



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

**Case No. EA/2014/0165**

**ON APPEAL FROM:**

**Information Commissioner's  
Decision Notice No: FS50535997  
Dated: 2 July 2014**

**Appellant: STEVEN ARMSTRONG**

**First Respondent: INFORMATION COMMISSIONER**

**Second Respondent: NOTTINGHAMSHIRE HEALTHCARE  
NHS TRUST**

**Heard at:** Lincoln County Court

**Date of hearing:** 14 January 2015

**Date of decision:** 3 February 2015

**Before**  
**CHRIS RYAN**  
(Judge)  
and  
**JEAN NELSON**  
**PAUL TAYLOR**

**Attendances:**

The Appellant appeared in person.  
Neither of the Respondents was represented at the hearing.

**Subject matter:** Absolute exemptions -Confidential information s.41

**Cases:** *Webber v Information Commissioner and Nottinghamshire Health Care NHS Trust* GIA 4090 2012.

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## **DECISION OF THE FIRST-TIER TRIBUNAL**

The appeal is allowed and the Second Respondent is directed to disclose the information requested in the Appellant's information request of 11 September 2013, subject to such redactions as this Tribunal may subsequently direct. Submissions in respect of redactions should be made within 14 days of the date of the Reasons for Decision below. The Tribunal will then rule on the question of redaction and set a date for disclosure to be made.

### **REASONS FOR DECISION**

#### Summary

1. We have decided that the medical records of a deceased individual should have been disclosed to the Appellant because, on the unusual facts of this case, the exemption from disclosure provided by section 41(1) of the Freedom of Information Act 2000 ("FOIA") is not engaged.

#### Background Facts

2. In April 1989 Mr James Armstrong died while being detained under the Mental Health Act in a secure medical facility operated by the Leicestershire Health Authority. The death was investigated by the Coroner, who recorded a verdict of suicide.
3. The Second Respondent ("the Trust") subsequently took over responsibility for the facility and was holding its medical records on the deceased when, in September 2013, the Appellant sent it a request for information.
4. The Appellant is the deceased's son. He was a school boy at the time of his father's death and stated in his information request that he wished to find out more about the circumstances in which the death had occurred. Although he raised a number of individual questions it is common ground that the effect of the request was to seek all records the Trust held on the deceased at the time.

5. The Trust refused the request and, following a complaint by the Appellant, the Information Commissioner issued a Decision Notice on 2 July 2014 in which he determined that it had been entitled to do so.
6. The matter comes before us on an appeal from that Decision Notice.

### The Law

7. The effect of section 1 of the FOIA is that the Trust was obliged to disclose the requested information unless certain conditions applied or the information fell within one of a number of exemptions set out in FOIA. Each exemption is categorised as either an absolute exemption or a qualified exemption. If an absolute exemption is found to be engaged then the information covered by it may not be disclosed. However, if a qualified exemption is found to be engaged then disclosure may still be required unless, pursuant to FOIA section 2(2)(b):

*“in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information”*

8. The Trust justified its refusal by relying on the exemption provided by FOIA section 41(1), which reads:

*“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.”*

9. Section 41 is categorised as an absolute exemption. However, it is still necessary to apply a public interest balancing test (albeit one in different terms to that imposed by section 2(2)(b)) because:
  - a. a breach of confidence would not be “actionable” for the purpose of the section if the public authority would have had a defence to the notional claim identified in sub-section (1)(b); and
  - b. such a defence may arise if it were found that public interest justified disclosure.

10. Toulson and Phipps on Confidentiality (3<sup>rd</sup> Edition) includes a summary of conclusions reached by the authors at the end of a comprehensive review of the law on the public interest defence, as it has developed under the impact on English law of the European Convention on Human Rights. The summary is in the following terms (paragraph 6-075):

*“Although each case has to be examined on its own facts, the following general principles are suggested:  
(1) Respect for confidentiality is itself a matter of public interest.*

*(2) To justify disclosure of otherwise confidential information on the grounds of public interest, it is not enough that the information is a matter of public interest. Its importance must be such that the duty otherwise owed to respect its confidentiality should be overridden.*

*(3) In broad summary either the disclosure must relate to serious misconduct (actual or contemplated) or it must otherwise be important for safeguarding the public welfare in matters of health and safety, or of comparable public importance, that the information should be known by those to whom it is disclosed or proposed to be disclosed.*

*(4)*

*(i) Even if the information meets that test it does not necessarily follow that it would be proper for the defendant to disclose it.*

