

Access to Deceased Persons' Records under the UK Freedom of Information Act 2000

“The dead can’t sue” or so the saying goes. But do they have a right to privacy when it comes to the disclosure of information about them? This question has been exercising the minds of public sector lawyers and information professionals alike ever since the Freedom of Information Act 2000 (FOIA)¹ came fully into force on 1st January 2005.

Scottish Freedom of Information legislation² has a specific exemption to cover a deceased person’s health record.³ No such exemption exists under FOIA whether for medical or any other records of the deceased. Therefore, when considering requests for access to a deceased persons records, the application of the general exemptions under sections 21, 40 and 41 of FOIA has to be considered.

Occasionally, in seeking to comply with a request for the records of the deceased, a public authority may be in danger of disclosing information about the living. For example, social work records are likely to contain, not only about a service user but also, about other members of the service user’s family. In such situations, the section 40 exemption, which protects personal may be claimed.

The Access to Health Records Act 1990 (AHRA)⁴ gives, amongst others, the personal representatives of the deceased, a right to access the health records of the deceased. This right does not apply in cases where⁵:

- The patient has requested a note be made that they did not wish access to be given; or
- In the opinion of the holder of the record, this would disclose:
 - i. Information likely to cause serious harm to the physical or mental health of any individual; or
 - ii. Information relating to or provided by an individual other than the patient, who could be identified from the information; or
 - iii. Information that was provided by the patient in the expectation that it would not be disclosed to the applicant; or
 - iv. Information obtained as a result of an examination or investigation the patient consented to in the expectation that the information would not be disclosed.

Where the applicant for medical records is the personal representative of the deceased, the information they are entitled to under the AHRA will be exempt from disclosure under section 21 of FOIA. This applies when the information requested is reasonably accessible by other means, including by exercising a statutory right of access other than through FOIA. In an Information Commissioner (ICO) decision involving Liverpool Womens NHS

¹ The Freedom of Information Act 2000, Chapter 36

² The Freedom of Information (Scotland) Act 2002, ASP 13

³ The Freedom of Information (Scotland) Act - section 38.

⁴ Access to Health Records Act 1990 Chapter 23 section 3

⁵ Access to Health Records Act 1990 – sections 4 and 5

Foundation Trust⁶ the complainant requested a copy of a medical report written by a consultant regarding the care of his late mother. The Trust offered to provide the information under the AHRA, on receipt of proof from the applicant that he was the deceased person's personal representative. It refused to disclose the information under FOIA, and cited the exemption under section 21. The Commissioner agreed with this approach. A similar decision was made in relation to The Royal Surrey County Hospital.⁷

If the requestor is not a personal representative of the deceased (or, to be technically correct, a person having a claim arising out of the death of the deceased) then they cannot access the information under the AHRA. Therefore their request has to be treated under the general right of access pursuant to section 1 of FOIA. However this does not mean that the information will have to be automatically disclosed.

Medical information is normally confidential and often quite sensitive. Section 41 of FOIA may assist the public authority to withhold such information if it can show that disclosure would amount to an actionable Breach of Confidence. Section 41 states:

"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."

In considering whether section 41 applies to information about the deceased, the Information Tribunal and the Information Commissioner have applied the three step test set out by Megarry J in Coco v A N Clark (Engineers) Limited [1968]⁸:

"In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene in the Saltman case on p.215 must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it..."

According to the above, for the information to be covered by confidence it must be highly confidential not trivial or be in the public domain. There now seems to be doubt whether this is the correct approach. As we will discuss later in this article, in the light of recent caselaw, the correct test is now whether the subject of the information can be said to have a reasonable expectation of privacy.

Medical information as well as social work records will obviously be highly confidential and as such the subject will have a reasonable expectation that it will not be disclosed. But other information may need to be considered more carefully. More guidance on this point has been given in the ICO decision involving The National Archives.⁹

⁶ Reference: FS50127442 Date: 19/02/2007,

⁷ Reference FS50128269 Date: 05/02/2007).

