



**Tribunals Service**  
Information Tribunal

**Freedom of Information Act 2000 (FOIA)**

Heard at Procession House, London

Decision

Promulgated

Date 10 August 2007

17 September 2007

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

Chris Ryan

And

LAY MEMBERS

Rosalind Tatam

Michael Hake

Between

PAULINE BLUCK

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

And

EPSOM & ST HELIER UNIVERSITY NHS TRUST

Additional Party

**Representation:**

For the Appellant: Huw P Davies - Counsel

For the Respondent: Timothy Pitt-Payne - Counsel

For the Additional Party: Neil Davy - Counsel

**Decision**

The Tribunal Upholds the decision notice dated 23 October 2006 and dismisses the appeal.

## **Reasons for Decision**

### **The request for information.**

1. On 16 June 1998 the Appellant's daughter, Karen Davies died at the Epsom General Hospital at the age of 33. At the time the Appellant was provided with a certain amount of information about the treatment her daughter had received but was not informed of any deficiencies in the standard of care. Approximately 5 years later the Appellant discovered that the Hospital's treatment of her daughter had not been satisfactory, that it had admitted liability for her daughter's death and had reached a settlement with her widower, on behalf of himself and two children of the marriage, under which a substantial compensation payment had been made. Since that time the Applicant has tried to obtain further information about Karen Davies' death from the Hospital and from the Epsom and St Helier University Hospital NHS Trust, which managed the Hospital ("the Trust"). However, she discovered that the Trust was not prepared to disclose or share any details concerning her daughter's treatment without the consent of Karen Davies' widower, as next of kin. That consent has been refused and this Appeal results from the Appellant's attempt to overcome that refusal by making a request for information under the Freedom of Information Act 2000 ("FOIA").
2. On the 10th of March 2005 the Appellant submitted a request to the Trust for all the information it held about Karen Davies including her health records. On 24th of March 2005 the Trust wrote in reply stating that the information requested was confidential and could only be disclosed with the consent of Karen Davies' next of kin, namely, her widower. It claimed that the information was therefore exempt from disclosure under section 41 of the FOIA. The Appellant's response to that refusal was to complain to the Information Commissioner who, following a lengthy investigation, issued a Decision Notice on 23 October 2006. The overall conclusion of the Decision Notice was that the health records in respect of Karen Davies should not be disclosed. The Information Commissioner's reasons were that they were subject to an obligation of confidence and that the obligation was capable of surviving the death of the person to whom the records related. He concluded that, as an action could therefore be brought by the personal representatives of the deceased person if the information were to be disclosed otherwise than under the FOIA, the exemption provided under section 41 applied. That exemption is an absolute one, so that it was not necessary for the Information Commissioner to proceed from there to consider whether the public interest in maintaining that exemption was outweighed by the public interest in disclosure.
3. The Decision Notice also found that the trust had not satisfied one of the procedural requirements of the FOIA and that certain other information which the Trust held in relation to legal matters, should not be disclosed because it fell within the exemption provided for by

section 42 of the FOIA (legal professional privilege) and the public interest in favour of maintaining that exemption outweighed the public interest in disclosure. Neither of these points forms part of the appeal. It has also now been clarified that the only information in which the Appellant is interested is the health record of Karen Davies (which for convenience we will refer to as “the Medical Records”).

