Case References: EA-2023-0231
Neutral Citation Number: [2024] UKFTT 00153 (GRC)

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by: CVP
Heard on: 30 January 2024
Decision given on: 26 February 2024

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER STEPHEN SHAW
TRIBUNAL MEMBER DR PHEBE MANN

Between

JANE O'CONNOR

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) MINISTRY OF DEFENCE

Respondents

Representation:
For the Appellant: Mr. Barrett (Counsel)
For the First Respondent: Did not appear
For the Second Respondent: Mr Ustych (Counsel)

Decision: The appeal is allowed.

Substituted Decision Notice

Public Authority: Ministry of Defence

Complainant: Jane O'Connor

The Substitute Decision – IC-206964-L3S5:

For the reasons set out below:

1. The public authority was not entitled to rely on section 41 of the Freedom of Information Act 2000 to withhold the requested information.
2. The public authority must take the following steps:
    a. Disclose the withheld information to the appellant within 35 days of the date of this decision.
3. Any failure to abide by the terms of the tribunal's substituted decision notice may amount to contempt which may, on application, be certified to the Upper Tribunal.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice IC-206964-L3S5 of 30 March 2023 which held that the Ministry of Defence ('MoD') was entitled to rely on section 41 of the Freedom of Information Act 2000 (FOIA) to withhold the requested information. The Commissioner did not require the MoD to take any steps.

Factual background

2. Operation Grapple is the name for the testing by the UK of the hydrogen bomb on Christmas Island in 1957-1958. The appellant's late father was a member of the 76 Squadron 'cloud sampling contingent' in Operation Grapple. This means that he was tasked with flying through the atomic cloud, making several cuts at different altitudes, in order to collect information on the radioactivity in the mushroom cloud which formed after the bomb was detonated.

3. The MoD has produced a factsheet describing the yield of each test, and the likely exposure individuals may have experienced as a result of their involvement of the test.[1] The factsheet states that personal dosemeters were carried by 20% of the men present at Operation Grapple, which showed the following in terms of exposure:

> "In general only those men most likely by the nature and location of their duties to be exposed to measurable doses were monitored. Not all of those monitored showed a recordable dose. Fewer than 500 individuals received 5 mSv or more and about 80 of these received 50 mSv. Doses recorded refer to the entire test programme for the individual, and in some cases this will be several years. Of the 80, the majority were RAF crew who took part in cloud sampling."

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data /file/82781/ntvfactsheet5.pdf

4. Before he died the appellant's father has had discussions with her over the years in which he explained that he has spent a great deal of time, with all the illnesses he has had, desperately trying to find out the source of the illnesses because he has always believed that they are linked to his exposure in 1958. After he died she found a large stack of newspaper cuttings including one dated 11 May 1991 entitled 'H-bomb officer died of 'industrial disease' cancer' which is about the verdict of an inquest into the death of the base commander on Christmas Island. At the top of that report the appellant's father has written:

> "In event of my sudden or premature death order an autopsy to see if any claim is justified like the one below. She was successful in her claim."

5. The appellant says that she discovered this too late to ask for an autopsy, but on the basis of that annotation and other discussions with her father it is her view that he would wish his medical notes from the time to be published to enable light to be shed on this issue. Those medical notes are the subject of the FOIA request in issue in this appeal.

6. The appellant's father's will appoints his daughters, the appellant and her sister Rosemary Nicholson, to be his executors and trustees of his estate.

7. The appellant has undertaken not to pursue a claim for breach of confidence in the following terms in her statement dated 26 January 2024:

> "I wish the information to be disclosed under FOIA and I confirm that I, both individually and on behalf of our father's estate, will not pursue a claim for breach of confidence in respect of the information being disclosed and that I waive any and all legal rights to do so."

8. The appellant's sister and co-executor Rosemary Nicholson has made a similar undertaking in her statement dated 29 January 2024:

> "I confirm that I support Jane's request for disclosure of the information relating to our father and I confirm that we, both individually and on behalf of our father's estate, will not pursue any claim for breach of confidence in respect of this information being disclosed and waive any and all legal rights to do so."

9. It is common ground that the Access to Health Records Act 1990 (the AHRA) does not apply to medical records created before it came into force and therefore cannot assist the appellant in relation to accessing her father's medical records (outside the FOIA process). In relation to medical records after that date the AHRA provides a right of access to health records after a patient's death to the patient's personal representative:

> "3 Right of access to health records.
>
> (1) An application for access to a health record, or to any part of a health record, may be made to the holder of the record by any of the following, namely—

…

(f) where the patient has died, the patient's personal representative and any person who may have a claim arising out of the patient's death.

