



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2017/0188

**Decided without an oral hearing
On 30 January 2018**

Before

**JUDGE CLAIRE TAYLOR
MICHAEL JONES
NIGEL WATSON**

Between

BRIAN BLAKE

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

CORNWALL COUNCIL

Second Respondent

DECISION

We allow the appeal in part for the reasons set out below.
Steps to be taken are set out in paragraph 28 below.
This decision is to be treated as a substituted decision notice.

REASONS

The Request

1. On 20 December 2016, the Appellant requested from Cornwall Council ('the Council') as a 'public authority' for the purposes of the Freedom of Information Act 2000 ('FOIA'):

"Mr & Mrs [X]"

Further to my letter of 10th October 2016, the above named were assessed for care in October 2010 and I have asked for a copy of the assessment on many occasions but again I have NOT received a copy of this assessment which I am entitled to receive as I had to pay the bill for his care.

I would also like to receive any other financial information appertaining to the above named, as it would appear to me that Mr [X] was paying more for his care than his income – this is surely not right.

[...] I would therefore request that the information be forwarded to me at the earliest. "

2. On 17 January 2017, the Council refused to provide the information relying on s.41(1) FOIA (*information provided in confidence*). (The Council's internal review of the case of 7 February 2017 stated that the needs assessment that was carried out contained no financial information. This was an inaccuracy that has been made clear in response to our directions, during the course of this appeal.)
3. The Appellant progressed the matter leading to an investigation by the Information Commissioner (the 'Commissioner'). The Commissioner's Decision Notice (Ref.FS50668967) found that section 41(1) had been correctly applied so as to withhold the information. The Appellant now appeals the matter.

The Task of the Tribunal

4. The Tribunal's remit is governed by section 58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law and whether she should have exercised any discretion differently. The Tribunal is independent of the Commissioner and considers afresh the Appellant's complaint. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner. This is the extent of the Tribunal's remit, such that our role in this case is limited to considering whether section 41(1) has been correctly relied upon and whether the Respondents properly addressed the full scope of the request. To the extent that the Appellant has raised issues that are beyond our remit, we do not address them below.

5. The parties elected or consented for the matter to be heard without an oral hearing. The panel convened and adjourned the hearing to issue directions of 19 February 2018 to join the Council as a party. The Tribunal then received a number of further responses, communications and applications for rulings. Further directions were then issued on 11, 18 and 25 June. We are now satisfied that we have sufficient before us to fairly determine the matter. Some of the directions and responses needed to be made on a closed basis as they contained reference to the requested material. However, a gist was provided to the Appellant. We have not found it necessary to issue any part of this decision on a closed basis.
6. We have been assisted by various submissions from the parties and a bundle of documents, including a closed bundle of requested information. Pursuant to further directions, we have received additional documents from the Council that also comprised part of the requested information, and this was added to the closed bundle. We have carefully considered all information before us even if not specifically referred to below.

The Law

7. Under s.1(1) of FOIA, a person making an information request to a public authority is entitled to be informed in writing whether it holds the information and to have it communicated to him, unless it is exempt from disclosure under the Act.

8. Section 41 provides one such exemption. It states:

"(1) 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." (Emphasis Added).*

9. For our purposes, the elements of breach of confidence¹ are that:
 - a. The information was imparted in circumstances conferring an obligation of confidentiality;
 - b. The information has the necessary quality of confidentiality; and
 - c. Disclosure would cause a detriment to the person who imparted the information.²

¹ As set out in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47. In the later House of Lords decision of *Attorney General v Guardian Newspapers* [1990] 1AC109, Lord Goff set out the broad principle in slightly different terms. He said: "a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others."

² There is some dispute over whether detriment is a necessary element of the cause of action, and in any event the detriment of having the information disclosed against one's wishes may satisfy any such requirement.