### The Appeal to the Information Tribunal

4. On 6 November 2006 the Appellant launched an appeal to this Tribunal challenging a number of the conclusions reached in the Decision Notice. By an Order dated 8 January 2007 the Tribunal ordered that the Trust be joined as a party to the Appeal. In its Reply to the Grounds of Appeal the Trust relied, not only on FOIA section 41, but also section 44 (information whose disclosure is prohibited by law) and section 40 (personal information). Both the Appellant and the Information Commissioner were content for the Trust to introduce, at the appeal stage, grounds of objection to disclosure which had not been put forward during the Information Commissioner’s investigation. We accordingly heard argument on them, in the course of a hearing in London, which took place on 10 August 2007. However, we are concerned that public authorities should not feel that they are free to take a relaxed attitude to the analysis of available exemptions to disclosure during the Information Commissioner’s investigation, on the basis that they will be able to raise new grounds at the appeal stage. In the course of the hearing we considered witness statements prepared by the Appellant, Richard Davies (Karen Davies’ widower), Dr Andrew Hoy (a consultant in palliative medicine at the Trust) and Mr Michael Keegan (a Policy Advisor within the Standards and Ethics Team at the General Medical Council). Dr Hoy made himself available during the hearing to answer a number of questions from the panel on points covered by his Witness Statement.
5. Section 58 of the FOIA provides that on an appeal this Tribunal must consider whether or not the Decision Notice was in accordance with the law or, to the extent that it involved an exercise of discretion, whether the Information Commissioner ought to have exercised his discretion differently. In the process we may review any finding of fact on which the notice in question was based. On this Appeal we received evidence that had not been available to the Information Commissioner, as is often the case. As there was a question raised at one stage on the burden of proof on an appeal to this Tribunal we should make it clear that the burden rested with the Appellant to satisfy us that the Appeal should be allowed.
6. We have decided that the Medical Records should not be disclosed because they fall within the scope of FOIA section 41 and are accordingly exempt from disclosure. We set out our detailed reasons for reaching that conclusion in paragraphs 7 to 30 below. Although our decision on that issue is sufficient to dispose of the Appeal we have

added some comments on the impact of section 44, as we see it, (paragraphs 31 and 32) and on section 40 (paragraph 33).

The section 41 exemption – breach of confidence.

7. Section 41 is in the following terms:

***"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."*

It is common ground between the parties that the Medical Records contain information obtained from a third person, namely Karen Davies, so that the requirement of section 41(1)(a) is satisfied. It is also common ground that section 40(1)(b) refers, on the facts of this case, to the protection of confidences established as an equitable principle over many years. The most frequently quoted statement of the constituent elements of the cause of action is to be found in the first instance decision of Megarry J in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415. It reads:

*"in my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene in the Saltman case on p.215 must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it..."*

Less frequently quoted is the doubt, expressed later in the same judgment, as to whether an element of detriment is in fact required in all cases. On that Megarry J. said:

*"Some of the statements of principle in the cases omit any mention of detriment; others include it. At first sight, it seems that detriment ought to be present if equity is to be induced to intervene; but I can conceive of cases where a plaintiff might have substantial motives for seeking the aid of equity and yet suffer nothing which could fairly be called a detriment to him, as when the confidential information shows him in a favourable light but gravely injures some relation or friend of his whom he wishes to protect"*

8. In the later House of The 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."*

Lord Goff went on to agree with Megarry J. in *Coco v Clark* that it was appropriate *"to keep open the question whether a detriment to the plaintiff is an essential ingredient of an action for breach of confidence"*.

In the same case Lord Keith of Kinkel also raised the question of whether there would be any need to establish a detriment in cases involving an invasion of personal privacy. He said:

*"The right to personal privacy is clearly one which the law should in this field seek to protect.... Further, as a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence even when the confider can point to no specific detriment to himself. Information about a person's private and personal affairs may be of a nature which shows him up in a favourable light and would by no means expose him to criticism .... So I would think it a sufficient detriment to the confider that information given in confidence is not to be disclosed to persons to whom he would prefer not to know of it, even though the disclosure would not be harmful to him in any positive way."*

9. Those statements of English Law must now be read in the context of the European Convention on Human Rights which has direct effect in English law as a result of the Human Rights Act 1998. Article 8 of the Convention is as follows:

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"*

Article 10 may also come into play in confidential information cases. It reads:

1. *Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
  2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*
10. In *Ash v McKennitt* [2006] EWCA Civ 1714 the Court of Appeal recently described the relationship between the Convention and the traditional approach in this area of law in these terms:

