

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 27 June 2022

Public Authority: London Borough of Newham
Address: Newham Dockside
1000 Dockside Road
London E16 2QU

Decision (including any steps ordered)

1. The complainant has requested information relating to an adult safeguarding review.
2. The Commissioner's decision is that London Borough of Newham (LBN) is entitled to rely on section 41(1) FOIA to refuse to provide the requested information.
3. The Commissioner does not require the public authority to any steps as a result of this decision notice.

Background

4. LBN advised that this request was originally received back in June 2020, asking for the same review documents. The follow up request made in July 2021 (the present request) was identical except for the qualification that due to the lapse of time, the information held should now be released.

Request and response

5. On 27 July 2021, the complainant wrote to LBN and requested information in the following terms:

"[Name redacted]: [redacted] [name redacted] was reviewed by Social Services in Newham, London, and Social Services in Northern Ireland. Then the reviews were brought together for an overall review. I would like copies of these documents, and any other related documents possible for me to access. I believe the team in Newham, was the Adult Safeguarding Review Board (see attached) I believe the team in Northern Ireland was - Adult Protection Gateway Team, Site 36 ' Knockbracken Clinic Knockbracken Healthcare Park Belfast

I would like to make another FOI for this report. Reason being –

- A considerable time has lapsed since my previous FOI
 - Although there is personal data, the main DS is deceased, so I do not think that should be an issue
 - Other subjects in the report can be redacted
 - I believe I would be in the report too."
6. LBN responded on 26 August 2021 and refused to provide the requested information citing section 41(1)(a) and (b) and section 40(2) as its basis for doing so.
7. Following an internal review LBN wrote to the complainant on 4 November 2021 and maintained its position.

Scope of the case

8. The complainant contacted the Commissioner on 12 October 2021 to complain about the delay in receiving a response to their internal review. Following receipt of LBN's response the complainant contacted the Commissioner again on 1 December 2021 to advise that they remained dissatisfied for the following reasons:

I) Paragraph 1 goes into detail about my relation to the subject and then further what legal documentation I would require making a request for information about the individual who passed away. I believe this is more in relation to issues around power of attorney, Will etc. I don't think this is at all relevant to a FOI, which is a request made from a member of the public.

II) Paragraph 3 talks about maintaining the confidence of the data subject. They recognise that a deceased person does not have any rights under GDPR. However, they then argue that it is in the public interest to protect the confidentiality of the data subject, so essentially the public will feel reassured that their information will be kept confidential. This doesn't make sense at all. The public need to be reassured those services follow GDPR, applicable to when people are deceased or alive. If those public members are deceased themselves, then how would they know if their information has been shared by a FOI? Nonetheless, a public interest test is about the **data being disclosed, not about the decision to disclose it**. Finally, where is the evidence to prove this would be the case, especially in this case? I actually believe it's in the public interest to know how this person suffered.

III) Paragraph 4 talks about third party data. I did not request the third-party data. Third-party data will always be present, one way or another. This is a separate issue. Measure can be taken to redact/use pseudonyms. I recently provided email exchanges. It feels as though this decision is more about me requesting. I wonder if someone else requested, would that be the same. The issue about third party should be more about the public not me.

IV) Public Interest Test - They identify that the exemption is not subject to a public interest test, when initially they said they are. This is so confusing. Nonetheless, these are now absolute exemptions. I don't know how and why these apply.

V) I have clarified I would like the reviews done, even it's not called a Serious Adult Review.

9. During the course of his investigation the Commissioner wrote to the complainant and advised that their complaint was unlikely to be upheld and invited them to withdraw it. The complainant responded that they would like a decision notice to be issued.
10. The Commissioner considers the scope of this case is to determine if LBN is entitled to rely on the exemptions it has cited. As the complainant has acknowledged third party names could be redacted, the Commissioner does not feel it is necessary to consider the application of section 40(2).
11. In addition, it is the Commissioner's understanding that the complainant was advised that release of their own personal data would be exempt under the Act. As an alternative course of action, the response and subsequent internal review suggested they may submit a Subject Access Request (SAR) for their own personal information held on file. The SAR was successfully carried out for the requester, and this additionally

included a right of appeal, which was not pursued. The response to the SAR also further updated the requester of the informal actions to be undertaken by the service, outside a formal Safeguarding Adults Review.

12. Therefore the Commissioner has focussed on whether LBN was entitled to rely on section 41 FOIA to withhold the remaining information.

