - 2) *I request a copy of all correspondence between anyone including third parties.*
 - 3) *I request a copy of the document which authorized I was not be informed of my [mother's] funeral date and [where] she was to be cremated.*
 - 4) *I request to know who authorized this and the reasons.*
 - 5) *My mother was under the supervision of the Social Work Department.*
2. The Council responded on 19 January 2021. It notified the Applicant, under section 17(1) of FOISA, that it did not hold any information falling within the scope of requests 3) and 4). The Council also argued that the information it held in relation to requests 1) and 2) was exempt from disclosure under section 36(2) and 38(1)(b) of FOISA, and it stated that it did not consider point 5) to be a valid request for recorded information; it considered it simply to be a statement, so no response was required.
3. On 19 January 2021, the Applicant wrote to the Council requesting a review of its decision on the basis that had not provided him with the information he had requested.
4. The Council notified the Applicant of the outcome of its review on 1 February 2021. It maintained that it did not hold any information falling within the scope of requests 3) and 4). It argued that information falling within the scope of request 1) was exempt under section 36(2) of FOISA, and information falling within the scope of request 2) was exempt under section 38(1)(b) (Personal information) of FOISA. The Council reiterated its view that point 5) was a statement and not a request for information.
5. On 3 February 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome

of the Council's review and he argued that his appeal should be upheld. The Applicant referred to a previous decision issued by the Commissioner, in support of his view.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 4 February 2021, the Council was notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Council was invited to comment on this application and to answer specific questions. These related to its view that some of the information was not held, and the remainder was exempt from disclosure under either section 36(2) or 38(1)(b) of FOISA.
9. The Commissioner agrees that request 5) is not a request for recorded information, but a statement. Consequently, he will not consider it further.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both the Applicant and the Council. He is satisfied that no matter of relevance has been overlooked.

Change of exemptions

11. In its submissions to the Commissioner, the Council submitted that it had erred in its review outcome, by indicating that it was only withholding information falling under the scope of request 1) under section 36(2) of FOISA, and that information falling within the scope of request 2) was being withheld solely under section 38(1)(b) of FOISA.
12. The Council submitted that it was, in fact, withholding all of the information falling within the scope of requests 1) and 2) under both section 36(2) and 38(1)(b) of FOISA.

Section 36(2) - Confidentiality

13. Under section 36(2) of FOISA, information is exempt from disclosure if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure by the authority so obtaining it to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA. However, it is generally accepted in common law that an obligation of confidence will not apply if the disclosure of the information is necessary in the public interest.
14. Section 36(2) contains a two-stage test, both parts of which must be fulfilled before the exemption can be relied upon.

Information obtained from another person

15. The first test is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.
16. The Council provided the Commissioner with a schedule of the information it is withholding under requests 1) and 2). The Commissioner has examined the schedule of documents and he notes that it comprises correspondence (letters, emails and telephone notes) between the Council's social work department and third parties (including hospital and care home staff) about the deceased's care. It is clear that all of the withheld information has been communicated to the Council by another person.
17. In the circumstances, the Commissioner is satisfied that the withheld information was obtained by the Council from other persons (either directly or indirectly) and that the first part of the section 36(2) test has therefore been fulfilled.

Actionable breach of confidence

18. The second part of the test is that the disclosure of the information by the public authority must constitute a breach of confidence actionable either by the person who gave the information to the public authority or by any other person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled.
19. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
 - (i) the information must have the necessary quality of confidence;
 - (ii) the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
 - (iii) unauthorised disclosure must be to the detriment of the person who communicated the information.

Necessary quality of confidence

20. The Council contended that the information it is withholding has the necessary quality of confidence. It explained that information relating to an individual's care and support needs as assessed by a qualified social work professional includes information provided in confidence by that individual to their social work to inform decisions relating to their care and support. The Council argued that this type of information is not accessible to the public.
21. Having considered the nature of the information requested and the explanation put forward by the Council, the Commissioner is satisfied that it fulfils the criteria of having the necessary quality of confidence. The information is not common knowledge and could not readily be obtained.