⁸ (1968) FSR 415

⁹ Reference FS50101391 11/12/06

The complainant requested information from The National Archives relating to the 1911 census schedule. The National Archives withheld the requested information, relying on the exemption under section 41 (Breach of Confidence). The Commissioner decided that this was wrong since the information requested did not have the “necessary quality of confidence” about it. It comprised the names of the individuals, their relationship to the head of the family, age, occupation, marital status, birthplace and nationality. This was not the type of sensitive information which was also captured in the 1911 census such as health or infirmity. Had it been the latter then it would have warranted protection even though the subjects may well be dead at the time the request was made.

Once it has been ascertained that the requested information is confidential, the next step is to consider whether the breach of confidence would be actionable. Obviously the dead cannot sue for Breach of Confidence, but can the living sue on their behalf?

The leading Information Tribunal decision on this issue involves Epsom and St. Helier University Hospitals NHS Trust¹⁰ which concerned the disclosure of records about Karen Davies who died at Epsom General Hospital in 1998. The Trust admitted liability in her death and paid a substantial compensation settlement to her widower, Richard Davies, on behalf of himself and the couple's two children. Karen Davies's mother sought access to her daughter's medical records to establish what happened. The Trust agreed to release the records but only with the permission of her next of kin, Richard Davies, who refused his permission.

The Trust's decision to deny access was based on section 41 FOIA i.e. that a duty of confidence was owed to the deceased. The Information Commissioner agreed with this approach. He stated that the duty of confidentiality extends beyond death. If the information was disclosed there was, in theory at least, an actionable Breach of Confidence which would allow the personal representatives of the deceased to sue the Trust.

On appeal, the Information Tribunal ruled that the first two elements of the Breach of Confidence test had been satisfied. It also ruled that there was no need to show detriment; merely a need to show that there was a breach of the deceased's reasonable expectation of confidence.

The next question for the Tribunal was whether the duty of confidence survived the death of the deceased. It admitted there was no caselaw on this point and the answer lay in conscience. Considering all the evidence before it, it decided that the answer was in the affirmative. So who could bring a claim on behalf of the deceased? To answer this question, the Tribunal drew upon European cases particularly those involving Article 8 of the European Convention on Human Rights (ECHR) (the right to privacy).

In Plon v France¹¹ the widow and children of the late President Mitterrand had brought an action in the French Court to prevent the distribution of a book written by the deceased's doctor and describing his health over a number of years while he was in office. Although the court acknowledged that the lapse of time since the death of a major public figure might lead to the public interest ultimately overriding the late president's right

¹⁰ Bluck v Information Commissioner and Epsom and St. Helier University Hospitals NHS Trust Appeal Number: EA/2006/0090 17 September 2007

¹¹ [2004] ECHR 200

to medical confidence, it nevertheless acknowledged the survival of that right and that it was appropriate for action to protect it to be brought on behalf of the deceased after his death.

When considering access to a deceased person's medical records, special care must be taken to ascertain what the wishes of the deceased were before they died. In an ICO decision involving County Durham NHS Primary Care Trust¹² the complainant requested a summary of the medical care provided to her late daughter. In order to provide this information it would have necessitated providing information from her daughter's medical records. The Trust refused to provide this information and cited the exemption under section 41, stating that the applicant was not the deceased person's next of kin. It also noted that the daughter had expressed a wish to her GP for details of her healthcare not to be disclosed to her parents. After examining the submissions by both parties the ICO concluded that the use of the section 41 exemption was correct.

This decision is consistent with section 4(3) AHRA which states :
"(3) Where an application is made under subsection (1)(f) of section 3 above, access shall not be given under subsection (2) of that section if the record includes a note, made at the patient's request, that he did not wish access to be given on such an application."

