



Scottish Information
Commissioner
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Decision Notice 028/2026

Deceased person's care records

Authority: East Dunbartonshire Council
Case Ref: 202501035

Summary

The Applicant asked the Authority for a copy of his late father's care records. The Authority withheld the information as it considered it to be confidential. The Commissioner investigated and found that the records were confidential, and the Authority was entitled to withhold the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 36(2) (Confidentiality); 47(1) and (2) (Application for decision by Commissioner).

Background

1. On 1 May 2025, the Applicant made a multi-part request for information to the Authority, seeking information regarding the care of his parents. Only certain of the information requested in part 3 of the Applicant's request forms the basis of his application to the Commissioner. In part 3 of his request, the Applicant asked for the following information:
Any other documentation relating to his mother or her late husband.
2. The Authority failed to respond.
3. On 4 June 2025, the Applicant wrote to the Authority requesting a review. The Applicant stated that he was dissatisfied because the Authority had failed to respond to his request.
4. The Authority notified the Applicant of the outcome of its review on 2 July 2025. The Authority refused to provide information relating to the Applicant's mother under section 38(1)(b) of FOISA, on the basis that it contained the personal information of other

individual(s). It commented that it was unable to release personal information in response to a FOISA request unless this could be justified under the UK GDPR and the DPA 2018, and personal information could not be released where doing so would be a breach of the data protection principles. The Authority relied on section 36(2) for withholding information about the Applicant's late father as it considered this to be covered by an inherent duty of confidentiality, disclosure of which would result in an actionable breach of confidence. The Authority advised the Applicant that they could submit a Subject Access Request for some of this information, as a more appropriate route to accessing the personal data in the circumstances.

5. On 3 July 2025, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review because he did not agree that the information should be withheld from him, as the next of kin and as his father's executor.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 14 August 2025, the Authority was notified in writing that the Applicant had made a valid application. The case was then allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to why it considered the information relating to the Applicant's late father to be exempt in line with section 36(2) of FOISA.

Commissioner's analysis and findings

9. In coming to a decision, the Commissioner has considered all of the submissions made to him by the Applicant and the Authority. He is satisfied that no matter of relevance has been overlooked.
10. As set out in previous decisions, information disclosed under FOISA is released into the public domain and is therefore accessible to anyone who asks for it, regardless of who they are or why they want it. Under FOISA, the Commissioner cannot require information to be disclosed only to an individual; he can only require the information to be disclosed to the wider public, and he must take this into account when considering whether the Authority complied with FOISA in withholding the information relating to the Applicant's late father.

Section 36(2) – Confidentiality

11. Under section 36(2) of FOISA, information is exempt from disclosure if it was obtained by a Scottish public authority from another person (including another such authority) and its disclosure by the authority so obtaining it to the public (otherwise than under FOISA) would constitute a breach of confidence actionable by that person or any other person. Section 36(2) is an absolute exemption and is not, therefore, subject to the public interest test in section 2(1)(b) of FOISA. However, it is generally accepted in common law that an obligation

of confidence will not apply where the disclosure of the information is necessary in the public interest.

12. Section 36(2) contains a two-stage test, both parts of which must be fulfilled before the exemption can be relied upon.

Information obtained from another person

13. The first test is that the information must have been obtained by a Scottish public authority from another person. "Person" is defined widely and means another individual, another Scottish public authority or any other legal entity, such as a company or partnership.
14. The Authority submitted that the information covered by the request was provided by its own employees, health employees, nurses, doctors, members of the public and the deceased person themselves. The Authority provided the Commissioner with a copy of this information.
15. Having reviewed the information, the Commissioner is satisfied that the withheld information was obtained by the Authority from other persons and that the first part of the section 36(2) test has therefore been fulfilled.

Actionable breach of confidence

16. The second part of the test is that the disclosure of the information by the public authority must constitute a breach of confidence actionable either by the person who gave the information to the public authority or by any other person. The Commissioner takes the view that "actionable" means that the basic requirements for a successful action must appear to be fulfilled.
17. There are three main requirements which must be met before a claim for breach of confidence can be established to satisfy the second element to this test. These are:
 - (i) the information must have the necessary quality of confidence;
 - (ii) the public authority must have received the information in circumstances which imposed an obligation on it to maintain confidentiality; and
 - (iii) unauthorised disclosure must be to the detriment of the person who communicated the information.

Necessary quality of confidence

18. The Authority explained that the information relating to the Applicant's late father was provided with an implicit expectation of confidentiality, was not common knowledge and could not be readily obtained. Consequently, it argued that it had the necessary quality of confidence.
19. The Commissioner has considered the nature of the withheld information and the submissions made by the Authority and is satisfied that the information has the necessary quality of confidence. The information is not common knowledge and could not readily be obtained.

Obligation to maintain confidentiality

20. In its submissions, the Authority asserted that information was provided to it within a relationship where confidence is implicit and that third parties have a clear expectation that

reports they provide are considered in private and treated with confidence. Such information is very clearly not intended to be published to the wider world.

