

Decision Notice



Decision 001/2012 Mrs F and Glasgow City Council

A deceased person's social work records

Reference No: 201101229

Decision Date: 4 January 2012

www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

Kinburn Castle

Doubledykes Road

St Andrews KY16 9DS

Tel: 01334 464610



Summary

Mrs F asked Glasgow City Council (the Council) to provide information relating to a relative, now deceased. The Council found the information to be exempt from disclosure under certain exemptions in FOISA, and confirmed this decision after a review. Mrs F remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner was satisfied that all the withheld information was properly withheld by the Council, as its disclosure would either substantially prejudice the effective conduct of public affairs (section 30(c) of FOISA) or constitute an actionable breach of confidence (section 36(2)).

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(c) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs) and 36(2) (Confidentiality)

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

1. On 25 March 2011, Mrs F's legal representatives wrote to the Council on her behalf to request all records held by West CHCP Social Work Services in relation to her relative. They advised the Council that a previous request for the same information, dated 4 August 2010, had received no response.
2. The Council responded on 7 April 2011. It apologised unreservedly if the Council had failed to respond to correspondence which it had received, but advised that it could not trace any reference to the letter of 4 August 2010 in its files. In relation to the request for information about Mrs F's relative, the Council advised that the information covered by the request was exempt from disclosure under the following exemptions in FOISA: section 36(2) (Confidentiality); section 38(1)(b) (Personal information) and section 26 (Prohibitions on disclosure).



3. On 17 May 2011, a request for review was sent on behalf of Mrs F which challenged the application of the exemptions listed above, and asked the Council to consider whether some information could be disclosed with personal details redacted. The Council was also asked to provide information to which Mrs F would have been entitled, as a “relevant person”, in relation to hearings and meetings about her relative.
4. On 17 June 2011, the Council issued its review response to Mrs F’s legal representatives. It concluded that the decision to withhold the information had been correct, for the reasons originally given. It advised that it was not possible to redact the information in a way which would allow it to be released. The Council advised that it would respond separately to the question of whether Mrs F, as a relevant person, would be entitled to receive the information, as this fell outwith the scope of FOISA.
5. On 5 July 2011, Mrs F’s legal representatives applied on her behalf for a decision from the Commissioner, in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mrs F 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 allocated to an investigating officer.

Investigation

7. On 9 August 2011, the investigating officer notified the Council that an application had been received from Mrs F and invited it to provide any comments it wished to make on the application, as required by section 49(3)(a) of FOISA. The Council was asked to provide more detail about the exemptions cited, and also to confirm whether all the information covered by the request was contained in social work records relating to Mrs F’s relative. It was invited to provide any other information it wished the Commissioner to consider in reaching his decision on this case.
8. The Council provided its response (its statement of case) on 31 August 2011. The information provided by the Council is considered in the next part of this decision. The Council also provided a summary of the information it held in relation to Mrs F’s relative.
9. During the investigation, the Council advised that it also wished to rely upon the exemption in section 30(c) of FOISA, and provided its reasons. Comments on the Council’s arguments were invited from Mrs F’s legal representatives, acting on her behalf. All submissions from the Council and Mrs F’s representatives are considered in the next part of this decision, where relevant to the Commissioner’s decision.



Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him on behalf of Mrs F and by the Council, and is satisfied that no matter of relevance has been overlooked.
11. Information disclosed under FOISA enters the public domain, and is then accessible to anyone who asks for it. The Commissioner cannot require any information to be disclosed solely to Mrs F and her legal representatives, and must take this into account when considering whether the Council complied with FOISA in withholding information under the exemptions it cited.

Section 36(2) - Confidentiality

12. 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 is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA, but 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.
13. Section 36(2) contains a two stage test, both parts of which must be fulfilled before the exemption can be relied upon. 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.
14. The Council has submitted, in its statement of case, that a large proportion of the information covered by the request had been obtained from a number of other people, including Mrs F's late relative, members of her family (including Mrs F herself), and health professionals.
15. The Council advised that where the information had originated within the Council (and did not, for example, report the comments of a third party), it had not sought to rely upon the exemption in section 36(2) of FOISA.
16. The Commissioner is satisfied that the first test required by section 36(2) of FOISA has been met, in relation to the information to which the exemption has been applied.
17. The second requirement relating to section 36(2) of FOISA 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.



18. In the request for review made on behalf of Mrs F (17 May 2011), her legal representatives queried whether the exemption in section 36(2) of FOISA could apply in the circumstances of this case; they believed an action for breach of confidence could not now be raised, since Mrs F's relative had died.
19. 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.
20. The Commissioner accepts that the information in question has the necessary quality of confidence, in not being generally accessible.
21. The next requirement is that the information was received in circumstances which imposed an obligation on the Council to maintain confidentiality. The Council has submitted that the relationship between client and social worker was clearly one which implied a duty of confidentiality. In its letter of 7 April 2011, the Council did not accept that this obligation of confidentiality ended with the death of the individual concerned.
22. 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 Mrs G and Aberdeen City Council*¹, in this respect the Commissioner 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)². The Commissioner therefore accepts that the Council has an ongoing duty of confidence to its former client, Mrs F's relative.
23. The Council submitted that the confidential relationship extended to third parties who were mentioned in the file and/or had supplied information in the file. The Commissioner accepts that when these people provided information about Mrs F's relative, they would have done so in the expectation that this information would be treated confidentially and not generally disclosed into the public domain. 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 client³.
24. For the reasons outlined in the previous paragraphs, therefore, the Commissioner accepts that the Council received the information in question in circumstances which imposed an obligation on the authority to maintain confidentiality.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2008/200700962.asp>

