



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights  
Decision notice FS50731558**

**Appeal Reference: EA/2018/0260**

**Considered on the papers  
On 15 July 2019**

**Before**

**JUDGE CHRIS HUGHES**

**TRIBUNAL MEMBERS**

**GARETH JONES & JOHN RANDALL**

**Between**

**JANET CARD**

Appellant

**and**

**INFORMATION COMMISSIONER**

Respondent

**DECISION**

The decision of the respondent is set aside in part and the following decision notice is substituted.

**REASONS AND SUBSTITUTED DECISION NOTICE**

1. On 12 July 2013 Mrs Card (an elderly lady who was registered blind) was referred by the nurse for a scan to see if she had a deep vein thrombosis. An appointment was made for 16 July and the West Midland Ambulance Service

(WMAS) was booked to take her and her accompanying daughter to hospital. No vehicle was sent and a further appointment was made for 10 am on 19 July. Mrs Card and her daughter were still waiting at 1.00pm. Following contact from the nurse a St John's ambulance arrived at 1.30pm and took her to hospital. The scan was performed and it was confirmed that she did not have a blood clot. On 23 July she signed a letter of complaint which asked, "I would be grateful for an explanation why 3 appointments weren't booked or kept?" On 31 July an acknowledgement was sent by WMAS which stated: -

*"Please be assured that an investigation has commenced and we will report back within 25 working days and we will forward a response to this investigation in writing. Please be assured that an Officer of the Trust will contact you once our investigations are complete to discuss the outcomes prior to a final resolution letter being sent to you."*

2. Mrs Card subsequently died.
3. The letters were not received. Her daughter Miss Card (the Appellant in these proceedings) pursued the complaint about ambulances not turning up and the failure to send the promised letters on various dates in 2016. These produced a reply from WMAS on 10 January 2017: -

*"Dear Ms Card*

*I write further to your letter dated 21 December 2016 regarding the concern you raised with the Trust on 30 July 2016.*

*I can confirm that your mother was spoken to on 5 September 2013 by Ellen Mowe, Investigating Officer at the time. Your mother was advised that notes would be added to her booking details.*

*I do not have any formal investigation to share with you as this was dealt with as an informal concern and unfortunately since this incident the Patient Advice and Liaison manager and the Investigating officer are no longer in post and the computer aided dispatch system can no longer be reviewed for the timeframe of your mother's bookings. I am sorry that I can be no further assistance to you but can only assure you your mothers concerns were dealt with at the time."*

4. Ms Card was dissatisfied and a further response was sent by WMAS: -

*"... Our process is that once*

*Once we have an outcome from the local manager we ask them to telephone the complainant with their findings and plan to resolve as applicable. **The local manager at the time looked at previous attendances for your mother and it was clear there had been a number of delays for various reasons.** To try to ensure a more speedy response she added notes to the system explaining this to prompt a more timely response. This may be that if a plan vehicle is likely to be delayed the dispatcher will consider sending an alternative vehicle.*

*Following this the manager telephoned your mother on 5 September 2013 advising her that notes had been added to her booking details. Our records show that following this phone call the local manager advised us the case which is now closed. I can only assume there was agreement that your mothers' concerns had been dealt with by means of this phone call.*

*I am sorry that we did not follow this up with the usual written response. I am not able to justify why we omitted to do this however as previously advised the managers involved are no longer in these roles and we are not able to access the booking system so I am not able to add further comment about your original investigation outcome.*

*Investigations may take many forms and we do not require managers to write full reports where issues can be resolved informally. We believed your mother had accepted the outcome and action taken during the 5 September 2013 telephone conversation.*

*Again, I reiterate my apologies that we did not follow this telephone call up with a letter which may have answered your query last May when you raised a concern with the patient experience team.*

*I appreciate this is frustrating for you but unfortunately, I do not have any further information to share as the electronic booking system has changed and the bookings cannot be retrieved. Mrs Limacher has been making attempts to attain these answers from a number of Managers within the Non-Emergency Patient Transport Service since May 2016 without success.*

*I am sorry to that I can be of no further assistance to you but can only assure your mothers concern were dealt with at the time."*

5. Ms Card remained dissatisfied (her copy of the letter is marked final letter to WMAS no reply) and on 17 December 2017 applied to WMAS under FOIA: -

*"I wish to apply for some records under the Freedom of Information Act.*

*They are as follows:*

*Journeys booked for Mrs K M Card and Carer who is me, her daughter, July 2013. Plus, the information on why the Ambulance did not turn up, until the fourth occasion. What happened with the bookings? The appointments were for the DVT Clinic also a scan. I would also request the St John Ambulance report on my mother."*

