



Scottish Information  
Commissioner

**Decision 029/2008 Mrs G and Aberdeen City  
Council**

*Deceased person's social work record*

**Applicant: Mrs G**  
**Authority: Aberdeen City Council**  
**Case No: 200700962**  
**Decision Date: 21 February 2008**

**Kevin Dunion**  
**Scottish Information Commissioner**

Kinburn Castle  
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## **Decision 029/2008 Mrs G and Aberdeen City Council**

***Request to access social work records of deceased son – information withheld under sections 26(a), 30(c) and 36(2) of Freedom of Information (Scotland) Act 2002 – Commissioner upheld the Council’s decision to withhold the information***

### **Relevant Statutory Provisions and Other Sources**

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Freedom of Information (Scotland) Act 2002 (FOISA) sections: 1(1) (General entitlement); 2(1), (2)(b) and (c) (Effect of exemptions); 26(a) (Prohibitions on disclosure); 30(c) (Prejudice to effective conduct of public affairs) and 36(2) (Confidentiality)

The full text of each of these provisions is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

### **Facts**

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Mrs G requested a copy of some of the information contained in her late son’s social work records from Aberdeen City Council (the Council). The Council refused to supply Mrs G with the information.

Following an investigation, the Commissioner found that information contained in the record was exempt from disclosure in terms of sections 36(2) and 30(c) of the Freedom of Information (Scotland) Act 2002 (FOISA).

### **Background**

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1. On 14 February 2007, Mrs G emailed the Council requesting:
    - a. The dates when a named social worker had visited her son during 2006.
    - b. A copy of the social worker’s appraisal of her son’s mental and physical health and his personal care during those visits.
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2. The Council responded on 28 February 2007 to Mrs G's request. The Council withheld the information in response to question b. under sections 26(a) and 36(2) of FOISA. However, the Council offered to provide Mrs G with a list of dates of when the named social worker met her son, either by providing them in written form or via a face-to-face meeting with an officer of the Council.
3. Mrs G emailed the Council on 23 March 2007 requesting a review of its decision.
4. The Council subsequently wrote to Mrs G on 12 April 2007 to advise her that it had upheld its decision upon review. .
5. On 4 July 2007, Mrs G wrote to my Office, stating that she was dissatisfied with the outcome of the Council's review and applying to me for a decision in terms of section 47(1) of FOISA.

## The Investigation

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6. The application was validated by establishing that Mrs G had made a request for information to a Scottish public authority (i.e. the Council) and had applied to me for a decision only after asking the authority to review its response to that request.
7. On 16 July 2007, the Council was notified in writing that an application had been received from Mrs G and was asked to provide my Office with a copy of the information which had been withheld from her. The Council responded with the information requested and the case was then allocated to an investigating officer.
8. On 18 September 2007 the investigating officer emailed the Council to ask whether it was still willing to provide Mrs G with a list of dates when the named social worker visited her son in 2006. The Council subsequently confirmed that this offer remained open.
9. The investigating officer emailed the Council on 12 October 2007 requesting detailed submissions as to its reasons for withholding the information from Mrs G. On 30 October 2007, the Council provided a comprehensive response and stated that it was also relying on section 30(c) of FOISA to withhold the information from Mrs G.



## The Commissioner's Analysis and Findings

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10. In coming to a decision on this matter, I have considered all of the information and submissions that have been presented to me by Mrs G and the Council. I am satisfied that no matter of relevance has been overlooked.
11. As noted above, Mrs G's request was for a list of dates when a named social worker visited her son in 2006 as well as for a copy of the social worker's appraisal of her son's mental and physical health and his personal care during those visits. The Council has offered to provide the list of dates to Mrs G and so my investigation (and this decision) focuses on the social worker's appraisal.
12. In coming to a decision on this matter, I must consider the fact that FOISA is designed to be "applicant blind". In view of this, I cannot take account of the unique circumstances of this case, i.e. the fact that it was information contained in her deceased son's file which Mrs G wanted to access. Mrs G therefore has to be considered, under FOISA, as being in the same position as a person with no prior relationship with the son.
13. I must also take account of the fact that the effect of releasing the file under FOISA would be to release the contents of the file into the public domain.
14. The Council consider that the information being sought by Mrs G is exempt under three separate exemptions, i.e. section 26(a), 30(c) and 36(2). I will first of all look at the exemption contained in section 36(2).

