

# Decision Notice



Decision 150/2012 Mr M and South Lanarkshire Council

Deceased persons' social work and homecare records

Reference No: 201200836

Decision Date: 5 September 2012

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**Rosemary Agnew**

Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
Tel: 01334 464610



## Summary

Mr M asked South Lanarkshire Council (the Council) for the social work and homecare records of his deceased parents. The Council refused to disclose the information, arguing that the records were confidential. The Commissioner agreed. While Mr M believed that the failure to disclose the records breached his human rights, the Commissioner took the view that disclosing the information into the public domain would breach the human rights of others.

## Relevant statutory provisions

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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)

Human Rights Act 1998 (HRA) section 6(1) (Acts of public authorities)

European Convention on Human Rights (ECHR) Article 8

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

## Background

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1. On 6 September 2011, Mr M wrote to the Council asking for the social work and homecare records of his deceased parents.
2. The Council responded on 22 September 2011. The Council informed Mr M that the records were exempt from disclosure under section 36(2) (Confidentiality) of FOISA, and explained why it had come to this view.
3. On 4 December 2011, Mr M wrote to the Council requesting a review of its decision. Mr M challenged the Council's assertion that the confidentiality of his parents would be breached if the records were disclosed. Mr M took the view that, as the son of the people involved, he had the right to be given access to the records.



4. The Council notified Mr M of the outcome of its review on 22 December 2011. The Council confirmed that it wished to rely on section 36(2) of FOISA for withholding the records and provided further reasoning to support its conclusion.
5. On 30 April 2012, Mr M emailed the Commissioner, stating that he was dissatisfied with the outcome of the Council's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr M had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

## Investigation

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7. Before commencing the investigation, the investigating officer alerted Mr M to the outcome of other, similar decisions<sup>1</sup> which had considered whether social work records could be disclosed under FOISA. In all of these cases, the Commissioner decided that the records were exempt from disclosure. In the light of these cases, Mr M was asked whether he still required a decision from the Commissioner in relation to his own request.
8. Mr M confirmed that he did, commenting that he considered FOISA was being used to suppress the disclosure of information and that he did not mind if the records were made public.
9. On 30 May 2012, the Council was notified in writing that an application had been received from Mr M and was asked to provide the Commissioner with a copy of the records in question. The investigating officer also gave the Council an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked it to respond to specific questions.
10. The Council replied on 21 June 2012.
11. The investigating officer also contacted Mr M during the investigation, seeking his submissions on the matters to be considered in the case. Mr M's submissions, along with those of the Council, are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.

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[http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/decisions.php?zoom\\_query=deceased+person%27s&zoom\\_sort=0&qo\\_search=Search&search\\_mode=decisions.php&year=0&exemptions=0&EIRS=0&status=0&outcome=](http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/decisions.php?zoom_query=deceased+person%27s&zoom_sort=0&qo_search=Search&search_mode=decisions.php&year=0&exemptions=0&EIRS=0&status=0&outcome=)



## Commissioner's analysis and findings

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12. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the submissions made to her by both Mr M and the Council, and is satisfied that no matter of relevance has been overlooked.

### Interaction between FOISA & Human Rights Act 1998

13. In his submissions, Mr M argued that the Council's refusal to provide him with his deceased parents' records breached his, and their, human rights under Article 8 of the Human Rights Act 1998 (HRA).
14. Article 8 of the HRA imposes both positive and negative duties on a public authority. This means that while there may be some cases where the disclosure of information would breach the rights contained within Article 8, there may also be cases where the refusal to release information constitutes a breach of Article 8. For example, in the case of *Gaskin v the United Kingdom* (1989) 12 EHRR 36<sup>2</sup>, the European Court of Human Rights decided that the fact that a person who had been in care had no right to access the information contained in those records was a breach of Article 8. However, in the case of *R (Addinell) v Sheffield City Council* [2001] A.C.D. 61, the Court held that Article 8 did not require the Council to disclose to a father the social services files of his deceased son. (It should be noted that neither of these cases involved requests made under freedom of information legislation; information disclosed under this legislation is not just disclosed to the parties involved, but is effectively placed in the public domain.)
15. So, while Mr M may argue that failing to release the records breaches his, or his deceased parents', Article 8 rights, others, such as surviving relatives, may argue that the disclosure would breach their own Article 8 rights.
16. When considering the disclosure of information, a number of matters may be relevant, for example: the more recent the death or the more sensitive the information, the more likely that disclosure would have an adverse effect on the rights of other people closely connected to the deceased.
17. Public authorities must consider Article 8(2) when considering whether Article 8 would allow information to be disclosed. The full text is set out in the Appendix, but, in general, it makes it clear that there shall be no interference with the right to family life and the right to privacy except where interference is necessary in the interests of matters such as public safety, for the prevention of disorder or crime or for the protection of the rights and freedoms of others.

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<sup>2</sup> <http://www.juridischeuitspraken.nl/19890707EHRMGaskin.pdf>



18. Having reviewed the withheld information, the Commissioner is satisfied that disclosing the case records would result in an unwarranted intrusion to the privacy of Mr M's parents' surviving family and would amount to a real and definite breach of their right to respect for their private and family life. The Commissioner does not consider that disclosure would be permitted by Article 8(2), or would be proportionate in the circumstances, particularly given, as noted above, that release of the information in response to Mr M's request under FOISA would result in the records being placed in the public domain.

