



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

Case No. EA/2010/0186

ON APPEAL FROM:

**Information Commissioner's
Decision Notice No: FS50229110
Dated: 18 October 2010**

Appellant: Robert O'Hara

Respondent: The Information Commissioner

On the papers

Date of decision: 30 March 2011

**Before
CHRIS RYAN
(Judge)
and
MICHAEL HAKE
MARION SAUNDERS**

Subject matter: Confidential information s.41

**Cases: *Home Office v BUAV* [2008] EWCH 892 (QB).
*Bluck v The Information Commissioner and Epsom St Helier
University NHS Trust* (EA/2006/0090).**

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DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

REASONS FOR DECISION

Introduction

1. The main point arising on this Appeal is whether the Ministry of Defence (“MOD”) was entitled to refuse the Appellant’s request for certain information about a particular member of the Armed Services (“the Subject”), who died in 1943, on the ground that it was exempt from the obligation of disclosure imposed by section 1 of the Freedom of Information Act 2000 (“FOIA”) by virtue of section 41 (1) of FOIA. The Information Commissioner decided, in a Decision Notice dated 18th October 2010 (“the Decision Notice”), that it had been entitled to do so. The Appellant challenges that decision, exercising his right to appeal under FOIA section 57.

2. FOIA section 1 reads:

“Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

3. FOIA section 41(1) 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”.*

4. The information which the MOD withheld (“the Withheld Information”) was:
 - (a) The Subject’s occupation prior to joining the Armed Services in 1942.
 - (b) His home address.
 - (c) The name, address and relationship of his next of kin.
 - (d) Any information relating to medical boards attended by the Subject.
 - (e) The Subject’s religion.
5. Other information was released to the Appellant because it fell within the scope of a Publication Scheme which the MOD had devised and the Appellant had complied with certain conditions applying to the scheme. The conditions included two that the Appellant considered to be unfair, although he complied with them. These were that he provide proof of death and that the consent of a deceased person’s next of kin would be required if disclosure was sought within 25 years from the date of death. Although the Appellant has included his criticism of the Publication Scheme in his Grounds of Appeal we do not have jurisdiction to consider them. The existence of the Publication Scheme as a reason for refusing disclosure under FOIA section 21 is not an issue on the Appeal and we do not have jurisdiction to rule on whether or not the Information Commissioner was justified when he previously approved the Publication Scheme under FOIA section 19.

The Information Commissioner’s Decision Notice under FOIA section 41

6. Founding his decision on the High Court decision in *Coco v A N Clark (Engineers) Ltd* (1968) FSR 415, the Information Commissioner decided that he had to satisfy himself on the following three issues:
 - (i) The Withheld Information must have had the necessary quality of confidence at the relevant time.
 - (ii) The Withheld Information must have been imparted to the MOD in circumstances importing an obligation of confidence.

(iii) The disclosure to the Appellant would have constituted an unauthorised use of the Withheld Information to the detriment of the Subject.

However, the Information Commissioner also acknowledged that the test required modification, insofar as the Withheld Information was an individual's personal information, as a result of the High Court's decision in *Home Office v BUAV* [2008] EWCH 892 (QB).

7. The Information Commissioner also acknowledged that a breach of confidence would not be "actionable" against the MOD, for the purpose of FOIA section 41, if it could establish that it would have had a public interest defence. The application of such a defence these days would require Articles 8 and 10 of the European Convention on Human Rights to be taken into consideration.
8. The Information Commissioner satisfied himself that any information about the Subject's medical boards constituted confidential information that had been obtained from him in circumstances giving rise to an obligation of confidence and that the right of action to prevent its unauthorised disclosure would have survived the Subject's death. He based that part of his decision on the earlier decision of this Tribunal (known at the time as the "Information Tribunal") in *Bluck v The Information Commissioner and Epsom St Helier University NHS Trust* (EA/2006/0090). He also concluded that the MOD would not have been able to show that the public interest in disclosure exceeded the public interest in maintaining the Subject's confidentiality, so as to give rise to a public interest defence. On these bases the Information Commissioner concluded that the section 41 exemption applied to any information the MOD held regarding the Subject's medical boards and that it had therefore been entitled to refuse disclosure.
9. The Information Commissioner applied the same considerations when assessing the rest of the Withheld Information. He acknowledged that it was not as sensitive as medical information and that in some respects it might be regarded as innocuous, particularly as 60 years had passed since the Subject's