(2) Subject to section 4 below, where an application is made under subsection (1) above the holder shall, within the requisite period, give access to the record, or the part of a record, to which the application relates—

(a) in the case of a record, by allowing the applicant to inspect the record or, where section 5 below applies, an extract setting out so much of the record as is not excluded by that section;

(b) in the case of a part of a record, by allowing the applicant to inspect an extract setting out that part or, where that section applies, so much of that part as is not so excluded; or

(c) in either case, if the applicant so requires, by supplying him with a copy of the record or extract.

(3) Where any information contained in a record or extract which is so allowed to be inspected, or a copy of which is so supplied, is expressed in terms which are not intelligible without explanation, an explanation of those terms shall be provided with the record or extract, or supplied with the copy.

(4) No fee shall be required for giving access under subsection (2) above other than the following, namely—

(a) where access is given to a record, or part of a record, none of which was made after the beginning of the period of 40 days immediately preceding the date of the application, a fee not exceeding [such maximum as may be prescribed for the purposes of this section by regulations under section 7 of the Data Protection Act 1998]; and

(b) where a copy of a record or extract is supplied to the applicant, a fee not exceeding the cost of making the copy and (where applicable) the cost of posting it to him.

(5) For the purposes of subsection (2) above the requisite period is—
Webber v Information Commissioner and another [2013] UKUT 648 (AAC)

(a) where the application relates to a record, or part of a record, none of which was made before the beginning of the period of 40 days immediately preceding the date of the application, the period of 21 days beginning with that date;

(b) in any other case, the period of 40 days beginning with that date.

(6) Where—

(a) an application under subsection (1) above does not contain sufficient information to enable the holder of the record to identify the patient or,. . . , to satisfy himself that the applicant is entitled to make the application; and

(b) within the period of 14 days beginning with the date of the application, the holder of the record requests the applicant to furnish him with such further information as he may reasonably require for that purpose,

subsection (5) above shall have effect as if for any reference to that date there were substituted a reference to the date on which that further information is so furnished.

4 Cases where right of access may be wholly excluded.
…
(3) Where an application is made under subsection (1)(f) of section 3 above, access shall not be given under subsection (2) of that section if the record includes a note, made at the patient's request, that he did not wish access to be given on such an application."

10. The Daily Mirror has obtained and published a list of some of the appellant's blood test results in November 2022.

The request

11. The appellant made the request which is the subject of this appeal on 5 May 2022 as follows:

> "…Grapple nuclear tests on Christmas Island in 1957 and 1958.
>
> …I would like to know under the Freedom of Information Act what information you hold about my father's health -specifically blood test results – during this time"

12. At the request of the MoD the appellant clarified her request on 9 June 2922, stating that 'I would like to see any blood counts or urine analyses, and if you are able to provide the health file for the full year I would appreciate it.'

13. The MoD responded on 2 July 2022, confirming that it held information within the scope of the request but withholding it under section 41 (information provided in confidence). It upheld its decision on internal review on 12 December 2022.

Decision notice

14. The Commissioner accepted that medical records constituted information provided by a third party. He was satisfied that the information had the necessary quality of confidence. The Commissioner was of the view that at the time that the medical records were created, the appellant's father would not have expected such information to be disclosed to the world at large. The information was imparted in circumstances importing an obligation of confidence.

15. The Commissioner considered that as medical records constituted information of a personal nature, there was no need for there to be any detriment to the confider in terms of tangible loss, in order for it to be protected by the law of confidence. The Commissioner considered that disclosure would be contrary to the deceased person's reasonable expectation of maintaining confidentiality in respect of his medical records.

16. The Commissioner emphasised the distinction between disclosure under FOIA under private or limited disclosure of information to the next of kin. Whilst the Commissioner acknowledged the wider issue of how nuclear testing affected service personnel, in terms of a disclosure under FOIA, the Commissioner considered that there was a particularly strong public interest in ensuring that patient confidentiality, and furthermore, that the relationship between patients and Service medical practitioners is not undermined. For these reasons the Commissioner concluded that there was not a sufficiently compelling argument in support of a public interest defence against an action for breach of confidence.