*(ii) The court must consider the relationship between the parties and the risks of harm which may be caused (or avoided) by permitting or prohibiting disclosure, both in the particular case and more generally. For example, if the law inhibits a doctor from disclosing information about a patient which may affect another person, it may lead to risk of avoidable injury or death; but if it permits a doctor to do so, it may impair a patient's willingness to confide in the doctor and receive treatment.*

*(5) Ultimately the court has to decide what is conscionable or unconscionable, which will depend on its view of what would be acceptable to the community as a fair and proper standard of behaviour. This requires the court to make an evaluative judgment, but it does not have an unfettered discretion.*

*(6) In cases where the party claiming confidentiality is a branch of Government, or a body performing a governmental function, a separate principle applies. In such cases detriment to the public interest is an essential ingredient of the cause of action.*

11. The application of section 41(1) to the medical records of a deceased person was considered by the Upper Tribunal of the Administrative Appeals Chamber in the case of *Webber v Information Commissioner and Nottinghamshire Health Care NHS Trust* GIA 4090 2012. The facts of the case were similar to this appeal in that it arose from a request by a mother for the medical records of her son, who had died while compulsorily detained in a hospital. There were, however, differences, including the fact that the appellant in that case had declined a suggestion that she should apply to be appointed as the deceased's Personal Representative and should then exercise the right of those holding that office to inspect medical records under the Access to Health Records Act 1990 ("the 1990 Act"). That route was not open to the Appellant on this appeal because his father died before the 1990 Act came into force (although, as discussed

below, he and one of his sisters have now been appointed as Personal Representatives).

12. Although, therefore, we are not obliged to reach the same ultimate conclusion as in *Webber* we are bound by certain points of principle which the Upper Tribunal set out. They are:
- 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.
13. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based. Frequently, as in this case, we find ourselves making our decision on the basis of information that is more extensive than that submitted to the Information Commissioner.

#### The Decision Notice under Appeal

14. The Information Commissioner reviewed the medical records and concluded that:
- a. they consisted of information which could properly be characterised as having been obtained by the Trust from a third party, namely the deceased;
  - b. they consisted of the sort of information that is capable of being protected from unauthorised disclosure by the law of confidence;
  - c. the circumstances in which the staff of the institution came to hold the information were such as to give rise to a duty to maintain confidentiality;
  - d. disclosure would be an unauthorised use of the information to the detriment of the deceased and, possibly also, surviving relatives; and
  - e. the notional claim for breach of confidence would not be defeated by a public interest defence because the, admittedly strong, public interest in understanding how a patient within a secure facility came by his death did not outweigh the public interest in maintaining

confidence over information imparted in a doctor/patient relationship.

15. In large measure the Information Commissioner's conclusions were based on established case law, including the *Webber* decision in the Upper Tribunal. There was, however, one key exception, which was that the Upper Tribunal in *Webber* made no statement of principle in respect of the defence of public interest. It simply recorded that it found no error of law in the First-tier Tribunal's decision that no defence would have been available on the particular facts of that case. Both the Information Commissioner and this Tribunal are therefore free to reach an independent conclusion on that issue.
16. The Information Commissioner also noted that the medical records did not include any information relating to any form of internal investigation into the circumstances surrounding the deceased's death. Our own inspection of the withheld records demonstrated to us that this was the case.

#### The Appeal to this Tribunal

17. The Appellant's Grounds of Appeal set out a large number of criticisms of the Decision Notice, but also included criticism of the conduct of those responsible for the deceased at the time of his death and of the system which, in the Appellant's view, was utilising artificial arguments about the surviving confidentiality rights of a deceased person to thwart the attempt of a son to find out about his father's death. Some of the language adopted by the Appellant was extreme and apparently based on suspicions about the death, which were not supported by evidence submitted to the Information Commissioner when he carried out his investigation or to us in the course of this appeal. Similar language and unsupported allegations of wrongdoing appeared in subsequent written submissions and in correspondence included in the bundle of documents made available to us. The Appellant did his case no favours by adopting irrational and inflammatory language, although we should add that he presented his case during the hearing before us on a more rational basis and in entirely measured terms.
18. The Information Commissioner filed a written Response in which he put forward the following arguments:
  - a. Apart from the fact that the medical records predated the coming into force of the 1990 Act the appeal was on all fours with *Webber*, a judgment which this Tribunal was bound to follow.
  - b. Disclosure under FOIA had the effect of putting the disclosed information into the public domain (unlike, for example, a disclosure under the 1990 Act, which was private as between the public authority and the personal representative).
  - c. No evidence had been presented to the Information Commissioner that the Appellant had been formally registered as personal representative. Nor had the Information Commissioner been told of

the views of other members of the deceased's family about the requested disclosure.

