



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL  
(INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF  
INFORMATION ACT 2000**

EA/2011/0243

**B E T W E E N:-**

**AUSTIN HEATHERINGTON**

**Appellant**

**-And-**

**THE INFORMATION COMMISSIONER**

**Respondent**

**HEALTH & SOCIAL CARE BOARD NORTHERN IRELAND**

**Second Respondent**

**Tribunal**

**Judge Kennedy QC  
Darryl Stevenson  
Dave Sivers**

**Hearing: 16<sup>th</sup> April 2012.**

**Decision: 15<sup>th</sup> May 2012.**

**Subject matter:** Freedom of Information Act 2000,  
Failing to provide information by way of exemption under Section 41 of the  
Act.

**DECISION OF THE FIRST-TIER TRIBUNAL:**

The appeal is allowed and the Tribunal refers the request back to the  
Respondents to consider the exemptions under Section 40 of the Act.

## **Introduction**

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (**the “Act”**). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“Decision Notice”) dated 28 September 2011 (reference FS50367720).
2. The Tribunal Judge and lay members sat to consider this case on the 16<sup>th</sup> day of April 2012 and decided it on the papers

## **Factual Background to this Appeal:**

3. Full details of the background to this appeal, the Appellant’s request made on 11 November 2010 for information and the Commissioner’s decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns a request made by the Appellant to the Health & Social Care Board Northern Ireland (**“the Second Respondent”**) regarding the number of people from Northern Ireland who received treatment at a specified London clinic in 2010. The HSCB refused to disclose the requested information as it stated that it was exempt under section 41(1) of the Act (information provided in confidence).

## **The Commissioner’s Decision:**

4. The Commissioner served a Decision Notice dated 28 September 2011. The Commissioner’s decision was that the HSCB dealt with the request in accordance with the requirements of the Act in that it correctly applied section 41 to the withheld information. The Commissioner has also decided that the HSCB did not deal with the request in accordance with the Act in that it breached section 17(1) of the Act by failing to issue a refusal notice within 20 working days, however, the Commissioner did not require any further steps to be taken.

5. The relevant provision of the FOIA is s.41(1), which 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.”

6. The Commissioner, in the Decision Notice at paragraph [12], set out the following in relation to information obtained from another:

*“The information sought relates to the number of persons who have been referred to and treated by a specific clinic in London. Those patients are referred to that clinic by the HSCB through the ECR process, which means that those patients, and information concerning those patients’ needs, had been supplied to the HSCB by a Trust or practitioner. That information is therefore obtained from another person. The further information relating to the cost of treatment is information received from the clinic and/or the referring Trust. The Tribunal has confirmed that even if the information is recorded in a document created by the HSCB, the test is concerned with whether the information itself was obtained from a third party: Department for Business, Enterprise and Regulatory Reform –v- Information Commissioner & Friends of the Earth (EA/2007/0072) at [78]-[79].*

*The first limb of s.41(1) is therefore satisfied in this case.”*

The Tribunal does not accept this finding for the reasons given below.

7. At paragraphs [14] to [32] the Commissioner goes on to discuss the following matters in detail and the Tribunal accepts the reasons and these findings in their entirety including:

- i. The Tripartite Analysis;
- ii. Necessary Quality of Confidence;
- iii. Obligation of Confidence;
- iv. Detriment; and
- v. Public interest.

The First-tier Tribunal agree with those discussions as put forth in said paragraphs and does not repeat same herein.

#### **The Notice of Appeal:**

8. The Appellant appealed by way of a notice of appeal dated 18 October 2011. The grounds of appeal are set out at page 6 of the Notice of Appeal. In addition, the Appellant attached letters dated 15 November 2010, 6<sup>th</sup> December 2010, 15<sup>th</sup> December 2010, and referred to other correspondence already forwarded as supporting documents. This notice of appeal seems to rely on the following grounds as basis for appeal:

- (i) That section 41 does not cover the information requested;
- (ii) That the Commissioner took no account of the correspondence before he clarified his request which he claims reveals an inconsistency in the HSCB's approach;
- (iii) That the ICO is "*part of a cover up to keep embarrassing facts out of the public domain*".
- (iv) The Appellant objects to the Commissioner having taken no steps in relation to the breach of s.17(1), and having failed to consider the Health Minister ignoring letters for the Appellant.

#### **Reasons & Analysis**

9. On the evidence before this Tribunal we are not satisfied, on the balance of probabilities that the requested information was obtained by the public authority from any other person (including another public authority).
10. While the Tribunal accept that requests for assistance to the Second Respondent through the Extra Contractual Referral process in individual cases, and any information relating to each case, would come from another person (including another public authority) , the requested information is in fact information that would be compiled by and held only within the possession of the Second Respondent. The Tribunal therefore finds in favour of the Appellant on his first ground of appeal.
11. However the Tribunal is aware of the highly confidential nature of the requested information and that small numbers are involved. There is also, we feel to be a public interest in non disclosure, but again we do not make any decisive comment on that in the circumstances of the paper hearing before us. We are not aware how many patients whose personal data are in fact involved but are of the view that Section 40 of the Act is likely to be engaged and invite the Respondents to reconsider the request in light of Section 40

### **Conclusion**

12. In light of the foregoing, the Tribunal allows the Appellant's appeal but refers the request back to the Respondents for re-consideration.
13. The Appellant has the right to apply to the Upper Tribunal for permission to appeal. Any such application must be made to the Tribunal in writing within 28 days of this decision.

Signed:

Brian Kennedy QC

Tribunal Judge

15<sup>th</sup> May 2012



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**APPLICATION BY THE SECOND  
RESPONDENT TO APPEAL**

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1. By letter of the 11<sup>th</sup> June 2012 the Tribunal received an application for leave to appeal the Tribunals' decision of the 15<sup>th</sup> May 2012.
2. This request was repeated in the formal form on the 15<sup>th</sup> June 2012 outside the time limit for such a request.
3. The letter of the 11<sup>th</sup> June makes clear the grounds for application to appeal and we will therefore consider it in time.
4. The request for information from the appellant in this case was as follows:

*“How many people from Northern Ireland availed of treatment at London clinics during the year 2010.” And*

*“What was the total cost to the public purse for each individual case”*

5. This information, as plainly can be seen from the papers in the case, was not the information supplied to the Second Respondent by any other person. See paragraph 3 of the Commissioners’ response: *“The HSCB **operates** (our emphasis) the Extra Contractual Referrals process (“ECR”) whereby patients ----- can be referred.”*
  
6. It is clear from the papers, and was never disputed, that the Second Respondent operates the ECR, not the other persons who sent the individual details of patients. The request is not about the details sent by other persons but about the referral process, the ECR, operated by the Second Respondent. The Tribunal explained this in paragraphs 10 and 11 of the Judgment.
  
7. Accordingly we refuse permission to appeal.

[Signed on the original]

**Brian Kennedy QC**  
Judge

27 June 2012.