Grounds of appeal

17. The Grounds of Appeal are, in essence, that the Commissioner was wrong to conclude that the exemption was engaged, because:
    17.1. The appellant, as her father's executor and personal representative, holds and exercises any right of confidence that applies to the relevant information. Where the appellant is instructing the MoD to disclose the information and confirming that they are released from any continuing obligation of confidence the MoD is not entitled to rely on section 41.
    17.2. Disclosure is in accordance with the appellant's father's wishes he had expressed when he was alive.
    17.3. The Access to Health Records Act 1990 (AHRA) makes clear that it is executors/personal representatives who have the right to determine whether medical records of deceased family members should or should not be disclosed. Because the records she has requested pre-date 1950 the AHRA does not apply and FOIA is the only route for disclosure.
    17.4. In the circumstances, there is also a public interest defence that would apply to breach of confidence which outweighs any weight that could be given to a hypothetical claim of breach of confidence relating to the information requested.
    17.5. The MoD is using a duty of confidence owed to my deceased father to avoid disclosing information that it considers unhelpful or embarrassing.

The response of the Commissioner

As the executor, the Appellant holds and exercises the right of confidence that applies to the relevant information and so MoD cannot apply section 41 to refuse to provide the information

18. The Commissioner submits that the duty of confidence continues to be owed to the deceased and does not pass on to the executor upon death. The Commissioner notes that the executor or personal representative could bring a claim for breach of confidence, but this is not the same as stating the duty of confidence is automatically

applied to them upon the death of the relevant person. The original confider would not have been entitled to the information under FOIA because of section 40(1) FOIA.

The ICO are incorrect to state disclosure would breach her father's confidence as it was his wish, when he was alive, for the records to be investigated

19. The duty of confidence is an absolute exemption and the Commissioner submits that due to the personal nature of such information (medical records), it is not even necessary to establish whether the confider would suffer a detriment as a result of disclosure.

20. The Commissioner submits that the fact her father stated, when he was alive, for the records to be investigated, is irrelevant as the Commissioner is applying the law as it stands now, not in the past.

The ICO were incorrect to state AHRA was irrelevant. This is because the Appellant cannot invoke AHRA to see her father's records and so FOIA is the only available route of access

21. It is submitted that the application of section 41 cannot be overridden because the AHRA process is not available to the Appellant.

The MoD are using section 41 to avoid disclosing information that it considers unhelpful or embarrassing.

22. The Commissioner submits that this ground does not overturn or weaken any of the strands of section 41 nor the Commissioner's conclusions.

Response of the second respondent

23. The second respondent submits that the elements of the test for an actionable duty of confidentiality claim are clearly made out in the context of medical records. It is reasonable to suppose that patients with medical records created before the introduction of AHRA had an understanding and expectation that their sensitive medical information would be kept confidential even after their death.

24. It is submitted that the Appellant has not identified sufficient countervailing public interest factors to displace the starting point of the assumption that confidentiality should be maintained.

25. The second respondent submits that the fact that the appellant's father wanted enquires to be made in respect of concerns about the health impact of his military service is not the same as electing to have his medical information disclosed to the world.

26. Insofar as any detriment element continues to apply, it may be sufficient detriment to the confider that information is to be disclosed to persons whom he would prefer not to know of it. In the case of FOIA, this is the world at large.

27. The second respondent submits that the duty of confidence is not owed to the appellant, because it is not an item of property but a question of conscience. An

executor does not inherit the ability to waive the duty of confidence. The MoD notes that the will identifies two executors.

28. The second respondent submits that the suggestion that the MOD are using the section 41 exemption to avoid disclosing unhelpful or embarrassing information, this is not a valid ground for appeal but, in any event, is not accurate and is speculative.

29. The second respondent adopts the arguments made in the Commissioner's response.

Legal Framework

Section 41

30. Section 41 provides, so far as relevant:

> **"S 41 – Information provided in confidence**
>
> (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."

31. The starting point for assessing whether there is an actionable breach of confidence is the three-fold test in **Coco v AN Clark (Engineers) Ltd** [1969] RPC 41, read in the light of the developing case law on privacy:

(i) Does the information have the necessary quality of confidence?
(ii) Was it imparted in circumstances importing an obligation of confidence?
(iii) Is there an unauthorised use to the detriment of the party communicating it?

32. The common law of confidence has developed in the light of Articles 8 and 10 of the European Convention on Human Rights to provide, in effect, that the misuse of 'private' information can also give rise to an actionable breach of confidence. If an individual objectively has a reasonable expectation of privacy in relation to the information, it may amount to an actionable breach of confidence if the balancing exercise between article 8 and article 10 rights comes down in favour of article 8.