On that basis, he argued, the Decision Notice had been correct.

19. The Response also addressed the arguments included in the Appellant's Grounds of Appeal. With respect to the Appellant, some of his arguments were so plainly wrong that we need not record the Information Commissioner's response to them. As to the remainder the Information Commissioner's case was:
  - a. The Appellant's criticism of the absence of any record of an internal investigation was misguided as the FOIA applied only to information that the public authority held at the relevant time, not what it might have held or even ought to have held.
  - b. The suggestion that neither the deceased nor the, now defunct, NHS Trust, which had operated the facility in question, would suffer detriment from disclosure was wrong. First (and in apparent contradiction with his own Decision Notice – see paragraph 14 d. above) the Information Commissioner argued that it was not necessary to prove any detriment. But there would, in any event, be detriment to the deceased, in that he would suffer a loss of privacy, and it was possible that a claim for breach of confidence in order to avoid, or obtain compensation in respect of, that detriment could be brought by any personal representative appointed in respect of the deceased's estate. Even without the appointment of a personal representative, the general test advocated in *Webber* (see paragraph 12 d. above) should lead to the conclusion that the exemption was engaged.
20. The Trust was added as Second Respondent to the appeal, at its own request, but ultimately did no more than to express its support of the case put forward by the Information Commissioner.
21. The Appellant submitted a number of written submissions prior to the hearing, expanding on some of the arguments set out in his Grounds of Appeal. In both those submissions and his presentation of his case at the hearing the Appellant stressed how inappropriate he considered it to be for the medical records of a deceased to be kept from his own family on the basis of a claim to confidentiality that he, the deceased, had not articulated and that those who might be said to stand in his shoes after death did not support. In support of his arguments the Appellant submitted evidence of the appointment of himself and his sister as the personal representatives of the deceased and a written statement signed by himself and the other seven children of the deceased to the effect that they authorised and requested the withheld information to be disclosed and would not pursue a claim for breach of confidence if it were.
22. The Information Commissioner filed written submissions addressing the fact of the Appellant's appointment as one of two Personal Representatives of the deceased. He acknowledged that a personal representative might have rights and expectations in relation to a

deceased's medical records which were not enjoyed by members of the public or even other family members. He argued, however, that the existence of a grant of representation did not have a bearing upon the question of disclosure under FOIA and it was not therefore a question for this Tribunal in the context of this appeal.

23. The Appellant exercised his right to have the appeal determined at a hearing, but neither the Information Commissioner nor the Trust chose to attend, preferring to allow the written Response and subsequent submissions to stand as their case for opposing the appeal.
24. By the time of the hearing we had been provided with a closed bundle containing the withheld information. The Appellant had not previously been informed of the gist of what the bundle contained. We accordingly explained to him at the start of the hearing that it consisted of the following:
- a. Evidence and related documents used in the prosecution of the deceased which led to his imprisonment;
  - b. Medical, psychiatric and probation officer reports on the deceased prepared in connection with the criminal prosecution and/or the subsequent decision to remove the deceased from prison and detain him under the Mental Health Act;
  - c. Correspondence with the Home Office about the detention;
  - d. Clinical Review reports between June 1988 and February 1989;
  - e. Report to the Mental Health Review Tribunal;
  - f. Correspondence between those running the facility where the deceased died and a member of his family;
  - g. The deceased's Death Certificate;
  - h. A letter from the facility to the Coroner's office.

### Our decision

25. We conclude, in compliance with the binding authority imposed on us by the decision in *Webber*, that the appeal must fail unless the facts of the case would give rise to a defence to the notional claim for breach of confidence. The only possible lines of defence, on the facts, would be:
- a. that the disclosure would have been with the consent of the person or persons able to bring a claim; or
  - b. that the notional claim in breach of confidence would have been defeated by a public interest defence.
- We will deal with each in turn.

### *Consent*

26. 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.

