

Decision Notice 078/2021

Deceased person's care records

Applicant: The Applicant

Public authority: Inverclyde Council

Case Ref: 202001465



Scottish Information
Commissioner

Summary

The Council was asked for records relating to the care and support of a deceased individual. 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) and (6) (General entitlement); 2(1)(a) and (2)(c) (Effect of exemptions); 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 16 March 2020, the Applicant made a request for information to Inverclyde Council (the Council). The information requested was that contained in the records held by each individual service regarding the Council's involvement with her late daughter. This, the Applicant stated, would include records held by, for example, addiction services (alcohol and drugs), social work, health and special needs in pregnancy.
2. The Council responded on 19 March 2020. It refused to provide the information requested under section 36(2) (Confidentiality) of FOISA, as the relationship between a social worker and their client gave rise to an obligation of confidentiality which continued beyond death.
3. On 18 August 2020, following further correspondence about the Applicant's right to seek a review, the Applicant wrote to the Council requesting a review of its decision, arguing that there was no basis for stating that disclosure of the information requested would constitute a breach of confidence actionable by her late daughter or any other person.
4. The Council notified the Applicant of the outcome of its review on 17 September 2020. It apologised for its earlier failure to inform her of her right to a review. The Council fully upheld its decision to rely on section 36(2) of FOISA for the deceased person's social work records, on the basis that disclosure would result in an actionable breach of confidence.
5. The Council also informed the Applicant, in terms of section 17(1) of FOISA (Notice that information is not held), that it did not hold her late daughter's health records, and that these would be held by the NHS. The Council advised the Applicant on other ways in which she might be able to access the information she was seeking, for example, through the social work complaints process or by reference to the Scottish Public Services Ombudsman (SPSO), recommending she sought independent legal advice as to her rights in these respects.
6. On 1 December 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant subsequently clarified, on 14 January 2021, that she was dissatisfied with the outcome of Council's review because she disagreed with its decision to refuse to provide the information requested under section 36(2) of FOISA. The Applicant provided background information to support her reasons for wishing to obtain the information.

Investigation

7. 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.
8. On 14 January 2021, the Council was notified in writing that the Applicant had made a valid application and the case was subsequently allocated to an investigating officer.
9. 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 justification for withholding the information requested under section 36(2) of FOISA.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all 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.
11. As rehearsed 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 Council complied with FOISA in withholding the information requested.

Section 36(2) – Confidentiality

12. 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.
13. 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

14. 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.
15. The Council explained that its social work, criminal justice and drugs services were involved in providing support services for the Applicant's daughter over a number of years. It submitted that the information requested included comments from various social workers, reports on discussions with the deceased individual and her family, in addition to discussions with other professionals. The Council had previously explained, in its review outcome, that a large proportion of the information had been obtained from a number of people, including the Applicant's daughter, her family (including the Applicant) and social work professionals.

16. 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

17. 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.
18. 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

19. The Council submitted that the information was held on its Swift and Civica social work case management systems, which are used to manage clients’ personal information. The Council explained that strict user access requirements were in place, which restricted access to those systems. As the information was not publicly available, and so not generally or readily accessible or obtainable, the Council was satisfied that the information in question had the necessary quality of confidence.
20. 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

21. The Council submitted that the relationship between the Applicant’s daughter and social workers was one which clearly implied a duty of confidentiality, which continued to exist after her death. In the Council’s view, there was clearly an expectation of privacy on the part of the Applicant’s daughter in relation to her affairs.
22. The Council argued that this confidential relationship extended to third parties who were mentioned in the records and/or who had supplied the information about the client, as contained in those records. It submitted that social work assessments, reports, case management notes and other records were created based on information communicated by third parties in circumstances importing an obligation of confidence. In the Council’s view, the third parties who provided the information would have done so in the expectation that it would be treated confidentially, and not disclosed into the public domain in response to an information request under FOISA.
23. For these reasons, the Council was satisfied that it had received the information in circumstances which imposed on it an obligation to maintain confidentiality.

24. 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*¹, 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)². The Commissioner therefore accepts that the Council has an ongoing duty of confidence to its former client, the Applicant's late daughter.
25. 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

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. The Council submitted that the information covered personal and sensitive issues involving the Applicant's daughter from an early age. Disclosure of this information, the Council submitted, would potentially cause damage and distress not only to the deceased and her surviving family, but also to other third parties mentioned in that information, as well as to the social work and other professionals involved in its creation.
28. 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.
29. The Commissioner accepts that, when others provided information with regard to the Applicant's daughter, 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.
30. 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.
31. 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.

¹ <https://www.itspublicknowledge.info/UploadedFiles/Decision029-2008.pdf>

²

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

Public interest defence – section 36(2)

32. 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.
33. 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.
34. In its submissions to the Commissioner, the Council maintained the interest in maintaining confidentiality strongly outweighed any public interest in disclosure of the information into the public domain, for which, it argued, no compelling or overwhelming argument had been put forward. In the Council's view, the expectation of maintaining confidentiality between social workers and clients was vital for the successful provision of its services to clients.
35. 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 daughter to be disclosed into the public domain.
36. The Commissioner notes the Council provided the Applicant with advice on other means by which she might be able to obtain the information, including the SPSO, which has investigatory and evidence gathering powers if a complaint is made to it. Should the Applicant wish to pursue any legal claim or complaint in this respect, she has the opportunity to do this as an alternative to asking for the information be disclosed into the public domain under FOISA.
37. In conclusion, the Commissioner finds that the Council was correct to withhold the information requested under section 36(2) of FOISA.

Decision

The Commissioner finds that Inverclyde 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

13 May 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.

...

- (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.

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