33. Section 41 is an absolute exemption, but a public interest defence is available to a breach of confidence claim. Accordingly there is an inbuilt balancing of the public interest in determining whether or not there is an actionable breach of confidence. The burden is on the person seeking disclosure to show that the public interest justifies interference with the right to confidence.

The role of the Tribunal

34. 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 or, where the Commissioner's decision involved exercising discretion, whether

he should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

List of issues

35. The issues for the tribunal determine are:

35.1. Is the disputed information confidential within the meaning of section 41(1) FOIA?

35.2. For any information which is confidential, would disclosure be in the public interest such that it would not amount to an actionable breach of confidence?

Evidence

36. We read an open and a closed bundle.

37. The closed bundle consists of the withheld information. The tribunal was satisfied that it was necessary to withhold the information in the closed bundle under rule 14.

38. We read witness statements and heard oral evidence from Brigadier Duncan Robertson Wilson, Medical Director to the Surgeon General, UK Defence Medical Services.

39. For the reasons given in the hearing, we permitted the appellant to rely on additional witness statements from the appellant herself and her sister, Rosemary Nicholson.

40. We held a closed session. The following gist of the session was provided to the appellant in the hearing:

"1. The Panel asked Brigadier Wilson ('BW') whether the urine and blood test results in the Closed Bundle were unusual and/or consistent with exposure to radiation. BW's evidence was that:

a) Dosimeter readings are not held on the medical file but would show levels of exposure

b) Urine tests looked for signs of gross kidney abnormality. Could not see anything unusual in those urine tests

c) There were 7 blood tests in 1957-1958. Not an expert on radiation exposure but would say there is some evidence consistent with radiation exposure—lowered white blood cell counts. Any inferences on cause and effect would need more expert input. However, the blood counts were back to normal in tests done subsequently in the 1960's.

d) The three significant blood test results have already been released within a list provided by the Atomic Weapons Establishment (on the Daily Mirror website)

2. The Panel asked BW to clarify which/how many blood test results in the Closed Bundle have been released via the above list. BW said that:

a) There appears to be one blood test result which was not in the above list, and another blood test result which may be on the list (unclear due to manuscript amendment in medical record). Therefore either 5 or 6 of the blood tests in 1957-1958 are on the list released.

b) The test (s) in the medical records but not on the AWE list probably relate to routine crewman checks.

c) Asked by MOD counsel about medical records in 1957-1958 (which were not urine/blood samples), BW said that:

d) From his review, no information or records consistent with radiation-related problems. Mostly routine aircrew medicals, he was mostly fit and well."

Submissions

41. We read a skeleton argument from the second respondent and heard and took account of oral submissions from both parties.

Submissions of the appellant

42. Mr Barrett submits that where information has been provided by a third party, the operative question under section 41 is whether disclosure up to the date of the request would give rise to an actionable breach of confidence. The appellant submits that the purpose of the provision is very simple. It is to ensure that a public body is not put in a position by being required to disclose information under FOIA where it is going to be sued for a breach of confidence.

43. Mr Barrett submits that the critical factor in this appeal is that the only legal person with any right to bring a claim for breach of confidence are the co-executors of the deceased's estate.

44. Mr. Barrett submits that an obligation of confidence is owed under 2 causes of action, in contract and in equity (conscience), but under either cause of action it is a legal obligation and the corollary of the legal obligation on the authority is that there is a right holder. While the appellant's father was alive, he was the right holder. Under implied contract or equity (conscience) he had a right that was exercisable against the MoD. When he died, his right, in so far as it can persist beyond death was transferred into his estate. The only persons who can exercise rights in respect of the estate are the appellant and her sister as co-executors.

45. Mr. Barrett submits that where both of those persons confirm that they wish disclosure to be made and have confirmed unequivocally that they waive any potential claim for breach of confidence in respect of such disclosure, then disclosure would not give rise to any actionable breach of confidence.

46. Mr. Barrett illustrated this by using the following example. If the MoD acquired information relating to B in circumstance that give rise to an obligation of confidence,

if B subsequently requested that the MoD disclosure the information under FOIA and made it unequivocally clear that he would not bring a claim for breach of confidence, there would be no question that the MoD could refuse to provide the information under section 41. Mr. Barrett submits that there is no difference of legal principle or substance between that position and the position in this appeal.

47. In relation to the public interest, Mr. Barrett submitted that in deciding what weight to be given to maintaining any obligation of confidence it is highly relevant that the executors who could exercise the relevant legal right have requested disclosure and expressly waived the right to bring legal action.