Reasons for decision

Section 41 – Information provided in confidence

13. Section 41(1) FOIA states that:

“Information is exempt information if –

a) it was obtained by the public authority from any other person (including another public authority), and

b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

14. The Commissioner has issued specific guidance¹ for public authorities in relation to requests for information about deceased persons. This guidance explains the particular relevance of section 41(1) to social care records.
15. In its submission to the Commissioner, LBN stated that with regards to an actual ‘review’ – there was no such written formal review carried out in relation to this case. This was noted in the internal review to the complainant where it stated that no overall formal written review had been carried out in relation to the case, or any review akin to a Safeguarding Adults Review or Serious Case Review as suggested by the requester. Therefore it focussed on the part of the request asking for “any other related documents possible for me to access.”
16. LBN explained that the use of the exemptions was made with regard to the generalised part of the request “any other related documents possible for me to access” which was taken to be in reference to the social file of the late [name redacted].

¹ <https://ico.org.uk/media/for-organisations/documents/1202/information-about-the-deceased-foi-eir.pdf>

17. In relation to the release of the social care files of deceased individuals LBN confirmed it would usually ask for evidence of letters of administration or probate from the requester to determine their link to the deceased party. The complainant did not hold this.
18. However in the interests of providing formal notification that the file should not be released into the public domain, and in an attempt to consolidate and prevent any further requests being made across Council areas, it went on to consider disclosure of the file under section 41 and section 40(1) and (2).

Was the information obtained from another person?

19. LBN stated that the information held were submissions made by the late data subject, the extended family of the deceased and interactions between past social care and medical professionals.
20. Therefore it is clear the requested information has been obtained from 'another person', as it is held in a social care file. The Commissioner is satisfied that this criterion is met.

Would disclosure constitute an actionable breach of confidence?

21. The Commissioner has been provided with some additional information by LBN in support of its position. However, he does not feel it is appropriate or necessary for this to be reproduced in this decision notice.
22. LBN believe that information in relation to the welfare of both the late data subject/living children would:
 - (i) Be considered as highly confidential due to its personal and sensitive nature
 - (ii) Have only been exchanged with the understanding that it was to be held in confidence between the two parties due to its very nature in respect of the personal wellbeing of the individuals involved
 - (iii) Cause detriment to the fair consideration of any current or future actions in relation to the conduct/care extended by any of the associated parties raised in the submissions.
23. In considering whether or not disclosure of information constitutes an actionable breach of confidence the Commissioner considers:
 - whether the information has the necessary quality of confidence;
 - whether the information was imparted in circumstances importing an obligation of confidence; and

- whether disclosure would be an unauthorised use of the information to the detriment of the confider.

Does the information have the necessary quality of confidence?

24. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
25. As above, the withheld information comprises social care files and related correspondence. This information is not otherwise accessible to the general public and is not trivial.

Was the information imparted in circumstances importing an obligation of confidence?

26. There is an implicit obligation of confidence where information is provided in the context of the relationship between a patient and doctor or other medical professionals, including carers. Disclosing such information without the explicit consent of an individual, or their personal representative in the case of a deceased person, would be a breach of confidence in respect of those individuals.
27. Information is provided about their health to the medical staff/carers involved in their care and receive assurance that their information is being treated in strict confidence and in accordance with their GDPR Article 8 right to respect for their private and family life, home and correspondence. This is supported by the duty of confidentiality of health professionals and carers to protect patient or client confidentiality.

Would disclosure be of detriment to the confider?

28. Where information relates to a personal or private matter, the Commissioner (in accordance with current case law) considers that it should be protected by the law of confidence, even if disclosure would not result in any tangible loss to the confider. A loss of privacy is itself detrimental. It is therefore not necessary for there to be any tangible loss to the original confiders for private healthcare information to be protected by the law of confidence.
29. The duty of confidence continues to apply after the death of the person concerned.
30. The Tribunal in *Pauline Bluck v Information Commissioner and Epsom & St Helier University Hospitals NHS Trust* (EA/2006/0090) confirmed this position. In the *Bluck* case the Tribunal found that, even though the person to whom the information related had died, action for breach of

confidence could still be taken by the personal representative of that person.

31. It is not necessary to consider who that personal representative should be. It is sufficient that the principle has been established in law that a duty of confidence can survive death and an actionable breach of confidence be initiated by a personal representative.
32. As referred to in paragraph 21 the Commissioner has been provided with additional information by LBN in support of its position. Suffice to say, the Commissioner is satisfied it demonstrates disclosure of the requested information would constitute an actionable breach.
33. Furthermore, LBN argued that disclosure of information individuals and personal representatives expected to be held in confidence would have a detrimental effect on its own reputation as being willing and able to protect such information.
34. Accordingly, the Commissioner is satisfied that the three tests for breach of confidence are met and that disclosing the requested information would be a breach of confidence for which action could be taken by the confiders (including other public authorities) or their personal representatives.

