

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 March 2024

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested information about the death of a named individual in a particular accommodation. The Home Office provided some information with redactions but withheld the remainder citing sections 38(1)(a) and (b) (health and safety), 40(2) (personal information) and 41(1)(b) (information provided in confidence) of FOIA. The complainant is concerned only with the information withheld in its entirety so the Commissioner has not needed to consider the redactions within the disclosed information. Furthermore, the complainant said he was not interested in the disclosure of any personal information bar that of the named individual. Section 40(2) cannot apply to deceased individuals so the Commissioner has not considered the Home Office's reliance on section 40(2) of FOIA any further.
2. The Commissioner's decision is that the Home Office was entitled to rely on section 41(1)(b) of FOIA. He has therefore not deemed it necessary to consider the Home Office's reliance on section 38 of FOIA.
3. No steps are required as a result of this notice.

Request and response

4. On 16 June 2023, the complainant wrote to the Home Office and requested information in the following terms:

"All communications between the Home Office and employees of Clearsprings Ready Homes or Clearsprings (Management) Ltd in relation to the death of [name redacted], a [age redacted] year-old man from [location redacted] who was found dead in his Clearsprings-managed accommodation on [date redacted].

It may assist your search to know that this incident was the subject of an HPN [High Profile Notification], reference [redacted]. An incident database previously provided by the Home Office in response to an FOI request suggests the Home Office was first notified of the incident at 9.39am on [date redacted]."

5. The Home Office responded on 17 July 2023 and provided some information, specifically:
 - CRH [Clearsprings Ready Homes] Incident Report REDACTED
 - SU [Service User] Incident Report CRH [Clearsprings Ready Homes] REDACTED
 - FOI [reference redacted] HPN Sudden Death.
6. Some of the disclosed information was partially redacted by the Home Office under the following FOIA exemptions:
 - Section 38(1)(a) and (b) - Health and safety
 - Section 40(2) – Personal information
 - Section 41(1)(b) – Information provided in confidence
7. The Home Office withheld the remaining information in scope of the request in its entirety, relying on the FOIA exemptions set out above.
8. The complainant requested an internal review on 7 August 2023 in relation to the remaining withheld information only, namely:
 - Patient Report form 1
 - Patient Report form 2
 - [Name redacted].jpg
 - Fact of Death Report form
9. At that stage, the Home Office failed to provide an internal review outcome.

Scope of the case

10. The complainant contacted the Commissioner on 11 October 2023 to complain about the way his request for information had been handled. At that stage, his complaint focussed on the lack of an internal review outcome.
11. The Commissioner wrote to both parties on 18 October 2023 advising that the complaint had been accepted without an internal review having been carried out. He explained this was because more than 40 working days had elapsed since the complainant requested an internal review.
12. Subsequently, the Home Office provided its internal review outcome on 27 October 2023. It maintained that sections 38, 40 and 41 of FOIA applied.
13. On 17 November 2023 the complainant advised that he remained dissatisfied following the internal review outcome. He told the Commissioner that he would accept any personal information being withheld under section 40(2) of FOIA bar that of the named individual.
14. In its investigation response, the Home Office advised that section 40(2) had been applied only to members of staff who are named or who have signed documents. The Commissioner has reviewed the withheld information and is satisfied that section 40(2) has been applied as set out by the Home Office. As section 40(2) cannot apply to deceased individuals (ie in this case, the individual named in the request), the Commissioner has not considered the Home Office's reliance on section 40(2) any further.
15. The complainant also submitted his views on the Home Office's reliance on sections 38 and 41 of FOIA. The Commissioner asked the Home Office to consider all the complainant's concerns as part of his investigation.
16. The Commissioner has first considered whether the Home Office was entitled to rely on section 41 of FOIA to withhold the remaining requested information in its entirety.

