

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 March 2022

Public Authority: Ministry of Defence
Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted to the Ministry of Defence (MOD) an application for the military service record of a deceased individual and a further request seeking all information the MOD held about the individual. The MOD initially argued that the information sought by the application for the service record was exempt from disclosure on the basis of section 21 (information reasonably accessible by other means). It subsequently provided the complainant with a copy of the service record with some information redacted on the basis of section 41(1) (information provided in confidence) of FOIA. In respect of the wider request the MOD located some medical records of the individual in question but it also considered these to be exempt from disclosure on the basis of section 41(1) of FOIA.
2. The Commissioner's decision is that by failing to process both the application for the service record and the wider request within 20 working days the MOD breached section 10(1) of FOIA. The Commissioner also concluded that the MOD was not entitled to rely on section 21 of FOIA in the manner which it did but that all of the information which the MOD has sought to withhold is exempt from disclosure on the basis of section 41(1) of FOIA.
3. No steps are required.

Request and response

4. The complainant submitted an application to the MOD on 22 October 2019 under its publication scheme seeking the personnel records of

Hugh Thompson Dickinson.¹ The complainant enclosed the relevant page from the National Probate Calendar and explained why, in the circumstances of this case, in his view it was not necessary to provide a death certificate in order for his application to be processed.

5. The MOD contacted him on 14 November 2019 and asked for a copy of the death certificate in order for his application to be progressed; it did not comment on the points in the complainant's previous correspondence as to why, in his view, this was not necessary.
6. The complainant provided the MOD with a copy of the death certificate on 28 November 2019, albeit he explained again why in his view this was not necessary in this particular case.
7. Having failed to receive a response the complainant contacted the MOD on 13 January 2020. The MOD responded on the same day; it acknowledged receipt of the complainant's correspondence of 28 November 2019 and explained that it may take up to six months for applications for records to be processed. The complainant responded, again on the same date, highlighting the time limits within FOIA for responding to a request.
8. The MOD contacted the complainant on 13 February 2020 and explained that requests for information on military service records are exempt from FOIA on the basis of section 21 (information reasonably accessible by other means) as such information is available via the MOD's publication scheme. The MOD noted that any information contained in a service record which was not in the description of information set out in the scheme, would be exempt from disclosure under sections 41 (information provided in confidence) and 44 (prohibitions on disclosure) of FOIA. The MOD explained that due to the number of requests some enquiries can take longer to process than it would like and it would write to him in due course.

¹ The MOD is the custodian of the records of armed forces service personnel until they are opened to general public access at The National Archives.

Under its publication scheme and subject to the payment of an administration fee and provision of a copy of a death certificate (except where death was in service), certain information can be provided from the records of service of deceased service personnel.

Further details of this process are available here: <https://www.gov.uk/guidance/request-records-of-deceased-service-personnel>

9. The complainant contacted the MOD on 18 February 2020 and explained that he was dissatisfied with the delay in processing his service record application. The complainant also explained why, in light of this delay, he considered that section 21 did not apply to the request, and challenged the MOD's position that sections 41 and 44 could apply to information in the specific service record he requested. In addition, the complainant also submitted a further request to the MOD:

'I now request **all** information held by the Ministry of Defence (including, without limitation, by APC [Army Personnel Centre]) relating to Mr Dickinson.' (Emphasis in original.)
10. The MOD provided him with a copy of the service record on 27 February 2020. One of the documents provided, namely form B199A, had a number of redactions applied to it but no FOIA exemptions were cited.
11. The complainant contacted the MOD on 2 April 2020 and noted that the response did not refer to his additional request of 18 February 2020 and therefore he was not clear whether the disclosed information encompassed the total information held by the MOD or simply the service record. The complainant also noted that the Commissioner had explained to him that he (ie the Commissioner) would have expected the MOD to conduct an internal review in relation to its response of 13 February in light of his letter of 18 February to the MOD. However, the complainant explained that he was unclear whether the MOD's letter of 27 February was intended to be such an internal review. In light of this the complainant asked the MOD to i) provide the information redacted from form B199A and ii) provide a substantive response to his request seeking **all** information held by the Ministry of Defence (including, without limitation, by APC) relating to Mr Dickinson.'
12. The Commissioner understands that the next communication the complainant received from the MOD in relation to this matter was on 29 June 2021. This letter constituted a substantive response to his request of 18 February 2020. The MOD explained the areas of the organisation it had searched to locate further information falling within the scope of his request and that no further information was held beyond the service record. The MOD explained that it considered the service record to be exempt from disclosure on the basis of section 21 as this had already been provided to him. The MOD also explained that it considered the redacted information to be exempt from disclosure on the basis of section 41 of FOIA. The MOD's letter concluded by inviting him to contact it if he was dissatisfied with this response and wished for an internal review to be conducted.

