

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 10 February 2023

**Public Authority:** London Borough of Southwark  
**Address:** PO Box 64529  
London  
SE1P 5LX

#### **Decision (including any steps ordered)**

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1. The complainant requested from London Borough of Southwark (the Council) information relating to the complainant's deceased relative. The Council disclosed some information but refused parts of the request under section 41(1) (information provided in confidence) and section 40(2) (personal information) of FOIA.
2. The Commissioner's decision is the Council is entitled to rely on section 41(1) to question 2 of the request and section 40(2) to question 9 to refuse to provide the information requested. The Commissioner does not require the Council to take any steps as a result of this decision.

#### **Request and response**

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3. On 4 October 2022 the complainant wrote to the Council and requested information regarding the complainant's late relative [name redacted] and in the following terms:

"Ideally, I would like all the information that you have but would like to know the following:

1. Could you confirm the dates of when [name redacted] was in your care?
2. Can you tell me what condition that [name redacted] was in when he was admitted into your care?

3. Could you provide dates of certain events relating to [name redacted] care e.g. being transferred into [name redacted] care etc.
  4. Did the council try to find/contact any other relative before [name redacted] passing? [Name redacted] said that she had told the council about my [name redacted] but she shouldn't be contacted as she was too unwell to look after[name redacted].
  5. Were the Council aware of any letter addressed to [name redacted] that apparently [name redacted] wanted to send whilst he was in [name redacted] Hospital?
  6. Were there any suggestions that [name redacted] had been mistreated in any way? This is because at one point, the funeral directors told a family member that the [name redacted] coroner had been informed but no further information was provided.
  7. Was the council aware that [name redacted] had a cremation plan and/or will in place? If so, please can you provide details.
  8. Did [name redacted] have any possessions brought with him when he was brought to the hospital? If yes, please can you provide details.
  9. Has the council been contacted by any other family member after his passing to present?
4. On 27 October 2022 the Council responded and provided a response to questions 1, 3, 4, 5, 6, 7 and 8 of the request. With regard to question 2, the Council refused to disclose this information as it contains personal information ("medical data"), and cited section 41(1) (information provided in confidence) of FOIA. Regarding question 9 of the request, the Council withheld this information under section 40(2) of FOIA, and explained that this information "represents the personal data of any other family member."
  5. On 22 November 2022 the complainant asked the Council for an internal review. He considered that although the Council provided some information, it did not provide "a full case file as requested in the FOI request."
  6. On 6 January 2023 the Council provided its internal review response. It maintained its original position to withhold information to questions 2 and 9 of the request under the exemptions cited.

## Reasons for decision

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7. The following analysis focuses on whether the Council was entitled to withhold information to question 2 under section 41(1) and information to question 9 of the request under section 40(2) of FOIA.

### Section 41 – information provided in confidence

8. Section 41(1) states information is exempt information if it was obtained by the public authority from any other person (including another public authority), and, if its disclosure to the public by the public authority holding it would constitute an actionable breach of confidence by that or any other person.
9. The Council relied on this exemption to question 2 of the request which concerns medical data of the deceased relative. The Commissioner accepts this information would have been received by the Council by another party, and having accepted this he must determine whether disclosure of that information would constitute a breach of confidence.
10. The three elements required to bring an action for a breach of confidence (set out by Judge Megarry at the High Court of Justice in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415) are:
  - The information must have the necessary quality of confidence,
  - It must have been imparted in circumstances importing an obligation of confidence, and
  - There must have been an unauthorised use of the information to the detriment of the confider.
11. Information will have the necessary quality of confidence if it is not already in the public domain and it is not trivial. In this instance the information is clearly not trivial as it relates to the case file of an individual. The Commissioner is aware that social care records concern the care of an individual, and the information can be considered to be obtained from the individual receiving the care. This will include assessments and notes of the professionals involved in providing the care, as well as information provided directly by the individual.
12. The Council explained to the complainant that the Council owes all service users, past and present, a legal duty of confidentiality in respect of the material on their files. This means this information may only be disclosed to third parties (without a court order) where disclosure is in the overriding public interest. The Council's view is the public interest in maintaining the confidentiality of the social services records of those

who have died (particularly personal medical data) outweighs the countervailing public interest in disclosure. The Council said this is because it is considered important for clients of social services to be confident professionals caring for them, will not disclose sensitive information about them once they have died. The knowledge of this possibility, the Council further explained, could inhibit information sharing and even result in some being discouraged from accessing services in the first place.

