

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 November 2022

Public Authority: London Borough of Lambeth
Address: 68 Acre Lane
London
SW2 5QN

Decision (including any steps ordered)

1. The complainant has requested the London Borough of Lambeth (the council) to disclose their late mother's personal file and correspondence between key staff members. The council refused to confirm or deny whether it holds any recorded information under section 41(2) of FOIA.
2. The Commissioner's decision is that the council is entitled to rely on section 41(2) of FOIA in this case. He therefore does not require any further action to be taken.

Request and response

3. On 23 September 2021, the complainant wrote to the council and requested information in the following terms:

"Please supply me all personal data you hold about my late mother which I am entitled to receive under data protection law .

This includes:

- her personal file
- emails between [names redacted]."

4. The council responded on 20 October 2021. It confirmed that section 41(2) of FOIA applied to the request, as any information it may or may not hold is information provided in confidence.
5. The complainant requested an internal review on 6 November 2021.
6. The council carried out an internal review and notified the complainant of its findings on 6 December 2021. It upheld its reliance on section 41(2), as it considers any information it may or may not hold is held in confidence.

Scope of the case

7. The complainant contacted the Commissioner on 15 February 2022 to complain about the way their request for information had been handled. They dispute the application of the exemption cited and believe they have a right to see any information held.
8. The Commissioner has not obtained any further submissions from the council in this case. He is satisfied from various other cases he has considered that if the requested information is held (information relating to any access of the deceased to Adult Social Care Services) it is exempt under section 41(2) of FOIA. The following section will explain why.
9. The complainant is reminded that FOIA is applicant blind. When considering requests for information the relevant consideration is whether the requested information, if held, is suitable for public disclosure. It is not whether the applicant should have sight of the requested information (if indeed it is held) but whether the world at large can.

Reasons for decision

Section 41 – Information provided in confidence

10. Information is exempt from disclosure if it was obtained by the public authority from any other person and the disclosure of the information to the public would constitute a breach of confidence actionable by that or any other person.
11. Subsection (2) also states that a public authority may refuse to confirm or deny if any recorded information is held if to do so would itself constitute an actionable breach of confidence.

12. The council has refused to confirm or deny whether any recorded information is held and is therefore relying on section 41(2) of FOIA.
13. Any information the council may or may not hold would be information shared by the deceased individual and any Adult Social Care Services used and associated carers. It would therefore be information obtained from another person and so, if held, this element of the exemption would be met.
14. When determining whether disclosure would constitute an actionable breach of confidence it is necessary to consider whether the information, if held, has the necessary quality of confidence and, if held, whether it was imparted in circumstances importing an obligation of confidence. Then, whether disclosure (if held) would be an unauthorised use of the information to the detriment of the confider.
15. The Commissioner is satisfied that social care records have the necessary quality of confidence. This type of information is not trivial or otherwise accessible to the general public.
16. If held, the information would have been imparted in circumstances giving rise to an obligation of confidence. The Commissioner is satisfied that there is an implicit obligation of confidence where information is provided in the context of the relationship between patient and doctor or social care service user and social care professionals or carers. This type of information is treated in the strictest of confidence.
17. In terms of disclosing any information that may or may not be held and this causing detriment to the confider, the Commissioner is satisfied that where information relates to a personal or private matter, it should be protected by the law of confidence, even if disclosure would not result in any tangible loss to the confider. He considers a loss of privacy is itself detrimental. It is therefore not necessary for there to be any tangible loss to the original confider for social care details and information to be protected by the law of confidence.
18. It is also accepted that any duty of confidence owed continues to apply after the death of the person concerned. This is in accordance with the Information Tribunal hearing of *Pauline Bluck v Information Commissioner and Epsom & St Helier University Hospitals NHS Trust* (EA/2006/0090).
19. Although section 41 is an absolute exemption (and there is no requirement to consider the public interest test), it is accepted that if there is an overriding public interest in disclosure of any information that may or may not be held, it can be a defence to an action of breach of confidentiality.

20. It is noted that the complainant may feel their own personal interests in the matter are sufficient but the Commissioner does not consider this would be enough to constitute a public interest defence. There is weighty public interest in maintaining the confidentiality of this type of information and protecting the integrity of the patient/carer and medical professional relationship. There are also other mechanisms available to monitor the quality of any care or services that may have been provided – the council's complaints procedures and the Parliamentary Health Service Ombudsman.
21. For the above reasons, the Commissioner is satisfied that the council is entitled to refuse to confirm or deny whether any recorded information is held in accordance with section 41(2) of FOIA.

Right of appeal

22. 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

23. 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.
24. 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

Samantha Coward
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF