



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

Case No. EA/2012/0195

ON APPEAL FROM:

**Information Commissioner's Decision Notice No: FS50346570
Dated 21st August 2012**

BETWEEN

MRS TROTT AND MRS SKINNER

Appellants

And

THE INFORMATION COMMISSIONER

Respondent

Determined on the papers on 4th February 2013 at Field House

Date of Decision 19th March 2013

BEFORE

Fiona Henderson (Judge)

Gareth Jones

And

Nigel Watson

Subject matter: FOIA– s41 Confidential information

Cases:

Bluck v IC and Epsom and St Helier University NHS EA/2006/0090

Coco v A N Clark (Engineers) Limited [1968] FSR 415 ChD

Attorney General v Guardian Newspapers [1990] 1AC109.

Ash v McKennitt [2006] EWCA Civ 1714

Decision: The Appeal is refused.

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision FS5346570 dated 21st August 2012 which concluded that East Sussex County Council (the Council) were entitled to rely upon s41 FOIA to withhold the disputed information.
2. The Appellants have an on-going complaint against the Council and the Home Care company who were contracted to provide services on behalf of the Council in relation to the care received by their sister prior to her death in 2009. The Appellants believe that she was neglected and this neglect contributed to her death. They visited her flat following her death and were concerned about its state.¹ They rely upon her physical state when admitted to hospital shortly before her death and note that her heating did not appear to be working, large quantities of unused medication were found in the flat and they question whether there was food for her to eat at home. In particular they assert that there were no home care visits between 24th and 28th December 2008. Their suspicion is that the Council did not have sufficient information relating to their sister to enable them to make appropriate decisions relating to her care.
3. They wrote to the Council in April 2009 on 9th May 2011 stating:

"We are writing to ask you to consider our request to have information from our sister's case notes given to us under FOI".
4. The Council refused the request on 15th June 2011 relying upon s41 FOIA namely that the information had been provided in confidence. This decision was upheld on 15th November 2011 following an internal review.
5. In their complaint to the Commissioner the Appellants argued that the information they were seeking was not about their sister rather about decisions made about her.

¹ They have provided the Tribunal with photographs to underline their concerns.

Scope of the Appeal

6. The Appellants have indicated that they would like the Care Agency to be reprimanded and possibly fined for their lack of care of their sister. This is outside the Tribunal's jurisdiction which is limited to determining whether the Freedom of Information Act has been correctly applied in this case².

Withheld information within the scope of the request

7. At a meeting with the Council in February 2009, the Appellants handed a request for information to the Council. Although they asked for information under the Data Protection Act, this was treated as a FOIA request and refused on 31 March 2009, the Council relying upon s41 FOIA (confidential information). The decision was upheld upon review in April 2009. The Appellants persisted with their complaints into their sister's care and following intervention from the Local Government Ombudsman, the Council agreed to carry out an independent investigation reviewing the involvement of the Council and the Care Agency concerned. The Appellants were provided with a very heavily redacted copy of the report in May 2010.³ They requested an unredacted copy verbally and the Council upheld its decision to make redactions in a letter dated 23rd July 2010. When the Appellants complained to the Commissioner about the redaction of the report the complaint was not admitted since the request had not been made in writing⁴. The Appellants were advised to submit a written request for the information that they were seeking.
8. Although the Appellants then submitted a written request for information in May 2011, the Tribunal is satisfied that the investigative report is not within scope for this appeal. The Tribunal notes that the terms of the written request in 2009 did not include the investigative report carried out by the independent investigator because it had not yet been commissioned or completed. The written request in 2011 which is the subject of this appeal is limited by its own terms to:

“information from our sister's case notes”

² S58 FOIA

³ Redactions under s41 (confidential information) and s40 (personal data)

⁴ S8 FOIA

9. The request states that this is a second request, we are satisfied that the 2009 request for essentially the same material is being referenced here, in particular because it is in the context of:

“As this is a second request, if you refuse, we would like you to consider waiving the internal review procedure that we have already gone through with Investigating Officer John Fowden...”

We note that John Fowden was the author of the investigative report and that the internal review of the verbal request for the report was carried out by Philip Baker. We are therefore satisfied that the request on its face is not for the report conducted by John Fowden.