10. It is a defence to an action for breach of confidence that it was in the public interest to disclose the confidential information. Therefore, the Tribunal considers the weight of public interest in disclosure, applying a presumption that confidentiality should be maintained.³
11. As regards whether a duty of confidence can survive the death of the confider, we have been referred to the First-tier Tribunal decision of *Pauline Bluck v the Information Commissioner and Epson and St Helier University NHS Trust (EA/2006/0090)*. In that case, the appellant made an FOIA request for her daughter's medical records after she had died. She and the daughter's husband were both personal representatives. The Tribunal decided that section 41(1) could continue to apply after death because an action for breach of confidence could still be taken by the personal representative of the deceased person. Again, the Appellant has not sought to dispute the reasoning in this case, and we find it persuasive. (It is noted that the Commissioner reasoned that the disclosure could constitute an actionable breach of confidence in this case even though at the time of the request, the Council was unable to determine whether or not the deceased person had a personal representative. In the Commissioner's view, it was not necessary to establish whether the deceased person has a personal representative who would be able to take action. This is because it would not be reasonable that a public authority should lay itself open to legal action. This has not been disputed by the Appellant.)

The Issues

12. One issue in this appeal concerns whether section 41(1) applies to the requested information contained in the Closed Bundle. To determine this, we must consider (a) whether the requested information was obtained by the public authority from any other person; and (b) if so, whether its disclosure to the public⁴ would constitute a breach of confidence actionable by that or any other person.
13. A second issue has arisen as a result of responses received to our directions after the hearing. This concerns the scope of the request.

Evidence and Submissions

Issue 1: Section 41

Commissioner's case

14. In essence, the Commissioner's case is that the Appellant has provided no reasons why her Decision Notice was wrongly decided and has not presented any new arguments beyond those already considered by the Commissioner. Her reasoning as to why section 41(1) applies includes:

The requested information obtained from another person

³ See *Derry City Council v Information Commissioner*, IT, 8 January 2006 for a discussion of the application of the public interest test in this context.

⁴ It is noted that a disclosure under FOIA is deemed to be made to the world at large and not solely to the requester.

- a. The withheld information was obtained from another person. Whilst social care records relate to the care of a particular individual and are likely to take the form of assessments and notes created by professionals involved in providing the individual's care, the information contained within such records derives from the individual under care.
- b. Having viewed the withheld information, it seems that in this case it was obtained from the deceased person, either directly or through professionals involved in providing their care, and other third parties.

Disclosure would constitute an actionable breach of confidence

- c. Disclosure of the information to the public would constitute an actionable breach of confidence for the purposes of section 41(1)(b). This is considered by reference to the test in *Coco v Clark*:

Quality of confidence

- d. The requested information has the 'quality of confidence': (A) It is more than trivial – comprising information of a sensitive nature, primarily medical, health, care details and financial information). These are personal, and important to the relevant individual. (B) There is no evidence to suggest the records are publicly accessible.

Information conveyed created an obligation of confidence

- e. The information was imparted in circumstances importing an obligation of confidence. That obligation was created by virtue of the relationship between client and professional. A person in social care or under the care of professionals, would not expect information produced about their case would be disclosed to third parties without their consent.

Detriment of confider

- f. Disclosure would be an unauthorised use of the information to the detriment of the confider. Even though the confider had passed away, a public disclosure of the information would infringe his privacy and dignity, which survived death. (*See the Bluck decision above*). It would also be an invasion of his right to privacy of his affairs under Article 8 of the Human Rights Act 1998.

No public interest defence

- g. Case law suggests that a breach of confidence would not be actionable in where a public authority can rely on a defence that the public interest in disclosure exceeds that in maintaining the confidence.
- h. The public interests in favour of non-disclosure are:
 - i. A duty of confidence (particularly where owed to the confider) should not be overridden lightly.

