



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2012/0005

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50400052

Dated: 12 December 2011

BETWEEN:

GARY MOORE

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

HAMPSHIRE COUNTY COUNCIL

Second Respondent

Final Ruling on an application by the First Respondent to strike out this appeal in its entirety pursuant to Rule 8(3)(c) of the Tribunal Procedure (First - tier Tribunal)(General Regulatory Chamber) Rules, 2009 ("the 2009 Rules")

1. In my ruling dated 13th. July, 2012 by which I struck out the greater part of this appeal, I indicated at paragraph 29 that the Appellant should state within fourteen days whether he wished to pursue this appeal in respect of category 5 (financial) information and that, failing any response, I should issue further directions.
2. He has not responded to that invitation.
3. I therefore direct, pursuant to Rules 5(2) and 8(3)(c) of the 2009 Rules, that this appeal be struck out in its entirety.

David Farrer Q.C.

Tribunal Judge

21 August 2012



IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL

Appeal No: EA/2012/0005

BETWEEN:

GARY MOORE

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

HAMPSHIRE COUNTY COUNCIL

Second Respondent

Ruling on an application by the First Respondent to strike out this appeal in its entirety pursuant to Rule 8(3)(c) of the Tribunal Procedure (First - tier Tribunal)(General Regulatory Chamber) Rules, 2009 ("the 2009 Rules")

1. The Decision

This appeal is struck out under Rule 8(3)(c), save in so far as it relates to financial records held by the Client Care Department of HCC (categories (v) and (vii) in paragraph 5), on the ground that , as to all other categories of the requested information, it has no reasonable prospect of success.

Background

2. From about 2004, the Appellant`s mother Doris Moore was under the care of the Second Respondent`s ("HCC`s") social services department , initially in

sheltered accommodation and from December, 2007 until her death on 14th. June, 2009, in two private nursing homes under contract to HCC¹.

3. Over that period very substantial records of her care, medical condition, financial circumstances and social needs were created within HCC. An order for HCC to manage her finances was obtained from the Court of Protection. Frequent meetings were held to monitor developments, involving various social work professionals. Legal advice was sought and obtained in – house on a number of issues. Assessments were made in meetings with Mrs. Moore. Whatever criticisms are made of the care that she received, it is clear that considerable time and human resources were devoted to her.
4. It is unfortunate that relations between the Appellant and his brother, Keith Moore were strained throughout this period. That posed a further problem for those caring for their mother. This ruling involves no assessments, either of the rights and wrongs of any dispute between the brothers or of the quality of care which Mrs. Moore received from HCC and bodies contracted to it.

The nature of the material held by HCC.

5. As can be inferred from paragraph 3, the extensive files contain a range of documents that can be broadly categorised as follows :
 - (i) Periodic assessments of Mrs. Moore`s physical, mental and emotional condition based on visits to her at home and later at the nursing homes in which she resided.
 - (ii) Minutes of meetings of members of different teams within social services at which her present and future condition and needs were discussed.
 - (iii) Large numbers of e mails within and between different teams in social services passing information as to Mrs. Moore and assessing

¹ Andover Nursing Home and finally, more briefly Millfield.

developments. Some relate to quite trivial issues, others to matters more critical to her care.

(iv) Some reports and correspondence from the nursing home staff.

(v) Voluminous financial records relating to Mrs. Moore, her income and assets. These were evidently held as a result of the order of the Court of Protection in 2008, providing that HCC social services should administer her financial affairs.

(vi) The obtaining of in – house legal advice.

(vii) Correspondence with solicitors for her estate, including the provision of financial information.

(viii) Some correspondence with the Appellant`s solicitors involving and following his FOIA request.

(ix) Documents relating to the Appellant and his brother Keith, which clearly involve their and her personal data.

6. Almost all the information contained within these records consists of the personal data, in many cases the sensitive personal data, of Mrs. Moore. However, the protection of the Data Protection Act, 1998 applies only to the personal data of “a living individual” (DPA 1998 s.1(1)(a)).

7. The FOIA Request was made by solicitors on behalf of the Appellant on 22nd. June, 2010. It followed an earlier request which had produced disclosure of about fifty documents. I am not informed whether they are within the files that I have perused but it matters not for the purposes of this ruling.

8. HCC initially refused disclosure on the ground that this was a subject access request. However, since the Appellant`s complaint to the ICO, the exemption generally relied on and scrutinised has been that provided by s.41(1) for information provided and received in confidence.

9. S.41(1) provides –

“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.”

10. The Decision Notice and the ICO`s Response treated s.41(1) as apt to cover all the information requested on the basis that the confider was Mrs. Moore. The Tribunal considers that this is an over – simplification.

11. Category (i) in paragraph 5 clearly involves information provided by Mrs. Moore to staff or social workers. Categories (ii), (iii) and (iv) probably do so indirectly in relation to some of the information that they contain. Categories (v) to (ix) do not.