Scope of the case

13. The complainant first contacted the Commissioner about this matter on 5 February 2020 and again on 2 April 2020. Regrettably, due to the fact that the Commissioner's offices were closed as a result of the first Covid-19 lockdown, there was a significant delay in the Commissioner being able to access the complainant's postal correspondence of 2 April 2020.
14. Consequently, the Commissioner did not contact the complainant until January 2021, at which point he established that the complainant remained dissatisfied with the MOD's handling of his requests.
15. The MOD's response of 29 June 2021 indicated that it could conduct an internal review of the original request under the publication scheme if the complainant wished, or an internal review of the response of 29 June 2021, or a review of the two issues combined, depending on the complainant's preference. However, given the history and delays to date in relation to these requests, the Commissioner did not consider it necessary for the complainant to have to exhaust the internal review process in relation to either request.
16. Therefore, the Commissioner decided to undertake an investigation of both requests without any internal review(s) taking place.
17. The Commissioner established with the complainant that his grounds of complaint were as follows:
18. In relation to his first request of 22 October 2019:
 1. He was dissatisfied with the MOD's failure to respond to his application of 22 October 2019 within 20 working days.
 2. He disputed the MOD's reliance on section 21 of FOIA in its refusal notice of 27 February 2020 in relation to this request as the information was not reasonably accessible to him given the MOD's delays in processing service record applications.
 3. He disagreed with the decision to redact information from form B199A.
19. In relation to the second request of 18 February 2020:
 4. He was unhappy with the MOD's failure to respond to his request within 20 working days and the significant delays in a substantive response actually being sent.
 5. He remained dissatisfied with the MOD's reliance on section 41 of FOIA to redact information from form B199A.
 6. He also wished to challenge the MOD's reliance on section 41 of FOIA to redact further information which he only became aware of during the course of the Commissioner's investigation, namely medical records of the individual in question.

20. In relation to complaints 3, 5 and 6 the MOD informed the Commissioner that it would also have been appropriate to apply the exemption contained at section 22 (information intended for future publication) of FOIA in relation to the withheld information. The MOD explained that whilst it is currently not possible to obtain completely unredacted copies of Mr Dickinson's Service records via the MOD FOI Publication Scheme, the records in scope of this request are amongst those selected for permanent preservation and transfer to The National Archives (TNA) in accordance with the MOD's obligations under the Public Records Act 1958. The MOD explained that the date for this transfer is not yet decided, but the intention is that this record will be made available to members of the public.

Reasons for decision

Request of 22 October 2019

Complaint 1

21. Section 1(1) of FOIA states that:

'(1) 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.'

22. Section 10(1) requires a public authority to comply with the requirements of section 1(1) within 20 working days.
23. In the Commissioner's view a request for information that a public authority makes available under its publication scheme is a valid request under FOIA as long as it meets the requirements of section 8 of FOIA. This requires a request to be in writing, state the name of the applicant and an address for correspondence, and describe the information requested.
24. In the Commissioner's view applications made under the MOD's advertised procedure for accessing deceased service personnel records, such as the complainant's, meet the criteria set out above.
25. The complainant's application was submitted in writing and included his name and an address. Furthermore, his application described the information requested. That is to say, the service record for the deceased individual in question, with the exact parts of the service

record being requested as those which the MOD had predetermined as releasable.

