



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

Appeal No: EA/2017/0003

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FS50645603
Dated: 14 December 2016**

Appellant: Christopher Phillips

Respondent: The Information Commissioner

Determined without a hearing

**Before
HH Judge Shanks
and
Rosalind Tatam and Mike Jones**

Date of decision: 28 July 2017

Date Promulgated: 31 July 2017

Subject matter:

**Freedom of Information Act 2000 (FOIA)
Section 40 (Personal information)**

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal allows the appeal and issues the following substitute decision notice.

SUBSTITUTE DECISION NOTICE

Public Authority: **West London Mental Health NHS Trust**

Complainant: **Christopher Phillips**

The Substitute Decision

For the reasons set out below the Public Authority did not deal with the Complainant's request for information dated 5 December 2015 in accordance with Part I of the FOIA in that they ought to have confirmed or denied in writing to the Complainant whether they held any information about the death of Tahir Gass.

Action Required

The Public Authority must so confirm or deny by 25 August 2017.

HH Judge Shanks

28 July 2017

REASONS FOR DECISION

1. On 9 November 1954 Tahir Gass, a Somali sailor born in 1920, was found guilty of murder but insane and sent to Broadmoor. He was discharged and repatriated to British Somaliland a year later, leaving Southampton on a boat bound for Aden on 11 October 1955. These are matters of public record.

2. In 1998 another Somali sailor, Mahmood Mattan, who had been hanged for murder in 1952, had his conviction quashed by the Court of Appeal. There was reference to Mr Gass's case in press coverage of Mr Mattan's. The press recorded that it was not known if Mr Gass was still alive.

3. On 5 December 2015 the Appellant, Dr Phillips, made a request under FOIA addressed to the West London Mental Health NHS Trust, which is responsible for Broadmoor, asking for information about Mr Gass. Dr Phillips acknowledged that normally in the absence of any other information it would be assumed that Mr Gass was still alive until 100 years after his birth and he asked, among other things, for "any information held about [Mr Gass's] death". In subsequent correspondence he confined his request to that information alone. The Trust has refused to say whether or not they hold any such information, relying on section 40(5)(b)(i) of FOIA, and the Information Commissioner has upheld that position in her decision notice dated 14 December 2016.

4. Dr Phillips has appealed against the decision notice. The parties agreed to the appeal being determined without a hearing and we consider that we can properly determine the issues in that way.

5. It is necessary to set out the relevant statutory provisions. Section 1(1) of FOIA, which is subject to section 2 among others, provides:

Any person making a request for information to a public authority is entitled-

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

Section 2 provides:

(1) Where any provision ... states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either-

(a) the provision confers absolute exemption or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply.

...

(3) For the purposes of this section, the following provisions ... (and no others) are to be regarded as conferring absolute exemption:

...

(f) in section 40-

(i) subsection (1)

(ii) subsection (2) [in certain cases which are immaterial]

(g) section 41 ...

Section 40(5) provides as far as relevant:

(5) The duty to confirm or deny –

(b) does not arise in relation to ... information if or to the extent that ...

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles ...

Section 1(1) of the Data Protection Act 1998 defines “personal data” as data which relate to an identifiable “living individual”. The data protection principles are set out in Schedule 1 to the Act and define the circumstances in which personal data can be disclosed or otherwise processed.

6. Dr Phillips’s case is disarmingly simple. He says that if the answer to his request is that the Trust do hold information about Mr Gass’s death, any such information will

by definition not be “personal data” and no question of a contravention of the data protection principles will be involved in the confirmation that they hold the information (or indeed in the disclosure of the information itself). If, on the other hand, they do not hold such information, confirmation that that is the case will disclose nothing about Mr Gass and therefore not amount to his personal data and not be capable of involving a contravention of the data protection principles.

7. The Respondents answer this by saying in effect that to engage with the request at all by giving a confirmation or denial would imply that Mr Gass had been under the care of the Trust at some time. That in itself would be his “personal data”, indeed his “sensitive personal data”, since the fact that an individual has been under the care of a Mental Health NHS Trust is clearly information “as to his mental health” (see section 2 of Data Protection Act 1998). The disclosure of such personal data would inevitably involve a contravention of the first data protection principle, which requires, apart from anything else, that one of the conditions in Schedule 3 to the Data Protection Act is met.

8. This is a nice intellectual conundrum in a notoriously difficult area, namely the interaction between FOIA and the Data Protection Act. On consideration we have come down in favour of the Appellant’s argument. It seems to us that for section 40(5)(b) to bite either confirmation or denial has to involve a putative contravention of a data protection principle. In this case, confirmation clearly will not, since it is inherent in a confirmation that the putative data subject is dead, and so not a data subject at all. But a bare denial that the Trust holds any information about Mr Gass’s death does not logically tell anyone anything at all; the fact that the Trust does not have any information about his death does not in itself mean they have other information about him or that he was once a patient. As a matter of fact we know that to be the case from publicly available information but by denying holding any information about Mr Gass’s death the Trust would not be confirming that this was so. In the particular circumstances of this case we are therefore of the view that the Respondents are wrong to say that the duty to confirm or deny did not arise.

9. At the very end of her Response the Commissioner also raises the exemption at section 41(2) of FOIA as an exemption that may be engaged in this case. Section 41(2) says this:

The duty to confirm or deny does not arise if ... the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence

There is case law to suggest that disclosure of information about physical and mental health can be the subject of an actionable breach of confidence even when it relates to a dead person. So, confirmation that the Trust held information about Mr Gass's death would imply that he had once been a patient and thus be a potential actionable breach of confidence which would mean that section 41(2) would be engaged even though Mr Gass was dead. However, the fact that Mr Gass was a patient of the Trust (as opposed to any of the details of his condition or treatment) is, as we have said, publicly available information and therefore not information which could in any circumstances be the subject of a breach of confidence action. For that reason we are quite satisfied that section 41(2) would not apply in this case any more than section 40(5)(b)(i).

10. For those reasons we are unanimously of the view that the Trust ought to have given the confirmation or denial required by section 1(1)(a) and we allow the appeal and issue the substitute decision notice set out above.

HH Judge Shanks

28 July 2017