12. Category (iv) (information from the nursing homes) plainly involves the provision of information to HCC by another person, namely its external contractor. If such information was provided in confidence, as defined in s.41(1)(b), then s.41(1) is engaged but on the basis that the contractor is the confider.

13. Categories (ii) and (iii) (minutes of meetings and e mails) directly involve the provision of information by one official of HCC to another, in most cases². Of itself, such a communication does not engage s.41(1) because an employee of HCC is not “another person” when acting within the scope of that employment. However, the information passed, where it does not originate with Mrs. Moore, generally derives from the staff of the nursing home or an external professional and is comparable to category (iv). There is also some overlap with category (ix) since the Appellant and his brother are referred to.

² Though not invariably. External professionals, such as Mrs. Moore`s GP attended some case conferences.

14. Whether such material includes the personal data of HCC staff, so as to engage the first data protection principle, is in my view less clear and I disregard this potential exemption in reaching my decision on this application.
15. Whether information in categories (i) to (iv) was provided by Mrs. Moore or by external staff or professionals it was plainly confidential information provided in circumstances imposing a duty of confidence. Its disclosure would have caused obvious distress to Mrs. Moore and would have been actionable by her in her lifetime, whether imparted by her or by such staff. The tests prescribed in *Coco v A.N. Clark (Engineers)* [1968] FSR 415 are satisfied.
16. The Tribunal accepts as correct and follows for the purposes of this application the decision in *Bluck v Information Commissioner & Epsom & St Helier University NHS Trust* EA/2006/0090, that the duty of confidence, unlike data protection rights, can survive the death of the person to whom the duty is owed so as to be actionable by the estate, where detriment can be demonstrated, as here.
17. The financial records, category (v), are not information provided in confidence since they include invoices and bank statements supplied to the client care department of HCC. Nothing in this category originates with Mrs. Moore nor does it involve the personal data of any other person. It may well be that the essential material has been disclosed to the Appellant. or that he can obtain it. without invoking FOIA. Nevertheless, I exclude this category from the strike – out because I am not persuaded by the submissions before me that a FOIA exemption can be relied on. I refer further to the consequences of that part of the ruling in paragraph 29 below.
18. Category (vi) engages legal professional privilege (s.42). No competing public interest could justify its disclosure in this case.
19. Category (vii), correspondence with solicitors for the estate, adds nothing to the information contained in the financial records and will be dealt with on the same basis.

20. Category (viii) is held by the Appellant already. It consists of the request and a reminder, so far as I can judge.
21. Category (ix) involves the personal data of the Appellant and his brother. The former are not disclosable under FOIA, but involve a subject access request under DPA 1998; the latter are protected by the first data protection principle. Disclosure would be unfair to the data subject.
22. The central issue raised by the Appellant is, however, not whether s.41(1) is engaged in relation to categories (i) to (iv) but whether there is an overriding public interest in disclosure of these records, a recognised exception to the duty of confidentiality.
23. Disclosure might assist the Appellant in litigation in respect of Mrs. Moore's last will, which he believes, according to correspondence, may have been the subject of undue influence by his brother. In his response to the ICO, however, he claimed that HCC had mismanaged his mother's financial affairs and had failed to prevent physical abuse and financial exploitation by his brother. In a more general way, he asserted neglect.
24. The Appellant rightly observes in his last response to the HCC submissions that his motives for seeking disclosure are not the concern of the Tribunal. The question is whether the public interest in maintaining the confidentiality of the identified classes of record outweighs the public interest in disclosure.
25. There is a public interest in ensuring that a potential litigant has access to information which enables him to assert public or private rights but it is generally properly catered for by the familiar rules on disclosure and inspection contained in the Civil Procedure Rules.
26. There is a potentially wider and more powerful public interest where disclosure of information relating to a particular individual, for example a vulnerable elderly patient or client of social services, might shed light on

possibly widespread abuses or malpractices. The Tribunal is fully alive to public concern and debate as to the issue of care for and abuse of the elderly to which the Appellant draws emphatic attention.

27. Nothing in the extensive HCC records which I have read would, if disclosed, serve any public interest in the protection of such people generally nor reveal anything of public concern as to Mrs. Moore in particular. The only disturbing feature of the case which these files reveal is the mutual antipathy of the Appellant and his brother and its impact on Mrs. Moore`s care.

28. I emphasise that this ruling does not involve a finding as to the standard of care that Mrs. Moore received from HCC. That is not the function of the Tribunal. My ruling is simply that the requested information contains nothing that could illuminate the public debate on care for or abuse of the elderly, specifically the elderly in residential care; nor would disclosure serve any public interest as to Mrs. Moore in particular.

29. Given my exclusion from this ruling of the financial records (category 5), I direct that the Appellant notify the Tribunal and the Respondents within fourteen days of receipt of this ruling whether he wishes to pursue his appeal in respect of this category alone. If he does, I shall issue further directions.

30. For these reasons I grant this application to the extent indicated.

David Farrer Q.C.

Tribunal Judge

19th. July, 2012