



IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL

Appeal No: EA/2011/0103

BETWEEN:

COLIN RICHARDSON

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision and Reasons

Determined on the papers by:

Alison McKenna, Tribunal Judge
Henry Fitzhugh, Tribunal Member
Richard Fox, Tribunal Member

On 22 August 2011 at Salisbury Law Courts

Decision dated: 7 September 2011

Subject Matter:

S. 41 Freedom of Information Act 2000 – Information Provided in Confidence

DECISION

This appeal is hereby dismissed.

Reasons

Background

1. The Appellant is the brother of an adult with learning disabilities, who receives care services from Lewisham Council ("the Council"). The Appellant was invited by the Council to participate in the process of appointing new service providers, by sitting on a panel of carers and service users convened to interview a number of organisations which were tendering for the contract. The Appellant asked for information about the award of the contracts under the Freedom of Information Act 2000 ("FOIA"). He also asked for a copy of the notes which he had made during the interview process, which were handed over to the Council at the end of the interviews. This appeal is concerned with the interview notes only.
2. The Council offered to provide the Appellant with a copy of the notes provided he agreed to sign a confidentiality agreement, which he refused to do. The Council refused his information request in reliance upon s. 41 FOIA, stating that the information in the notes had been provided to it in confidence.

The Information Requests

3. On 16 June 2009, the Appellant requested certain information concerning the tendering exercise in which he had participated. This was subsequently the subject of a complaint to the Respondent, but the Appellant does not now appeal that part of the Decision Notice, as information has now been provided to him.
4. The information request on 16 June had also included a request for a copy of the notes that the Appellant had made during the carers/service users panel interviews. On 4 November 2009, the Appellant reiterated this request.

The Council's Response

5. The Council replied that the notes were exempt from disclosure under FOIA under sections 40 (personal information), 41 (information provided in confidence) and 43 (commercial interests), however it offered to provide him with a copy of the notes if he agreed to sign a confidentiality agreement.

The Information Commissioner's Decision Notice

6. The Respondent issued Decision Notice FS50302294 on 17 March 2011. He ordered disclosure of certain information relating to the award of the contracts, but maintained the exemption under section 43 FOIA in relation to other information. As noted above, this aspect of the Decision Notice is not appealed.
7. In relation to the Appellant's interview notes, the Decision Notice considered the application of s. 41 FOIA to the notes (paragraphs 89 to 131) and concluded (at paragraph 136) that the Council had been correct to withhold the notes in reliance upon s. 41 FOIA.
8. The Respondent's decision was made on the following basis:

- (i) The notes take the form of a table on which the questions for the interviewees are set out with a space for the interviewer to make notes about the responses given and about the further questions put by the panel and responses to those;
- (ii) The notes do not therefore contain personal information about the Appellant, the contents are not about him, do not provide any biographical details about him and do not reveal his personal opinions. Accordingly the exemption under s. 40 FOIA does not apply;
- (iii) In relation to s. 41 FOIA, the information is exempt from disclosure if (a) it was obtained by the Council from another person and (b) disclosure of it would constitute a breach of confidence actionable by the person who supplied it or another person;
- (iv) An “actionable breach of confidence” requires that the circumstances in which the information was provided gave rise to an obligation of confidence through the expectation on the part of the confider that the information confided would only be disclosed in accordance with the wishes of the confider;
- (v) The information confided must also have the necessary “quality of confidence”; its disclosure would be to the detriment of the confider or result in a loss of privacy by that person; and there must be no legal defence to the potential action, for example a public interest defence. Such information would not be exempt from disclosure merely as a result of contractual provisions;
- (vi) In the circumstances of this case: the interviewees provided information to the panel (of which the Appellant was a member) as part of the tender process. In sitting on the interview panel, the Appellant was acting on behalf of, or in conjunction with, the Council in evaluating the tenders. The information was therefore obtained by the Council from another person;
- (vii) The Council was contractually obliged to keep information obtained during the tender process confidential. However, the Appellant had not been informed that his notes were confidential. The Council accepts that the members of the panel were not informed that the notes were confidential but asserted that this was evident from the fact that the notes were collected in at the end of the interviews (it has since amended its procedures to make this clear to panel members). The fact that the situation was not made clear to the Appellant could not of itself override the obligation of confidence that arose as a result of the Council’s contractual obligation. The information confided therefore had the necessary obligation of confidence;
- (viii) The Respondent must consider the information request as though any person had asked for the notes because FOIA is “applicant blind”. Disclosure to the Appellant must be viewed as disclosure to the public at large. The specific information contained within the notes went beyond information otherwise publicly available, referring to specific situations. The information concerned is not trivial and it is not in the public domain. It therefore has the necessary quality of confidence;
- (ix) The interviewees had responded to questions about very specific circumstances in a way that they may not have done if they thought that their answers might become public. A restriction on their ability to respond to such questions could damage their ability to present their case to such panels in future, and they would therefore suffer a detriment if the notes were disclosed;
- (x) There would in principle be an actionable breach of confidence against the Council by the persons who confided the information if it were to disclose it. The possible defences to such an action include a public interest defence. The test to be applied was whether the public interest in disclosing the information outweighed the public interest in protecting confidences.

