



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

Case No. EA/2012/0182

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50431237
Dated: 2 August 2012**

Appellant: Brian Redman

Respondent: Information Commissioner

Second Respondent: Norfolk County Council

Considered on the Papers

Date of decision: 13 November 2012

Before
John Angel
(Judge)
and
Michael Hake
Michael Jones

Subject Matter: Confidential information s.41(1)

Cases: Coco v Clark [1969] RPC 41

Thackeray v Information Commissioner EA/2011/0043

Bluck v Information Commissioner and Epsom and St Helier University NHS

Trust EA/2006/0090

Decision

The Tribunal upholds the Information Commissioner's decision notice dated 2 August 2012 and dismisses the appeal.

Reasons for Decision

Background

1. Mr Redman lived with his mother for 67 years during which time he had taken a carer role. She died on 11 October 2010 at the age of 92. From 3 October until 9 October 2010, when she was admitted to hospital, she was in the sole care of Norfolk County Council Adult Social Services (“NCC”) although still remaining at home. Mr Redman was prevented from living with his mother during this period. She was admitted to hospital on the evening of 9 October and died on 11th.
2. Mr Redman was not aware she had been admitted to hospital or died until 12 October.
3. The NCC became involved in securing urgent care and support during the absence of Mr Redman, who had been the principal carer, from the home he had shared with his mother.
4. Mr Redman was his mother’s closest relative at the time of her death but was not the executor or personal representative under her will. Her executors were a firm of solicitors. There had been a dispute over the terms of the will which had been settled by the time the Tribunal considered the papers in this case.
5. Mr Redman was upset that his mother died so soon after the NCC took over the carer role. He requested to see the records of the events leading up to her admittance into hospital. In other words he wanted to see her care records when he was unable to look after her..

The Request and complaint to the Information Commissioner

6. On 3 August 2011 Mr Redman made a request for information from NCC as follows:

What was N.C.C. Adult Social Care plan of action and responses to the above patient who at 921/2 was under your care from the 3rd of October 2010 until the 9th of October 2010. Letter sent to (Complaints Case Manager) on 4th July 2011. Attendance Notes and Rapid Response records required.

7. The NCC at first seemed a little confused as to how to deal with the request and refused the request under the Data Protection Act 1998. In the process of dealing with Mr Redman’s request for an internal review of their decision they accepted by letter dated 10 January 2012 that it was a FOI request but upheld their decision not to release the information under s.41 (confidential information).

8. Mr Redman complained to the Commissioner giving as his reason that “I wish to complete my mother’s last few days having looked after my late beloved Mother for 67 years.”
9. During the course of the Commissioner’s investigation the NCC also claimed the s.40(2) exemption in relation to third parties personal data in the requested information. Also the NCC claimed s.36 and provided the Commissioner with the opinion of the qualified person dated 22 June 2012 which indicated that the exemption being claimed was s.36(2)(c) (prejudice to effective conduct of public affairs).
10. The Commissioner issued a Decision Notice dated 2 August 2012 (“DN”) which found that NCC had correctly relied on s.41(1) exemption except for some information which was Mr Redman’s personal data which should have been dealt with under the DPA.

Appeal to the Tribunal

11. Mr Redman appealed to the First-tier Tribunal on 21 August 2012 asking for the case to be considered on the papers and without a hearing.
12. The Commissioner invited the Tribunal to strike out the appeal on the basis that he had no reasonable prospect of succeeding. Judge Warren considered this application and decided the case should proceed to be heard by a full Tribunal and gave reasons and case management directions on 20 September 2012.
13. NCC were joined as a party and the reasons for their application to be joined were considered as part of the evidence and submissions before us.
14. We were provided with both open and closed evidence. The latter mainly includes the information Mr Redman has requested and we shall call it the disputed information.

The Legal Framework on confidence information

15. S.41(1) provides that
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.*
16. Although we are not bound by decisions of other Tribunals we can be guided by them. We note that in Thackeray v Information Commissioner EA/2011/0043 published on 18 May 2012 that the Tribunal considered that the scope of information included under this exemption includes

information created by a public authority in its own file, but based on confidential information obtained from third parties.

