



Neutral citation number: [2022] UKFTT 00389 (GRC)

Case Reference: EA/2022/0093

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

**Heard on in person at Field House on 6 October 2022**

**Decision given on 1<sup>st</sup> November 2022**

**Before**

**TRIBUNAL JUDGE Stephen Cragg KC  
TRIBUNAL MEMBER Dave Sivers  
TRIBUNAL MEMBER Kate Grimley Evans**

**Between**

**ANDY WALKER**

Appellant

**And**

**INFORMATION COMMISSIONER**

Respondent

**Decision: The appeal is Dismissed.**

**Substituted Decision Notice: No substituted decision notice.**

**Mr Walker represented himself**

**The Commissioner was not represented.**

**REASONS**

MODE OF HEARING

1. The case was heard in person at Field House.

2. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 118, a closed bundle and a skeleton argument from the Appellant.

## INTRODUCTION

3. The Appellant wrote to Barking, Havering and Redbridge University Hospitals NHS Trust (the Trust) on 20 April 2021 and requested the following information further to health concerns relating to proposed residential developments: -

- 1) The full postcodes of patients, both in patients and outpatients aged under 18 who have been are/receiving treatment for the following conditions

- a) Cancer with a breakdown of types, for example

Leukemia (Sic)

Brain and spinal cord tumour

Neuroblastoma

Wilms tumour

Lymphoma (including both Hodgkin and non-Hodgkin)

Rhabdomyosarcoma

Retinoblastoma

Bone cancer

- b) Otitis media

- c) All Acute lower respiratory infections, such as pneumonia and bronchiolitis.

- d) Meningitis

For the following periods:

23rd March 2020 to 22nd March 2021

23rd March 2019 to 22nd March 2020

These dates tie in with the lockdown period.

- 2) Children who have died in your care either in hospital or at home as out-patients aged under 18 for the same time periods and same conditions with the full postcodes set out in 1 above. It is accepted there are confidentiality issues here, but when Councils are planning substantial housing developments close to roads it must be right to discover if there is a health risk to building homes in these locations.

4. The Trust responded on 14 July 2021 and declined to provide the requested information under s.40(2) FOIA (personal data). However, following an internal review on 12 August 2021, the Trust amended its position to rely on s.41(1) FOIA on the basis that the request related to confidential patient information, and some of the individuals had died.
5. On 12 August 2021 the Appellant complained to the Commissioner about the way his request for information had been handled, and the Commissioner determined that the scope of his

investigation was to determine if the Trust had correctly applied s.41(1) FOIA. The Commissioner determined that s.41(1) FOIA was engaged. The Commissioner has provided a summary of the decision which, in our view, accurately sets out what was decided by the Commissioner as follows: -

- (a) Information contained within medical records was obtained from the patient and accordingly the requested medical information, from which patients could be identified was obtained from another person.
  - (b) The information extracted from the medical records was not trivial and had the necessary quality of confidence given the sensitivity and nature of the information, to which an explicit duty of confidence was owed, and the small number of individuals which could enable identification.
  - (c) The Trust owed an explicit duty of confidence in respect of the medical information, and those patients would not expect their healthcare information along with full postcode to be disclosed to third parties without their consent. Accordingly, the Commissioner was satisfied that the medical information was imparted in circumstances importing an obligation of confidence.
  - (d) Disclosure would be detrimental to the patients given the breach of the explicit duty of confidence to which the Trust owed, even if the patient was deceased, and could enable the patient to be identified by their families or others thereby confirming their medical issue.
  - (e) The public interest in disclosure was not sufficient to enable a public interest defence given the importance of preserving patient confidentiality.
6. The Appellant appealed against the decision notice on 13 April 2022. We set out the appeal in full as it contains useful background and context. He explained as follows: -

My freedom of information request concerns child death & hospital attendances in the area near a proposed high-rise development which includes a primary school at Tesco Goodmayes RM6. The planning application has been passed by Redbridge Council & Sadiq Khan, the London Mayor. The development in question is beside a busy high road and Crossrail.

The application has been referred to Michael Gove MP, the Secretary of State for Housing for a call-in decision in the near future.

My argument made to Mr Gove's office is the child health statistics in this appeal and further statistics in a later freedom of information are grounds for a call in. National Institute of Clinical Excellence QS 181 advises schools should not be built by busy roads on health grounds. The Council and GLA have ignored this advice relying on the air filters which will be installed if the development is built.