Reasons for decision

Section 41 - information provided in confidence

17. In order for section 41 of FOIA to be engaged, the following criteria must be fulfilled:

- the authority must have obtained the information from another person,
 - its disclosure must constitute a breach of confidence,
 - a legal person must be able to bring an action for the breach of confidence to court, and
 - that court action must be likely to succeed.
18. For section 41(1)(b) to be met disclosure of the withheld information must constitute an actionable breach of confidence. In the Commissioner's view a breach will generally be actionable if:
- The information has the necessary quality of confidence.
 - The information was communicated in circumstances importing an obligation of confidence.
 - Unauthorised disclosure would cause detriment to either the party which provided it or any other party.
19. The Home Office has explained that:
- "...the withheld information is in the context of confidential health data that originated in the NHS and which has been shared with the Home Office. These documents are governed by a confidentiality clause that precludes disclosure, notwithstanding that the individual named within them is deceased. Were the Home Office to disclose the requested information this would in our view constitute an actionable breach of confidence in that it would entail the disclosure of information of a sensitive nature which should remain confidential. On these grounds the exemption at section 41(1) is engaged".
20. The complainant submitted the following arguments in support of his view that section 41 cannot be relied on to withhold the requested information:
- 'Firstly, my request was for communications between the Home Office and a subcontractor. The documents that the Home Office has declined to disclose have therefore already been disclosed to a third party (the subcontractor), indicating that a view has already been taken by the Home Office that disclosure does not constitute an actionable breach of confidence.

Furthermore, the ICO guidance¹ on Section 41 states: "The section 41 exemption may not apply if the information has already been made public. For example, the cause of a person's death will be recorded on a death certificate, which is a public document. Similarly, the cause of death and other medical information may have been put in the public domain by the surviving family or as a result of an inquest or court case. If the requested information has been put into the public domain before the request for information is made, section 41 cannot apply."

[Name redacted]'s death was the subject of an inquest in January 2021. The inquest hearing heard evidence from the paramedic who attended the scene of [name redacted]'s death and was presumably the author of the patient report forms and fact of death form that the Home Office has declined to disclose. Given that the circumstances of [name redacted]'s death have been discussed at an inquest, I believe Section 41 does not apply to the requested documents.'

21. The Commissioner has inspected the information in question. He notes that it relates to medical records surrounding the death of the named individual; medical records are not trivial. The Home Office referenced a related decision notice² (issued in May 2023) concerning medical records, arguing that this decision reflects the position the Commissioner takes on medical information relating to any individual, namely that it will be exempt under section 41 of FOIA regardless of whether that person is still alive.
22. The Commissioner's previous decision notices are not legally binding, and he does assess each case on its individual merits. However, he has taken the earlier decision into consideration.
23. Furthermore, the Commissioner's guidance in respect of section 41 confirms that "the duty of confidence owed to a living individual will continue after their death". Information such as medical records therefore, will still have the necessary quality of confidence even if the subject is deceased.

¹ <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4025330/ic-227096-l5v5.pdf>

24. In relation to the inquest to which the complainant refers in his complaint, the Home Office said it is unaware of any disclosure of the withheld information via this inquest.
25. The Commissioner notes the complainant's arguments. However, he is mindful that a disclosure under FOIA is effectively one to the 'world at large' and that medical records would not be disclosed to the wider public. He accepts that the NHS provided the information to the Home Office, and that the third party, Clearsprings Ready Homes, is also party to this information. However, as a Home Office contracted provider of asylum accommodation, the Commissioner would accept that it is necessary and part of the process for Clearsprings Ready Homes to be involved and informed. The Commissioner would regard this as a private disclosure which is otherwise not accessible, as opposed to a public disclosure.
26. The Commissioner is therefore satisfied that the information was provided in confidence to the Home Office and, consequently, that the information has the necessary quality of confidence, meaning that the first condition has been met in this case.
27. The second condition is that the information must have been imparted in circumstances that import a duty of confidence. The Home Office has explained that the withheld information is protected by a confidentiality clause that precludes disclosure. The Commissioner considers it not just implicit but fundamental to the NHS-patient relationship that details about a person's medical history and treatment are confidential. As above, it is well established in law that a duty of confidence does not end just because the confider has died. He therefore finds that the second condition has been met.
28. The third condition is that an unauthorised use of the information must be detrimental to the confider.
29. Making the named individual's confidential medical records available to the general public is, in itself, an invasion of privacy – irrespective of the type of medical care the person actually received. It is not necessary to demonstrate that publication would cause particular embarrassment – the invasion of privacy alone is sufficient to establish detriment. This applies even though the named individual is deceased.
30. The Home Office has argued:

“Were the Home Office to disclose the requested information this would constitute an actionable breach of confidence in that it would entail the disclosure of information of a sensitive nature which should remain confidential.”