48. Mr. Barrett submitted that release of the information could not undermine the future confidence of members of the armed forces in sharing information when dealing with MoD medical personnel, because all information going forward is subject, in any event, under the AHRA to a right of access by the personal representative of the deceased in any event, who are then unrestricted in the use they wish to make of that information including publication.

49. Mr. Barret submitted that there was a public interest in disclosure because tens of thousands of members of the armed forces are affected and hundreds or thousands of their children are now in the position where their parents are deceased and there is no legal route to obtain information about their parent's health other than under FOIA. The interests of those individuals and the interests of transparency are an important consideration.

50. In response to questions from the tribunal, Mr. Barrett submitted that the fact that the executors have not seen the requested records does not undermine the effectiveness of their consent to publication absent any issues of legal capacity.

51. Mr. Barrett submitted that there was a clear and substantive distinction between this appeal and the decision of the Upper Tribunal in **Webber v Information Commissioner and another** [2013] UKUT 648 (AAC). In **Webber** the appellant was not the personal representative or the executor and there was no evidence available from those who would or might exercise the right to bring an action for breach of confidence.

Skeleton argument of the second respondent.

52. The second respondent submits that the AHRA does not apply. In the 1950s the appellant's father would not have expected blood test data to be disclosed.

53. The Will of the appellant's late father shows that the appellant and her sister were appointed as executors. There is no evidence as the other executor's position. The appellant's own preference does not remove the risk of legal action.

54. Section 41 does not contain a 'carve out' of information requested by legal representatives/executors. The Freedom of Information (Scotland) Act 2002 contains an absolute exemption for a deceased person's medical records.

55. In **Bluck v IC and Epsom & St Helier University NHS Trust** (17 September 2007), the basis of the duty of confidence is treated by the information rights tribunal not as a matter of inherited property but as lying "in conscience" (paragraph 23), with a focus on preventing "unconscionable behaviour that would undermine confidence in the secrecy of medical consultations" (paragraph 26). Where FOIA disclosure amounts to disclosure 'to the world', the interest in preventing such 'unconscionable behaviour' (not by the appellant but by third parties) remains even when an executor has requested the information to be provided.

56. The appellant has not inherited her father's right to access his records under data protection, and he could not have made a FOIA request for this own personal data.

57. The annotated news article does not show that her father elected to have his medical information disclosed to the world. The appellant's late father's wish for enquiries to be made in the generic sense does not take the appellant's case further.

58. In the specific circumstances of this case, some blood test documents were erroneously disclosed to the Appellant following a subject access request to the Atomic Weapons Establishment (paragraph 22 of BG WS). However, a release in this manner is not synonymous to the information being in the public domain.

59. The MOD attaches great importance to the confidential nature of the relationship between patients and Service medical practitioners and, as medical records relating to a deceased service person contain information which the patient would have expected to remain confidential, the MOD would not wish to undermine that relationship.

60. The Appellant has not identified sufficient countervailing public interest factors to displace the starting point of the assumption that confidentiality should be maintained. Insofar as the Appellant suggested that information is being sought as a means to consider/bring a civil claim, alternative mechanisms exist in the civil courts for applying for such disclosure (to the applicant only, not to the world at large).

61. The appellant's assertions underpinning her final ground of appeal are purely speculative. In any event, BG at paragraph 18 of his statement refutes the suggestion of an improper motivation and explains steps already taken to provide information about the impact of nuclear testing.

Oral submissions of the second respondent

62. Mr. Ustych confirmed that the MoD understood the scope of the request to include full medical records for 1957 and 1958 and the blood and urine tests before and after that period.

63. In relation to the implications of having evidence from both co-executors, Mr. Ustych did not fundamentally disagree with Mr. Barrett's analysis of how an action for breach of confidence works i.e. that there has to be someone who has standing to bring a claim and that when the individual in question dies those who have standing are the executors/personal representative. Mr. Ustych submitted that the difference between them related to the effect of the **Webber** case.

64. Mr. Ustych submitted that the statement of the Upper Tribunal in **Webber** at paragraph 44 was a statement of principle and not tied to the facts of the case:

> "43. Mr Barrett returned to his argument before me. He first made the point that the actionability was to be established at the time of the application. I have no issue with that. He then argued that the plain and ordinary meaning of section 41 was that it only applied if a public authority could establish that disclosure of the information would expose the authority to a successful claim for breach of confidence.
>
> 44. Miss John submitted that this was too narrow an approach to section 41(1)(b) both as to the time frame and as to the test of actionability. I agree. I also consider that the argument for the appellant focuses too narrowly on the particular circumstances of the appellant's own application. The test must be applied generally to any information that comes within the potential scope of the provision, so for example it must apply equally to any release of any information within the scope of the section about any deceased person by any public authority."

