

FOIA s.42 – Qualified exemption: legal professional privilege

FOIA s.3(2) – Public Authorities

Mrs B Francis v IC & South Essex Partnership Foundation NHS Trust

EA/2007/0091

21st July 2008

Cases:

Facts

The Appellant requested information regarding the care her son received at various hospitals prior to his death in 1998. However, the Trust did not send her everything she requested as some of the information could not be found, and some was withheld on the basis that it was legally privileged from disclosure under s.42 FOIA.

The IC accepted that legal professional privilege applied to the other withheld information; and that therefore the material was exempt under section 42 FOIA, subject to the public interest test. The IC considered the test and decided that the balance of public interest came down in favour of maintaining the exemption. The IC ordered no steps to be taken.

Findings

The Tribunal accepted that the Trust had searched in good faith for the information requested. However, they were surprised that this search did not throw up any pointers to relevant information held in other files, and suggested this pointed to an inadequate level of cross-referencing in the Trust's filing system. However, they accepted that, given s.12 (regarding exceeding the cost of compliance limit), they should not order the Trust to search further.

However, the Tribunal declined to draw the inference from this that the Trust no longer held the information if it ever did as there was no suggestion that it had been destroyed, only that it had not been found.

Section 42

The Tribunal reviewed the arguments for maintaining the exemption and for disclosure and held that the balance in this case was firmly in favour of maintaining the exemption. The Tribunal recognised a weighty public interest in ensuring that deaths are appropriately and properly investigated. They accepted that the Appellant had a great personal interest in information relating to the circumstances in which her son died, but that is not the same as the public interest in those circumstances, which had been largely satisfied. They found that the IC was correct in the decision notice on this point.

Section 3(2)(b)

S.3(2)(b) of the Act provides that information is held by a public authority if it is held by another person on behalf of the authority. In this case, sets of papers of potential relevance to the application were held by firms of solicitors who had been instructed to represent the Trust. In respect of each of these the Tribunal had to consider whether the papers were owned by the Trust, as a client, or whether they were owned by the firm of solicitors. If the former, the papers were held on behalf of the Trust and would be disclosable unless an exemption applied. If the latter, the papers were held by a private entity outwith the scope of the Act, and would not be disclosable.

With regard to particular papers named the 'Bevan Brittan Papers' the Trust argued that the papers were held by Bevan Brittan on its own behalf, not on behalf of the Trust. The Trust argued that the documents were 'heavily annotated' which suggested that it was a set of 'working papers' and as such the property of Bevan Brittan. The Tribunal inspected the documents and found little annotation and thus concluded that they were not working papers. Therefore, the Trust held that the Bevan Brittan papers were held on behalf of the Trust within the meaning of s.3(2)(b) of the Act. They ordered that the information in this document be disclosed to the Appellant.

Conclusion

The Tribunal allowed the appeal in part and substituted the decision notice.