10. From the correspondence between the Council and the Commissioner it is clear that the Council treated this request as not including the report which they treated as a separate matter. Whilst the report was compiled using information gleaned from the case notes, it also contained conclusions and recommendations which never formed part of the Appellants’ sister’s case notes as it was completed after she had died. We note the Commissioner’s observations that the report was provided electronically whereas the social care file had to be retrieved from the archive and provided in hard copy in support of our conclusion that the report did not form part of the case file. Despite the opportunity to make further submissions and to vary directions if more time is needed⁵, the Appellants have not challenged the Commissioners submissions on this point before the Tribunal.

11. In light of our finding that the report is not included within the request, if the Appellants wish the Commissioner to consider the report they would need to apply to the Council in writing asking for an unredacted or less redacted copy of the report, and then if refused they would have the right to apply to the Commissioner.

Confidential information

12. S41 provides

(1) Information is exempt information if –

⁵ Additional Case management Note 7.1.13

a) *It was obtained by the public authority from any other person... and*

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...”.

From the Tribunal’s reading of s41 and the associated case law on confidence⁶, the Tribunal is satisfied that it should consider the following matters in reaching its determination.

Has the information been obtained by the public authority from any other person?

13. The Appellants dispute that they are seeking information about their sister, since they are already aware of her background. Their argument is that they want information about the “[the Council’s] decisions about our sister’s care, how they formed their opinions about her competence to make decisions regarding her care of herself and their instructions to the Care Agency... as to the tasks they required them to undertake”.⁷ The Tribunal is satisfied that the opinions formed about the Appellants’ sister and the Council’s instructions to the Care Agency are based upon information obtained from their sister and that this element is therefore satisfied. It is not possible to separate the decisions and actions from the disclosures which led to them being made.

The information must have been imparted in circumstances importing an obligation of confidence

14. The Commissioner argues that the obligation of confidence is created by the very nature of the carer/client relationship. This is sensitive personal data⁸, it pertains to the physical and mental health of the Appellants’ sister. She was given the opportunity to indicate that she agreed to let the Council “*share personal information on care with family members/friends listed below*”. She did not sign her agreement or list anybody in the space provided⁹. Having reviewed the withheld information we are also satisfied that on several occasions she was given specific assures that the information

⁶ See paragraph 16 below

⁷ Letter to Tribunal 15.10.12

⁸ S2 DPA 1998

⁹ A standard “Consent to Gather and Share Information “ form signed 13th May 2008 during a review visit by a Community Assessor (Care Manager)

she provided would be treated confidentially. We are therefore satisfied that this ground is made out.

Does the information have the necessary quality of confidence?

15. We have reviewed the withheld material, we are satisfied that it contains sensitive personal data (as defined by s 2 DPA) and is neither trivial nor is it readily available by any other means. Consequently it retains the necessary quality of confidence.

There must be an unauthorised use of the information such that an action for breach of confidence could be brought.

16. *Bluck v IC and Epsom and St Helier University NHS EA/2006/0090* was a first tier Tribunal decision relating to an application for disclosure of medical records of a deceased patient. In *Bluck* the Tribunal reviewed the existing case law¹⁰ and determined that the cause of action for breach of confidence does survive the death of the person whose private information is concerned and that the personal representative of that person is able to enforce the right. The law of confidence must be read in the context of articles 8 and 10 of the European Convention on Human Rights, and we are satisfied that the effect of this is that if the fact of disclosure of private information would be contrary to an individual's reasonable expectation of confidentiality this would be sufficient to bring a claim for breach of confidence in the absence of any other detriment.

17. Although we are not bound by this decision we agree with that panel's analysis of the law and apply it in this case for the same reasons.

18. For s41 to be engaged the Tribunal must be satisfied on a balance of probabilities that disclosure under FOIA would be unauthorised. In his Decision Notice the Commissioner stated that "*there are no issues surrounding consent... in this case*"¹¹ The Tribunal notes that in their letter to the Appellants dated 15th November 2011 the Council stated that:

¹⁰ Relying upon *Coco v A N Clark (Engineers) Limited* [1968] FSR 415 ChD
Attorney General v Guardian Newspapers [1990] 1AC109.
Ash v McKennitt [2006] EWCA Civ 1714

¹¹ DN paragraph 24

“Even where the person making a request for information may in fact be the same person that would be entitled to bring any action for breach of confidence as the personal representative of the deceased, it is likely that disclosure under the Act would still amount to a breach of confidence. This is because information disclosed under the Act is thereafter in the public domain, and is not disclosed solely to the individual(s) who have requested it.”¹²

19. The Tribunal agrees with this statement but notes that the evidence before the Council as to whether the Appellants were the personal representatives and whether they did in fact consent to disclosure to the world at large under FOIA was incomplete.