Article 8 of the European Convention on Human Rights¹³ has also been relied upon by the domestic courts to refuse disclosure of social services records. In R (on the application of Addinell) v Sheffield City Council¹⁴ Sullivan J. upheld the decision of Sheffield City Council to refuse the father of a dead teenager access to his son's social services records on the grounds that the boy had a right to privacy. If Article 8(1) allows the disclosure of information about a deceased minor to be refused to a close relative then, arguably, close relatives should have standing to enforce an obligation of confidentiality owed to the deceased during his lifetime (assuming that Article 8(2) does not justify disclosure), particularly if the disclosure is threatened by a public authority.

Until late 2007 we were still waiting for the first ICO decision on access to a deceased person's social work records. In Trafford Metropolitan Borough Council¹⁵ the complainant asked to see information about her deceased mother which was contained in the deceased's social services records. The Council refused to disclose the information claiming a number of exemptions.

The Commissioner ruled that in respect of the information about and which identifies the deceased's primary carer, the Council was correct to claim the section 40 exemption (personal data). The information included references to the primary carer's personal circumstances, health and financial arrangements. The sensitive nature of the information and the fact that the carer had objected to the release of similar information held by

¹² Reference FS50111780 Date 26/02/2007

¹³ ROME 4 November 1950

¹⁴ QBD unreported 27 Oct. 2000

¹⁵ Reference FS50153179 Date 27/11/2007

another public authority meant that the disclosure of personal data about the primary carer, without her consent, would be unfair.

Most of the rest of the requested information was about the deceased. The Commissioner ruled that the exemption at section 41 (Breach of Confidence) could be claimed. Clearly this information was obtained from another party (i.e. GPs, the primary carer, the deceased etc) but was it confidential? The Council explained that individuals enter into social services care arrangements with the expectation that the information they provide (both directly and indirectly) will only be used in connection with the provision of that care and will not otherwise be disclosed to third parties without their consent (except in very limited circumstances). The Commissioner accepted that this expectation of confidence is the cornerstone of the Council's relationships with its clients and is vital for successful service provision. The Commissioner also accepted that the threat of onward disclosure of such information could inhibit this relationship, in that concerns that private information may subsequently be open to public scrutiny may cause clients to be unwilling or to refuse to disclose important information.

On the other elements of the section 41 exemption, the Commissioner relied on the Tribunal decision in *Bluck* (see above) to rule that the duty of confidence survived the death of the deceased and disclosure of the information would be an actionable breach of confidence. The personal representative of the deceased (the primary carer) had a theoretical right to sue the Council.

This decision will be welcome clarification for social services staff who are often required to deal with complicated requests for social services records which involve assessing the privacy of the living as well as the dead. However there is one flaw in the decision. In deciding whether an actionable breach of confidence exists, the Commissioner's own guidance (FOIA Awareness Guidance Note No.2) (as well as previous decisions) state that the public authority must consider whether the public interest defence would apply. i.e. whether the disclosure would be justified on public interest grounds. Here the Commissioner does not seem to have done this. Whilst he may have come to the same conclusion, it still a flaw in his decision making process.

The above decisions of the Information Tribunal and the Information Commissioner have a common thread. They apply the Breach of Confidence test as set out by Megarry J¹⁶, and then decide whether the breach is actionable. If it is then they apply the section 41 exemption to the information requested after having considered the public interest in disclosure.

However, as stated above, there remains some doubt as to whether the Megarry test is appropriate for considering Breach of Confidence especially where it involves disclosure of personal information. Whilst the outcome of all the above decisions will probably be the same whatever the test is applied, it is appropriate to examine recent case law on this issue

In a recent case High Court case¹⁷, the Home Office challenged the decision of the Information Tribunal in respect of a request by the British Union for the Abolition of

¹⁶ Note 8 above

¹⁷ [Secretary of State for the Home Department v British Union for the Abolition of Vivisection and another: \[2008\] WLR \(D\) 129](#)

Vivisection (BUAV) for access to certain information submitted by firms when seeking licenses to conduct animal research pursuant to the Animals (Scientific Procedures) Act 1986 (ASP)

The Tribunal had taken the view that the reference in section 24 ASPA (which makes it a criminal offence for anyone to disclose information given in confidence under ASPA) to information being "given in confidence" should be construed as meaning that in order for section 24 to override the right of access under FOIA it had to be demonstrated that there would be an actionable breach of confidence if the information were to be revealed.