6. WMAS refused the request relying on s40 FOIA which subject to certain conditions protects categories of personal information from disclosure (the reason for the existence of this provision is that disclosure under FOIA is to the world at large and not simply to the person who requests it). The response stated: - *"However due to the nature of the information you have requested, we have passed your request onto our Patient Advice Liaison team who will be in touch shortly.*

7. The Patient Advice Liaison Service wrote to Ms Card on 5 February following on from the letter of 15 January stating: -

*"Due to the time that has elapsed I can only refer to the Computer Aided dispatch record held by the Emergency Operations Centre (EOC).*

*On the 19 July 2013 we received an urgent call at 12:00 hours. EOC were asked to arrive with your mother within 2 hours. An ambulance arrived on scene at 12.54 hours and conveyed your mother to hospital arriving at 13.45 hours..."*

8. The letter stated that it included a Patient Report Form dated 19 July 2013, it was omitted and sent two days later.
9. **In essence WMAS chose to provide to Ms Card through its Patient Advice Liaison Service information which it did not think it should be prepared to release to the world at large.**
10. Ms Card thanked WMAS for the information that it had provided and requested an internal review of the FOIA decision. WMAS confirmed that it was relying on S40(2) FOIA to refuse to disclose the information.

11. Ms Card complained to the Respondent Information Commissioner (ICO) who investigated. During the course of his investigation she clarified with WMAS that since Mrs Card had died it could not rely on s40(2) FOIA which only protected the personal information of living people from disclosure under FOIA. In her decision notice she drew attention to the distinctions which WMAS had applied between Ms Card trying to find out, as a daughter, what had happened and Ms Card using FOIA. In the latter case WMAS had to deal with her as though she were a complete stranger with no connection to Mrs Card (decision notice paragraph 23): -

*"WMAS may well have indicated to the complainant in response to her separate service complaint whether or not it holds information relevant to her request. This response was given to the complainant as an individual. However, as WMAS has pointed out to the complainant, a response under the FOIA is, in effect, a response to the wider world and, for the reasons given above, WMAS can appear to give a contradictory response under the FOIA."*

12. She then considered what grounds there were for withholding the information: -

*"In cases where information about the deceased requires protection, certain exemptions will apply. In certain circumstances, such as a request for medical records of the deceased, the exemption for confidential information is likely to apply. Although WMAS has not referred to it, given the sensitivity of the disputed information (if held) the Commissioner has proactively considered whether WMAS can rely on section 41(2) of the FOIA to neither confirm nor deny the information is held."*

13. S41 allows public bodies to withhold information if to disclose it would expose them to the risk of an action for breach of confidence: -

*“Information provided in confidence.*

*(1) 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.*

*(2) The duty to confirm or deny does not arise if, or to the extent that, 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.”*

14. The ICO then applied this to the request (decision notice paragraph 28): -

*“The Commissioner is satisfied that, if held, the information in question about ambulance journeys and a report associated with the complainant’s deceased mother would have been obtained from a third party...this information, if held, constitutes the deceased’s medical records...”*

15. In the light of these conclusions the ICO concluded (paragraphs 29-36) that disclosure would amount to an actionable breach of confidence and in the light of this decided: -

*“37. In light of the above the Commissioner concludes that the requested information engages the exemption under section 41(2) of the FOIA and that WMAS is not obliged, under the FOIA, to confirm or deny it holds the requested information.*

*38. In certain circumstances an individual may have access to a deceased person’s medical records through Access to Health Records legislation. This is something the complainant may want to consider, after reviewing all WMAS’s correspondence to her.”*

16. Ms Card appealed against the decision. In her notice she set out the difficulty she had had understanding the decision notice. She set out the background to her request and expressed her dissatisfaction at the suggestion that she access the information through the Access to Health Records Legislation *How could I get access if my mother did not have a will? It was not an obligation to have one... I do not wish to look at my mother’s medical notes re WMAS. I only want to know why the ambulance did not turn up until the 4<sup>th</sup> time. Can these two things not be separated, notes and bookings? To give me an explanation? To miss an appointment once is not good 2 and 3 and arrives on the 4<sup>th</sup> needs an explanation from the ambulance transport booking office as to what is going wrong. She stated that the outcome she was seeking from the appeal was an explanation as to why the*

*WMAS did not turn up until the 4<sup>th</sup> time, (in fact it was St John Ambulance that arrived the 4<sup>th</sup> time on their behalf) what happened the other 3 times?*

17. In resisting the appeal, the ICO emphasised that the request made to WMAS had included a request for medical records and that s41(2) applied to medical records of deceased persons.