death by the time the request for information was made. However he concluded that it would have been of sufficient personal significance to the Subject still to be treated as confidential and had been acquired by the MOD in circumstances giving rise to an obligation of confidence. To the extent that it was necessary to prove detriment in the case of personal information the Information Commissioner considered that the loss of privacy itself satisfied the requirement. Finally, in considering whether the MOD would be at risk of an “actionable” claim for breach of confidence, the Information Commissioner considered whether the public interest in receiving and imparting information of this type under Article 10 of the European Convention on Human Rights outweighed the public interest in maintaining the Subject’s privacy under Article 8. He concluded that it did not and that these categories of information therefore also fell within the section 41 exemption.

The Appeal

10. The Appellant launched his appeal from the Decision Notice on 3 November 2010 and the Information Commissioner filed a Response on 6 December 2010. Directions were given for the Appeal to be determined on the papers, without a hearing and both the Appellant and the Information Commissioner lodged written submissions for the Tribunal to consider. Shortly before the meeting to determine the Appeal the Appellant raised a concern about the content of the agreed bundle. He believed that it did not contain all of the correspondence between the Information Commissioner and the MOD. However, we considered that, given the issues to be determined, the selection of materials was appropriate and provided us with the information we needed regarding the Information Commissioner’s original investigation.
11. Our task, on an appeal of this nature, is defined in FOIA section 58. We are to consider whether or not the Decision Notice was in accordance with the law and to allow the appeal if we conclude that it is not. To the extent that the decision involved an exercise of discretion by the Information Commissioner we should allow the appeal if we conclude that he ought to have exercised his

discretion differently. In the course of determining an appeal we may review any finding of fact in the Decision Notice.

12. In his Grounds of Appeal the Appellant argued that the Information Commissioner had failed to give due weight to the passage of time since the Subject's death. In his subsequent written submission he also complained of the complexity introduced into the law by reliance on case law and stressed the importance of transparency in relation to historical records of this kind.
13. The Information Commissioner, for his part, argued that the Decision Notice did not contain any error of law or suggest that he had exercised a discretion inappropriately. He pointed out that the Decision Notice acknowledged the potential for confidentiality to dilute over time and argued that he had not fallen into error in concluding that, on the particular facts of this case, each category of information included in the Withheld Information retained the characteristic of confidentiality at the date when the Appellant made his request.
14. We have concluded that the legal analysis set out in the Decision Notice was correct and that there is no basis for us to conclude that the Information Commissioner fell into error when he applied to the facts of this case the legal principles he had identified. Clearly some categories of information are likely to justify the maintenance of confidentiality for longer than others, but we do not think that the Appellant's general criticism of the Information Commissioner's approach to the lapse of time should lead to the conclusion that any of the categories of information within the Withheld Information could have been disclosed by the MOD without triggering an actionable claim for breach of confidence by the Subject's personal representatives.
15. The Appellant complained that there was inconsistency between the approach adopted on this Appeal and the availability, through other routes of investigation, of equivalent information affecting other individuals. He also argued that the MOD had not been entirely consistent in its public statements from time to time on the appropriate passage of time since the birth of an

individual before information should be disclosed without evidence of death. Whilst the inconsistencies were apparent to us we do not believe that either criticism undermines our conclusion that the Information Commissioner did not fall into error when, on the facts of this case, he decided that confidentiality continued to exist in the Withheld Information at the date of the request for information and that its disclosure would have exposed the MOD to a claim for breach of confidence.

Conclusion

16. We have concluded that all the information falling within the scope of the Appellant's original request for information continued to fall within the section 41 exemption at the time of the Appellant's request. Accordingly, the MOD had been entitled to refuse disclosure and the Appeal should be dismissed.

Mr Chris Ryan
Judge

30 March 2011