

# Decision Notice 059/2020

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## Deceased person's care records

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**Applicant: The Applicant**

**Public authority: Glasgow City Council**

**Case Ref: 201901044**



Scottish Information  
Commissioner

## Summary

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The Council was asked for the care records of a deceased individual. The Council found the information to be exempt from disclosure.

The Commissioner investigated and found that the care records were confidential and could not, in this case, be disclosed under FOISA.

## 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)

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

## Background

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1. On 9 April 2019, the Applicant made a request for information to Glasgow City Council (the Council) seeking all information held with regard to her late father's stays in named care homes.
2. The Council responded on 16 April 2019. The Council informed the Applicant that the information was exempt from disclosure under section 36(2) (Confidentiality), section 38(1)(b) (Personal information) and section 26 (Prohibitions on disclosure) of FOISA.
3. On 19 April 2019, the Applicant wrote to the Council requesting a review of its decision. She said she required the information to progress a complaint to the Scottish Public Services Ombudsman (SPSO). The Applicant did not accept that this information would fall into any exemptions stated.
4. The Council notified the Applicant of the outcome of its review on 22 May 2019. It upheld its original response. The Council also advised the Applicant that, although information could not be provided through the FOI route, she could utilise the Council's complaint process. The Council explained that the SPSO would not accept a complaint until its own complaint process had been exhausted.
5. On 24 June 2019, the Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of the Council's review and wished the Commissioner to investigate the refusal to disclose the requested information.

## Investigation

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6. 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.
7. On 2 September 2019, the Council was notified in writing that the Applicant had made a valid application. The Council was asked to send the Commissioner the information withheld from

the Applicant. The Council 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 Council was invited to comment on this application and to answer specific questions.

## **Commissioner's analysis and findings**

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9. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the 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.
10. Information disclosed under FOISA enters the public domain and is accessible to anyone who asks for it. The Commissioner cannot require any information to be disclosed solely to the Applicant, and must take this into account when considering whether the Council complied with FOISA in withholding information under the exemptions applied.

### **Section 36(2) – Confidentiality**

11. Under section 36(2), 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. 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.

#### *Obtained from another person*

13. The Council submitted that the Council's Social Work Services were engaged to provide care and support services for the Applicant's father. The information was received in circumstances imposing an obligation to maintain confidentiality. An implicit obligation of confidentiality is created whenever social workers receive personal information directly from clients and certain others concerning their personal affairs. The records include discussions with the subject where family were not present and include private and confidential communications between clinical and social work staff.
14. The Commissioner is satisfied that the first test required by section 36(2) of FOISA has been met.

#### *Actionable breach of confidence*

15. The second part of the test is that the disclosure of the information by a 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.

16. 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*

17. Having considered the withheld information 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, is not generally accessible and could not be readily obtained.

*Obligation to maintain confidentiality*

18. The Council stated that the relationship between the Applicant's father and his care providers (including social workers) is clearly one which would imply a duty of confidentiality. Social work assessments, reports, case management notes and other records are created based on information communicated in circumstances importing an obligation of confidence. The Council stated that it considered that the obligation of confidentiality exists even after the death of the client.
19. 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*<sup>1</sup>, 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)<sup>2</sup>. The Commissioner therefore accepts that the Council has an ongoing duty of confidence to its former client, the Applicant's father.
20. For the reasons outlined, the Commissioner accepts that the Council received the information in question in circumstances which imposed an obligation on the authority to maintain confidentiality.

*Unauthorised disclosure which would cause detriment*

21. The third requirement is that disclosure of the information must be unauthorised and to the detriment of the person who communicated it. The damage need not be substantial and could follow from the mere fact of unauthorised use or disclosure in breach of confidence.
22. The Council stated that disclosure of information provided in confidence to the Council by other parties, notably clinical staff, may undermine their professional standing if put into the public domain other than by means of a lawful court order. Other patients may lose confidence that their personal information, entrusted to a clinician, would be protected from

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

<sup>2</sup> <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i25/mrspbluckvinformationcommissioner17sept07.pdf>

disclosure by others to whom it was communicated, if such communications were released on demand after the death of an individual.

23. The Commissioner accepts that, when others provided information with regard to the Applicant's father, 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.
24. Considering the information in the records 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 his passing, other surviving relatives and the health care professionals involved in the creation of the records by disclosure.
25. 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 test*

26. As stated above, the exemption in section 36(2) of FOISA is not subject to the public interest test in section 2(1)(b) of FOISA. However, 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 Commissioner is required to balance these competing interests, but there is no presumption in favour of disclosure.
27. In this case, the Commissioner has concluded that there are no compelling reasons for the content of the care files to be disclosed.
28. The SPSO has investigatory and evidence gathering powers if a complaint is made to them. If the Applicant wishes to pursue any legal claim or complaint, she will be able to do this or access relevant information through other means than by seeking public disclosure under FOISA.
29. As the Commissioner has concluded that the Council was correct to withhold the information under section 36(2) of FOISA, he will not go on to consider the exemptions in sections 26 or 38(1)(b) of FOISA (which were also applied by the Council).

## **Decision**

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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 made by the Applicant.

## **Appeal**

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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**

**14 May 2020**

## Appendix 1: Relevant statutory provisions

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### 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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