



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No: EA/2012/0031

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice FS50406744
Dated 18 January 2012**

Appellant: LORD DUNBOYNE

Respondent: INFORMATION COMMISSIONER

**Second Respondent: CENTRAL & NORTH WEST LONDON
NHS FOUNDATION TRUST**

Determined on the papers: 18 June 2012

Date of decision: 12 July 2012

Before

Robin Callender Smith
Judge

Paul Taylor and Nigel Watson
Tribunal Members

Written representations:

For the Appellant: Lord Dunboyne (in person)
For the Respondent: Mark Thorogood, Solicitor on behalf of the Information
Commissioner
For the Second Respondents: Eleanor Grey QC

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GENERAL REGULATORY CHAMBER
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Case No: EA/2012/0031

Subject matter:

FOIA

Absolute exemptions

- Confidential information s.41

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

REASONS FOR DECISION

Introduction

1. This is the third appeal by Lord Dunboyne to the Information Rights Tribunal on issues relating to the tragic death of the Appellant's daughter on 28 April 2006 when she was an inpatient of the Chelsea & Westminster Hospital, a hospital for which the Second Respondent is responsible.
2. Ms Genevieve Butler fell to her death from the fourth floor, outside the Edgar Horn Ward at the hospital, at around 19:00 hours on the evening in question as the process for her to be discharged from hospital was being completed.
3. There was an inquest into the circumstances of Ms Butler's death and the Deputy Coroner recorded a narrative verdict on 20 September 2007. That recorded that Ms Butler died of multiple injuries.

4. This appeal relates to a request made by the Appellant on 1 April 2011 for the evidence submitted by the Second Respondent to the Coroner.
5. Two previous appeals (EA/2011/0303 and EA/2011/0261) – involving different but related issues - were heard by the same Tribunal panel and both were dismissed.
6. This third appeal deals with issues relating to confidentiality and the operation of s.41 FOIA.

Chronology, submission and the Tribunal's conclusions

7. The Appellants letter of 1 April 2011 was in four parts. The Decision Notice issued by the Information Commissioner related only to Part 2 of that letter, i.e. "the evidence submitted by the CNWL to the Coroner".
8. In the course of the Information Commissioner's investigation CNWL informed him that 10 witness statements were provided to the Coroner, two of which had been read out at the inquest and provided to the Appellant's solicitor at the time.
9. Having reviewed the matter for the purposes of this appeal the Second Respondent stated that only one of the statements was read out at the inquest. That statement, by Dr Mike Bellew, was contained in the open bundle available to all the parties to this appeal.
10. This appeal relates to 9 other statements – "the disputed information" – which have been disclosed to the Tribunal for the purposes of determining the issues in this appeal.
11. Of the nine statements, two were created solely for the purposes of assisting the Coroner. The Second Respondents relied on the sections 40 (2), 41 (1), 32 and 42 FOIA. In respect of the other seven statements CNWL relied on sections 31 (1) (g), 36 (2) (b), 40 (2) and 41 (1) FOIA.

12. The Information Commissioner concluded that all the disputed information was exempt under section 41 (1).

13. The wording of 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. CNWL noted that Ministry of Justice guidance in respect of section 41 stated that from 'any other person'

"...usually requires the information to have been obtained from outside the Department and not from an employee."

It went on to point out that

It is noticeable that the word 'usually' is used, implying that there will be some circumstances when information provided by an employee will give rise to a duty of confidence. Whilst the day-to-day processing of staff information would not ordinarily be confidential, given the contentious and sensitive information contained in an SUI [Sudden Untoward Incident] statement, the circumstances are an example of where a duty of confidence will arise. The Trust notes that [in another decision notice] the Commissioner accepted that witness statement apparently obtained by the Police Service of Northern Ireland from its own officers constituted information obtained from 'another person, the other persons being the authors of the witness statements and report'.with regard to the statements produced [solely] for the SUI investigation, it is often the case that staff who are asked to contribute to such investigations are employed by other organisations despite working for the Trust, such as Local Authorities and Social Services. These members of staff would seemingly satisfy the test for the information being provided by 'another person'. Where highly sensitive information has been provided by a 'team' comprising both CNWL and non-CNWL employees, it would seem nonsensical to hold that some of the information was confidential whilst some of it was not, despite the information being given for the same purpose.

15. The Information Commissioner concluded, on that basis, that section 41 (1) (a) had been met.

16. He had then concluded that the disclosure would constitute an actionable breach of confidence and then considered whether there would be a defence to a claim for breach of confidence based on the public interest test in the disclosure of the information.

17. He concluded (Paragraph 16 of the Decision Notice) that there would be no defence on the basis of the lack of evidence that any of the details were in the public domain and that the information contained in the witness statements had the necessary quality of confidence.