26. It follows that as the complainant's application was a valid request under section 8 of FOIA, in the Commissioner's view the MOD was therefore under an obligation to respond to this application within the timescales required by section 10(1) of FOIA.
27. As the MOD did not do so, the Commissioner has found that this represents a breach of section 10(1) of FOIA.
28. In submissions to the Commissioner the MOD explained that it could offer no mitigation for this delay other than the fact that the Army Personnel Centre (APC) historical enquiries section process anywhere between 8,000 to 10,000 publication scheme applications a year and often find it difficult to meet the demands placed on them. The MOD also explained that resources within the APC organisation are continually monitored and adjusted to try and meet the demands placed on them; priority for resources is given to those sections that deal with core operational outputs or manage requests submitted by, or on behalf of, veterans who are trying to gain access to services and support.
29. The Commissioner appreciates the significant challenges that the MOD faces in processing the volume of applications that it receives for the records of service personnel such as the complainant's request. The Commissioner also notes the steps taken by the MOD to best manage the demand placed upon them by the volume of these applications.

Complaint 2

30. Section 21 of FOIA states that:

- (1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
- (2) For the purposes of subsection (1)—
 - (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
 - (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.
- (3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to

be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

The complainant's position

31. The complainant noted that the MOD contacted him on 14 January 2020 and explained that it could be up to six months before his publication scheme request was processed.
32. The complainant acknowledged that under section 21(3), information can be exempt from disclosure on the basis of section 21 if it is available in a public authority's publication scheme.
33. However, he noted that the scheme must comply with the Commissioner's Model Publication Scheme, and the guidance on it which stated that:

'Most public authorities will make their publication scheme available on their website under 'freedom of information', 'guide to information' or 'publication scheme'. If you are asked for any of this information, you should be able to make it available **quickly** and easily, so you should make your staff aware of the information available through your publication scheme.'² (emphasis added by complainant).

34. The complainant also emphasised that the Commissioner's guidance on section 21 stated that:

'Subsection (1) describes the fundamental principle underlying section 21, which is that, in order to be exempt, information must be reasonably accessible to the applicant. Unlike consideration of most other exemptions in FOIA, this allows a public authority to take the individual circumstances of the applicant into account. Note the importance of the phrase "to the applicant" – in effect a distinction is being made between information that is reasonably accessible to the particular applicant and information that is available to the general public. In order for section 21 to apply there should be another existing, clear mechanism by which the particular applicant can reasonably access the information outside of FOIA.'³

² <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/publication-scheme/>

³ <https://ico.org.uk/media/for-organisations/documents/1203/information-reasonably-accessible-to-the-applicant-by-other-means-sec21.pdf>

35. The complainant argued that the delay of up to six months in the MOD processing his request under its publication scheme self-evidently meant that the information was not 'reasonably accessible' to him. Furthermore, he argued that the arrangements the MOD was operating did not comply with the Commissioner's model publication scheme.

The Commissioner's position

36. In the Commissioner's opinion, when assessing whether information is 'reasonably accessible' in the context of section 21 of FOIA it is appropriate to take into account the time it takes to search and locate information.
37. The Commissioner's guidance on this exemption does not set a clear point in time after which he would not accept information as being reasonably accessible under section 21. However, in the Commissioner's view if a public authority is relying on section 21 to refuse a request on the basis that the information is available via its publication scheme, then that information should be available, via the scheme, within 20 working days of the request having been validly submitted.
38. In the circumstances of this case the MOD took 89 working days to process the complainant's request for the service record. In light of the rationale set out above, in the Commissioner's view this information could not be said to have been reasonably accessible to the complainant at the point he made his request and therefore section 21(1) could not be said to apply.