Obligation to maintain confidentiality

22. The Council submitted that correspondence regarding the Applicant's mother's care has been based on information communicated in circumstances importing an obligation of confidence.
23. The Council argued that the relationship between the Applicant's mother and her care providers (including social workers) is clearly one which would imply a duty of confidentiality.

It maintained that such an obligation is created whenever a professional social worker receives personal information directly from clients and certain others concerning their personal affairs.

24. The Council acknowledged that there is little case law on the subject of breach of confidence after death, but it referred to two tribunal decisions (relating to the (UK) Freedom of Information Act 2000) which have upheld this point: *Bluck v Information Commissioner and Epsom and St Helier University NHS Trust*¹ and *Martyres v Information Commissioner and NHS Cambridgeshire*².
25. The Council argued that disclosure of correspondence contained within the deceased's social work records would result in an actionable breach of confidence since the information the Applicant has requested is not generally accessible to the public and was communicated in circumstances importing an obligation of confidentiality, during the process of providing care to the Applicant's late mother. The deceased would have no expectation that details of such a private nature would ever be released into the public domain in response to an FOI request.
26. In previous decisions, the Commissioner has accepted that the relationship between client and social worker is one in which a duty of confidentiality is implicit, and that the duty of confidence is one which can exist even after the death of the client. As explained in *Decision 029/2008*³, in this respect the Commissioner agrees with the view taken by the Information Tribunal in the case of *Bluck v Information Commissioner and Epsom and St Helier University NHS Trust* (paragraphs 17-21)⁴. The Commissioner therefore accepts that the Council has an ongoing duty of confidence to its former client, the Applicant's late mother.
27. For the reasons outlined, the Commissioner is satisfied that information withheld from the Applicant was received in circumstances which imposed an obligation on the Council to maintain confidentiality.

Unauthorised disclosure which could cause detriment

28. The third requirement is that unauthorised disclosure of the information must be to the detriment of the person who communicated it. The damage need not be substantial and indeed could follow from the mere fact of unauthorised use or disclosure in breach of confidence.
29. The disclosure of information held within a social work record and containing information provided by any given client may be of detriment to the interests of that individual, even after their death, as information may be disclosed in relation to their actions, support needs, opinions or vulnerabilities that they would not have wished to be disclosed into the public domain. Given the circumstances of this case, the Council argued that it was very doubtful

1

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

2

<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i653/20120131%20Decision%20and%20ORuling%20EA20110209.pdf>

³ <https://www.itspublicknowledge.info/UploadedFiles/Decision029-2008.pdf>

4

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

that the Applicant's late mother would wish communications regarding her care to be disclosed into the wider public domain.

30. The Council submitted that disclosure of information that it obtained in confidence from other parties, may undermine their own professional standing if put into the public domain other than by means of a lawful court order. If this information was disclosed, the Council argued that other patients may lose the necessary confidence that their personal information, entrusted to their care provider, would be protected from disclosure by others to whom it was communicated, if such communications were simply released on demand after the death of the individual.
31. The Council also argued that release of this type of information would be likely to cause potential detriment to the health professionals and social workers who provided care services to the deceased and to any future clients since it would inhibit their freedom to their job properly. If such information was released into the public domain, this may lead to sensitive information being withheld from written records which could have a direct impact on the quality of service a client receives from care providers.
32. Considering the nature of the information and the subject matter to which it relates, the Commissioner considers that there is potential for damage or distress to be caused to the client (regardless of her passing), other surviving relatives and the professionals involved in the creation of the information through its disclosure into the public domain.
33. The Commissioner accepts that, when others provided information with regard to the Applicant's mother, they would have done so in the expectation that this information would be treated confidentially and not disclosed into the public domain in response to an information request under FOISA. In previous cases, the Commissioner has accepted that the confidential relationship between client and social worker will extend to other people providing information to the social worker in relation to the client.
34. The Commissioner is therefore satisfied that the tests for an actionable breach of confidence are met in this case, in relation to the information being withheld under section 36(2) of FOISA.
35. Having found that all the tests for the exemption in section 36(2) of FOISA have been met, and the exemption is properly engaged, the Commissioner must now go on to consider where the balance of public interest lies in disclosure of the information.

