



Appeal number: EA/2016/ 0237

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

JENNIFER SLACK

Appellant

- and -

THE INFORMATION COMMISSIONER

Respondent

TRIBUNAL:

**JUDGE ALISON MCKENNA
Mr PIETER DE WAAL
PROFESSOR DARRYL STEVENSON**

Sitting in public at Riverside House Edinburgh on 31 January 2017

DECISION

1. The appeal is allowed. The Council is required to take the following steps:
 - (a) Clarify the scope of the request with the requester;
 - (b) Respond to the request, having considered all documents falling within its scope.

REASONS

Background to Appeal

2. The Appellant's father made a request to Cumbria County Council ("the Council") on 30 October 2015. The Appellant has conducted the correspondence and appeal on his behalf. The request was made in the following terms (page 27, open bundle):

"I am making a request under the Freedom of Information Act regarding either viewing or receiving copies of my deceased brother – Ivan Hodgson – who passed away on 29 June 2015 in Hillcroft Nursing Home in Camforth.

Ivan's social work records began after the death of our younger brother Olwyn in March 2001....Ivan was born with learning difficulties....

As it is a legal requirement for documentation to be kept for six years in view of any query...they will still be in the possession of Kendal Social Work" ...

3. The Council belatedly refused the information request in reliance upon s. 41 (1) of the Freedom of Information Act 2000 ("FOIA") on 8 January 2016 (page 46, open bundle).
4. The Respondent issued Decision Notice FS50613789 on 13 September 2016, upholding the Council's decision. The Respondent found that the Council had breached s. 17 (1) FOIA by responding outside the time for compliance. The Decision Notice also concluded (at paragraph 24) that *"...the withheld information in this case has the necessary quality of confidence required to sustain an action for breach of confidence" ...*
5. The Decision Notice further concluded (at paragraph 40):

"...the Commissioner's view is that a duty of confidence would be capable of surviving the person's death. The Commissioner is also satisfied that the withheld information has the necessary quality of confidence, was imparted in circumstances giving rise to an obligation of confidence, and that disclosure would result in detriment to the confider. Having considered the circumstances of this case, the Commissioner does not consider that there would be a public interest defence in disclosing the information, and as such, accepts that s. 41 (1) has been correctly engaged."

Appeal to the Tribunal

6. The Appellant's Notice of Appeal dated 8 October 2016 submits that Ivan Hodgson had been a vulnerable adult since birth, that he was manipulated into making a Lasting Power of Attorney (LPA) and other financial arrangements which he did not understand, that his social care records were requested in order to prove this, and that social care workers, lawyers and neighbours have made false statements and are covering up their crimes.

7. The Respondent's Response dated 8 November 2016 maintained the analysis as set out in the Decision Notice.

8. The Tribunal held an oral hearing in Edinburgh on 31 January 2017. The Respondent notified the Tribunal that she would not appear or be represented at the hearing. The Tribunal heard submissions from the Appellant and had before it an open bundle comprising 120 pages and a closed bundle containing the sample of the withheld information which had been provided to the Respondent by the Council.

The Law

9. S. 41(1) of FOIA provides as follows:

“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”.

10. S. 41 (1) FOIA is an absolute exemption, so that no public interest test is applicable.

11. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

“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.

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

12. We note that the burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

The Appellant’s Submissions

13. The majority of the Appellant’s submissions concerned allegations of conspiracy and criminality against social care workers and solicitors, and also a complaint that she had received an unfair hearing before the Court of Protection. We had before us a number of witness statements in relation to those proceedings and note that after a hearing the Court upheld the LPA by which the late Mr Hodgson appointed his neighbours as his attorneys.

14. We asked the Appellant to take us through the Decision Notice which is the subject of this appeal and to explain why she thought it was wrong. Referring to paragraph 15 of the Decision Notice, she submitted that it was wrong for the Information Commissioner to have looked at a proportion only of the social care records that were relevant to her request and held by the Council. She thought they all should have been examined. She said that the late Mr Hodgson had been involved with social care workers for a long time before he was admitted to the care home, she thought probably from his birth, and not just in relation to the dementia which he suffered in the last few years of his life. The Tribunal asked the Appellant to look at the original information request (see paragraph 2 above) and to consider how it might have been understood by the Council and the Respondent. She agreed that the only date it referred to was 2001 but she said she thought the records went back further than that. She said she would have been happy with the Decision Notice if she knew that all the records had been read by the Information Commissioner.

15. The Appellant’s other submissions were that: it was wrong for s. 41 (1) to be applied in respect of any statements where the “other person” was the late Mr Hodgson’s neighbour; that confidentiality should not take precedence over the truth being revealed; and that the late Mr Hodgson would not have objected to his blood relatives having access to the documents.

Conclusion

16. The Appellant is concerned about a number of matters which, as we explained to her, fall outside of the Tribunal’s jurisdiction. We understand that she has strong feelings about these matters but we can express no views on the allegations of conspiracy and criminality which she made to us. We can only decide whether the Decision Notice is not in accordance with the law.