I say that that the case Gemma Cameron v Manchester Council (CO/4745/2019) requires Mr Gove and this Tribunal to

- 1) Allow the full postcodes for child deaths and hospital admissions to be published, or in the alternative
- 2) Allow the full postcodes for child hospital admissions to be published The Cameron judgment says Councils should make reasonable enquires. I rely on: -

"59. The defendant had no information on which it could sensibly assess the extent to which the car park would impact on the health of those children at the school with respiratory conditions. It was under a duty to make inquiries and so be properly informed to ensure that it was in a position to consider the discharge of its duty (see R Hurley & Moore) v Secretary of State for Business, Innovation and Skills [2012] EWHC 201 (Admin))."

In order to "sensibly assess" the extent of the proposed development on child health the Council and this Tribunal need to investigate real child deaths and hospital admissions in nearby postcodes. The schools nearby are Chadwell and Barley Lane primaries, both in RM6. Instead of "sensibly assess" the risk to child health with real deaths and hospital admissions the Council & GLA have used air quality monitors and modelling.

When an authority has failed in its duty to "sensibly assess" the risk to child health it is reasonable for a resident to assess the risk by using freedom of information requests. The ICO writes at 39

"The Commissioner has accorded some weight to the argument that there is some public interest in knowing whether there may be a causal link between the built environment, and childhood illnesses the Trust have documented, as well as concerns for any future development and the knock-on effect that may have in the area."

The ICO appears confidentiality is an absolute right. Firstly, this application, if successful, will not provide the full address or names of the children, this information will remain confidential. My argument is the key test is who gains the most benefit by publishing the full postcodes? My answer is that it would be the children who are the subject of the application. Research suggests the deaths and admissions will be linked to proximity to roads. Should this be the case this may lead the planning application to fail or planning conditions imposed and/or impact upon the 106 agreement (the deal between the developer and the Council for benefits in exchange for building the high-rise towers) and upon public health policy

The statistics in this application and the statistics in a later freedom of information request show four child deaths in RM6 over a two-year period with diseases linked to air pollution. I will be seeking the permission of BHRUT to agree with me that the second information request be part of this appeal too.

Four deaths is a disproportionate number for RM6, hospital admissions are also disproportionately feature in RM6. Should my application be successful I would be writing to the parents via the partial postcodes disclosed.

I would consult with the campaign supporters about the letter; however, my expectation would be that it would state:

- 1 - That the Tesco development is one of a number of developments planned locally.
- 2 - That the dust caused by construction and the HGVs used in the construction will on high pollution days add to the pollution load suffered by your child who may as a consequence require a hospital admission.
- 3 - If your child has asthma, a recommendation they apply for a NHS asthma care plan (this application does not include asthma, but my second application does)
- 4 - If your child's school does not already have the best air filters to reduce pollution, then you consider writing to the school and council to ask for these filters to be installed.
- 5 - If Mr Gove has called the application in, that you consider writing to Mr Gove if you share my concerns
- 6- If a legal campaign against the development is happening that they consider a contribution
- 7 - They contact their elected representatives for support which may include seeking 106 monies for air pollution filters to be installed at their homes if the developments go ahead.

Should the death postcodes be published I provide an undertaking not to write to these postcodes. It would risk upsetting bereaved parents and would do my cause damage. I maintain it is in the public interest for these death postcodes to be known, as if they are close to roads, it will be evidence for the development not to go ahead.

I also provide an undertaking not to knock on any of the doors within these postcodes as they would be an unnecessary intrusion. It should be noted that Cllr Athwal, the Leader of Redbridge Council said he had commissioned a cumulative impact report into the Tesco developments and other nearby developments in June and July 2020 but did not produce the said report. Should the Tribunal order the NHS to produce the full postcodes I expect to use the data to attend council meetings against over development and perhaps use the data in a potential court case against the council.

7. The Commissioner resists the appeal, relying on the decision notice. The interprets the Appellant's appeal as arguing that that there would be a public interest defence for a cause of

action for breach of confidence on the basis of health concerns regarding the children of the proposed primary school.

8. The Commissioner notes that the defence is similar to the public interest test used for many information rights exemptions set out in FOIA, however argues that it is different in that (i) the exercise starts from the presumption that confidentiality should be maintained; and (ii) that purely private interests in maintaining confidentiality can weigh against disclosure.
9. The Commissioner maintains that there is not a public interest in the disclosure of the full postcodes such as to override the importance in preserving patient confidentiality, and the presumption in favour of upholding that confidentiality should be maintained. It is said that this is especially the case given the sensitive nature of health data, and the low number of children affected by these conditions. The Commissioner also accepts that disclosure could cause a breakdown of the confidential doctor – patient relationship in the context of this case where such low numbers and identifiers are involved.
10. The Commissioner therefore maintains that the Trust would not have a public interest defence to a cause of action for breach of confidence if it were to disclose the requested information for the reasons set out in the decision notice. The full postcode data combined with illness and age, sourced from patient health records, and number of individuals, is information that is clearly not trivial and has the necessary quality of confidence in itself, and especially given the low numbers of individuals which could lead to identification. The Commissioner says that this conclusion is supported by the Appellant’s intention, as set out in the grounds, to write to the postcodes identified, if disclosed, which would clearly be distressing for the parents and children given it would indicate that the Trust had disclosed such highly sensitive and confidential information.
11. The Commissioner argues that the Appellant’s undertakings are irrelevant as a disclosure under FOIA is free of any duty of confidentiality.

