



**First-Tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal reference: EA/2017/0285

JENNIFER SLACK

Appellant:

and

THE INFORMATION COMMISSIONER

First Respondent:

and

CUMBRIA COUNTY COUNCIL

Second Respondent

Before: Brian Kennedy QC, Suzanne Cosgrave and Jean Nelson

DECISION

Introduction:

[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”) The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“DN”) dated 6 November 2017 (reference FS50696508) which is a matter of public record.

[2]. The Tribunal sat at George House, Edinburgh on 27 March 2018 to consider this appeal. The Tribunal decided to join the relevant Public Body, the Cumbria County Council, as a co-respondent and sought further submissions from the parties. The Tribunal sat again in Edinburgh on 29 August 2018 and again head the Appellant.

Factual Background to this Appeal:

[3] Full details of the background to this appeal, Ms Slack's request 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 the question of whether Cumbria County Council ('the Council') was correct to withhold the requested information under ss40 and 41 FOIA.

Chronology:

27 Feb 2017	Ms Slack's request for all social work records relating to a deceased person
15 March 2017	Council clarifies the request
27 March 2017	Council refuses request citing s41
21 July 2017	Ms Slack complains to Commissioner
6 Nov 2017	Commissioner's Decision Notice upholding the Council's refusal notice

Relevant Legislation:

Section 40 Personal information.

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.

(3) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

Section 41 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.

Commissioner's Decision Notice:

[4] Ms Slack has previously made a similar request, to which the Council withheld the requested information under section 41(1). The Commissioner subsequently issued a decision notice, which upheld the Council's refusal notice (FS50613789). Following an appeal on the basis that the request was unclear in its scope, the Tribunal directed the Council to clarify the scope of the request with the requestor, and to issue a fresh response (EA/2016/0237). During investigation, the Council informed the Commissioner that it also considered part of the withheld information would fall under the exemptions provided by sections 40(2) and 40(1).

Section 41 Information received in Confidence

[5] The Commissioner referred to her guidance issued in relation to requests for information about deceased persons. The Commissioner considers that the information contained within social care records derives directly or indirectly from the individual under care and pertains to support plans; supported assessment questionnaires, special factor notes, referrals, common assessment tool documents, and historic provision documents. The Commissioner therefore accepts that the withheld information was obtained from another person for the purposes of s41(1)(a).

[6] The Commissioner has taken the view, in line with the decision reached by the Tribunal in the case of Pauline Bluck v the Information Commissioner and Epson & St Helier University NHS Trust (EA/2006/0090) that a duty of confidence (and therefore the s41

exemption) is capable of surviving the death of the confider. It is not necessary to establish whether the deceased person has a personal representative who would be able to take action, because it would be unreasonable to expect a public authority to open itself to legal action if at the time of a request it is unaware of any potential representative.

[7] The confidence test in *Coco v Clark* [1969] RPC 41 was repeated:

- a. The information has the necessary quality of confidence;
- b. The information was imparted in circumstances importing an obligation of confidence; and
- c. There was an unauthorised use of the information to the detriment of the confider.

[8] Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial. The Commissioner is satisfied that social care records are personal, sensitive, and important to the confider, and indeed are akin to medical records. They are not readily accessible save to a limited number of individuals who received it in circumstances that created an obligation of confidence, and as such meet the first and second limbs of the test.

[9] In many cases, it may be difficult to argue that a disclosure of information would result in the confider suffering a detriment in terms of any tangible loss. As the person is now deceased, the Commissioner does not consider that the disclosure of the withheld information would cause any tangible loss. However the Commissioner does consider that disclosure to the general public would be an infringement of the deceased person's privacy and dignity, which can be a detriment in its own right.

[10] While s41 (1) is an absolute exemption, case law suggests that breach of confidence may not be actionable if there is a public interest in disclosure, and so the Commissioner is of the opinion that there could be a public interest defence to any release of confidential information. The Commissioner considers it important that a social care client has confidence that their information will not be made publicly available following their death. Disclosure may discourage clients from providing necessary information to those providing their care, undermining the quality of care and endangering service users.