- ii. Disclosure of any confidential information undermines the principle of confidentiality, which depends on a relationship of trust between the confider and the confidant.
 - iii. People would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected.
 - iv. It is important that social care clients have confidence that sensitive information about them will not be made publicly available following their death. Otherwise, they may be discouraged from providing necessary information to those providing their care. This would ultimately undermine the quality of care that social services were able to provide; and may even lead to some people choosing not to engage with such services. This could endanger the health of social care clients and prejudice the effective functioning of social services.
 - v. It is important to protect the confider's privacy and dignity. The requested information is of a sensitive nature, - primarily medical or health or social care details and financial information- that was provided by or derived from third parties to the Council and ought not be disclosed to the world under FOIA.
 - vi. There is a competing human right in Article 10 which provides for a right to freedom of expression, which includes the freedom to receive and impart information.
- i. The public interest in favour of non-disclosure is:
 - i. So that the Appellant can administer the deceased's estate as an executor. He claims to be liable for debts accrued by the deceased and wishes to understand the basis of these debts.
 - ii. However, this is clearly a private rather than public interest. Whilst the Council's refusal to disclose the information under the terms of the FOIA is likely to be frustrating to the Appellant, the Commissioner considers that disclosure under the terms of the FOIA is to the general public, and not the requestor in isolation.

15. The Appellant's submissions and evidence includes:

- a. Mr [X] passed away in 2011. He and his wife are executors to the will. He requires the financial information held by the Council in order to obtain probate.
- b. The Council have dealt with someone else who is not a blood relative but will not deal with him whether in his role as next of kin or as executor.
- c. The Council did an assessment of Mr and Mrs [X], but will not provide a copy what information as to how they were assessed.

- d. He questions the point of a will if the Council treats him like this. He is of the understanding that a will is a legal document and as an executor he has the right to access the affairs of the deceased and obtain the assets, in order to administer the will as instructed by the deceased. This has not happened and he has not been able to obtain probate or letters of administration because of the information being kept secret from him. The Council instructed him to get legal advice which was very costly but his solicitor was unable to assist.

16. The bundle of papers included a copy of the will.

Our Findings

17. We find the Commissioner's arguments more compelling than those of the Appellant's and adopt those set out in paragraph 14 above in their entirety.

18. As regards para. 14(a), we note that in our directions, we probed the Respondent's case, particularly in relation to whether the information could be said to have been from someone other than the Council. This was because much of the information was on forms produced by the Council, and presumably completed by someone on behalf of the Council. However, the substantive information within those forms is the information requested by the Appellant. We are clear from reviewing that information that this was obtained from the deceased person either directly or through professionals involved in providing care, and/or third parties.

19. As regards para. 14(d), we note that the requested information comprises financial information in addition to social care records. These too carry the 'quality of confidence'.

20. As regards the weight of public interest set out in para.14(h) and (i), there is a public interest in the Appellant being able to progress with his role as executor. However, the requested information comprises records that are all of a most personal nature. It is important to understand that when considering a request for disclosure of information under FOIA, we consider it based on it being disclosed publicly, to the world at large, and material disclosed under FOIA can be made public. Disclosing the material that the Appellant has requested to the public at large, would in our view be most inappropriate and not in the public interest. It is not suited to disclosure under the Act, because we find that section 41(1) applies.

Issue 2

21. The panel noticed that information related to Mrs [X] had not been provided in the Closed Bundle, and it is not clear that it was before the Commissioner during the investigation or considered in the Decision Notice. In response to directions, the Appellant confirmed that his request concerned both Mr and Mrs [X]. He explained that he understood that a joint assessment had been undertaken and that he needed both assessments to obtain the full information.

22. The Council stated on 26 June 2018:

- a. By letter to the Appellant of 27 June, that the assessment undertaken on 25 October 2010 related to Mr [X] only, and was not a joint assessment with Mrs [X].
- b. The original request was processed as a request relating to the data of Mr & Mrs [X]. However, when the Appellant requested a review of the Council's decision, no mention was made of Mrs [X] and the review was therefore processed just as a request for the information relating to Mrs [X]. This was not questioned by the Appellant at the time.