*"... in developing a right to protect private information, including the implementation in the English courts of articles 8 and 10 of the European Convention on Human Rights, the English courts have to proceed through the tort of breach of confidence, into which the jurisprudence of articles 8 and 10 has to be 'shoehorned' ..."*

Later it said:

*Those articles are now not merely of persuasive or parallel effect but, ... are the very content of the domestic tort that the English court has to enforce."*

On that basis the court said that the test, in the case of private information, was to find the answer to the following two questions:

*"First, is the information private in the sense that it is in principle protected by Article 8? If no, that is the end of the case. If yes, the second question arises: in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher by article 10?"*

11. The parties are agreed that information about a patient, acquired by a doctor in the course of the doctor/patient relationship, is capable of being protected by the law of confidence. Although they have tended to express that agreed position by reference to the older English law authorities, it is clear that this type of information falls equally comfortably within the concept of "private information" for the purposes

of Human Rights law. However, the parties are not in agreement on the second question posed in *Ash v McKennitt*. This again finds expression in the terminology of both the European Convention on Human Rights (the right to freedom of expression under Article 10) and the public interest defence acknowledged in several of the English law authorities. In *A G v Guardian* it was expressed in these terms by Lord Goff:

*"... although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. ... It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure".*

12. Mr Davies, Counsel for the Appellant, argued that the public interest balance that is therefore required to be performed under the jurisprudence of both the English courts and the European Court of Human Rights provides the Trust with a defence to any claim based on confidential information. It is also said on the Appellant's behalf that other defences would be available to defeat any claim for breach of confidence. First that the claim could not succeed in the absence of any "detriment" likely to be suffered by either the deceased or her estate. Secondly, that so much of the information contained in the Medical Records has already passed into the public domain that it no longer has the required quality of confidence. Thirdly, it is said that the cause of action does not survive the death of the person whose private information is concerned and that the personal representative of that person is not able to enforce the right. As a consequence, it is said, any breach of confidence is not "actionable" as required by section 41 (1) (b). We will deal with each of these arguments in turn.

Would the Trust have a defence to a breach of confidence claim because the public interest in disclosure would outweigh the public interest in maintaining confidence?

13. The Appellant's case is that there is a clear public interest in the disclosure of information in cases where a hospital has been negligent in its treatment of a patient, leading to that patient's death. Her counsel emphasised the importance of poor treatment being recognised and avoided in the future and of the public being made aware of the treatment of diseases. He also submitted that disclosure of such information would facilitate communication between medical staff and the relatives of a deceased person, whose grieving may be assisted if they receive a full medical explanation. The Trust accepted that circumstances may arise where disclosure may be justified, including the need for public scrutiny of the activities of a public authority, but both the Trust and the Information Commissioner argued that the

factors in favour of disclosure are outweighed by the need to ensure that patients retain trust in the confidentiality of information they impart to doctors. They argue that if a patient is aware that the information he gives his doctor may be disclosed to the public after his death he may not make full disclosure, with the result that medical staff may be unable to make a correct diagnosis or provide appropriate treatment. Mr Davies, on behalf of the Appellant, countered that the public interest in maintaining confidence is diluted, on the facts of this case, because of the passage of time since Karen Davies died, the admission of negligence and the extent to which information has already been released. However, we believe that the public interest in maintaining confidentiality in the medical records of a deceased outweighs, by some way, the countervailing public interest in disclosure. We accept that it is frequently helpful for doctors to discuss the circumstances of a person's death with his or her close relatives but believe, on the basis in particular of the evidence of Dr Hoy, that maintaining the confidentiality of the Medical Records will not impede the professional approach which doctors currently adopt in this area. We accordingly decide that there would be no ground for defending a claim for breach of confidence on this basis. In reaching this decision we have had to put on one side our sympathy with the Appellant's very understandable private interest in wishing to see the Medical Records covering the period of time that her daughter spent in hospital immediately before her death.

Would an action for breach of confidence be defeated because neither Karen Davies nor her estate would suffer any detriment as a result of disclosure?