20. In the preceding paragraph of the same letter the Council had stated that:

“In determining whether disclosure would give rise to a legal action for breach of confidence, it is not necessary to establish that, as a matter of fact, the deceased person has a personal representative who would take action.”

We would not expect the Council to consider this in every case, but in establishing that disclosure would be unauthorised under FOIA in this case we note:

- a) It was known to the Council and the Commissioner that the Appellants are the sisters of the deceased.
- b) There is evidence of SERCO writing to Mrs Skinner in relation to her late sister’s pension.
- c) References within the closed bundle to individuals named as next of kin at times by the deceased,
consequently there is substantial prima facie evidence that the Appellants may be the deceased’s personal representative.

21. The evidence is not determinative because it is not clear whether there was a valid will and if so the identity of any executors or if intestate who was responsible for administering the Estate. This is a question of evidence and one not dealt with by the Council or the Commissioner. The Commissioner relies upon this factual uncertainty in support of his contention that it was correct to uphold the reliance upon s41. We

¹² The same point is relied upon by the Commissioner in his additional submissions 18.1.13

note that in the other cases referred to by the Commissioner¹³ in argument before the Tribunal it had been established as a matter of fact that the applicant was either not the personal representative or not the only personal representative and that disclosure under FOIA was opposed by the non applicant personal representative in each of these cases.

22. In light of the facts already apparent in this case the Tribunal considers it was incumbent upon the Council and thereafter the Commissioner to check whether as a matter of fact the Appellants were the personal representatives and if so whether they did consent to disclosure under FOIA. In reaching this conclusion we also note the obligation upon the Council to provide advice and assistance pursuant to s16 FOIA.

23. For this reason the tribunal adjourned the case, and issued adjournment directions dated 7th February 2013 to seek further evidence from the Appellants. The Appellants responded by way of letter dated 18th February 2013 and the Commissioner made additional submissions dated 13th March 2013. From this evidence we are satisfied on a balance of probabilities that:

- There is a will,
- There is therefore an executor of the will and that is not either of the Appellants,
- The Executor has locus to act as the deceased's personal representative,
- There is no evidence that there is consent for disclosure under FOIA from the Executor.

24. Consequently we are satisfied that notwithstanding the consent of the Appellants for this information to be disclosed to the public at large under FOIA, this ground is made out.

¹³ Bluck, FS5040052 and FS50328160

Is there a public interest defence such as to render a breach of confidence un-actionable?

25. S41 FOIA is an absolute exemption¹⁴ however, it is still necessary to consider the public interest in determining whether any breach of confidence is actionable. This differs from the public interest test as set out in s2(2)(b) FOIA where if the balance of public interest is equal the information must be disclosed. For a defence to breach of action to succeed the public interest must be positively in favour of disclosure.
26. The Commissioner acknowledges the public interest in transparency and accountability however, he argues that that public interest is met by the provision of the redacted investigation report.
27. The Commissioner maintains that the public interest is clearly in favour of maintaining the confidentiality of the information relying upon:
- a) the public interest in service users having confidence that their care staff will not disclose their sensitive data when they divulge details of their medical history and lifestyle,
 - b) the concern that if they do not have such confidence they may be deterred from seeking assistance or not be candid in their communications.
 - c) Failure by service users to be frank or to become involved with social services could prejudice the effective functioning of social services
28. The Appellants believe that errors and omissions were made by the carers and that the public interest would be served in these mistakes being aired. They wish to lay blame where necessary in order to teach what they perceive to be much needed lessons.
29. The Tribunal accepts that transparency is an important public interest:
- a) where errors have been made it is important that the public can be satisfied that improvements are being made to prevent this happening again.
 - b) if errors have not been made it is also important that the public know this and can have confidence in their services,
 - c) disclosure would also aid transparency in terms of how well public money is allocated.

¹⁴ Pursuant to s2(3)(G) FOIA

30. We do note the investigation carried out by Mr Fowden which found that there were no serious lapses in the care provided to the Appellants' sister . Additionally where elements of the complaint were upheld recommendations have been made to address these. We consider that this goes some way towards meeting the Council's obligations of transparency and accountability and that this reduces the public interest in this information being disclosed in its entirety.

31. Having weighed the competing public interests as set out above, we are satisfied that the public interest lies in favour of withholding the information.

Conclusion

32. For the reasons set out above we are satisfied that s41 is engaged and that the information was correctly withheld under FOIA, the appeal is therefore refused.

Dated this 19th day of March 2013

Fiona Henderson
Tribunal Judge