23. It also explained not all its records were held electronically. If now seeking the information concerning Mrs [X], there would need to be a manual search of files to consider if there was any information that fell within the scope of this request.

24. The Commissioner chose not to address this matter.

Our Findings

25. We find that the Appellant's request included a copy of the care assessment for Mrs [X] and any other financial information appertaining to her. Given its absence from the Closed Bundle, and in the absence of further submissions on the point, on balance, we find it likely that the material was also absent from the Commissioner's investigation and not considered by her in the Decision Notice. We find she erred in not considering the matter.

26. The Council's explanation as to why Mrs [X] was not considered is not fully supported by the papers before us. We see no indication from the Appellant's request for internal review that he was limited the scope of his request. Accordingly, the internal review should have properly considered the full request.

Conclusion

27. In summary, we find that the information concerning Mr [X] was properly withheld under section 41 FOIA. However, the Commissioner erred in not considering the request insofar as it concerned Mrs [X].

Steps To Be Taken

28. The Council has confirmed that a joint assessment was not undertaken. Having taken into account rule 2 of *the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ('the rules')*, and our finding in relation to the request concerning Mr [X], the importance of proportionality and efficiency, we find that the following steps should be undertaken:

Within five working of the date this decision is promulgated to the Appellant, the Council is required to contact to the Appellant to confirm whether he still seeks the information requested insofar as it concerns Mrs X.

If he does, the Council is required to provide a full response under section 17 FOIA within fifteen working days of receipt of the Appellant's response.

Other

Alternative Resolution

29. We note that this case relates to a matter that has been ongoing for a considerable length of time, and the Appellant seems to have tried hard to find a resolution. In our view, the material is not suited to a disclosure under FOIA, and we are surprised that the Council had not been able to assist in resolving this before it reached this court.
30. We asked in our directions to the Council whether there was an alternative means to resolve the issues. The Council explained the problems in its reply of 8 March 2018. Curiously, this was withheld from the Appellant, and we ordered this disclosed under further directions. Notwithstanding the explanation, we hope that the Council can find a way to help the Appellant to understand what is needed and exactly how he can take the necessary steps to get what is needed. We would anticipate that they may be able to put him in touch with the public body in the vicinity responsible for assisting in these matters. This might be the Principal Registry of the Family Division.

Appellant's Application

31. In his reply to directions, the Appellant asked for the Tribunal to seek for the Council to pay the costs of the solicitor he instructed that is referred to in the papers. This is not within the powers or remit of the Tribunal. He claimed that our directions stated that he had not needed a solicitor. This is a misreading of the directions.
32. The Appellant also requested to understand the Registrar's direction that waived the requirement under rule 23. This requires a respondent to reply to a notice of appeal. After the Council was joined to the appeal, it became a respondent. The Registrar made clear in her directions that it was not necessary for the Council to provide a full response to the Appellant's Notice of Appeal. This was because the Council had been joined in order to respond to the particular points raised in our directions of 19 February. It was therefore not considered necessary, efficient or proportionate to require the Council to make a broader response. The Tribunal has an overriding duty to ensure the case is conducted within a proportionate manner. (*See rule 2 of the rules.*)
33. In various letters, the Appellant made objections that the Respondents' responses had been redacted or that they did not fully address the points raised in the judge's directions. Between 19 February and 5 July there has been extensive correspondence, directions and responses in this case, beyond what is common in this jurisdiction. The judge has repeatedly explained why certain material needs to be kept closed. The judge is satisfied that adequate responses were received for the panel to be able to come to a decision in this case, and that she has scrutinised these responses to ensure that they were not kept 'closed' when it was not necessary. This has meant issuing directions a number of times to reach that position where the judge considered that the Respondents ought to have provided open responses and at an earlier point. The Appellant was given an opportunity to respond (and he did so) when receiving those parts of the responses the she ordered be disclosed to the Appellant where the Respondents had initially sought to keep these closed.

Signed

**Judge Taylor
Date: 9 July 2018**

**Date Promulgated:
12 July 2018**