Disclosure might serve the public interest of increasing transparency in the Council's processes, however the courts have recognised that confidentiality is important in itself and have been slow to override it except for cases involving misconduct. The duty of confidence promotes a relationship of trust between the persons involved and that relationship could be undermined by disclosure;

- (xi) In the circumstances of this case, the panel members performed a valuable function in the public interest and their ability to elicit open answers to their questions, and so influence the Council's decision, in future could be impaired by disclosure. Disclosure would therefore damage the transparency of the process that was established. A public interest defence is not therefore made out in this case.

The Grounds of Appeal

9. Following the Respondent's Decision Notice, the Appellant filed a Notice of Appeal with the Tribunal, concerned only with the Decision Notice as it related to the notes of interview.

10. The Appellant's grounds of appeal were that:

- (i) the information recorded in the notes did constitute personal data belonging to him, and were intended to be one of the means by which he would monitor performance under the contract. For this reason he is particularly concerned to obtain disclosure of his notes in relation to the winning tender;
- (ii) it was not made clear to him that the notes were intended to be confidential to the Council and he would have made notes on his own paper if he had known this. It is absurd that he could have kept possession of his own notes on his own paper (as he had originally started to do) but that that his notes made on the Council's paper were not disclosable to him;
- (iii) the information recorded in the notes was not provided to the Council but to the panel members;
- (iv) the notes do not contain information which it would be detrimental to disclose, especially as some of it was or would be in the public domain e.g. arrangements for the transfer of staff under TUPE.

The Respondent's Response

11. The Response, dated 11 May 2011, was prepared by Counsel on behalf of the Respondent. It responded to the Grounds of Appeal as follows:

- (i) As stated in the Decision Notice, the notes do not contain personal information about the Appellant, the contents are not about him, they do not provide any biographical details about him and they do not reveal his personal opinions. Accordingly it is not personal data. If it were personal data about the Appellant or his sister, it would be exempt from disclosure;
- (ii) In relation to the Appellant's wish to use the notes to monitor performance, FOIA is motive blind and so the use to which he wished to put the notes is immaterial. The general public interest in disclosure had been considered

- in relation to the public interest defence and found not to outweigh the public interest in maintaining confidentiality;
- (iii) It is not known what action the Council would have taken if the Appellant had kept his own notes, however the issue of where the information was recorded does not override the legal duty of confidence owed by the Council to the interviewees. The fact that the Council did not inform the panel members of the duty of confidence did not disapply it;
 - (iv) Section 41 FOIA does not require that the person who provided the information must be the same person to whom the duty of confidentiality is owed. In this case, the interviewees initially provided the information to the panel members and the panel members then provided the information to the Council. The duty of confidentiality is owed to the interviewees by the Council. The Decision Notice sets out the basis upon which the Respondent concluded that detriment would arise if disclosure was made.

The Law

13. The sections of the FOIA which are engaged by this appeal are as follows:

Section 41(1)

Information is exempt information if –

- (a) it was obtained by the public authority by 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.
14. Section 41(1) is an “absolute exemption” under FOIA, which means that it is not subject to a public interest test. However, breach of confidence actions may themselves be contested on the basis of a separate public interest defence.

Sections 57 & 58

57 Appeal against notices served under Part IV.

- (1)Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.
- (2)...
- (3)...

58 Determination of appeals.

(1)If on an appeal under section 57 the Tribunal considers—

- (a)that the notice against which the appeal is brought is not in accordance with the law, or
- (b)to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2)On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

The Hearing

15. This appeal was determined on the papers with the agreement of the parties. The Tribunal was satisfied that it could properly determine the issues without an oral hearing, pursuant to rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.
16. The Tribunal was provided with an open hearing bundle (the contents of which had been agreed by the parties) running to some 108 pages, and also with a copy of the notes taken by the Appellant on a “closed” basis.