65. Mr. Ustych submitted that the Upper Tribunal in **Webber** was saying that it was not about whether anybody was going to sue the public authority, but that the tribunal had to take a step back and effectively assess the nature of the information and if it would, if disclosed, trigger a section 41 breach of confidence claim, rather than focussing on the specific legal situation vis-à-vis any executors or similar.

66. Mr. Ustych submitted that the first-tier tribunal decision in **Armstrong v Information Commissioner and Nottinghamshire NHS Trust** [2015] WL 4874768 was, although not binding, a helpful illustration of how Webber was interpreted by that tribunal. The tribunal in that case considered itself bound by certain points of principle set out by the Upper Tribunal, which it set out at paragraph 12 as follows:

a. The effect of a disclosure in response to a FOIA request is to put the disclosed information into the public domain;

b. Medical records held by a public authority constitute information "obtained" by it from the patient in question;

c. Such records, being " patently intimate personal information" , fall within the scope of information protected from unauthorised disclosure by the law of confidence by virtue of the nature of the information and the circumstances in which the public authority came to hold it;

d. Disclosure of such records would be actionable whether or not there was at the relevant time any person able or likely to bring such an action: it was necessary only that the information was of the kind that would be open to action if disclosed without authority.

67. Mr. Ustych submitted that this accorded with Webber's 'slightly more abstract' way of looking at a breach of confidence claim.

68. Mr. Ustych noted that the tribunal did go on to consider the evidence of consent by family members and submitted that an important point is the question of the date at which the evidence of consent is to be considered. In **Armstrong** the tribunal had evidence that the executors consented at the date of the hearing but stated, at paragraphs 26 and 30:

> "The difficulty facing the Appellant is that we are required by FOIA section 57, read in conjunction with section 50, to consider, not whether the requested information should be disclosed today, but whether the Information Commissioner was right to decide that the Council had dealt with the request in accordance with the statute. The issue must therefore be assessed as at the date of the refusal. And at that stage the Trust did not have the consent of the deceased's children and no one had been appointed as his personal representative.
> …
> 30. We conclude that, as at the date of the Trust's rejection of the information request, it cannot be said that the Trust would have had a defence to a claim for breach of confidence based on the consent of all those who might have been a position to object to disclosure."

69. Mr. Ustych submitted that the appellant's request made no reference to her being an executor and that was not information available when the decision was made on 1 July 2021. The mention in the request for an internal review that the appellant as his next of kin had a legal right to access his records post-dates the refusal and is not a reference to being executor. It is only when the complaint is made to the Commissioner on 14 December 2022 that there is is a reference to the status of executor. When the will was provided the MoD flagged up the point about there being no consent from the co-executor and that was only provided yesterday.

70. Mr. Ustych submitted that, as per **Armstrong,** that means that at the relevant point of time for the purposes of this appeal the MoD would not have had a defence to a claim for breach of confidence based on the consent of all those who might have been in a position to object to its disclosure.

71. Although in **Armstrong** the tribunal ultimately concluded that there was a public interest defence so section 41 did not apply, Mr. Ustych submitted that the tribunal had evidence before it as to the executor's stance at the date of the request and this tribunal does not have that evidence in this appeal.

72. In response to questions from the Judge Mr. Ustych accepted that the evidence given by the appellant and her sister did not suggest that their view has changed in any way since the request was made, but said that his primary submission was that in accordance with **Webber** the tribunal is not looking at the level of individual detail. The tribunal is looking at the nature of the information and the consequences of their disclosure.

73. In relation to the public interest and expectations of confidentiality, Mr. Ustcyh submitted that the expectation in relation to medical records created before the AHRA was that confidentiality would be preserved and there is a public interest in confidentiality which goes beyond any harm to the individual person and their family.

The military's ability to provide care to service personnel depends on that relationship being preserved. This might be diminished by disclosure in circumstances that go outside the scope of the AHRA, which might result in individuals losing confidence in the confidential relationship.

74. It is accepted that there is a significant public interest in this issue at least in the sense that it is a matter of public discussion and concern. It is accepted that what the appellant's late father thought is impactful, but in spite of that concern he did not submit a subject access request.