Public interest defence - section 36(2)

36. As noted above, the exemption in section 36(2) of FOISA is an absolute exemption in terms of section 2(2) of FOISA and not subject to the public interest test in section 2(1)(b). However, the law of confidence recognises that, in certain circumstances, the strong public interest in maintaining confidences may be outweighed by the public interest in disclosure of the information. In deciding whether to enforce an obligation of confidentiality, the courts are required to balance these competing interests, but there is no presumption in favour of disclosure. This is generally known as the public interest defence.
37. The courts have identified a relevant public interest defence in cases where withholding information would cover up serious wrongdoing, and where it would lead to the public being misled on, or would unjustifiably inhibit public scrutiny of, a matter of genuine public concern.
38. In its submissions to the Commissioner, the Council argued that it is in the public interest that social work records and related information should not be disclosed under FOISA.

39. In this case, the Commissioner agrees that there are no compelling reasons for the content of the records held by the Council relating to its involvement in the care and support of the Applicant's late mother to be disclosed into the public domain.
40. In conclusion, the Commissioner finds that the Council was correct to withhold information falling under the scope of requests 1) and 2) under section 36(2) of FOISA.
41. As the Commissioner has found all of the information falling under the scope of requests 1) and 2) to be exempt from disclosure under section 36(2) of FOISA, he will not go on to consider whether the same information is also exempt under section 38(1)(b) of FOISA.

Section 17(1) - Notice that information is not held

42. Under section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received.
43. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must (unless it wishes neither to confirm nor deny whether the information is held under section 18 of FOISA), give the applicant notice in writing to that effect.
44. The Council submitted that it did not consider it necessary to conduct searches for parts 3) and 4) of the Applicant's request where he asked for the following information:
 - 3) I request a copy of the document which authorized I was not be informed of my [mother's] funeral date and [where] she was to be cremated.
 - 4) I request to know who authorized this and the reasons.
45. The Council notes that the Applicant appears to assume that it organised his mother's funeral and did not inform him of the date. The Council stated that it was not responsible for organising the funeral and therefore did not consider it necessary to conduct searches for the information asked for in requests 3) and 4). The Council argued that it was clear from the deceased's social work records that her funeral was organised by another party. The Council maintained that it does not hold any documents authorising that the Applicant should not be informed of the date and location of the funeral.
46. The Commissioner must decide whether the Council complied with Part 1 of FOISA in refusing requests 3) and 4), i.e. whether the Council was correct to notify the Applicant that it held no recorded information falling within the scope of his requests.
47. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
48. Having considered all the relevant submissions, the Commissioner is satisfied that the Council took adequate and proportionate steps to establish whether it held recorded information falling within the scope of the Applicant's request. The Council has explained that it holds information, contained in his late mother's social care records, that confirms that another party organised the deceased's funeral. As the Council did not organise the funeral, and had no involvement in its arrangements, the Commissioner is satisfied that it does not hold the information that the Applicant has asked for in requests 3) and 4).

49. Given the explanations and other submissions provided, he is satisfied that the Council did not hold the information under consideration here and was correct to give the Applicant notice, in terms of section 17(1) of FOISA, that it held no information falling within the scope of requests 3) and 4).

Decision

The Commissioner finds that Glasgow City Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or the Council wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Margaret Keyse
Head of Enforcement

17 June 2021

Appendix 1: Relevant statutory provisions

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
- (a) the provision does not confer absolute exemption; and
- ...
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
- ...
- (c) section 36(2);
- ...

17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or
- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),
- if it held the information to which the request relates; but
- (b) the authority does not hold that information,
- it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.
- ...

36 Confidentiality

...

- (2) Information is exempt information if-
 - (a) it was obtained by a Scottish public authority from another person (including another such authority); and
 - (b) its disclosure by the authority so obtaining it to the public (otherwise than under this Act) would constitute a breach of confidence actionable by that person or any other person.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info