14. The Appellant's case is that, as there can be no detriment to the deceased in the event that the Medical Records are disclosed and that, as this is an essential ingredient of the action for breach of confidence, no claim could be sustained were the Trust to disclose the information other than under FOIA.
15. We have already set out extracts from the judgments in both *Coco v Clark* and *AG v Guardian* which questioned the requirement for detriment as an essential ingredient of the cause of action in all circumstances. In *Ash v McKennitt* the Court of Appeal, after explaining the role to be played by Article 8 in the English law of confidence (see paragraph 10 above), went on to apply the law to the facts of the case before it, which involved private information about an individual. It expressly approved the part of the decision of the Judge at first instance to the effect that relatively trivial information about the interior of the Claimant's home fell within the protection afforded by Article 8. It did not require any detriment to be established beyond the fact that there had been an invasion of the Claimant's privacy and home life. We believe that the principle to be drawn from this is that, if disclosure would be contrary to an individual's reasonable expectation of maintaining confidentiality in respect of his or her private information, then the absence of detriment in the sense apparently contemplated in



the argument presented on behalf of the Appellant, is not a necessary ingredient of the cause of action. As the Medical Records do fall within the meaning of the phrase "private information" the claim for breach of confidence would not in our view therefore be defeated on this ground.

Has the information contained in the Medical Records lost the necessary quality of confidence?

16. The Appellant's case on this point was hampered by the fact that neither she nor her legal team had been able to inspect the Medical Records. We have done so and have concluded that they contain a certain amount of information, beyond that contained in earlier correspondence, press statements and court documents disclosed to the Appellant without restriction. In our view that body of non-disclosed information retains the necessary quality of confidence and would be capable of forming the basis of a claim for breach of confidence. The Appellant's challenge on this point therefore fails.

Did the Duty of Confidence Survive the Death of Karen Davies?

17. Counsel for the Appellant argued that a duty of confidence in respect of private information does not survive the death of the individual to whom the duty was owed. One of the unusual features of this case has been that no authority was found by any of the parties' legal teams either in support of this contention or against it. Mr Davies, for the Appellant suggested that the absence of definitive authority in favour of survival created a substantial doubt as to whether a claim for breach of confidence would succeed. The Information Commissioner's Decision Notice concluded that, notwithstanding the absence of authority, the duty could survive the death of the person to whom the information related. Mr Pitt-Payne, Counsel for the Information Commissioner, suggested in support of that view that we should not be tempted to draw any conclusion from the lack of authority as it could support either side's argument.
18. Some support for the proposition that the cause of action does survive is provided by the second edition of *Toulson & Phipps on Confidentiality* which, at paragraph 11-053, having dealt with the extent of any professional obligation of confidence after a patient's death, said:

*"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"*

The case cited by the authors in support of the proposition contained in the first sentence was *Morison v Moat* (1851) 9 Hare 241. In that case one of two business partners unlawfully disclosed to his son, the defendant, a secret recipe, which constituted the confidential

information of the other partner. After the death of the partners the personal representatives of the partner entitled to the obligation of confidence succeeded in an action to prevent the defendant commercialising the secret recipe. Although the significance of the case was not debated before us, Mr Davies for the Appellant argued generally that cases involving property (in this case the recipe) should be distinguished from those involving purely private, non-commercial, information. On that basis even the tentative statement to the effect that a duty “may” be imposed would appear to be only lightly supported by case law authority.