27. FOIA section 16 imposed on the Trust an obligation to provide advice and assistance to those requesting information, so far as it would be reasonable to expect it to do so. In this case the Trust considered the information request by reference to both FOIA and the 1990 Act but made no enquiry as to whether those having the status to bring a claim for breach of confidence were agreeable to the disclosure. The Information Commissioner's investigation of the Appellant's complaint did not appear to address the issue of consent either.
28. We are in the position of knowing that the five signatories of the consent document referred to in paragraph 21 above who attended the hearing confirmed to us that, had they been asked at the time, they would have given their consent. That leaves others who, having not attended the hearing, have given no indication as to what response they would have given. More importantly, it cannot alter the fact that, as at the date when the Trust rejected the Appellant's information request, it did not have consent from any family members and faced the possibility that a personal representative might have been appointed subsequently and might then have brought a claim for breach of confidence.
29. We do not think that the Trust's possible breach of section 16 prevents it from relying on the exemption. There is no language in the FOIA, which we can detect, capable of forming the necessary connection between the breach of section 16 (if and to the extent that there was one) and a public authority's right to rely on an exemption. It would be surprising if such a link did exist because, of course, FOIA section 41(1) is designed to protect the right to confidence of a third party and those rights should not be undermined by any unlawful conduct of the party to whom the confidence had been imparted.
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 in a position to object to disclosure.

#### *Public Interest*

31. Both Respondents have acknowledged that there is a public interest in knowing how a person died while detained under the Mental Health Act. In this case the public interest is increased by additional factors. First, contrary to the Information Commissioner's argument to the effect that we should not take the 1990 Act into account, (because it does not have direct application to the requested information), we believe that its presence on the statute book gives rise to a persuasive public interest argument in favour of disclosure. In passing the 1990 Act Parliament acknowledged the importance of medical record being available to a patient or his/her personal representatives. At the Committee stage (when the Government

adopted what had previously been a Private Member's Bill) the Under Secretary for Health at the time recorded the belief of the Government of the day that *"gains will flow from the enactment of the legislation and that they will include greater accuracy in record keeping, a higher trust in the medical profession and an enhancement of the doctor-patient relationship"*. Those words articulate a public interest in respect of health and safety which is consistent with the third element of the Toulson and Phipps summary quoted in paragraph 10 above.

32. We do not think that this factor in favour of disclosure is materially diluted by the fact that the Appellant did not hold the office of personal representative at the time when he made his request. Conversely the case in favour of disclosure is strengthened, in our view, by the fact that all of the deceased's children have made it clear that they do wish to have the requested information disclosed and are content for the disclosure to be public. Although the evidence did not come to light until the hearing of this appeal its effect was that the shared interest in disclosure existed at the time of the request. Therefore the concern expressed by Toulson and Phipps as to the potential harm that might result from disclosure (the fourth element of their summary) does not, on the particular facts of this case, carry any significant weight to be set against the factors in favour of disclosure.
33. A second additional factor in favour of disclosure is the public interest in the conduct of enquiries into this particular death. Concerns were expressed by the Appellant that there were discrepancies in the evidence prepared in connection with the inquest into the deceased's death. These were touched on in written submissions and were expanded upon and clarified at the hearing. They strengthened his concern about the absence of any information about an internal investigation and support the case for disclosure of such information as does exist, particularly reports on the deceased in the weeks and months before his death.
34. We think that we are also entitled to give some weight to a third factor, which is the waste of time and resources likely to result if the appeal is rejected and the Appellant and his sister are required to submit the same information request, now in their capacity as personal representatives and with the support and consent of the deceased's other children.
35. Set against those arguments are the public interest factors in favour of maintaining confidence. It is clearly important that patients generally are not deterred from consulting doctors, and providing them with full information, by a fear that the information they impart may be disclosed to the world after their death. However, that factor carries less weight in the context of this case than in others where the passage of time since death has been less (it is over 25 years in this case). The consent of all the deceased's children, including the two now appointed to be his personal representative, further weakens the argument against disclosure. Those of the children who attended the hearing made it clear that they understood that the effect of a disclosure under FOIA was that the medical

records would become available, not only to the family, but to the public at large.

### Conclusion

36. We conclude, on balance, that in the unusual circumstances arising in this case the public interest factors in favour of disclosure do justify overriding the obligation of confidence. In the language adopted by Toulson and Phipps it would be unconscionable for the Appellant, acting with the consent and encouragement of the deceased's entire family, to be prevented from seeing the withheld information.
37. It follows that the Trust would have a defence to the notional claim for breach of confidence identified in FOIA section 41(1) and that the exemption is not therefore engaged.
38. The withheld information should therefore be disclosed. The documents which will have to be disclosed appear to include the names of one or more apparently junior members of staff and, in one instance, that of a medical practitioner's patient having no connection with the case. We will accept submissions from either or both of the Respondents as to any redactions which should be made, before disclosure, in order to protect the personal data of those individuals and any others who are still alive and are perceived to lack the seniority or public facing role to justify being identified. Any submissions should be filed within 14 days of the date of these reasons.
39. Our decision is unanimous.

**Chris Ryan**

Judge  
3 February 2015