[11] The user's Article 8 ECHR right to private and family life must be balanced against Article 10 rights to freedom of expression, which includes the right to impart and receive information. It is understood by the Commissioner that the complainant is a member of the deceased person's family, and that they hold various concerns about the quality of the deceased person's social care, the legality of the Lasting Power of Attorney held by two third parties, and the terms of the deceased person's will. Whilst it is in the public interest to expose malpractice and to permit individuals to have access to information in order to mount legal challenges. However, the Commissioner identified no material that would give

rise to concerns of impropriety, and noted that any allegations of malpractice would be better dealt with by other avenues that would not result in the requested information being released to the world at large. There is therefore no overriding public interest in breaching the confidence.

Section 40 Personal Information

[12] The requested information clearly contains personal data, and it therefore must be processed lawfully and fairly. Section 40(2) refers to the personal data of third parties, and the Commissioner did not consider that they would have a reasonable expectation that their data would be disclosed to the world at large, especially when it was collected in the circumstances of the provision of social care. It is likely that personal distress would be occasioned, and in this instance there is not a sufficiently strong public interest to dislodge this exemption. No such public interest consideration occurs in s40(1), where the data refers to the personal information of the requestor themselves. The Commissioner considered that some of the requested information is likely to represent Ms Slack's personal data, and as such the exemption should stand.

Appellant's Grounds of Appeal:

[13] Ms Slack's grounds of appeal appeared to focus on the fact that as a blood relative of the deceased she was entitled to have information, she believed to be true, confirmed to her, and dismissed the cited cases as irrelevant unless they conformed to her characterisation of the facts of her particular complaint. While she did not criticise the care received by her relative, she did accuse named individuals of abuse, criminality and blackmail, and of being "compulsive liars". She repeatedly stated that she knew the truth of the situation and that she did not "intend to expose family secrets".

Commissioner's Response:

[14] The Commissioner noted that Ms Slack had not set out why her decision was wrong in law or why her discretion should have been exercised differently. She raised concerns that Ms Slack did not appear to understand the role of the Commissioner and the consequences of disclosure under FOIA, which would mean that the information she requested would be made available to the world at large, rather than just to her. She repeated and expanded upon her reasons in the Decision Notice, and reiterated that despite the concerns raised by Ms Slack pertaining to wrongdoing in the completion of a Lasting Power of Attorney that would give rise to a legitimate interest in *private* disclosure, there is nothing of sufficient gravity to dislodge the overwhelming public interest in keeping such sensitive information out of the public domain.

Appellant's Response:

[15] Ms Slack responded to the Commissioner's argument by stating that the alleged crimes of named individuals meant that the information should be disclosed, and that she viewed the engagement of the exemptions as a *de facto* admission of wrongdoing on the part of those individuals and public authorities. Her view was that the information was being withheld as a continuation of disputed probate proceedings.

Tribunal's Findings:

[16] The Tribunal took evidence at an oral hearing in Edinburgh, considered submissions, sought and considered the requested information itself, held in closed form. We were at pains to explain the implications of disclosure under FOIA to the Appellant and the impact of disclosure to the world at large. We had made detailed enquiries as a result of her submissions, which resulted in some previously undisclosed and relevant material being made available to the Tribunal plus the confirmation by the Council that they held no records for the deceased which pre-dated 2010. This fact was relayed to the Appellant at the 29 August 2018 hearing. We are satisfied that the closed information was highly sensitive personal data and there was nothing untoward in it that would shift the balance in the Public Interest test to favour disclosure of the confidential care records to the world at large. It is accepted that the Appellant did not criticise the Care of the deceased at any time.

[17] In all the circumstances, and on the evidence before us we accept and adopt the reasoning of the Commissioner in this case and we find no error on the facts or on the application of the Law by the Commissioner. Accordingly, we refuse the appeal in its entirety, and uphold the decision of the Commissioner. Nothing further is required.

Brian Kennedy QC

Judge of First Tier Tribunal

Date of Decision: 12 September 2018.

Date Promulgated: 13 September 2018.