31. Therefore the Commissioner finds that all three conditions are met. It follows that he finds section 41(1)(b) to have been properly relied on in this case.
32. The exemption at section 41 of FOIA is not subject to the public interest test at section 2(2) of FOIA. However, the Commissioner is mindful that an action for breach of confidence will fail if there is a public interest defence to disclosure. The test for section 41 assumes that the public interest in maintaining confidentiality will prevail unless the public interest in disclosure outweighs the public interest in maintaining the confidence.
33. Therefore the Commissioner has considered whether there is an overriding public interest in disclosure which is sufficient to set aside the public interest in maintaining the duty of confidence.
34. The Home Office has said:

"...there is a public interest in government departments being able to accommodate asylum seekers by representing their best interests. Anything that would undermine this is not in the public interest".
35. The Commissioner is mindful of his own guidance in respect of section 41 (see paragraph 31) which clarifies that where a legally enforceable duty of confidence is owed to a living individual, it can be enforced after death by the deceased person's personal representative. The Commissioner's guidance further explains that there is no need to be certain that a personal representative exists who would be able to take action. The important thing is to establish in principle that a personal representative might exist who can take such action.
36. The Commissioner considers that disclosure of sensitive or private information about the deceased individual would be a breach of confidence that could in principle be actionable by any other person such as bereaved relatives and/or personal representatives of the deceased. Further, any disclosure under FOIA would breach the confidentiality agreement in place with the NHS.
37. The Home Office has argued that it could not rely on a public interest defence for breach of confidence. It stated that due to the clear sensitive and private nature of the information, the general interest in transparency is insufficient to override the public interest in maintaining privacy. Additionally, to the Commissioner's knowledge, there are no exceptional grounds for disclosure such as allegations of misconduct, illegality or gross immorality or risk to public safety.

38. The Commissioner recognises that some weight should always be afforded to the general public interest in ensuring that public authorities remain transparent, accountable and open to scrutiny. However, the Commissioner is mindful that the public interest in maintaining a duty of confidence is inherently weighty. The courts are reluctant to overturn a duty of confidence, save in exceptional circumstances and in the context of an overriding public interest in disclosure.
39. Having examined the withheld information in this case, the Commissioner considers that public interest in disclosure falls short of allowing the Home Office to defend a claim of breach of confidence. Therefore he finds that the Home Office was entitled to rely on the exemption at section 41 of FOIA in respect of this information.

Other matters

40. Although they do not form part of this section 50 notice the Commissioner wishes to highlight the following matters of concern:

Information Notice

41. As the Home Office failed to respond to the Commissioner's enquiries in a timely manner it was necessary for him to issue an Information Notice in this case, formally requiring a response. The Information Notice will be published on his website.
42. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in the FOI and Transparency Regulatory Manual³.

Internal Review

43. The complainant's original complaint concerned the then outstanding internal review outcome, which was subsequently provided, but late.
44. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of FOIA. Rather they are

³ https://ico.org.uk/media/about-the-ico/documents/4020912/foi-and-transparency-regulatory-manual-v1_0.pdf

matters of good practice which are addressed in the code of practice issued under section 45 of FOIA.

45. Part 5 of the section 45 Code of Practice⁴ (the Code) states that it is best practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Code states that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.
46. Although he notes that there are sensitivities around this case because of the subject matter and the exemptions relied on, the Commissioner is nevertheless concerned that it took two and a half months for an internal review to be completed.
47. The Commissioner will use intelligence gathered from individual cases to inform his insight and compliance function. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our FOI and Transparency Regulatory Manual.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Right of appeal

48. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

49. 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.
50. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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