19. In the absence of more compelling authority all parties reverted to general principles. The Appellant’s case was that a duty of confidence has to be owed to someone and that, once that person has died, there is no one capable of enforcing it. It was accepted that there might be continuing ethical, moral or professional duties requiring a doctor to maintain confidentiality (and Mr Keegan’s evidence drew our attention, for example, to a policy statement by the General Medical Council to that effect) but that no legal obligation survived. The Information Commissioner and the Trust argued that the basis of the equitable obligation of confidence, in the circumstances of this case, stemmed from the purpose of the doctor’s obligation of confidence. It was said that this was to create the trust that is needed to ensure that a patient makes full disclosure to his doctor of all matters that the doctor may require in order to diagnose and treat the patient. The argument was said to be supported by the terms of the modern Hippocratic Oath (“*I will respect the privacy of my patients, for their problems are not disclosed to me that the world may know. Most especially must I tread with care in matters of life and death*”) as well as the evidence of both Dr Hoy and Mr Keegan. They confirmed that the doctor/patient trust might be undermined if a patient believed that information might be disseminated to the public after his death. An analogy was drawn with the purpose underlying legal professional privilege, but we would not want to place too much reliance on this aspect of the argument as there are also self evident differences between the two areas of law. It was argued that, a doctor having accepted the obligation of confidence as an essential part of the doctor/patient relationship, it would be unconscionable for him to disclose the information to the public. It was suggested that it would remain unconscionable to do so after the death of the person to whom the information related and that the duty must therefore survive death. It should not come to an end simply because it could be said that there was no one able to enforce it or capable of demonstrating harm resulting from its breach.

20. The Information Commissioner also invited us to consider the unacceptable practical consequence if the duty did come to an end on death. Any medical practitioner would then be legally entitled to publish information from the records of a deceased patient, possibly for financial gain. We think that this is a powerful point. Mr Davies attempted to dilute its impact on the Appellant’s case by suggesting

that each decision on disclosure will be fact specific and that a decision in favour of the Appellant in this case would not have the effect that all medical records on all deceased patients would be open to disclosure. That might have been open for argument if we were to conclude that the duty of confidence survives, but is outweighed by countervailing public interests in disclosure existing on the facts of the present case. However, if we accept his broader proposition to the effect that death brings the duty to an end, then that must apply to all deceased patients.

21. We also agree with the Trust and the Information Commissioner that, as a matter of principle, the basis of the duty in respect of private information lies in conscience. That is consistent with the evidence of Dr Hoy, who explained that those working within palliative care operate on the basis that their patients assume that information about them will not be disclosed to others both before and after they die. It is also entirely consistent with the statement of Lord Goff quoted in paragraph 8 above, with its emphasis on the justice of precluding a person receiving a confidence from disclosing it. It is also consistent with an earlier part of the decision of Megarry J in *Coco v Clark* which reads:

*“The equitable jurisdiction in cases of breach of confidence is ancient; confidence is the cousin of trust. The Statute of Uses, 1535, is framed in terms of “use, confidence or trust”; and a couplet, attributed to Sir Thomas More, Lord Chancellor avers that*

*‘Three things are to be held in Conscience;  
Fraud, Accident and things of Confidence’”*

In these circumstances we conclude that a duty of confidence is capable of surviving the death of the confider and that in the circumstances of this case it does survive.

If the cause of action does survive would Karen Davies’ personal representatives have the right to bring a claim?

22. There was again no directly relevant authority to help us reach a decision on this point. We were referred to the Law Reform (Miscellaneous Provisions) Act 1934, but as this only applied to the enforcement after death of a cause of action existing at the time of death, it provides no assistance in the circumstances of this case in which the threatened breach of confidence (and therefore the establishment of a cause of action) would not occur until after death. The Information Commissioner also referred us to FOIA itself and pointed out that section 41(1)(b) refers to a breach of confidence that is actionable by the person who originally imparted the confidential information to the public authority “or any other person”. His Counsel suggested that this is at least not inconsistent with the duty being capable of enforcement by the personal representative of the deceased confider.

23. In terms of case law Mr Davies, on behalf of the Appellant, drew our attention to the unreported case of *Wilson v Wyatt* in 1820, referred to in *Argyll v Argyll*, in which Lord Eldon appeared to have assumed that the duty of confidentiality ceased to be enforceable after death:

*“If one of the late King’s physicians had kept a diary of what he had heard or seen, the court would not in the King’s lifetime, have permitted him to print or publish it”*

Mr Davies placed emphasis on the words “in the King’s lifetime” but we are uncomfortable in placing significant weight to such a vague cross reference, taken out of its original context, particularly in view of the substantial developments which have taken place in the law of confidentiality since the early nineteenth century.