75. Mr. Ustych submitted that the withheld information can be divided into categories. First, the blood test results, most of which have been published because they appear in the list published by the Daily Mirror. There are one or two that have not been dicsclosed. Second, a large body of medical records.

76. Mr. Ustych submits that the identified public interest in disclosure will apply to a greater extent to the blood tests than to the other medical records. Further there is strong privacy element to the remainder of the records which might contain information that is embarrassing or highly personal. Brigadier Wilson's evidence was that the vast majority of the medical records did not contain anything relevant to the identified public interest.

77. Mr. Ustych submitted that unlike in a normal FOIA appeal the starting point in relation to section 41 is the presumption that confidences will be maintained.

Mr. Barrett's reply

78. Mr. Barrett submitted that whilst the relevant date was the date of the response to the request, the tribunal could take account of all facts and matters at that date, and it is not confined to those that were known to the public authority at the time.

79. Mr. Barrett submitted that an important distinction between this appeal and **Webber** is that the appellant in **Webber** could have been appointed as personal representative and used the AHRA to obtain the information, which caused the Upper Tribunal a degree of frustration because their view was that was the proper route. The decision is dealing with those particular facts and the analysis in paragraphs 44-47 must be seen in that light. Mr. Barrett submitted that the Upper Tribunal is not saying, and could not be saying, that section 41 would apply in circumstances where the parties with the related legal right have specifically waived or disclaimed any claim.

80. In relation to the public interest balance, Mr. Barrett submitted that Brigadier Wilson's personal expectations of confidentiality are not relevant and that the fact that no subject access request was made by the appellant's father while he was alive is not relevant. It cannot be assumed that he was aware of the right to do so.

Discussion and conclusions

Scope of the request

81. Although it appeared during the course of the hearing that there might be some dispute as to the scope of the request, Mr. Ustych helpfully clarified the MoD's understanding of the scope of the request in his reply.

82. Looking at the request objectively, in the light of the surrounding circumstances, and in the light of the clarification provided by the claimant, we find that the request is for the full medical records from 1957 and 1958 and any blood and urine tests from before and after that period. That is the information in the closed bundle.

Section 41

The factual circumstances at the relevant date

83. We must decide whether there was an actionable breach of confidence at the date of the response to the request. That is the relevant date. We are not limited to considering matters that were known to the MoD and it is permissible to have regard to later- occurring matters if they cast light on the circumstances at the reference date.

84. The tribunal has been provided with evidence from the deceased's executors which was not available to the MoD at the time. On the basis of that evidence two things are clear:

84.1. The executors consent to the disclosure of the information.
84.2. The executors will not pursue a claim for breach of confidence in respect of the information being disclosed.
84.3. The executors have waived any and all legal rights to pursue a claim for breach of confidence.

85. There is no evidence to suggest that the views of the executors have changed since the relevant date. In our view that is highly unlikely. The tribunal takes the view that this evidence casts light on their views at the relevant date. On the basis of the evidence before us today, we find that at the relevant time in July 2022:
85.1. The executors consented to the disclosure of the information and
85.2. The executors would not have pursued a claim for breach of confidence in respect of the information being disclosed.

86. We know that the executors had not yet expressly waived their legal rights to pursue a claim for breach of confidence at the relevant date, and the fact that they have done so recently does not alter that for the purposes of this appeal.

Is the test for an actionable breach of confidence satisfied?

87. In determining this question we apply the three-fold test in **Coco v AN Clark (Engineers) Ltd** [1969] RPC 41, read in the light of the developing case law on privacy:

87.1. Does the information have the necessary quality of confidence?
87.2. Was it imparted in circumstances importing an obligation of confidence?
87.3. Is there an unauthorised use to the detriment of the party communicating it?

88. We accept that the first and second limbs are satisfied.

89. We agree with Mr. Bartlett that, on more straightforward facts, if the tribunal had evidence before it that the person who had provided information to a public authority in confidence consented to disclosure to the world, and there was no-one else who was entitled to maintain a claim of confidentiality, the public authority would not be able to rely on section 41 in relation to a FOIA request.

90. We take the view that this would be the case even if the evidence which showed that person consented only emerged during the tribunal hearing, and was not known the public authority at the time, as long at the tribunal was satisfied that the consent was present at the relevant date.