13. The Commissioner notes the complainant's specific points raised in his internal review request and the Council's response. The complainant said the Council did not provide a full case file as initially requested. He stated that following a response from the Council's 'Transfer of Care department' to his follow-up questions, he strongly believes his FOI request "has either been omitted or falsified by Southwark Council to conceal its failure to reach out to [name redacted]...".
14. The Council reiterated to the complainant the reasons explained in its response letter, that without consent of the data subject, the Council has a duty of confidentiality to protect the sensitive personal data of [name redacted]. In its response, the Council provided the complainant with information it considered it was able to disclose without breaching its responsibilities.
15. With regard to the complainant's follow-up email exchange with the Council's officer and subsequent contact with the Social Care team, the Commissioner recognises the Council's attempt to advise and support the complainant as much as it could under the circumstances. He also accepts that the Council does not make comment or express opinion on information or processes of other public authorities and/or hearsay information. This also applies to the Commissioner, he cannot comment on information provided by other public authorities, he can only comment on the circumstances on a case by case basis.
16. The Commissioner considers the withheld information in this instance, will retain the necessary quality of confidence owed to the deceased relative.
17. The Commissioner is satisfied that the case file/social care records (personal medical data) of the individual in question, would reveal the condition [name redacted] was in when he was admitted into the Council's care. This would contain information imparted in circumstances importing an obligation of confidence.

18. With regard to the third element required to bring an action for a breach of confidence, the Commissioner considers there would be detriment to the deceased person if there was an unauthorised use of the information. Also, there was no public interest defence available to the Council had it disclosed the information, as there was no evidence of wrongdoing during the period of the authority's caring role.
19. Section 41 of FOIA is an absolute exemption and is not subject to the public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that a public authority should not disclose the information unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence.
20. The Commissioner is satisfied that disclosure of the requested information into the public domain would not be within the public interest. He considers there is greater public interest in the Council being able to maintain good relationships with Social Services and partner bodies and retaining trust in not revealing sensitive/confidential information. There is not sufficient public interest in this case to warrant the Council breaking the obligation of confidence.
21. The Commissioner is satisfied that the information at question 2 of the request meets the conditions under section 41(1) of FOIA. Therefore, the Council was entitled to rely on this exemption to withhold the information.

### **Section 40(2) – personal information**

22. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
23. Section 3(2) of the Data Protection Act 2018 defines personal data as:  

“any information relating to an identified or identifiable living individual.”
24. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
25. In this case, the complainant requested information the Council holds concerning the complainant's deceased relative. The Commissioner accepts this exemption has not been applied in terms of the deceased but that the Council applied it to any third party living individuals referenced.

26. The Commissioner is satisfied that the requested information relates to the personal data of a third party and would identify the individuals referenced. He therefore considers the requested information falls within the definition of 'personal data' in section 3(2) of the DPA.
27. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on principle (a), which states:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."
28. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
29. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.
30. The Commissioner considers that in this instance, the complainant is pursuing a legitimate interest as the request concerns details held about his deceased relative. The Commissioner accepts disclosure of the requested information is necessary to meet that legitimate interest. However, he considers the individual(s)/family member(s) would not expect that private information about themselves to be made public under FOIA without their consent.
31. The Commissioner has determined there is insufficient legitimate interest to outweigh the fundamental rights and freedoms of the third parties referenced. Therefore, he deems that there is no legal basis for the Council to disclose the requested information and to do so would be in breach of principle (a).
32. The Commissioner's decision is that the Council is entitled to rely on section 40(2) of FOIA to refuse to provide the requested information.

## Right of appeal

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33. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk).

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

34. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Joanna Marshall**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**