24. Mr Davies also referred us to a statement of opinion in the 1981 Law Commission report on Breach of Confidence, in which the Commissioners appear to have proceeded on the basis that a personal representative would only have a right of action for a breach of confidence occurring after death *“if the information is of a ‘quasi-proprietary’ character – such as information relating to know how – which can be regarded as an asset of the deceased’s estate. The personal representatives of a deceased patient cannot employ the action for breach of confidence to protect the relations or friends of the deceased from distress resulting from the doctor’s disclosure of his deceased patient’s confidences”*. The Commissioners quote no authority in support of that quite specific statement. It may reflect the difference between the cases of *Wilson v Wyatt* and *Morison v Moat* referred to above, but we do not believe it is consistent with the following, more recent but less dogmatic, statement in the 2006 second edition of *Toulson and Phipps on Confidentiality*:

*“It is open to the courts to regard divulgements 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”*

25. Mr Davies argued that the role of a personal representative was to handle the assets of the deceased, including rights arising in contract, and that the cases showed that the only occasions in which personal representatives have been allowed to enforce legal duties owed to a deceased person have been where action has been necessary in order to protect the deceased’s property. He submitted that, as regards torts occurring after death, a personal representative may only bring an action if injury is done to property forming part of the estate. He relied on both the statement of the Law Commission referred to above and on

an extract from *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* which, in describing the procedure to be adopted by personal representatives in bringing action for torts committed after an individual's death, appeared to assume that the requirement to enforce the right would only arise where injury was done to the deceased's property. Our attention was also drawn to various other text books whose authors appeared to share the uncertainty, reflected in the tentative statement from *Toulson and Phipps* quoted above, as to whether the right to have confidences observed is a right which passes to a deceased's estate. However we believe that the answer to these doubts lies in the recent jurisprudence of the European Court of Human Rights. Jurisprudence which, as mentioned earlier, we should absorb into the existing action for breach of confidence.

26. In this connection we were referred to two decisions which we find helpful. In the first *Z v Finland* (1997) 25 EHRR 371 the European Court of Human Rights stressed that medical data was of fundamental importance to a person's rights under Article 8, not only to protect a patient's own privacy, but also to preserve confidence in health services. It then said:

*“Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and even intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health, and, in the case of transmissible diseases, that of the community”*

Although the information in that case concerned a living individual the extract sets out the principle that underlies the cause of action in relation to medical records. It creates the requirement for a remedy to prevent the unconscionable behaviour that would undermine confidence in the secrecy of medical consultations. Both the Information Commissioner and the Trust urged us to conclude that the remedy required to address this potential wrong was to permit personal representatives to enforce the deceased's entitlement to confidence by legal action.

27. In the case of *Plon v France* [2004] ECHR 200 the widow and children of the late President Mitterrand had brought an action in the French Court to prevent the distribution of a book written by the deceased's doctor and describing his health over a number of years while he was in office. Although the Court acknowledged that the lapse of time since the death of a major public figure might lead to the public interest ultimately overriding the late president's right to medical confidence, it nevertheless acknowledged the survival of that right and that it was appropriate for action to protect it to be brought on behalf of the deceased after his death.

28. We believe that such of the older authorities that suggest that personal representatives may not have a right to enforce a deceased's entitlement to confidentiality, should be regarded as having been overruled, at least in relation to medical records, by the more recent cases on private information.
29. Counsel for the Appellant suggested that the conclusion we have reached in the previous paragraph would give rise to various practical difficulties. First, he said that there would be uncertainty as to how long the duty of confidence should last. Mr Davy, Counsel for the Trust provided the answer to that. The confidence would last, as any confidence does, until either the information passed into the public domain or the public interest in its disclosure came to outweigh the public interest in maintaining the confidence. Neither of those events has occurred in relation to Karen Davies during the nine years since her death. Secondly, it was suggested that medical practitioners would be unsure when to seek the personal representatives' consent to the making of any disclosure. However, as the evidence of Mr Keegan made clear, this is an issue which medical practitioners already face in a number of different situations and we do not believe that our decision will add significantly to the difficulty of balancing different interests in those situations.
30. We have concluded, therefore, that the Trust would breach the duty of confidence owed to Karen Davies if it disclosed the Medical Records other than under the terms of the FOIA and that the breach would be actionable by the personal representatives of Karen Davies. Accordingly the Medical Records constitute exempt information for the purposes of FOIA section 41 and should not be disclosed to the Appellant.