The High Court disagreed with this approach. It stated that the law of confidence was not confined to the principles set out in *Coco v AN Clark (Engineers) Limited*¹⁸ which the Tribunal had relied upon in its decision.

The court noted that Parliament had specifically decided to retain section 24 ASPA when bringing the FOIA into force and therefore they should be "very wary of interpreting [section 24] so as to water down its effect". In order to satisfy section 24 the court noted that it was simply enough that the relevant official making the assessment within the Home Office believed that the information being sought was given in confidence for section 24 to be engaged and therefore for the exemption in section 44 FOIA (which exempts from disclosure information where disclosure of that information is prohibited by any other enactment) to apply. Whilst the court realised that it was unsatisfactory insofar as it means that any Home Office official dealing with an FOIA request will have to decide whether they believe that the information has been given in confidence they felt that it would be a matter for the legislators in future to decide whether section 24 ASPA was compatible with FOIA purposes.

This decision suggests that the approach of both Commissioner and Tribunal in applying the Megarry J Principles of Breach of Confidence will not necessarily be as straightforward as has been the case previously.

Furthermore when it comes to disclosure of personal information the true test seems to be not whether there was confidential information but whether there was reasonable expectation of privacy on the part of the subject. This is especially so as Article 8 of ECHR (the right to privacy) is often claimed to have been breached in such cases in such cases.

In *Murray v Big Pictures (UK) Limited*¹⁹, JK Rowling and her husband appealed against a High Court decision to strike a claim for breach of privacy on behalf of their son, David. This arose in respect of some covert photographs taken of the three of them on an Edinburgh street.

The Court of Appeal came to the view that the High Court had placed too much importance on the fact that David is the son of a very famous mother. It stated "the issue of principle is whether the Claimant who is not a public figure in his own right but is the child of one, is entitled to protection from being photographed in a public place even where a photograph shows nothing embarrassing or untoward but in which he is shown depicted with his parents"

¹⁸ Note 8 above

¹⁹ *David Murray (by his litigation friends Neil Murray and Joanne Murray) v Big Pictures (UK) Ltd* [2008] EWCA Civ 446

The court examined the decisions of the House Lords in Campbell v MGN Limited²⁰ and also that of the European Court of Human Rights in Von-Hannover v Germany²¹. Both decisions focused on privacy rights of individuals photographed by the press. The court was of the view that the first question to be answered is whether there was a reasonable expectation of privacy in the circumstances being looked at. Then, once the right of privacy was established the next question was how the balance should be struck between the right to privacy and the press's right to publish (under Article 10).

The court held that it was at least arguable that David had a reasonable expectation of privacy and therefore a trial of the issues should now be held. It placed great emphasis on the fact that the Murrays had taken considerable steps to keep their children out of the public eye and had not allowed any pictures of David or his sisters to be published. Ultimately the Murrays will still have to take this a stage further and have the issues fully heard at trial (unless settlement is reached) but for now, at least, they have established that children can expect a degree of privacy despite who their parents are.

Access to deceased persons' information under FOIA is a legal minefield which requires consideration of a number of different areas of law including human rights, the law of confidence and the Access to Health Records Act 1990. Recent decisions from the Information Commissioner and the Information Tribunal have clarified the issues to a certain extent. However decisions of the High Court and the Court of Appeal show that judges views on the rights of the living will also have an impact on the rights of the dead.

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²⁰ UKHL 22

²¹No. 59320/00, 2004-VI ECHR 294