17. As the Appellant highlighted in her submissions, the Decision Notice states at paragraph 15 that the Respondent viewed a proportion only of the Council’s records. We note that, having viewed the sample of 26 pages included in our closed bundle,

the Respondent made a clear finding of fact in relation to all the information falling within the scope of the request. That finding was the basis for the conclusion that all the information falling within the scope of the request was exempt from disclosure under s. 41 (1) FOIA.

18. We are troubled by the Respondent's approach to the making of this finding of fact for three reasons.

19. Firstly, the information request (see paragraph 2 above) is ambiguous in its scope. There is clearly a word missing after "*copies of my deceased brother*" (possibly "records"?) so that it seems to us it would have been reasonable for the Council to have sought to clarify it with the information requester. The request is also ambiguous as to whether it refers to all records whenever created, or *the records created between 2001 and the date of death*. This is because, whilst 2001 is mentioned, the reference to learning difficulties throughout the deceased's life raised the possibility of much earlier social care involvement. To complicate matters further still, there is a reference to the requester's expectation that only six years' records would be available. Once again, it seems to us that it would have been reasonable for the Council, and consistent with the Code of Practice, to have clarified the scope of the request before responding to it.

20. Secondly, we note that the Decision Notice does not seem to have reached a firm interpretation of the ambiguous scope of the request before making findings of fact in relation to it. We note that in the correspondence between the Council and the Respondent (page 116, open bundle) the Council refers to an information request made on 4 January 2016 (which we have not seen) whereas the Decision Notice refers at paragraph 4 to the request made on 30 October 2015 (page 27, open bundle). There would therefore appear to have been a miscommunication between the Council and the Respondent as to both the date and scope of the information request. It is difficult to see how the Respondent could make robust findings of fact whilst communicating at cross purposes with the Council.

21. Our third concern relates to the question of whether the nature and volume of the information viewed by the Respondent provides a satisfactory basis for the finding of fact made at paragraph 40 of the Decision Notice. We note that in the correspondence between the Council and the Respondent (page 118, open bundle) the Council states that it holds a "large volume" of withheld information including case notes, details of hospital meetings, reviews, e mails received and sent, telephone calls in and out, assessment plans Jan 2011 to March 2011 and support plans for the same period. The Council asks the Respondent for guidance as to how much of the withheld information it wishes to view but we have not seen the Respondent's response. We can only assume that the information contained within our closed bundle is what was agreed should be provided and this is but a small sample of information which would appear to fall within only one of the categories of information referred to in the Council's letter, and relates only to the last few years of Mr Hodgson's life. We do not know how the Respondent reached the conclusion that the sample information it received from the Council was a sufficient basis on which to reach its conclusions.

22. We do not suggest that the Respondent is required in every case to read all the withheld information. In many cases, a sample would be proportionate and sufficient. However, we conclude that in issuing the Decision Notice in this case the Respondent should have (i) set out clearly her understanding of the scope of an ambiguous information request and (ii) ensured that, if she were going to review a sample only of the withheld information, that that sample was, in some considered way, representative of the whole. It does not seem to us that a finding of fact in relation to the totality of the withheld information can be substantiated where a small and unrepresentative sample of information withheld was viewed. In this case, the request was either for all records since the late Mr Hodgson's birth, or for the records concerning the last fourteen years of his life, or for the records from the last six years of his life. On any of these analyses, it is difficult to see how the Respondent reached the view that it had considered a representative sample.

23. We note that paragraph 15 of the Decision Notice refers to the sample information plus the Council's submissions. Having seen the submissions on pages 116 to 118 of the open bundle, we are not persuaded that they provide sufficient additional information about the factual position to enable the Respondent to rely on only a small sample of the withheld information. We note, for example, that on page 117 the Council states that the information in social care records "*will have been obtained*" from that individual themselves as well as from the professionals involved. We note that the Council does not submit as a fact that the criteria for applying s. 41 (1) FOIA is met for all categories of information held in this case, as the writer appears to be making a generalised assumption only.

24. For all the above reasons we are not satisfied that the Decision Notice makes an appropriate finding of fact in relation to the withheld information. We conclude that it was not possible for the Respondent to be satisfied on the balance of probabilities that *the withheld information has the necessary quality of confidence, was imparted in circumstances giving rise to an obligation of confidence, and that disclosure would result in detriment to the confider* because the Respondent had only considered a small sample of the withheld information which we find cannot be described as a representative sample. This is because (a) it represents only one category of the total information held when it is clear there are several categories of information held; (b) the Council's submissions provided an insufficiently strong basis for making a finding of fact and (c) it is difficult to see how the Respondent could have satisfied herself that the sample was representative of the whole when the scope of the request had not been clarified with the requester and there was an on-going miscommunication about it between the Council and the Respondent.

25. For all these reasons, we conclude that the Decision Notice is not in accordance with the law. The appeal is allowed and the Council is required to take the steps set out at paragraph 1 above. We would wish to make clear to the Appellant that, after taking the steps we have directed, the Council may still conclude that s. 41 (1) FOIA or some other exemption under FOIA is applicable. If so, it will inform her and she will be at liberty to make a further complaint to the Information Commissioner.

ALISON MCKENNA

DATE: 14 February 2017

PRINCIPAL JUDGE