Section 44 exemption – prohibition against disclosure

31. FOIA section 44 provides as follows:

***“Prohibition on disclosure***

- (1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –*
- a. is prohibited by or under any enactment,*
  - b. is incompatible with any Community obligation, or*
  - c. would constitute or be punishable as a contempt of court.”*

The Trust argued that the disclosure of the Medical Records would be prohibited by Article 8 of the European Convention on Human Rights. We have already set out the text of Article 8 in paragraph 9 above. In view of our decision not to order disclosure because of the application of the section 41 exemption it is not essential for us to reach a decision on this issue. However, were we required to do so we would not be in

favour of translating the general principles laid down in Article 8 into the form of specific legal prohibition to which we believe section 44 is intended to apply. This Tribunal is to be treated for the purposes of Article 8 as a public authority and is therefore obliged not to act in a way which is incompatible with those principles. We are conscious, therefore, that we should interpret any provision of English law that comes before us in a manner that is consistent with Article 8, and the other provisions of the Convention, which is what we have attempted to do in applying the law of confidentiality to the facts of this case. However, we do not believe that the effect of the Human Rights Act is to elevate to the level of a directly enforceable legal prohibition the general terms of Article 8. If a person is to be prohibited from taking a particular step he must be able to establish clearly whether or not his proposed actions fall within the scope of the prohibition and we do not think that the language of Article 8, which is intended to guide public authorities to interpret their rights and obligations in a manner that is consistent with an individual's right to a private and family life, is capable of providing that degree of certainty.

32. If we are wrong on that general point of applicability we must consider the evidence of Karen Davies' widower, to the effect that he does not wish the Medical Records to be disclosed and would be upset if they were. The Appellant's Counsel urged us to balance that evidence against the fact that it is now nine years since Karen Davies died and the widower did place into the public domain a small part of the information when he associated himself with a press release issued at the time the settlement with the Trust was concluded. He also invited us to conclude that the Article 8 rights of the Appellant would be infringed by non-disclosure. The difficulty in balancing matters relating to the personal feelings of individuals, in circumstances where they are almost bound to be incompletely revealed to us, reinforces us in our view that it is the language of general guidance, not precise prohibition, which we are being asked to apply. However, if required to make that balance, we would find that disclosure would be contrary to the right to privacy of Karen Davies' widower and that the rights of the next of kin must prevail where the rights and wishes of family members differ. We therefore conclude that the effect of section 44 on the facts of this case would be that disclosure ought not to be ordered.

#### Section 40 exemption – personal information

33. The Trust put forward arguments to the effect that disclosure of the Medical Records would involve the disclosure of personal data of employees of the Trust and other third parties. It was suggested that this would contravene the first and second data protection principles, with the result that the information would be exempt information under FOIA section 40. However, in the course of argument Counsel for the Trust, Mr Davy, suggested that his objection to disclosure on this ground could be met by redacting the relevant names from any disclosed copy of the Medical Records. If that solution were to be

adopted it would be necessary for us to review the proposed redactions in detail. However, in view of our decision under section 41 above it is not necessary for us to do so and we accordingly make no finding on this issue.

Conclusion

34. In view of our decision to the effect that the exemption provided for by FOIA section 41 applies to the Medical Records we have concluded that they should not be disclosed. Accordingly we dismiss the Appeal.

Signed

Deputy Chairman

Chris Ryan

Date 17 September 2007