91. The tribunal agrees with the following statement in Coppel, 'Information Rights', volume 1, 34-009 in relation to consultation with those whose rights of confidentiality would be breached by disclosure:

> "If the persons consulted consent to disclosure, and no other person is entitled to maintain any claim to confidentiality with regard to the information in question, then the public authority will be released from any obligation of confidence that it would otherwise have had, and it will not be able to rely on the exemption to resist disclosure."

92. Further we note the following passage from Toulson and Phipps on Confidentiality (4th Ed.) at paragraph 5-052: "A person cannot be in breach of a duty of confidence to another by disclosure of information or material to which the other consents."[2]

93. The First-tier Tribunal in **Armstrong** categorised consent as a 'defence' to a claim for breach of confidence, but it might be also be categorised as a failure to satisfy limb three of the **Coco** test. That is because disclosure would not be an 'unauthorised' use, where the person in question consents to disclosure.

94. The fact that consent would defeat a claim for breach of confidence can be tested by considering the approach a Judge might take in an action for breach of confidence, if the evidence showed that the claimant had consented to disclosure at the relevant time.

95. The position is complicated in this appeal by the fact that the appellant's father is deceased. Whilst the appellant's father was alive, the MoD owed him an obligation of confidence, in contract and in equity (conscience). He was the person who could have consented to disclosure. We find that when he died, the duty and the correlative right, whether in contract or equity, was transferred to his estate.

96. The Upper Tribunal in **Webber** assumed, without deciding, that an executor or personal representative could bring an action for breach of confidentiality.

97. The tribunal notes the following passages from Toulson and Phipps on Confidentiality (4th ed):

[2] The following case is cited in support of that principle: Tournier v National Provincial and Union Bank [1924] 1 K.B. 461 at 473

> "Privilege may survive in favour of a deceased's estate and it is hard to see why a court should not recognise the survival of an obligation of confidentiality. The period for which any duty of confidentiality could reasonably be expected to continue would depend on many circumstances, including the nature of the relationship, the nature of the information and any harm which might be caused to the deceased's estate or, possibly, those whom the deceased would reasonably have wished to protect, as well as any grounds for justifying disclosure." (para 6-025)
>
> "Equity may impose a duty of confidentiality towards another after the death of the original confider. The question is not one of property (whether a cause of action owned by the deceased has been assigned) but of conscience.
>
> It is open to the courts to regard divulgence by a doctor of information supplied in confidence by a patient who has since died as being unconscionable as well as unprofessional. If so, there is no reason in principle why equity should not regard the doctor as owing a duty of confidence to the deceased's estate, consonant with the maxim that equity will not suffer a wrong to be without a remedy." (paragraph 10-061)

98. The tribunal notes that paragraph 10-061 expressly recognises that the duty of confidence would be owed by the doctor *to the deceased's estate*. We agree with that. We do not agree with the Commissioner's position, set out at paragraph 22 of the grounds of appeal that the duty is not owed to the estate.

99. Further, in the tribunal's view, just as an executor or personal representative have the power to waive privilege after an individual's death[3], in our view an executor or personal representative has the power to consent to or to authorise disclosure of confidential information.

100. In our view, this is sufficient to allow the appeal. Both executors consented to disclosure at the relevant time. There is therefore no actionable breach of confidence and section 41 is not engaged.

101. Both parties addressed us on the effect of **Webber.** The Upper Tribunal in that appeal was considering the question of whether the First-tier Tribunal was correct to decide that the application of section 41 could not be avoided on the ground that there was no personal representative.

102. We agree with the tribunal in **Armstrong** that the following principles were set out in **Webber**:

> a. The effect of a disclosure in response to a FOIA request is to put the disclosed information into the public domain;
>
> b. Medical records held by a public authority constitute information "obtained" by it from the patient in question;

[3] See paragraph 33 of Addlesee v Dentons Europe LLP [2019] EWCA Civ 1600

c. Such records, being " patently intimate personal information" , fall within the scope of information protected from unauthorised disclosure by the law of confidence by virtue of the nature of the information and the circumstances in which the public authority came to hold it;

d. Disclosure of such records would be actionable whether or not there was at the relevant time any person able or likely to bring such an action: it was necessary only that the information was of the kind that would be open to action if disclosed without authority.

103. We do not consider that **Webber** prevents a tribunal from reaching the conclusion that there is no actionable duty of confidence where there is evidence that those who to whom the duty of confidence is owed consent to disclosure.

104. For those reasons we conclude that there was no actionable breach of confidence at the relevant time. We do not need to go on to consider the public interest balance.

Signed Sophie Buckley Date: 26 February 2024
Judge of the First-tier Tribunal