Is there a public interest defence for disclosure?

35. The section 41 FOIA exemption is absolute and there is no requirement to apply a public interest test. However, disclosure of confidential information where there is an overriding public interest in disclosure is a defence to an action for breach of confidentiality.
36. The Commissioner therefore considered whether LBN could reasonably rely on such a public interest defence to an action for breach of confidence in this case, having seen that the Courts have taken the view that significant public interest factors must be present in order to override the strong public interest in maintaining confidentiality.
37. It is noted that the requester believes it is in the public interest to disclose this information relating to the deceased as it is of interest to them personally, in light of their own ongoing interactions with the extended parties.
38. LBN consider that the complainant's interest does not constitute an overriding public interest under section 41 to disclose this information to the wider public. LBN acknowledge that in the interests of transparency and accountability, there is value in the public disclosure of the decisions and actions of the local authority. However, it cannot see the value of disclosing the personal records held in relation to deceased parties, especially when living relatives remain.

39. Any interactions in relation to personal care and social services are very difficult exchanges, particularly where vulnerable adults and children are concerned. LBN consider that if individuals believed their details and information of such exchanges with social services were to be made publicly available upon request, even after their passing, this could potentially deter individuals from actively engaging with social services.
40. For the welfare and protection of its residents, this would not be in the public interest. LBN consider these are implicitly confidential exchanges between deceased and living parties and consequently a duty of confidence exists and persists after death.
41. LBN also considered the Commissioner's guidance in noting that the complainant is not directly related or significantly close to the late data subject and disclosure could leave the authority open to action from the personal representative of the deceased's estate, although unidentified.
42. It determined that there was no public interest in disclosing the information to the complainant that outweighed the public interest in maintaining the duty of confidence. It was noted the complainant felt it was valid to their own personal interest in the matter but this was not considered an overriding public interest in disclosure for the purposes of applying section 41.
43. The public interest consideration here is whether disclosing the information requested would cause a breakdown in relationships between the service provider (LBN), the service users and the medical professionals/carers.
44. Overriding the duties of privacy and confidentiality would cause the breakdown of the confidential carer/client and medical professional/patient relationship. This would result in some individuals being reluctant to divulge sensitive information about themselves to their healthcare team, thereby adversely impacting the quality of their care.
45. The Commissioner gives some weight to the need for openness and transparency and accepts that there is legitimate public interest in the public knowing whether or not a council is providing appropriate social care. However there are other mechanisms, including complaints procedures, that already exist specifically to monitor the quality of care provided.
46. Against disclosure, there is a weighty public interest in maintaining the confidentiality of this type of information so that patients/clients are not deterred from seeking medical treatment or support for fear of having their personal histories made public.

47. On balance, the Commissioner considers that the public interest in disclosing the withheld information is not so significant as to outweigh the strong public interest in maintaining the confidentiality between healthcare professionals, carers and those being cared for.
48. It is the Commissioner's conclusion that the relevant requested information has been provided to LBN in confidence. Disclosure would be a breach of confidence actionable by the relevant confiders and personal representatives. There is no public interest defence that LBN could rely on and therefore the Commissioner has decided that LBN is entitled to rely on section 41 to withhold the requested information.

Other matters

49. LBN advised the Commissioner that in hindsight it may have been more transparent to have just confirmed at the time of the request and internal review and at the very start of the response that there had not been a formal review or associated report in relation to the death of [name redacted] in direct response to the request made. This point was made directly to the complainant in the responses but in addition to the use of the exemptions in respect of the wider documentation, this may have been missed.
50. In the interests of clarity for the complainant, it may have been preferable to just expressly state that no such review had taken place. However, given the repeated requests over a significant period and across a number of officers and avenues LBN did not feel this would be sufficient to prevent the continuation of requests. It therefore elaborated on the effect of the exemptions in respect of any related information associated with the events surrounding the late [name redacted].
51. In light of this case LBN noted the following learning points in the drafting of future responses and/or internal reviews.

Learning Points:

- expressly detail where the requested documentation does not exist at the start of the response, when possible. This will prevent confusion later if exemptions are also used to withhold information that does exist.
- request specific details of requests – not to assume what the requester is asking in terms of “any related documents” – revert back to the requester and ask them to be very specific as to the exact documents that are sought.

- honesty with requester – very much dependent upon the individual nature of the request and the information located but potential to advise/further consult with requesters where from sourcing information in relation to their request, information had been discovered which may give light to difficulties in response – to afford them the opportunity to confirm how they wish to address/progress.
52. The Commissioner acknowledges the additional work carried out following this complaint, and that specific learning points have been identified.

Right of appeal

53. 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

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

54. 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.
55. 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

Susan Duffy
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