17. We also note that in *Bluck v Information Commissioner and Epson and St Heiler University NHS Trust* EA/2006/0090 that a duty of confidence is capable of surviving the death of the confider and that an action for breach of confidence could still be taken by the personal representative of that person.
18. In *Coco v Clark* [1969] RPC 41 the court stated that a breach of confidence will be actionable if:
 - (a) The information has the necessary quality of confidence;
 - (b) The information was imparted in circumstances importing an obligation of confidence; and
 - (c) There was an unauthorised use of the information to the detriment of the confider.
19. S.41(1) is described as an absolute exemption not requiring a public interest test as with qualified exemptions under FOIA. However it has been recognised by the courts that there is a public interest defence to breaches of confidence. This means, in effect, that if the public interest in disclosure outweighs the public interest in maintaining the confidence then s.41(1) would not apply.

Applying s.41(1) to the facts in this case

20. Was the information obtained from another person including another public authority?
21. We agree with the conclusions of the Commissioner set out in paragraphs 15 to 18 of the DN and that on the facts of this case. We have had the opportunity of examining the disputed information in some detail and agree that the social services records are about the care of Mrs Redman and we accept that such information should be considered to be information obtained from other persons such as NHS staff, the police, Mrs Redman herself and Mr Redman.
22. Therefore we need to consider whether there is an actionable breach of confidence.
23. We accept as the Commissioner has done in paragraphs 19 and 20 of the DN that actions for breach of confidence can survive Mrs Redman's death and be taken by personal representatives. Such actions can only be taken if they meet the Coco tests.
24. Here we revert again to the findings of the Commissioner. We agree with the Commissioner that the disputed information has the necessary quality of confidence as set out in paragraphs 22 to 26 of the DN.

25. We also agree with the Commissioner that there is an obligation of confidence as set out in paragraphs 27 and 28 of the DN.
26. Finally we agree with the Commissioner that there would be a detriment to Mrs Redman if there was an unauthorised use of the information as explained by the Commissioner in paragraph 30 of the DN.
27. It must be difficult for Mr Redman to accept after so many years of living with his mother and caring for her that it could be a detriment to Mrs Redman that her only son should have access to her records. However the evidence before the Tribunal leads us to this conclusion. Some of this evidence is closed but the fact Mr Redman was excluded, in Mrs Redman's interests as well as his own, from the house during the period of the requested records and that he was not an executor or beneficiary under his late mother's will are part of the reason for coming to this conclusion.
28. However is there a public interest defence available had the NCC disclosed the disputed information? Again the Tribunal has considered the Commissioner's findings in paragraphs 32 to 39 of the DN and we can find nothing wrong with his analysis. If the disputed information showed any wrongdoing, for example, any negligence in Mrs Redman's care during the period of NCC's caring role, then we may have found that the public interest favoured disclosure. However we have considered the disputed information carefully and can find no evidence of wrongdoing.
29. We can understand Mr Redman wanting to see the care records of his late mother during the period of NCC sole care leading up to her death. But in the absence of any evidence of wrongdoing on the part of the NCC this is a private interest and not one we can take into account when considering the public interest balance.
30. We therefore find there is no public interest defence.
31. We agree with the Commissioner that s.41(1) applies and therefore uphold his DN. This means that there is an absolute exemption against disclosure and we do not need to consider any further exemptions claimed by the NCC.
32. Our decision is unanimous.

Observations

33. In the Commissioner's DN he finds that the NCC correctly withheld the information applying s.41(1) "apart from some information that represents the complainant's personal data which ought to have been considered separately in accordance with the rights of subject access provided by the Data Protection Act 1998". This Tribunal does not have jurisdiction to

consider such rights but there is nothing to stop Mr Redman making a subject access request to the NCC if has not already done so.

34. We note from recent copy correspondence sent by Mr Redman to the Tribunal from his solicitors that he has the opportunity to have released to him the records he has been requesting under certain conditions. We hope that in view of our finding that there is no evidence of wrongdoing, and now that he has settled matters in relation to the will, that he will feel able to consider this opportunity and have the records released to him so he can have peace of mind as to how his mother spent her last few days.

Dated: 13 November 2012

Signed: Judge Angel