18. He had considered (Paragraph 19 of the Decision Notice) that because the information in the witness statements related to the medical care of a deceased patient then that information was imparted in circumstances importing an obligation of confidence as it was provided in confidence by the patient to the health professionals involved in their care who subsequently provided the witness statements to CNWL and the Coroner.

19. He noted specifically:

When patients submit to treatment from doctors and other medical professionals, they do so with the expectation that information would not be disclosed to third parties without their consent.

20. Section 41 (1) is an absolute exemption without a public interest test under FOIA. Case law suggested that a breach of confidence would not be actionable in circumstances where a public authority could rely on the public interest defence. The "duty of confidence" public interest test assumed that the information should be withheld unless the public interest in disclosure exceeded the public interest in maintaining the confidence. He had gone on to consider that. He did not consider that the public interest in understanding how the incident occurred and whether it had been investigated appropriately by disclosure of the requested witness statements were sufficient to outweigh the considerable public interest in maintaining the confidentiality of the information.

21. The Commissioner sympathised with the Appellant's wish to access the information on a personal level. He took the view, however, that the public interest in preserving the principle of confidentiality was much stronger and that there would be no public interest defence available if the CNWL had disclosed it.

22. In the Commissioner's response to this appeal – as well as drawing attention to other relevant case law – he noted the remarks by Lord Phillips LCJ in the Court of Appeal decision of *HRH Prince of Wales v Associated Newspapers* [2008] Ch 57 at Paragraph 68:

.... The test to be applied when considering whether it is necessary to restrict freedom of expression in order to prevent disclosure of information received in confidence is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached. The court will need to consider whether, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public.

23. The Appellant's position in respect of this appeal is that the perception of the "public interest" in the eyes of each of the regulatory and statutory authorities involved in the matter appeared to consist of maintaining secrecy with a view of protecting their own reputations and position, only taking action if it was actually required or obliged by statute. That had led to failures to protect the vulnerable and the failures had been allowed to persist for an unwarranted period.

24. To the Appellant it appeared that it was quite acceptable for health workers to cause death by breaking the law, notably the Mental Health Act, because everyone else was doing the same thing.

25. The Appellant rejected the arguments advanced by the Information Commissioner and CNWL in respect of section 41 FOIA.

26. In particular he stated:

It is an absurdity in law, if not the logic of the lunatic asylum, for the Tribunal to give serious credence to the argument advanced by CNWL that NHS employees, acting throughout in their roles as employees, should be judged for the purposes of s.41 to have a schizophrenic split-personality. *Reductio ad absurdum*, this argument would mean that no government Department, sitting as judge on its own conduct, would ever have to release any information under FOIA for fear of consequential embarrassment, let alone criminal proceedings, affecting its own employees.

27. The Tribunal is satisfied to the required standard – the balance of probabilities – that the Appellant's appeal cannot succeed. The case law in respect of both s.41 FOIA and the law of confidence is well-settled. Applied to this situation then the expectations of any staff members involved in respect of the processes surrounding the incident have to be considered.

28. While it is right that s.41 FOIA will not be engaged where information is generated by the public authority itself the situation here is very different. Here, however, the phrase "any other person" in section 41 (1) (a) FOIA cannot be taken as excluding employees of the public authority.

29. In relation to staff interviews, the Tribunal in *Johnson v IC* (EA/2011/0055), found as follows:

In relation to the staff interviews the Tribunal notes that whilst the interviews were held in an employment context, the persons concerned performed a different function from their usual clinical role. Whilst they provided the information in the course of their employment, public disclosure could give rise to private consequences for them extending beyond their employment. There is no evidence whether participating in such an investigation forms part of their terms and conditions. But the Tribunal is satisfied that whether the information is obtained from another in relation to these interviews depends upon the subject matter and content of the interview at the time. It is hard to see how providing the public authority with information about its own processes/systems etc. or with information recorded in medical records in the course of their employment.... could constitute information obtained from another. But expressing a subjective and personal opinion or judgement as to e.g. the behaviour of an individual patient, [a] patient's

relative or colleague would not be attributable to the employer or made in the usual course of employment, and therefore could be obtained from the employee as "another". Consequently the Tribunal is satisfied that in respect of those elements of the interviews where personal judgement or opinions were obtained beyond the usual scope of employment duties, the information was obtained from another for the purposes of section 41.

30. The Tribunal has had the benefit of considering the disputed material in respect of this appeal and is satisfied that both section 41 FOIA and the law of confidentiality and breach of confidence have been properly considered and applied in respect of withholding that information from the Appellant.

31. For all these reasons, the appeal for the requested information must fail.

32. Our decision is unanimous.

Robin Callender Smith

Judge

12 July 2012