21. The Authority is also of the view that, in line with the position reflected in previous Decisions of the Commissioner, and in the Information Tribunal case [of Bluck v Information Commissioner and Epsom and St Helier University NHS Trust](#)¹, that duty of confidence persists even after the death of the client.
22. The Commissioner therefore accepts, for the same reasons as he has done in many previous cases (including [Decision Notice 296/2024](#)²) which have considered similar information, that the Authority has an ongoing duty of confidence to its former client, the Applicant's late father.
23. For the reasons outlined above, the Commissioner is satisfied that information withheld from the Applicant was received in circumstances which imposed an obligation on the Authority to maintain confidentiality to its former client.

Unauthorised disclosure which could cause detriment

24. The third requirement is that unauthorised disclosure of the information must be to the detriment of the person who communicated it. The damage need not be substantial and indeed could follow from the mere fact of unauthorised use or disclosure in breach of confidence.
25. The Authority submitted that the information was provided within a relationship where confidence is implicit. The Authority contended that detriment may not be restricted just to financial loss but also covered circumstances where a person's private details were disclosed to others who the individual would prefer not to know them. It is the Authority's view that clients would not want the information provided by them to be made public. The disclosure of information held within social work records containing information provided by a client and their clinicians may, the Authority argued, be of detriment to the interests of that individual, even after their death.
26. The Commissioner recognises that the disclosure of information held within social care records detailing aspects of individual care needs communicated by the client and discussed with their care team is likely to have a detrimental effect on all concerned, if the information were made public.
27. Having considered the nature of the information and the subject matter to which it relates, the Commissioner acknowledges that there is potential for damage or distress to be caused to the client (regardless of his passing) and other surviving relatives through its disclosure into the public domain.
28. The Commissioner accepts that, when others provided information with regard to the Applicant's father, they would have done so in the expectation that this information would be treated confidentially and not disclosed into the public domain in response to an information request under FOISA.

¹

<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i25/mrspbluckvinformationcommissioner17sept07.pdf>

² <https://www.foi.scot/decision-2962024>

29. The Commissioner is therefore satisfied that the tests for an actionable breach of confidence are met in this case, in relation to the information being withheld under section 36(2) of FOISA.
30. Having found that all the tests for the exemption in section 36(2) of FOISA have been met, and the exemption is properly engaged, the Commissioner must now go on to consider any public interest in disclosure of the information.

Public interest defence - section 36(2)

31. As noted above, the exemption in section 36(2) of FOISA is an absolute exemption in terms of section 2(2) of FOISA and not subject to the public interest test in section 2(1)(b). However, the law of confidence recognises that, in certain circumstances, the strong public interest in maintaining confidences may be outweighed by the public interest in disclosure of the information. In deciding whether to enforce an obligation of confidentiality, the courts are required to balance these competing interests, but there is no presumption in favour of disclosure. This is generally known as the public interest defence.
32. The Applicant submitted that as Power of Attorney and executor of his late father's estate, he considered it unacceptable for the Authority to refuse to provide the information he requested. The Applicant considered it necessary for this information to be disclosed to him to assist him in legal proceedings.
33. The Authority acknowledged that the Applicant had a legitimate interest in the information relating to his late father; however, it considered this interest to be entirely outweighed by the harm in making the information available to the wider public.
34. The Authority noted that it had released the withheld information to the Applicant in response to a Subject Access Request he had submitted.
35. The Authority commented that were the information to be provided to the Court in relation to an action there, then the Court might consider whether some if not all information should be considered confidential and made available to the wider public.

The Commissioner's view on the public interest defence

36. The Commissioner has carefully considered all relevant factors in relation to the public interest defence, including the withheld information itself. He accepts that there may be some occasions where the very strong public interest in maintaining the confidentiality of information regarding the specific care needs of an individual which have been provided by that individual, together with persons involved in their care, is outweighed by a strong public interest defence in favour of disclosure; for example, where withholding information would cover up serious wrongdoing or would lead to the public being misled on, or kept in ignorance of, matters of genuine public concern.
37. The Commissioner understands that the Applicant is seeking disclosure of this information as a consequence of ongoing legal proceedings, as he considered the information necessary to assist with these proceedings. What is, however, important to note is that disclosure under Freedom of Information legislation is disclosure to the public at large and not just to one individual. Whilst it may well be the case that the content of this information would be of benefit to the Applicant (in the context of proceedings or otherwise), the Commissioner cannot agree that the public interest favours disclosure of this information into the public domain to the clear detriment he has identified above.

38. Therefore, in the circumstances of this case, the Commissioner agrees that there are no compelling reasons, in the public interest, for the content of the records held by the Authority relating to the care of the Applicant's late father to be disclosed into the public domain.
39. In conclusion, the Commissioner finds that the Authority was correct to withhold information under section 36(2) of FOISA.

Decision

The Commissioner finds that, in respect of the matters specified in the application, the Authority complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Euan McCulloch
Head of Enforcement

23 February 2025