#### THE STATUTORY FRAMEWORK

12. The rights of a person requesting information from a public authority has to be informed by the public authority whether it holds the information pursuant to s.1(1)(a) FOIA and to have that information communicated, if it is held (s.1(1)(b) FOIA), are subject to a number of exceptions. In this case the exemption claimed is set out in s.41 FOIA which provides that:

(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.

13. Whether a breach of confidence is actionable, was explored in *Coco v AN Clark (Engineers) Limited* [1968] FSR 415, 419: -

‘... 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, M.R. in the *Saltman* case on page 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’.

14. Reliance on s.41 FOIA constitutes an absolute exemption by virtue of s. 2(3)(g) FOIA and is therefore not subject to a public interest test under FOIA. However, it is a defence to an action for breach of confidence that it was in the public interest to disclose the confidential information., and therefore the Tribunal must consider the public interest in disclosure.

### THE HEARING

15. The Appellant attended the hearing, made submissions and answered questions from the Tribunal. The Commissioner was not represented. The Appellant did not dispute that the exemption in s41 FOIA was applicable in this case and made it clear that his submissions focused on whether disclosure was, nevertheless, in the public interest, and that he was part of a group campaigning against air and noise pollution.

16. The Appellant read out two quotes from [Imperial College London](#)’s Dr Ian Mudway, from an address to the London Assembly’s environment committee in February 2022. Dr Mudway said:

Knowing that there’s an association between poor air quality and children’s respiratory health and development across time, what we should absolutely not be doing is building new schools, or building cheap and affordable housing for young families, in areas which are known pollution hotspots within our city.

I know there are some conflicting and intersecting issues here, but I can think of many examples within London where I see new builds occurring in places which, if you were really concerned about children's health, you would never be building them there and you certainly wouldn't be targeting them to young families.<sup>1</sup>

17. The Appellant confirmed that there was a lot of research which found a correlation between childhood diseases and poor air quality and noise caused by road and rail pollution. He told us though that there is a problem with local authorities sticking to the statutory limits on air pollution when considering planning and building issues, when there is research from the WHO that levels below these limits are still harmful to children.
18. He confirmed that wider post-code information would not give him the information he wants in relation to his particular issue. He needs to have very specific post-code information so that he has information about those children with diseases who are closest to the project. He told us that within exact post-codes there will be approximately 14 properties.
19. The Appellant also told us that if this information is disclosed his next steps would be to ask for information about hospital admissions on days of high air pollution and to see if there is a correlation between that information and the information he is requesting in this case.
20. The Appellant said that the information he sought was similar to information already disclosed in public about the location of road traffic accidents or incidences of crime. His point was that if information about road traffic accidents and crime is available then so should be the incidence of child disease. He accepted the point that this information about road traffic accidents or crime would not contain information about the home addresses of victims, as he is now seeking.
21. The Appellant told us that there were a limited number of streets he was interested in as close enough to the project in question to make a difference to children's health. We asked him whether he had considered contacting the relevant addresses (for example by leafletting or even through the press) to invite people to supply the relevant information voluntarily. The Appellant made it clear that this had not been done.

## DISCUSSION

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<sup>1</sup> <https://www.standard.co.uk/news/london/london-pollution-hotspots-new-schools-houses-city-hall-b984264.html>



22. Although this is not a case where the personal data exemption in s40(2) FOIA is relied on, it seems to us to be a useful exercise to consider whether the information sought by the Appellant would amount to personal data of those living individuals who might be identified. The case that brings together the caselaw most conveniently is *Information Commissioner v Miller* [2018] UKUT 229 (AAC). In that case it was confirmed that applying the judgment in *R (Department of Health) v Information Commissioner* [2011] EWHC 1430 (Admin):-

10...the proper approach to whether anonymised information is personal data within section 1(1)(b), for the purposes of a disclosure request, is to consider whether an individual or individuals could be identified from it and other information, which is in the possession of, or likely to come into the possession of a person other than the data controller after disclosure.

