



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2011/0034

ON APPEAL FROM:

The Information Commissioner's

Decision Notice No: FS50297890

Dated: 10 January 2011

Appellant: Adrienne Nairn

Respondent: Information Commissioner

Heard at: Field House, London

Date of consideration: 8 July 2011

Date of decision: 12th August 2011

Before

Christopher Hughes OBE

Judge

and

Elizabeth Hodder and Jean Nelson

Members

Appearances: This hearing was conducted on the papers.

**Subject matter: FOIA S.40 Personal Information
FOIA S.41 Information provided in confidence**

Cases considered:

Coco v AN Clark (Engineers) {1968} FSR 415

**Buck v the Information Commissioner and Epsom and St Helier University NHS Trust
(EA/2006/0090)**

BUAV v Secretary of State for the Home Office {2008} EWHC Civ 870

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal rejects the appeal for the reasons stated.

Signed Christopher Hughes Judge

Dated this 12th day of August 2011

REASONS FOR DECISION

1. On 14 January 2010 the Appellant sought disclosure of a file relating to an alleged benefit fraud perpetrated against New Forest District Council. The request was phrased as:

"I want to see your file".

2. The Council responded promptly and on 18 January 2010 provided part of the requested information. It stated that it was withholding some information under section 41(1) of the Act on the grounds that it was information provided in confidence. Following further correspondence the Appellant remained dissatisfied and complained to the Information Commissioner (the Respondent in these proceedings) on 23 February 2010. Following an investigation the Respondent issued a Decision Notice (DN) on 10 January 2011 which upheld the approach of the Council.

3. In his DN the Respondent identified its function as to determine whether that decision of the New Forest District Council was correct and whether the information withheld fell within the exemption. Having examined the withheld material he found that some of the information was personal information relating to the appellant which could not be disclosed under FOIA since section 40(1) provides that information is exempt from disclosure under the Act if it constitutes personal data of which the applicant is the data subject. The Respondent further observed that it was open to the appellant to exercise her rights under the Data Protection Act to access such data. He further found that the rest of the withheld material was exempt under section 41(1) since it was obtained by a public authority in circumstances where disclosure would constitute an actionable breach of confidence and the balance of public interest was in preserving that confidence. The Respondent concluded that the Council dealt with the request for information in accordance with the law.

4. The Appellant was dissatisfied with this response and appealed to this Tribunal. The Appellant's notice of appeal stated;-

"I therefore do not have the expertise to argue the points legally and wish to keep the matter simple. I have presumed that the information requested is of a personal nature concerning myself but because it was given by third parties (one of whom is now deceased) it is exempt. I believe that I have the right to know what anybody is saying about me to third parties because, particularly, in this case I believe the information to be false and character harming."

5. The Appellant provided a substantial amount of background information about matters concerning members of her family. She alleged fraud and coercion. She stated that she had alleged benefit fraud in confidence and her confidence had not been respected, leading to detriment to her. She stated that it was in the public and the Council's interests to ensure that these matters were fully investigated. She further stated:-

" concerning public interest and would point out that the information withheld is about me (presumably) and I have no problem with the information being made available to the public, indeed I have every intention of making this matter with the New Forest District

Council public once I have exhausted all legal and normal formalities of pursuing information."

She added:-

"I request the withheld information and I state categorically that this information is confidential to the ICO, this appeal procedure and the New Forest District Council. In no way is it to be divulged to..."

6. It is appropriate at this point to comment that there appears to be some confusion in the Appellant's mind as to the impact of a disclosure under FOIA and its interaction with other processes by which information may be required to be disclosed to another person. If an individual approaches an organisation and seeks to know what information that organisation holds about her then this may be considered as a subject access request made under the Data Protection Act (DPA) and needs to be considered within that framework. If she is entitled to disclosure and pays the appropriate fee then the information held about her will be supplied to her and only her. If an individual seeks disclosure of material under FOIA then they are exercising a right as a member of the public to seek information and, if under FOIA the information may be disclosed, then it may be disclosed to any member of the public. To protect personal information from disclosure under FOIA to anyone other than the data subject (the person whom the information is about) S40 of FOIA provides at subsection (1):-

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

For this reason public authorities need to consider, as part of the process of responding to a FOIA request, whether it constitutes personal data about the applicant. If so there is a prohibition on disclosing it to the applicant under FOIA, even though it may well be inaccessible to the applicant using the DPA.

