



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

Appeal Reference: EA/2017/0234

Decided without a hearing

**Before
CHRIS RYAN
JUDGE
ALISON LOWTON
PIETER DE WALL
TRIBUNAL MEMBER(S)**

Between

**TERENCE J HARROP
(OBO CHRISTINE HARROP)**

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

1. The issue we have considered in this appeal is whether or not the social care records of the Appellant's late mother should have been disclosed by Worcestershire County Council ("the Council") in response to a request by the Appellant. We have decided that, on the particular circumstances of this case, they should not.
2. The request was made under the Freedom of Information Act 2000 ("FOIA"). Section 1 of FOIA imposes on the public authorities to which it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in FOIA.

3. The Council refused the information request on the basis of the exemption set out in section 41 of FOIA.

4. Section 41 reads:

“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.”

5. On 26 September 2017 the Information Commissioner issued a Decision Notice on the Appellant’s complaint about the Council’s refusal to disclose. She decided that:

- a. Social care records contain confidential information, derived from the individual to whom they relate (in this case, the Appellant’s late mother), and passed to the Council in circumstances that gave rise to a duty of confidence;
- b. Disclosure in response to the information request would give rise to detriment to the person whose personal privacy and dignity would be invaded;
- c. A deceased person’s right to confidentiality survives death and may be enforced by his or her personal representatives;
- d. It was immaterial that the Appellant was one of two personal representatives and asserted that the other personal representative agreed to disclosure being made;
- e. The Council would not have a public interest defence to any claim in confidence. This was because the public interest in transparency (in respect of the Council’s, possibly inadequate, operation of the social care system) outweighed the public interest in the maintenance of confidences.

6. The case comes to us, under appeal from the Information Commissioner’s decision notice, to be decided on the papers. No party has asked for a hearing and we are satisfied that determination on the papers is appropriate in the circumstances. We were provided with the parties’ written submissions and a bundle of relevant papers. We were also provided with copies of the withheld information in a closed bundle. This was not made available to the Appellant because this would have the effect of pre-judging the appeal.

7. The Appellant’s only challenge to the decision notice is that no breach of confidence claim would be “actionable”, for the purposes of section 41, because the only persons who could bring such a claim were the personal representatives and both of them consented to disclosure. The Information Commissioner argued that, even if a personal representative (or all the appointed personal representatives,) consented to disclosure, the section 41 exemption still applied because it was open to the personal representative(s) to withdraw the consent. We have no hesitation in rejecting that argument. If a personal representative first gave consent to disclosure and then, after the relevant material had been released, purported to withdraw the consent and claim breach of confidence, the claim would simply be unarguable. Accordingly, the public authority in those circumstances would not be vulnerable to an “actionable” claim for breach of confidence and the exemption would not apply.

8. The Information Commissioner also argued that the consent of both personal representatives had not been verified by the Council and there was no duty on public authorities to make such verification.

9. As regards consent, and the verification of that consent, the relevant communications between the Appellant and the Council were as follows:

- a. The original information request (a letter dated 26 September 2016) had made no reference to the Appellant's co-personal representative or indeed that the request was being made other than by the Appellant in her own right.
- b. A subsequent letter to the Council, dated 27 October 2016, did refer to the Appellant's brother possibly attending a meeting on the question of their late mother's care and one dated 27 January 2017 stated:

"In this case my late mother's only personal representative are my brother and myself. Both of us are making this request for information to be released. Therefore, the main test laid down for exemption under Section 41, that any action for breach of confidence is likely to succeed is, as a consequence, not valid"

- c. A request for the Council to conduct an internal review of its original refusal to disclose was contained in a letter to the Council dated 16 December 2016. It included an acknowledgement that a breach of confidence claim was a theoretical possibility but added:

"I would contend that, in this particular case, no such action would succeed since the request for the information to be released is in fact being made by my late mother's personal representatives, namely my brother and myself."

10. The involvement of the second personal representative in the information request, and his approval of the requested disclosure, was therefore asserted. However, the Council was not provided with any document signed by the second personal representative evidencing or confirming such approval or consent. The Council, as it has argued, was under no duty to carry out its own verification of either the official grant of probate to both personal representatives or the second personal representative's consent to disclosure.

11. Regrettably, this very simple omission condemned the Appellant's case to fail. Although strict rules of evidence do not apply to either appeals to this Tribunal or to complaints to the Information Commissioner, it is necessary for those seeking disclosure to do more than the Appellant did in this case. She needed to establish that the second representative supported the information request or, at the very least, did not object to it.

12. The Information Commissioner was therefore entitled to reach the conclusion that the section 41 exemption was engaged and the Appellant's appeal from her Decision Notice must therefore be dismissed.

13. Having reached that conclusion, it is not necessary for us to consider whether, had it been established that the Council was vulnerable to an actionable breach of confidence claim, it would have had a defence on public interest grounds or whether any of the other exemptions relied on by the Council were sustainable.

14. We would add, in passing, that the Council did owe the Appellant an obligation under section 16 of FOIA to provide advice and assistance to the Appellant. In our view that included, in this case, an obligation to point out that providing the written consent of the second personal representative would have removed the objection to disclosure. The same would apply to any future request for the same information.

16. The Appeal is therefore dismissed. However, we should add that the Information Commissioner concluded that the Council did not delay its response to the information request

in breach of FOIA section 10. However, during the course of preparing the appeal, the Information Commissioner was informed by the Council that, contrary to what it had said previously, it had received the letter of 26 September 2016 referred to in paragraph 9 a. above, the original request. The Council had, therefore, breached section 10 and the Information Commissioner accepted that the original decision notice was wrong on this point. We therefore substitute that decision notice with one that is in the same terms as the original decision notice, but records that the Council was in breach of FOIA section 10.

16. Our decision is unanimous.

Chris Ryan

Judge of the First-tier Tribunal

Date of Decision: 14 June 2018

Date Promulgated: 29 June 2018

Amended under Sect 40 Slip Rule correction on 12 July 2018.