



Scottish Information
Commissioner
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Decision Notice 296/2024

Authority: South Lanarkshire Council
Case Ref: 202401097

Summary

The Applicant asked the Authority for her late mother's care records. The Authority withheld the information on the grounds that it was confidential. The Commissioner investigated and found that the records were confidential and the Authority was correct to withhold the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 36(2) (Confidentiality); 47(1) and (2) (Application for decision by Commissioner)

Background

1. On 17 April 2024, the Applicant made a request for information to the Authority. She asked for records and information held by Adult Protective Services about her mother's care at a specified care home, in relation to a severe pressure sore.
2. The Authority responded on 19 April 2024. It withheld the information under section 36(2) of FOISA, on the grounds that disclosure would constitute an actionable breach of confidence.
3. On 19 April 2024, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that she needed the information in order to make a complaint against the care home. The Applicant asked the Authority how she could obtain this information, as she was her mother's next of kin and executor.

4. The Authority notified the Applicant of the outcome of its review on 21 May 2024. It upheld its original decision to withhold the information under section 36(2) of FOISA.
5. On 15 August 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of the Authority's review because she had been refused access to the information, which she needed to investigate her late mother's neglect.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 9 September 2024, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information 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 Authority was invited to comment on this application and to answer specific questions. These related to its decision to withhold the information under section 36(2) of FOISA.

Commissioner's analysis and findings

9. In coming to a decision, 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 is released into the public domain and is therefore accessible to anyone who asks for it, regardless of who they are or why they want it. Under FOISA, the Commissioner cannot require information to be disclosed only to an individual; he can only require the information to be disclosed to the wider public, 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 submitted that the information captured by the request was provided in confidence by clinical staff and social work staff, in addition to the deceased client herself. The Authority provided the Commissioner with a copy of this information.
15. Having reviewed the information, 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 stated that the information was not common knowledge. It had been provided to social work by the individual in question, and by third parties, and was not publicly available. The Authority submitted that the information had the necessary quality of confidence.
19. The Commissioner has considered the nature of the withheld information and the submissions made by the Authority and is satisfied that the information has the necessary quality of confidence. The information is not common knowledge and could not readily be obtained.

Obligation to maintain confidentiality

20. The Authority argued that while some information exchanged by the Authority and NHS staff might be subject to a data sharing agreement with provisions around confidentiality, there was an implied duty of confidentiality in relation to information exchanges by a client and their social workers and this extended to information provided by third parties such as clinicians.
21. It argued that it received the information as part of the ongoing relationship between social worker and client and that those who provided the information, whether in a private or professional capacity, would have expected it to remain confidential. The Authority submitted that the information therefore had the necessary quality of confidence.

22. The Authority also referenced Decision [150/2012](https://www.foi.scot/decision-1502012)¹, in which the Scottish Information 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 a parent was released under FOISA.
23. 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 can exist even after the death of the client. As explained in Decision [029/2008](https://www.foi.scot/decision-0292008)², 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](#)³.
24. 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 other relatives.

Unauthorised disclosure which could cause detriment

25. 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.
26. The Authority submitted that detriment was not restricted to financial loss but also covered circumstances where a person's private details were disclosed to others whom the individual would prefer not to know them. The Authority suggested that, while it was impossible to ask the deceased for her views, such clients generally would not wish the information provided by them to be made available to the public and it referred to Decision [051/2022](https://www.foi.scot/decision-0512022)⁴ in relation to this. The Authority also argued that the third parties who provided information (contained in the documents) would not want that information to be made public.
27. The Authority also cited [Decision 078/2021](https://www.foi.scot/decision-0782021)⁵ which considered access to records in relation to confidentiality. In this decision, the Commissioner considered the potential for damage or distress to be caused to the client (even after their death) as well as other surviving relatives and professionals involved in the creation of the information. The Authority commented that it endorsed the approach taken by the Commissioner in that decision.
28. The Commissioner recognises that the disclosure of information held within social work records and containing information provided by a client and their clinicians 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 and vulnerabilities that they would not have wished to be disclosed into the public domain.
29. 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

¹ <https://www.foi.scot/decision-1502012>

² <https://www.foi.scot/decision-0292008>

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

⁴ <https://www.foi.scot/decision-0512022>

⁵ <https://www.foi.scot/decision-0782021>

treated confidentially and not disclosed into the public domain in response to an information request under FOISA.

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 both 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)

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 Applicant disagreed with the application of section 36(2) because she believed she was entitled to receive the information. She stated that she needed it to investigate what she believed was her late mother's neglect at the care home.
34. The Authority accepted that the Applicant may well have a personal interest in obtaining the information but argued that was not the same as there being a public interest. It argued that for the purposes of FOISA, the request had to be treated as if a member of the public unrelated to the deceased woman had made the request.
35. The Authority submitted that it had identified no compelling reason to disclose the information. It submitted that the information was not needed to enable the Applicant to fulfil her role as executor and that there was another means (through the court process) for her to obtain the information. The Authority argued that if an application was made to the court, the Authority would be entitled to submit the information in a confidential envelope for the court to determine what information should be released, and a court order would provide it with a lawful basis for releasing the information.
36. In her requirement for review, the Applicant stated that a referral had been made to Adult Protective Services regarding a severe pressure sore her mother had, and the Applicant therefore intended to make a complaint against the care home, and that was why she wanted the information.

The Commissioner's view on the public interest defence

37. The Commissioner has carefully considered all relevant factors in relation to the public interest defence, including the withheld information itself. He accepts that there may be some occasions where the very strong public interest in maintaining the confidentiality of information passed between a deceased person and a social worker is outweighed by a strong public interest defence in favour of disclosure; for example, where withholding information would cover up serious wrongdoing or would lead to the public being misled on, or kept in ignorance of, matters of genuine public concern.

38. However, in the circumstances of this particular case the Commissioner agrees that there are no compelling reasons for the content of the records held by the Authority relating to its involvement in the care of the Applicant's late mother to be disclosed into the public domain.
39. In conclusion, the Commissioner finds that the Authority was correct to withhold the 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 (FOISA) 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.

Euan McCulloch
Head of Enforcement

12 December 2024