### Section 36(2) - Confidentiality

15. In terms of section 36(2) of FOISA, information is exempt information if it was obtained by a Scottish public authority from another person and its disclosure by the authority so obtaining it would constitute a breach of confidence actionable by that person or any other person.
16. The exemption in section 36(2) is absolute in that it is not subject to the public interest test required by section 2(1)(b) of FOISA. However, it is generally accepted in common law that an obligation of confidence will not be enforced to restrain the disclosure of information which is justified in the public interest (this is commonly known as "the public interest defence").
17. In order to rely on section 36(2), an authority needs to demonstrate certain elements. Firstly, the information must have been obtained by the Council from another person.



18. The Council has commented that, inherent in the job of a social worker, is the recording of both the verbal and non-verbal communications that occur with the client and with other professionals involved with the client's care. Much of the information which has been withheld from Mrs G contains comments from the social worker, reporting on discussions with the son and also reflects discussions the social worker has had with various medical professionals. I am satisfied that this is information which has been provided by third parties to the Council.
19. The second test is that the disclosure of the information by the public authority must constitute a breach of confidence actionable either by the person or persons from whom the authority obtained the information or by any other person. I take the view that actionable means that the basic requirements for a successful action must appear to be fulfilled.
20. There are three main requirements, all of which must be met before a claim for breach of confidentiality can be established. These are:
  - i. the information must have the necessary quality of confidence about it. It must not be generally accessible to the public already.
  - ii. the information must have been communicated in circumstances importing an obligation of confidentiality. The obligation may be express (for example, in a contract or other agreement), or implied from the circumstances or the nature of the relationship between the parties; and
  - iii. there must have been unauthorised use or disclosure of the information to the detriment of the party communicating it. Detriment may be potential rather than actual and need not be financial.
21. To have the necessary quality of confidence, the information should not be generally accessible. That is clearly the case here. Only a limited number of members of staff of the Council have seen the information.
22. The Council must also have received the information in circumstances which imposed an obligation on it to maintain confidentiality. The Council has submitted that the relationship between client and social worker is clearly one which would imply a duty of confidentiality and I agree that this is the case. Additionally, I consider that this confidential relationship will extend to other people who provided information to the social worker, including medical practitioners. I am therefore satisfied that the information was received in circumstances which imposed an obligation on it to maintain confidentiality.



23. While the position is clearer in relation to the information provided by the medical practitioners, I have had to consider separately whether the duty of confidence owed by the Council to the son can survive his death. I am satisfied that it can and have followed 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 to 21) ([http://www.informationtribunal.gov.uk/Documents/decisions/mrspbluckvinformationcommissioner\(17sept2007\).pdf](http://www.informationtribunal.gov.uk/Documents/decisions/mrspbluckvinformationcommissioner(17sept2007).pdf)).
24. The third part of the test requires that disclosure of the information must be unauthorised by, and cause damage to, the person who communicated it.
25. I am satisfied that when the third parties (such as the son and the medical practitioners) provided information to the social worker, they did so in the expectation that the information would not be disclosed into the public domain. As such, I consider that the disclosure of the information under FOISA would be unauthorised.
26. I am satisfied on the basis of the submissions that I have received from the Council that there is a potential for damage or distress to be caused to surviving relatives by the release of the information contained in the file. The same may be said for information which has been provided in confidence by health professionals.
27. I also note decision FS50111780 from the Information Commissioner (County of Durham NHS Primary Care Trust), in which he reached a view that the personal representative of the deceased person could sue in the event of details of her medical condition being released to her parents under the UK Freedom of Information Act 2000.
28. As with the Information Commissioner, while I have found no binding authority on this point, I consider that it may be possible for other surviving relatives of the deceased son (i.e. not the applicant, Mrs G), to raise an action for breach of confidence in the event that information contained in the file is disclosed under FOISA.
29. I am also satisfied that the medical practitioners who gave information to the Council in confidence would be able to raise an action for breach of confidence if the information were to be disclosed into the public domain under FOISA.
30. I am therefore satisfied that disclosure of the file would be actionable.



31. As stated above, if the conditions of section 36(2) are fulfilled, an absolute exemption is created. However, it is generally accepted in common law that an obligation of confidence cannot apply to information the disclosure of which is necessary in the public interest. The law of confidence recognises that there is a strong public interest in ensuring that people respect confidences, and the burden of showing that a failure to maintain confidentiality would be in the public interest is therefore a heavy one. However, in certain circumstances the public interest in maintaining confidences may be outweighed by the public interest in disclosure of information.
32. In this instance I can see no overwhelming public interest which would justify the release of such information into the public domain. It is clear to me that the expectation of confidence between social worker and client is a cornerstone of the Council's relationships with its clients and is vital for successful service provision.
33. I am therefore satisfied that the Council acted in accordance with Part 1 of FOISA in withholding the information requested by Mrs G under section 36(2) of FOISA.