7. In his reply the Respondent maintained the position set out in the DN and helpfully analysed the Appellant's Grounds of Appeal into five headings, an analysis which the Tribunal has adopted for its own analysis of the case.
8. The Appellant provided further material consistent with what had been submitted before.
9. The role of the Tribunal in considering this Appeal is laid down by S58 of FOIA. This provides that the Tribunal needs to consider whether the finding of the Respondent is in accordance with the law and in doing so it may review any finding of fact on which the decision of the Respondent is based. If it concludes that the Respondent decision is correctly decided on the facts which have been proved then it must dismiss the appeal.

Consideration of the Appeal

Ground 1

10. "The information, which the Appellant presumes to be her personal data, should be disclosed to her because she has the right to know what is being about her to third parties. This is particularly so in the present case because she believes the information to be false and character harming."

11. As has been noted at paragraph (8) above if this information is indeed the Appellant's personal data then the information is exempt from disclosure due to the effect of S40 of FOIA. In this appeal and in his DN the Respondent relied on S41 of FOIA in that he found that the information was provided in confidence and its disclosure would be an actionable breach of confidence. In *Coco v AN Clark (Engineers) {1968} FSR 415* it was held that for a breach of confidence to be actionable:-

- The information had the quality of confidence
- Was imparted in circumstances importing an obligation of confidence
- The use of the information was unauthorised and to the detriment of the confider

12. In this case the material as contained in a file of a fraud investigation and was provided by a person outside the Council and related to that investigation. It was not information widely known and was communicated in circumstances which clearly imported an obligation of confidence – it would not be disclosed to third parties. Such a disclosure would itself be a detriment to the source of the information's privacy (*Buck v the Information Commissioner and Epsom and St Helier University NHS Trust (EA/2006/0090)*).

13. This exemption is an absolute exemption and in order for the Tribunal to find that the information should be disclosed it would need to satisfy itself that there is a compelling public interest in disclosure such that if the disclosure were made and an action for breach of confidence brought, a public interest defence to the action would succeed (*BUAV v Secretary of State for the Home Office {2008} EWHC Civ 870*).

14. In considering the overarching question of the public interest the Tribunal was satisfied as to the significance of maintaining confidentiality in fraud investigations in order to ensure that Information was available to public authorities to enable them to investigate and prevent fraud on the public purse; such frauds are a matter of widespread and legitimate public concern. The Appellant argues that she wishes to know what is said about her. While the Tribunal understands her concerns it does not consider that this can outweigh the need to collect information about potential fraud in confidence which would be substantially undermined by disclosure in a case such as this.

Ground 2

15. "The Appellant states that she has a lot of evidence of what she describes as coercion on the part of one of her relatives. She states that she believes the disputed information would add to that evidence. She therefore asserts that it is in the Council's interest and that of the public, for the disputed information to be divulged so that the matter can be investigated fully; further, it is in the Council's interests to learn by their mistakes and the taxpayer should know about these errors."

16. The Tribunal is satisfied that, while public authorities need to constantly learn from their experience, such learning could not amount to a defence to an action for breach of confidence if the Council were to disclose the information.

Ground 3

17. "The Appellant made a report of alleged benefit fraud which was, contrary to assurances of confidentiality, disclosed to relatives. This led to allegations of harassment being levelled at her and she therefore wishes to establish whether this breach of her own confidence was actionable."
18. The Tribunal notes that the Council has apologised for a breach of confidence. The Appellant may, if she wishes, take legal advice on what action she might be able to take as a result of that. That apparent breach does not justify the Council in committing a further breach of confidence, since to do so would be to undermine the whole framework of confidentiality upon which the Council may receive significant information with respect to its functions.

Ground 4

19. "Although the DN refers to the living individual who provided the information to the Council as having power of attorney for the deceased person whilst they were alive, no power of attorney was, in fact, registered with the Court of Protection."
20. Paragraph 33 of the DN refers to a power of attorney and from the submissions of the Appellant it appears that the DN on this point may be inaccurate. However the point at issue is whether there is an individual living, or personal representatives of a deceased person, who could bring an action for breach of the duty of confidence. The Tribunal is satisfied that such an action would lie irrespective of whether or not a valid power of attorney had been executed and this ground is therefore not a basis for finding that the Respondent erred in law.

Ground 5

21. "The Appellant does not have any objection to the disputed information, to the extent it is her own personal data, being disclosed to the world at large; indeed, she intends to make the matter public in due course."
22. The Tribunal has already noted (at paragraph 8 above) the exemption arising from the interaction with the DPA. The fundamental issue remains that the information sought was given to the Council in confidence and therefore, irrespective of the wishes of the Appellant with respect to any of her personal data it may contain, remains protected from disclosure by reason of the Council's duty of confidence.
23. The Tribunal is satisfied that the Respondent's DN is correct in law and rejects the appeal.

Chris Hughes
Information Judge
12 August 2011