The Tribunal's Conclusions

17. The Tribunal regards it as regrettable that the Appellant was not fully informed of the role that the carers/service users panel played in the tendering process or that a duty of confidentiality was owed by the panel members, on behalf of the Council, to the interviewees. It is pleased to hear that this will be made clear to panel members in the future.
18. The Tribunal is satisfied that there is no error of law in the Decision Notice for the following reasons. The Tribunal has seen the notes and is satisfied that they do not constitute personal data for the reasons given in the Decision Notice: they do not contain personal information about the Appellant, the contents are not about him, they do not provide any biographical details about him and they do not reveal his personal opinions. It therefore finds against the Appellant in relation to the first of his Grounds of Appeal.
19. The Tribunal is also satisfied that the Respondent applied the correct legal test to the application of s. 41(1) FOIA in the Decision Notice and agrees with the Respondent that the information in the notes is exempt from disclosure under s. 41(1) FOIA because (a) it was obtained by the Council from another person (the Appellant) and (b) disclosure of it would constitute a breach of confidence actionable by the interviewees because the circumstances in which the information was provided gave rise to an obligation of confidence through the expectation on the part of the confider that the information confided would only be disclosed in accordance with the wishes of the confider (as a result of the contractual duty of confidentiality to which the interviewees were entitled). The Tribunal is satisfied that the information confided had the necessary “quality of confidence” and that its disclosure would be to the detriment of the confider or result in a loss of privacy by that person so as to amount to an actionable breach of confidence even if it were not for the contractual obligation into which the Council had entered.
20. The Tribunal agrees that a public interest defence would not be successful in the particular circumstances of this case for the reasons given in the Decision Notice. It agrees with the Respondent that in the circumstances of this case the public interest lies in maintaining confidentiality, noting that there is no element of misconduct here and that the process of involving carers and service users would

be undermined if disclosure were ordered. The Tribunal accordingly finds against the Appellant in relation to his fourth Ground of Appeal.

21. The Tribunal also considered carefully the Appellant's second and third Grounds of Appeal. In particular, the Tribunal has considered whether the Appellant's right to freedom of expression under Article 10 of the European Convention on Human Rights ("ECHR") has been interfered with by the non-disclosure, so as to affect his ability to speak out if the successful contractor provides unacceptable care services to his sister; also whether the Appellant could be said to have any independent ownership (intellectual property rights) in the notes he took, as this is central to his third Ground of Appeal, namely that it would be absurd to allow him to keep possession of the notes if made on his own paper but not the notes made on the Council's paper.
22. In relation to the second Ground, the Tribunal notes that this argument has not been raised by the parties, however the Tribunal is itself a public authority under s.6 (3) (a) of the Human Rights Act 1998 ("the HRA") and section 6(1) of the HRA makes it unlawful for a public authority to act in a way which is incompatible with a Convention right, so the issue must be considered. The Tribunal notes that Article 10 rights carry with them "duties and responsibilities" and are capable of being limited "for preventing the disclosure of information received in confidence". In the circumstances of this case, the Tribunal finds that the Appellant's right to freedom of expression i.e. his right to criticise the Council or the service provider has not been curtailed through non-disclosure of the notes. The Appellant is free to monitor the performance of the service provider and to speak out on this issue in his capacity as a carer. He is only prevented from speaking out in reliance upon the confidential notes that he took whilst participating in the Council's tender process, and not from speaking out in a personal capacity.
23. In relation to the third Ground, the Appellant suggests that the position would have been different had he made the notes on his own paper. The Tribunal considers that this could only be a correct analysis if the Appellant could be said to have ownership of, or intellectual property in, the notes. The Tribunal finds that, due to the circumstances in which the notes were created, the Appellant did not "own" them, even though he created them. In any event, if he ever did own them, he would probably be deemed to have assigned his property rights to the Council by handing them over at the end of the interview. This analysis of his rights is the same whether or not he wrote them on his own paper. If the Appellant had made the notes on his own paper and left the room with them, the Tribunal finds it probable that he would have been liable to legal action by the Council if he had disclosed them to another person. The Tribunal repeats here its concern that the Appellant was not made aware of the legal obligation the Council had entered into and by which he was bound before engaging him in the interview process. Nevertheless, the Appellant's lack of information about the process did not affect the nature of the legal obligation to which the Tribunal finds he was subject, whether he made the notes on his own paper or not.
24. In all the circumstances, the Tribunal dismisses the appeal and upholds the Decision Notice.

Alison McKenna
Tribunal Judge

Dated: 7 September 2011