### Consideration

18. The tribunal is unsurprised at the confusion which Ms Card has experienced in trying to understand what happened. The request for information under FOIA arose out of the handling of a complaint signed by her mother (and written by Ms Card) which had not been formally concluded by WMAS in accordance with its policies. Following the death of her mother Ms Card sought the resolution of the complaint, which was made more difficult by the time which had elapsed with consequent staffing changes and changes as to the availability of records. She then made a FOIA request which triggered further activity and the disclosure of certain information by WMAS PALS (possibly unaware that her mother was dead) in an attempt to assist the resolution of Ms Card's concerns. This information released in this way included a report by St John's Ambulance (which had attended to take Mrs Card to hospital at the request of WMAS) as well as a statement indicating that not all records were available (see paragraph 7 above).
19. The request has been treated throughout as a single request which sought the medical record of Mrs Card held by WMAS. In the light of this interpretation of the request the ICO considered the application of s41(2) and concluded that it was a request for confidential information which should not be disclosed under FOIA. The ICO concluded that, taken all together the request for information were for some of Mrs Card's medical records in the form in which they were held by WMAS. A careful reading of the terms of the request indicates that it has two different component parts, namely information about the bookings and the medical report. Furthermore it is clear from the notice of appeal that the decision notice is appealed only in part, in relation to the ambulance bookings; as Ms Card stated: -

*"I do not wish to look at my mother's medical notes re WMAS. I only want to know why the ambulance did not turn up until the 4<sup>th</sup> time. Can these two things not be separated, notes and bookings? To give me an explanation?"*

20. The ICO's position on this is that information about whether Mrs Card used an ambulance would provide information about her health and this constitutes part of her medical records. She further concluded that the information was not otherwise available to the public and more than trivial. It arose in circumstances where there was a duty of confidence, that disclosure of medical records was in itself a detriment.

21. In weighing whether there was a public interest in the disclosure of these medical records sufficient to justify what would otherwise be a breach of confidence the ICO made the decision in the light of a case decided by this tribunal's predecessor which defined the public interest in such cases in terms of patient confidence that *"medical staff will not disclose sensitive medical data before they divulge full details of their medical history and lifestyle. Without that assurance patients may be deterred from seeking advice and without that assurance patients may be deterred from seeking advice and without adequate information patients cannot properly diagnose or treat patients"*.
22. While this is undoubtedly a true statement of the significance of confidence in ensuring an effective therapeutic relationship between patients and doctors and other health professionals: for a breach of confidentiality to be actionable it is necessary to look at the actual facts of the individual case.
23. In this case a woman who repeatedly waited with her mother for an ambulance and who assisted her mother in making a complaint wants to know why the ambulance repeatedly failed to arrive. The WMAS has acknowledged that it did not fully follow its own procedures in handling the complaint. It has already disclosed certain information to the daughter in what it clearly feels was a proper discharge of its responsibilities. The daughter is using FOIA to find out what information the WMAS holds as to why ambulances did not turn up when booked. For an action to be brought against WMAS in these circumstances it would have to be brought by the personal representatives of Mrs Card. It is simply beyond the bounds of credibility to suggest that a court would find disclosure of the reason in these circumstances to be an actionable breach of confidence.
24. Given the passage of time it may well be that such information is no longer held – this is foreshadowed by the reply of 10 January 2017 which stated that: -  
  
*"the computer aided dispatch system can no longer be reviewed for the timeframe of your mother's bookings"*
25. A public authority can often, if it chooses, disclose information. There are many occasions when it should disclose information. In this case, through the complaints procedure which Ms Card has followed some information has been disclosed. It is however unclear whether all information sources which could supply information which explains why the ambulances repeatedly failed to turn up have been considered. Ms Card has asked for disclosure of this information under FOIA. WMAS should now conduct a formal search to determine whether the information is held.
26. The tribunal therefore directs: -

(a) West Midlands Ambulance Service within 35 days to confirm whether or not information falling within the scope of the request: -

*"Journeys booked for Mrs K M Card and Carer who is me, her daughter, July 2013. Plus, the information on why the Ambulance did not turn up, until the fourth occasion. What happened with the bookings?"*

In the event that information is held to disclose that information or justify the refusal of that information in accordance with exemptions in FOIA.

Signed Hughes

Judge of the First-tier Tribunal

Date: 22 July 2019

Promulgated Date: 24 July  
2019