

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 June 2025

Public Authority: Herefordshire Council
Address: Plough Lane
Hereford
HR4 0LE

Decision (including any steps ordered)

1. The complainant requested information relating to their late mother. Herefordshire Council (the "Council") disclosed some information and withheld other information under the exemptions for personal information (section 40) and information provided in confidence (section 41).
2. The Commissioner's decision is that the Council correctly relied on the exemptions in section 40(1), section 40(2) and section 41 to withhold the requested information but that it failed to issue a refusal notice in time and breached section 17(1).
3. The Commissioner does not require the Council to take any further steps.

Request and response

4. On 22 July 2024, the complainant wrote to the Council and requested the following information:

"I have been advised by my solicitor to get as much information about my mother as possible. This includes her medical records since March 2020, details of any safeguarding concerns submitted by concerned agencies or individuals, details of any safeguarding investigations and their outcomes. Also how your office was made aware of her death."

5. The Council responded on 4 October 2024. It confirmed that it was handling the request as a subject access request (SAR) under the UK General Data Protection Regulation (UK GDPR). The Council disclosed some information and withheld other information on the grounds that it was information provided in confidence and the personal information of third parties.
6. Following an internal review the Council wrote to the complainant on 16 January 2025 and confirmed that it was maintaining its position.

Scope of the case

7. On 17 January 2025 the Commissioner received the complainant's complaint about the way their request for information had been handled.
8. During the Commissioner's investigation the Council issued a new response to the complainant under the FOIA, confirming that it was withholding the requested information under the exemption for information provided in confidence (section 41) and personal information (section 40).

Reasons for decision

Section 40 – personal information

Section 40(1) – personal information of the requester

9. Section 40(1) of the FOIA provides that any information to which a request for information relates, is exempt information if it constitutes personal data of which the applicant is the data subject.
10. The FOIA is clear, therefore, that an applicant's own personal data should not be disclosed under FOIA or the EIR. Instead, public

authorities should handle this aspect of the request as a subject access request (SAR) under the Data Protection Act 2018 (DPA).

11. This reasoning covers why the Commissioner has determined that the information the Council has withheld under section 40(1) is the applicants' own personal data and therefore, exempt from disclosure under section 40(1) of FOIA.
12. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual."
13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable. 18. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
14. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus. In this case, the Council has confirmed that some of the withheld information relates to the complainant's safeguarding referral regarding this matter and constitutes their own personal information.
15. The Commissioner's conclusion is that, therefore, it is appropriate for the Council to exempt this information from disclosure under section 40(1) of FOIA
16. Section 40(1) is an absolute exemption and there is no requirement for the Commissioner to consider the public interest. He is also not required to consider whether or not the complainant would be content to have their personal data disclosed to the world at large

Section 40(2) – third party personal information

17. 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.
18. Section 3(2) of the Data Protection Act 2018 defines personal data as:

"any information relating to an identified or identifiable living individual."

19. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
20. In this case, the complainant requested information the Council holds concerning the complainant's deceased mother. 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.
21. 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
22. 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."
23. 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.
24. 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.
25. The Commissioner considers that in this case, the complainant is pursuing a legitimate interest as the request concerns details about the care of their deceased mother. The Commissioner accepts disclosure of the requested information is necessary to meet that legitimate interest.
26. However, he considers the individuals involved in the individual's care, would not expect that private information about themselves would be made public under FOIA without their consent.
27. 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).
28. 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.

Section 41(1) Information Provided in Confidence

29. This exemption provides that information is exempt if it was obtained by a public authority from any other person and the disclosure would constitute an actionable breach of confidence.
30. The Council relied on this exemption to withhold information concerning the care of the complainant's deceased mother. The Commissioner accepts this information would have been received by the Council from another party, and having accepted this he must determine whether disclosure of that information would constitute a breach of confidence.

The necessary quality of confidence

31. 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 social care records of an individual. The Commissioner is aware that 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.
32. The Council considers that due to the nature of the information, it will have the necessary quality of confidence.
33. The Commissioner acknowledges that some of this information will be known to the complainant due to their relationship with their mother, and also due to the fact that material may already be in the public domain. However, the Commissioner recognises that the withheld records contain information beyond that which was already in the public domain¹. Therefore, the Commissioner considers the withheld information will retain the necessary quality of confidence owed to the deceased relative.

The obligation of confidence

34. Even if information is to be regarded as confidential, a breach of confidence will not be actionable if it was not communicated in

¹ This position is supported in the following Tribunal decision:

<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i25/mrspbluckvinformationcommissioner17sept07.pdf> and echoed in the Commissioner's guidance: <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-41-information-provided-in-confidence/how-does-section-41-apply-to-requests-for-information-about-deceased-people/>

circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.

35. When a social care client is under the care of professionals, the Commissioner accepts that the client would not expect information produced about their case to be disclosed to third parties without their consent. As such the Commissioner is satisfied that an obligation of confidence is created by the very nature of the relationship between client and professional.