### Section 36(2) - Confidentiality

19. Section 36(2) of FOISA provides that information is exempt 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. Section 36(2) is an absolute exemption and so is not subject to the public interest test in section 2(1)(b) of FOISA. Nonetheless, 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.
20. Section 36(2) contains a two stage test, both parts of which must be fulfilled before the exemption can be relied upon.
21. The first 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.
22. The Commissioner is satisfied that the information in the records was obtained by the Council from a third party. In coming to this conclusion, the Commissioner has taken into account: *Decisions 165/2007 Mrs S and the City of Edinburgh Council, 029/2008 Mrs G and Aberdeen City Council and 001/2012 Mrs F and Glasgow City Council.*
23. The second requirement is that disclosure of the information by the public authority would constitute a breach of confidence actionable either by the person from whom the public authority obtained the information or by any other person.
24. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled. There are three main requirements which must be met before a claim for breach of confidentiality can be established. These are:
- the information must have the necessary quality of confidence;
  - the public authority must have received the information in circumstances which imposed an obligation on the authority to maintain confidentiality; and
  - there must be a disclosure which has not been authorised by the person who communicated the information but which would cause damage to that person.



*Necessary quality of confidence*

25. The Council stated that as the withheld information was held on files which were not publicly available, then it had the necessary quality of confidence, as it is not generally accessible. The Commissioner agrees with this.

*Maintenance of confidentiality*

26. The next requirement is that the information was received in circumstances which imposed an obligation on the Council to maintain confidentiality. The Council submitted that it had received the information as part of the ongoing relationship between a social worker and client.
27. The Commissioner accepts that the relationship between client and social worker is one in which a duty of confidentiality is implicit. She also accepts that the duty of confidence is one which can exist even after the death of the client (see *Decision 029/2008 Mrs G and Aberdeen City Council*<sup>3</sup>). In this respect the Commissioner concurs with and follows 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)<sup>4</sup>. The Commissioner, therefore, accepts that the Council has an ongoing duty of confidence to its former clients, Mr M's parents.
28. For the reasons outlined in the previous paragraphs, the Commissioner accepts that the Council received the information in question in circumstances which imposed an obligation on the authority to maintain confidentiality.

*Actionable breach of confidence*

29. The third part of the test for an actionable breach of confidence is that disclosure of the information must be unauthorised by, and cause damage to, the person who communicated it.
30. The records contain information provided by third parties, including other relatives and health professionals. Having considered the nature of this information, the Commissioner considers that these individuals did so in the expectation that the information would not be disclosed into the public domain. Consequently, the Commissioner has concluded that disclosure under FOISA would be unauthorised.
31. Considering the information in the case records, and the subject matter to which it relates, the Commissioner considers that there is a potential for damage or distress to be caused to others such as surviving relatives and health care professionals by the disclosure of the information contained in the records.
32. The Commissioner notes decision FS50111780 of 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.

<sup>3</sup> <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2008/200700962.asp>

<sup>4</sup> [http://foiwiki.com/foiwiki/info\\_tribunal/DBFiles/Decision/i25/mrspbluckvinformationcommissioner17sept07.pdf](http://foiwiki.com/foiwiki/info_tribunal/DBFiles/Decision/i25/mrspbluckvinformationcommissioner17sept07.pdf)





33. As with the Information Commissioner, whilst the Commissioner has found no binding authority on this point, she considers that it may be possible for other surviving relatives of the deceased parents (i.e. not the applicant, Mr M), to raise an action for breach of confidence in the event that the records are disclosed under FOISA.
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.

#### *Public interest defence*

35. As noted above, while the exemption in section 36(2) of FOISA is an absolute exemption in terms of section 2(2)(c) of FOISA, the law of confidence recognises that in certain circumstances the strong public interest in maintaining confidence 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.
36. 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.
37. The Council commented that, if the Commissioner came to the view that the allegations made by Mr M in relation to third parties (these allegations are not repeated in this decision) were sufficient to infer that there was a public interest in disclosure, proper disclosure would be to the person who can take appropriate action to protect the public interest, and in this case that would be to the police.
38. The Commissioner acknowledges that Mr M has concerns about the actions of other relatives while his parents were being cared for by the Council's Social Work Services. Nonetheless, the Commissioner does not accept that, in the circumstances of this case, disclosure of the information covered by the terms of Mr M's request is required in terms of the public interest defence outlined above.
39. In all the circumstances, therefore, the Commissioner is satisfied that the records are exempt from disclosure under section 36(2) of FOISA.

#### *Is it possible to disclose the information in redacted form?*

40. In his submissions, Mr M questioned whether the records could be disclosed to him in redacted form, with the confidential information withheld. The Commissioner has considered this point, but has concluded that it would not be practicable to do this, given that all that would be left are empty examples of forms used by the Council.

#### **The Council's handling of Mr M's request**

41. In his submissions, Mr M raised various concerns with the Council's handling of his request and correspondence with him.



42. The Commissioner is aware of Mr M's reasons for his dissatisfaction with the Council's responses and communication, but she must limit herself to the consideration of whether the Council complied with the requirements of FOISA. Having considered all relevant matters in this case, the Commissioner cannot identify any failure by the Council to comply with the requirements of FOISA.

## **DECISION**

The Commissioner finds that South Lanarkshire Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr M.

## **Appeal**

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Should either Mr M 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.

**Rosemary Agnew**  
**Scottish Information Commissioner**  
**5 September 2012**





## 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.

...

- (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.



## Human Rights Act 1998

### 6 Acts of public authorities

- (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

...

## European Convention on Human Rights and Fundamental Freedoms

### Article 8

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.