



Decision Notice 157/2024

Deceased relative's social care information

Authority: Argyll and Bute Council
Case Ref: 202301126

Summary

The Applicant asked the Authority for the social care records of his deceased stepmother. The Authority withheld the requested information on the basis that it was confidential. The Commissioner investigated and found that the records were confidential and the Authority was correct to withhold the information under FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 47(1) and (2) (Application for decision by Commissioner); 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 15 February 2023, the Applicant made a request for information to the Authority. He asked for a copy of his late stepmother's social care records under section 3(f) of the Access to Health Records Act 1990 (the 1990 Act). (Both Applicant and Authority referred to the Access to Medical Records Act 1990 in their correspondence, but the context shows that both intended to refer to the Access to Health Records Act 1990.)
2. The Authority responded on 15 March 2023. It informed the Applicant that social care records were not covered by the 1990 Act, as these were not health records. The Authority explained that a health record was defined as a record "made by or on behalf of a health professional in connection with the care of that individual".

It went on to state that “health professional” under the 1990 Act had the same meaning as in the Data Protection Act 2018, and that this meaning did not cover social work professionals. The Authority explained that it had dealt with the request under FOISA and was withholding his stepmother’s care records under section 36(2) of FOISA.

3. On 14 April 2023, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because he did not believe that confidentiality issues applied to a deceased person.
4. The Authority notified the Applicant of the outcome of its review on 17 May 2023. It upheld its original decision to withhold the information under section 36(2) of FOISA, on the basis that disclosure would result in an actionable breach of confidence.
5. On 5 September 2023, 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 Authority’s review because he did not accept that it could refuse to give him access to his stepmother’s care records on the grounds of confidentiality, particularly when his stepmother was deceased and he already had copies of her medical records.

Investigation

6. The Commissioner subsequently determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 11 October 2023, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing that the Applicant had made a valid application and invited its comments.
8. The case was subsequently allocated to an investigating officer.

Commissioner’s analysis and findings

9. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by the Applicant and the Authority. He is satisfied that no matter of relevance has been overlooked.
10. As set out in previous decisions, information disclosed under FOISA enters the public domain and is therefore accessible to anyone who asks for it, regardless of who they are and/or why they want it. Under FOISA, the Commissioner cannot require any information to be disclosed solely to an applicant, and he must take this into account when considering whether the Authority complied with FOISA in withholding the information requested.

Section 36(2) – Confidentiality

11. 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.

12. 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

13. 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.
14. The Authority stated that the information was provided to its Social Work staff, from the deceased and also from a relative of the deceased, in order to inform the decisions that were taken in relation to the deceased's care.
15. In the circumstances, the Commissioner is satisfied that the withheld information was obtained by the Authority from other persons and that the first part of the section 36(2) test has therefore been fulfilled.

Actionable breach of confidence

16. 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.
17. 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

18. The Authority claimed that the information had the necessary quality of confidence. It explained that the information was held on files which were not publicly available, and not generally accessible, and that the information therefore had the necessary quality of confidence.
19. Having considered the nature of the information requested and the explanation put forward by the Authority, 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

20. The Authority submitted that the information was received in circumstances which imposed an obligation on the Authority to maintain confidentiality.

It argued that the information formed part of a relationship between social work and the Applicant's deceased stepmother and that there was an ongoing duty of confidence to her, even after her death. The Authority also argued that the relative who provided information to social work would have expected the information they provided to remain confidential.

21. The Authority referred to previous decisions by the Commissioner which accepted that the relationship between the client and a social worker was one in which a duty of confidentiality was implicit and one which could exist after the death of the client. The decisions referenced by the Authority were decisions [051/2022](#)¹, [098/2021](#)², and [078/2021](#)³.
22. The Applicant said he was not aware of confidentiality issues in relation to someone who was deceased. He stated that claiming confidentiality as regards his late stepmother's information was not a reasonable position in light of the fact that he already had the NHS records (medical records) which ran parallel to the social care records he sought. The Applicant stated that he had been active in his stepmother's care before she had moved away.
23. In decision [150/2012](#)⁴ the Commissioner accepted that it might be possible for surviving relatives (other than the Applicant) to raise an action for breach of confidence if information relating to their mother was released under FOISA.
24. As noted by the Authority, 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](#)⁵, paragraph 23, 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](#)⁶.
25. For the reasons outlined above, the Commissioner is satisfied that information withheld from the Applicant was received in circumstances which imposed an obligation on the Authority to maintain confidentiality to its former client and to her relative.

Unauthorised disclosure which could cause detriment

26. 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.
27. In comments to the Commissioner, the Authority argued that disclosure of information held within a social work record, and containing information provided by or on behalf of a client, may be of detriment to the client's interests (in this case, the Applicant's stepmother) even after their death.

¹ <https://www.foi.scot/decision-0512022>

² <https://www.foi.scot/decision-0982021>

³ <https://www.foi.scot/decision-0782021>

⁴ <https://www.foi.scot/decision-1502012>

⁵ <https://www.foi.scot/decision-0292008>

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

It argued that disclosure would mean that information may be disclosed in relation to their stepmother's actions, support needs, opinions or vulnerabilities that they would not have wished to be made public (which would be the effect of disclosing the information in response to the request).

28. The Authority also addressed information which was provided not by the client but by third parties and social work professionals, saying that it was provided with the expectation that the information would not be disclosed into the public domain.
29. 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.
30. The Commissioner accepts that, when others provided information with regard to the Applicant's stepmother, 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.
31. 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.
32. 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)

33. 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.
34. The Applicant stated that he felt "very strongly" that the Authority had something to hide. He argued that if the Authority was trying to cover something up, it was better to be open and honest, something which he believed the Authority was not being. He stated that the information he sought was to ensure that correct procedures were put in place to ensure that his late stepmother's health, welfare and wellbeing were paramount when decisions about her care were taken and to ensure the correct checks and balances were applied.
35. The Authority acknowledged that a public interest defence may be relevant 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. However, the Authority argued that it did not consider this to be the case in this instance.

36. The Commissioner agrees that there are no compelling reasons, in the public interest, for the content of the records held by the Authority relating to its involvement in the care of the Applicant's late stepmother to be disclosed into the public domain.
37. In conclusion, the Commissioner finds that the Authority was correct to withhold information under section 36(2) of FOISA.

Decision

The Commissioner finds that the Authority 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 Authority 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.

Jennifer Ross
(Acting) Deputy Head of Enforcement

31 July 2024

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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (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);
 - ...

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.

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
 - (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);
and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).