The detriment of the confider

36. Having concluded that the information withheld in this case has the necessary quality of confidence, and was imparted in circumstances giving rise to an obligation of confidence, the Commissioner has proceeded to consider whether unauthorised disclosure could cause detriment to the deceased person.
37. In many cases, it may be difficult to argue that a disclosure of information would result in the confider suffering a detriment in terms of any tangible loss. As the person is now deceased, the Commissioner does not consider that the disclosure of the withheld information would cause any tangible loss. However the Commissioner does consider that disclosure to the general public (which is what disclosure under the terms of the FOIA represents) would be an infringement of the deceased person's privacy and dignity. Such a loss of privacy and dignity can be a detriment in its own right.
38. Further to the above, following the decision of the High Court in *Home Office v BUAV and ICO* [2008] EWHC 892 (QB), the Commissioner recognises that with the introduction of the Human Rights Act 1998 ("the HRA"), all domestic law, including the law of confidence, must be read in the context of the HRA. In relation to personal information, this involves consideration of Article 8, which provides for a right to privacy. Article 8 of the HRA recognises the importance to individuals of having the privacy of their affairs respected, and in this context the Commissioner must consider that the invasion of the deceased's privacy of affairs would also represent a detriment to the deceased as a confider.
39. Article 8 of the HRA recognises the importance to individuals of having the privacy of their affairs respected, and in this context the Commissioner must consider that the invasion of the complainant's mother's privacy of affairs would also represent a detriment to the mother as a confider. This, in the Commissioner's view, also extends to that information which may have been provided by the third party about the complainant's mother.

40. Having considered the above factors, the Commissioner therefore finds that no specific detriment, beyond the general loss of privacy and dignity, needs to be found in the circumstances of this case. He is, therefore, satisfied that the third element of the test is met.

Is there a public interest defence?

41. Although section 41(1) is an absolute exemption, and does not need to be qualified by a public interest test under section 2 of the FOIA, case law suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence.
42. The Commissioner has, therefore, considered whether there is a public interest defence available, should the Council disclose the information that has been withheld.
43. The duty of confidence public interest defence assumes that the information should be withheld, unless the public interest in disclosure exceeds the public interest in maintaining the confidence.
44. The Commissioner takes the view that a duty of confidence should not be overridden lightly, particularly in the context of a duty owed to the confider. In this instance this is relevant to the information which was obtained from the complainant's mother, and the third party.
45. Disclosure of any confidential information undermines the principle of confidentiality, which itself depends on a relationship of trust between the confider and the confidant. It is the Commissioner's view that people would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected. It is therefore in the public interest that confidences are maintained.
46. In the circumstances of this particular case, the Commissioner also considers it important that a social care client has confidence that sensitive information about them will not be made publicly available following their death. A breakdown in the trust between parties in such a situation would be counter to the public interest, as it could endanger the health of social care clients and prejudice the effective functioning of social services.
47. In addition to the wider public interest in preserving confidentiality, there is also a public interest in protecting the confider from detriment. The Commissioner has already established that it would be a sufficient detriment to the confider to infringe their privacy and dignity. As already noted, the importance of a right to privacy is further recognised by Article 8 of the HRA

48. However, there is a competing human right in Article 10 which provides for a right to freedom of expression, which includes the freedom to receive and impart information, and the general test for an actionable breach of confidence provides that if there is a public interest in disclosure that exceeds the public interest in preserving confidentiality, the breach will not be actionable.
49. In considering the specific circumstances of this case, the Commissioner recognises that the complainant holds various concerns about the quality of the deceased person's care, the actions of other relatives in relation to this, and the terms of the deceased person's will.
50. The Commissioner recognises that it is in the public interest to expose any malpractice on the part of public authorities, and that it is also in the public interest for individuals to have access to information to help them to conduct a legal challenge. However, having considered the detailed submissions made by the complainant, there is no immediate evidence available to the Commissioner of any malpractice on the part of the Council. He further notes that any appropriate review of the concerns held by the complainant would need to be undertaken by independent bodies with the jurisdiction to consider such issues. Such a review does not fall within the jurisdiction of the Commissioner.
51. In light of the above, there is no evidence available to the Commissioner that suggests there is sufficient wider public interest in the information being disclosed. The complainant's wish to access this information is based on personal need, and the Commissioner considers it reasonable to consider that there are proper routes for the complainant to have their concerns addressed. The Commissioner, therefore, takes the view that the public interest in preserving the principle of confidentiality is much stronger than that in disclosing the information, and that there would be no public interest defence available should the Council disclose the information.
52. As discussed above, the Commissioner's view is that a duty of confidence would be capable of surviving the person's death. The Commissioner is also satisfied that the withheld information has the necessary quality of confidence, was imparted in circumstances giving rise to an obligation of confidence, and that disclosure would result in detriment to the confider. Having considered the circumstances of this case, the Commissioner does not consider that there would be a public interest defence in disclosing the information, and as such, accepts that section 41(1) has been correctly engaged.

Procedural matters

53. In this case the Council failed to issue a refusal notice specifying the exemptions it was relying on within the statutory time limit. The Commissioner's has, therefore, found a breach of 17(1) of the FOIA.

Right of appeal

54. 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)
General Regulatory Chamber
PO Box 11230
Leicester
LE1 8FQ

Tel: 0203 936 8963
Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

55. 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.
56. 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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