² <http://www.informationtribunal.gov.uk/DBFiles/Decision/i25/mrspbluckvinformationcommissioner17sept07.pdf>

³ Decision 029/2008 Mrs G and Aberdeen City Council; Decision 165/2007 Mr S and the City of Edinburgh Council



25. 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. The Council submitted, and, from the evidence presented to him, the Commissioner accepts, that the information in the file has the potential to cause distress to surviving relatives, if it were disclosed.
26. The Commissioner is therefore satisfied that the tests for an actionable breach of confidence are met in this case, in relation to the information withheld under section 36(2) of FOISA.
27. 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 and consequently not subject to the public interest test in section 2(1)(b), 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.
28. 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. The Commissioner acknowledges that Mrs F has serious concerns about the care and support that her relative received while in the care of the Council's Social Work Services. However, he does not accept that, in the circumstances of this case, disclosure of the information covered by the terms of Mrs F's request is required in terms of the public interest defence outlined above. The Commissioner has taken into account that there are other ways in which concerns about Social Work Services can be raised and investigated (e.g. by making a complaint to Social Care and Social Work Improvement Scotland (SCSWIS)).
29. In all the circumstances, therefore, the Commissioner is satisfied that the Council correctly withheld information under section 36(2) of FOISA, where this exemption was applied.
30. As previously noted, the Council did not rely upon section 36(2) in relation to some of the withheld information, where this was not provided by a third party but originated within the Council. The Commissioner will therefore go on to consider whether the information not exempt from disclosure under section 36(2) was correctly withheld under the other exemptions cited by the Council.



Section 30(c) - Prejudice to effective conduct of public affairs

31. Section 30(c) of FOISA applies where the disclosure of information would "otherwise" prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. The word "otherwise" refers (by exception) to the exemptions in section 30(a) and (b). Section 30(c) is a broad exemption, and the Commissioner expects any public authority citing this exemption to show what specific harm (which must be at the level of substantial prejudice) would, or would be likely to, be caused to the conduct of public affairs by release of the information.
32. This exemption is subject to the public interest test laid down by section 2(1)(b) of FOISA.
33. The Council argued that disclosure of the information in the social work file would substantially prejudice future social work assessments, to the detriment of the care provided. It submitted that comments provided by social workers were a crucial part of the process of care provision. It was vital, the Council argued, that other health and social work professionals could assess a situation quickly and accurately in order to recommend the appropriate course of action, and therefore it was important that social workers could write freely and frankly about a matter of concern without fear that their views might be released into the public domain. Important, sensitive information might be withheld from written comments and subsequently forgotten, leading to erroneous decisions in treatment.
34. On behalf of their client, Mrs F's legal representatives argued that the information contained in the file notes created by Social Workers should be subject to public scrutiny, to ensure that the effective and efficient delivery of public services was achieved by the Social Work Department. They acknowledged, however, that any information which was likely to have a negative effect on the delivery of services to some of the most vulnerable people in society could be redacted, if it was of a highly sensitive nature and it was highly likely that there would in fact be a negative effect.
35. The Commissioner accepts the Council's argument that social workers are operating in a situation which, in order to operate effectively, requires all parties to be assured that the information they share and the views they record will be dealt with in confidence. In the circumstances of this particular case, the Commissioner takes the view that disclosure of any information from the social work case file is likely to discourage future clients and professional colleagues/partners from making information available to social workers. Having considered carefully the arguments put forward of behalf of both parties, he accepts those advanced by the Council to the effect that disclosure would ultimately undermine the quality of care that the social work service is able to provide. The Commissioner accepts that this would, in turn, substantially prejudice the Council's ability to provide an effective social work service, thus prejudicing substantially the effective conduct of public affairs.
36. Having accepted this reasoning, the Commissioner does not accept that some of the information in the social work file could be disclosed if the remaining highly sensitive information were redacted, as suggested by Mrs F's legal representative (see paragraph 34 above).



37. Section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA.
38. The Council submitted that the public interest in disclosure was outweighed by that in maintaining the exemption. It identified a public interest in the disclosure of information which would provide an insight into the care of Mrs F's relative and whether procedures had been followed correctly. On the other hand, it was not in the public interest to disclose information which would have a negative effect on the delivery of services to some of the most vulnerable people in society, for the reasons outlined previously.
39. The Commissioner takes the view that there are strong reasons why it would not be in the public interest for the contents of social work files to be disclosed under FOISA, as discussed above, and considers that it would require a compelling argument in order for the public interest in disclosure to outweigh the public interest in protecting the confidentiality of such information.
40. In this case, the Commissioner finds that the public interest in withholding the information and maintaining the exemption in section 30(c) outweighs the public interest in disclosure, and that the exemption should therefore be upheld. In reaching this decision he has taken into account that if Mrs F wishes to pursue any legal claim or complaint, she may be able to do this or access relevant information through means other than by seeking public disclosure. The Commissioner is also mindful that the services provided by the Council's Social Work Department, and its professional staff, are subject to regular audit and scrutiny from bodies such as SCSWIS.
41. The Commissioner has therefore found that all information covered by Mrs F's request is exempt from disclosure under section 30(c) and/or section 36(2) of FOISA. Consequently, he does not find it necessary to go on to consider the application of the other exemptions cited by the Council.

DECISION

The Commissioner finds that Glasgow City Council complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request from Mrs F.



Appeal

Should either Mrs F or Glasgow City 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.

Margaret Keyse
Head of Enforcement
4 January 2012



Appendix

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
- (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 –

...

- (c) section 36(2);

...

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.



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.