23. In the *Department of Health* case Cranston J said at paragraph 66 that the assessment of the likelihood of identification included ‘assessing a range of every day factors, such as the likelihood that particular groups, such as campaigners, and the press, will seek out information of identity and the types of other information, already in the public domain, which could inform the search’.

24. In *Miller* the UT noted the ‘motivated intruder’ test relates to ‘...a person who starts without any prior knowledge but who wishes to identify the individual or individuals referred to in the purportedly anonymised information and will take all reasonable steps to do so.’ Again, in *Miller* the UT noted that a similar approach was taken by the Court of Session (Inner House) in *Craigdale Housing Association v The Scottish Information Commissioner* [2010] CSIH 43 at paragraph 24:

“...it is not just the means reasonably likely to be used by the ordinary man on the street to identify a person, but also the means which are likely to be used by a determined person with a particular reason to want to identify the individual...using the touchstone of, say, an investigative journalist...”.

25. Further, the Commissioner’s Code of Practice on “*Anonymisation: managing data protection risk*” is described by the Commissioner as a good starting point and at page 22-23 considers the application of the “motivated intruder” test:

“The approach assumes that the ‘motivated intruder’ is reasonably competent, has access to resources such as the internet, libraries, and all public documents, and would employ investigative techniques such as making enquiries of people who may have additional knowledge of the identity of the data subject or advertising for anyone with information to come forward. The ‘motivated intruder’ is not assumed to have any specialist knowledge

such as computer hacking skills, or to have access to specialist equipment or to resort to criminality such as burglary, to gain access to data that is kept securely.”

26. In our view providing the exact postcodes of children who have received treatment for specific diseases or illnesses over a limited period of time would inevitably allow any ‘reasonably competent’ person to make further enquiries to identify the individuals involved and therefore the information requested is the ‘personal data’ of those living individuals involved and we note that the Appellant has not argued otherwise.
27. However, the Trust does not rely on the exemption in s40(2) FOIA because the Appellant has also sought the same information for children who have died in the periods of interest to him, and the ‘personal data’ provisions only relate to living individuals.
28. The Appellant has not disputed that disclosure would amount to the disclosure of the information to the public (otherwise than under FOIA) by the Trust which would constitute a breach of confidence actionable by that or any other person. We think that must be the right position, applying the tests in *Coco v A N Clark (Engineers) Limited* set out above, given that the disclosure would amount to disclosing information provided to the Trust by patients or families of patients.
29. However, there is a potential public interest defence to a breach of confidence claim which in our view requires us to balance the Article 8 ECHR rights to respect for privacy of the individuals (and their families) involved, against the public interest in disclosure, including the Article 10 ECHR rights of the Appellant, as a local campaigner, to access to information for the purposes of freedom of expression: see *R v Shayler* [2003] 1 AC 247 and the discussion at paragraph 34-024 in Philip Coppel, *Information Rights* (5<sup>th</sup> edition, 2020).
30. We have already discussed the privacy rights of the data subjects and their families. The Appellant himself in his request accepts ‘there are confidentiality issues here, but when Councils are planning substantial housing developments close to roads it must be right to discover if there is a health risk to building homes in these locations?’.
31. We are not convinced however that the public interest factors in favour of disclosure outweigh the disclosure of this private information linked to very serious medical issues. We note that the

Appellant told us that if this information was disclosed, he would next be seeking even further information from the Trust about the ailments of the individuals involved.

32. The Appellant says that there is a lot of research which links the proximity of air and noise pollution to childhood diseases, but we are not in a position judge whether the disclosure of this information is necessary to establish the link further in the Appellant's local area. The quotes from Dr Mudway set out above suggest that there is no doubt about the link. It seems to us that the Appellant can carry on his campaigning on the issue without the need for disclosure of the information sought.
33. It also seems that the Appellant has not carried out basic steps for seeking the information with the consent of those involved. A request in the local press for people to come forward might be one way of doing this, or even leafletting in the few streets about which the Appellant is interested.
34. Finally, we note that any undertakings from the Appellant about future use of the information are not enforceable by this Tribunal or anybody else: disclosure under FOIA is effectively disclosure to the whole world.
35. Our conclusion is that, although the Appellant is seeking the information for the very best of motives, the private life interests of the data subjects and their families far outweigh the public interest in disclosure of the information for the Article 10 ECHR purposes of the Appellant, or any other purposes he has identified.
36. Therefore, this appeal must be dismissed.

**Signed: Recorder Stephen Cragg KC**

Sitting as a judge of the First-tier Tribunal

Date: 10 October 2022.