#### **Section 30(c) – Prejudice to effective conduct of public affairs**

34. Section 30(c) of FOISA exempts from disclosure information which would otherwise (i.e. otherwise than provided for in section 30(a) and (b)) prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. This is a qualified exemption, and as such is subject to the public interest test required by section 2(1)(b) of FOISA.
35. Authorities seeking to rely on the exemption in section 30(c) of FOISA need to show that disclosure would (or would be likely to) prejudice substantially the way in which they conduct their business. They should be able to demonstrate that the risk of damage being caused by disclosing information is real or very likely, not simply a remote possibility. The harm caused or likely to be caused must be of some real and demonstrable significance, not simply marginal, which would occur in the near (certainly the foreseeable) future rather than in some unspecified distant time. Authorities should therefore consider disclosing the information asked for unless it would (or would be likely to) cause real, actual and significant harm.
36. In this instance the effective conduct of public affairs has been identified by the Council as the ability for social workers to write freely and frankly about a matter of concern without fear of it being released into the public domain. The Council is of the opinion that the release of this information would severely inhibit and substantially prejudice future social work assessments to the detriment of the care provided.



37. The Council also submitted that the effect on social workers would be immediate and would severely inhibit their freedom to do their job properly. Important, sensitive information may be withheld from written comments and subsequently forgotten, leading to erroneous decisions in treatment. Also the clients themselves would be less likely to co-operate if they felt comments regarding their current state of mind and health could be released into the public domain.
38. In their submissions to my Office, the Council stated that comments provided by social workers are a crucial part of the process of care provision. It is vital that other health and social work professionals can assess the situation quickly and accurately in order to recommend the appropriate course of action. So, it is important that the social workers can write freely and frankly about a matter of concern without fear of it being released into the public domain.
39. Considering the sensitive subject at the heart of the request and the effect which I agree that the release of such information would have on the affairs of the Council (and, in particular, its social work services), I am satisfied that the information in question is exempt under section 30(c) of FOISA.

### **The Public Interest**

40. Given that I have upheld the exemption in section 30(c), I am now required to go on to apply the public interest test required by section 2(1)(b) of FOISA. I must therefore order disclosure of the information unless I am satisfied, in all the circumstances of the case, that the public interest in disclosing the information is outweighed by the public interest in withholding the information..
41. The Council considered both reasons for and against disclosure. In summary:

#### **For disclosure**

- The release of the requested information would provide an insight into whether the process was followed correctly with regards to the care of Mrs G's son and it would provide additional insight into the death of her son.

#### **Against disclosure**

- The processes used in the care of the son have already been externally reviewed and the information being withheld would provide no additional insight into his treatment and would be detrimental to both social workers and clients alike as identified above.
- There is also a risk that existing or future social work clients would avoid engaging with their social workers, if they felt that their information was not being treated in a confidential manner and may be released to third parties after their death.





- If the information were to be released then, in order to avoid a similar case happening in the future, social workers would certainly be more guarded in their written comments and as a result important details could be missed.
42. Mrs G has also commented, in correspondence with my Office, that she considers that her son's care was poor and that the refusal to provide her with the information is being used to cloak poor practice. She therefore considers that this is a matter of great public concern.
43. I acknowledge that this is a difficult case and I understand the arguments from both parties. However, given that the disclosure of this information under FOISA would mean disclosure into the public domain, I am persuaded by the arguments put to me by the Council as to the negative effect which the disclosure of this information would have on the delivery of services to some of the most vulnerable people in our society.
44. While I note Mrs G's concerns about the care provided to her son, I hope that the provision to her of information about the dates on which the social worker in question had contact with her son will go some way to providing her with answers to the questions she has about his care..
45. In all the circumstances of the case, therefore, I am satisfied that the public interest in the disclosure of this information is outweighed by that in maintaining the exemption in section 30(c).
46. Given that I have upheld the Council's decision to withhold the information under sections 36(2) and 30(c) of FOISA, I do not intend to go on to consider its reliance on the exemption in section 26(a).

## **Decision**

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I find that Aberdeen City Council acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in refusing to disclose a copy of the named social worker's appraisal of her son's mental and physical health and his personal care during those visits. For the reasons set out above, I find the information to be exempt from disclosure in terms of section 36(2) and 30(c) of FOISA.



## **Appeal**

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Should either Mrs G or the Council wish to appeal against this decision, there is an 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 notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**21 February 2008**



## Appendix

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### 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 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
  - (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- (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 –
  - [...]
  - (b) section 26;
  - (c) section 36(2);
  - [...]

##### 26 Prohibition on disclosure

Information is exempt if its disclosure by a Scottish public authority (otherwise than under this Act) –

- (a) is prohibited by or under an enactment;
- [...]

##### 30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

[...]

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.