Complaint 3

39. The Commissioner has considered the MOD's decision to redact information from form B199A later in this notice.

Request of 18 February 2020

Complaint 4

40. In its submissions to the Commissioner the MOD accepted that it breached section 10(1) of FOIA by failing respond to the complainant's request of 18 February 2020 within 20 working days.
41. However, the MOD explained that the delays in processing the complainant's request 18 February 2020 were of a different nature to the factors that led to the delay in processing his original request of 22 October 2019.
42. The MOD explained that the searches required to process the later request were not limited to the holdings of APC, or a single file as is the case with processing service records requests.
43. The MOD acknowledged that a response to this request should have been issued by 18 March 2020 but it could find no evidence of the request being processed during that period and nor was the complainant issued with a notice under 17 of FOIA extending the time it needed to consider the public interest test in relation to any qualified exemptions.
44. In any event, the MOD explained that as result of the first national Covid-19 lockdown its staff remained at home from 24 March 2020 until July 2020, when a very limited number of staff returned, with further staff permitted to return in September 2020. The MOD explained that as a result of the second lockdown in January 2021, only a very limited number of APC staff were able to complete 'life-changing' legal, medical and welfare disclosures and the team processing historic requests did not return to the office until 26 April 2021. The MOD explained that although the team processing requests could work remotely, any requests for records of the period covered by this request were held in hard copy only and could only be accessed by staff working in APC offices.
45. The MOD explained that another difficulty in relation to this request (and others submitted by post) was that the complainant's letters were held, unopened, in mailrooms until staff were able to access the mail. The MOD explained that one of the first actions of APC staff when they returned to the office in April 2021 was to begin opening and assessing the significant backlog of post.

46. The Commissioner recognises the difficulties the MOD (and other public authorities) have faced in processing requests which required access to hard copy records during the course of the Covid-19 lockdowns. Nevertheless, the MOD's failure to respond to the request of 18 February 2020 clearly resulted in a breach of section 10(1) of FOIA.

Complaints 5 and 6

47. As detailed above the MOD has redacted information from form B199A on the basis of section 41(1) of FOIA. Furthermore, as also detailed above, it has withheld a number of medical records on the basis of the same exemption.

48. Section 41 of FOIA states that:

'(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.'

49. Therefore, for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party **and** the disclosure of that information has to constitute an actionable breach of confidence.

50. With regard to whether disclosure would constitute an actionable breach of confidence the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:

- whether the information had the necessary quality of confidence;
- whether the information was imparted in circumstances importing an obligation of confidence; and,
- whether an unauthorised use of the information would result in detriment to the confider.

51. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

The complainant's position

52. In relation to form B199A the complainant noted that the information redacted from this consisted of the entries listed in section 3 of the form namely 'Name of Wife', 'Date of Marriage', 'Names of Living Children' and the latter's 'Date of Birth' and 'Sex'. The complainant explained that through his own research he had located what this information was likely to be and that he had established that Mr Dickinson's wife and child were deceased.
53. Furthermore, the complainant argued that it was not sustainable for the MOD to argue that disclosure of this information would constitute a breach of confidence. In support of this position he put forward the following arguments:
- (a) It is highly improbable that Mr Dickinson or the Army believed that any of the redacted information was confidential: it should all have appeared in the relevant marriage and birth registrations, which were public records.
 - (b) Mr Dickinson and his then wife are dead; so too, is the child whose name the complainant believed had been redacted. The complainant argued that it was improbable that any living person could have a credible cause of action for breach of confidence.
 - (c) Form B199A does not bear any confidentiality notice.
 - (d) The form includes personal information which has not been redacted but which was not in the public domain, including details of Mr Dickinson's knowledge of foreign countries, his bank, and his extensive wartime hospitalisations.
 - (e) No information was redacted from forms E564A or E536.
54. The complainant did not offer any specific arguments to challenge the MOD's reliance on section 41(1) of FOIA to withhold the medical records.

The MOD's position

55. The MOD explained that it had applied the exemption contained at section 41(1) in relation to the information redacted from form B199 because in its view it had an enduring obligation of confidentiality to Service personnel and their families, even after death, with regard to information they provided in confidence for the purposes of military service. The MOD explained that this is why such information was not included in the publication scheme. The MOD explained that it also took the view that the release of personal details of deceased members of the Armed Forces can, in some cases, have the potential of sullyng the reputation of the individual and that such recompense for their service is not deserved.

56. The MOD noted that the principle that individuals have a reasonable expectation of confidentiality in these circumstances has previously been upheld by the Information Commissioner in decision notice FS50229110, dated 18 October 2010.⁴
57. With regard to the three criteria set out above, the MOD argued that all three were met in relation to the information redacted from form B199A. This is on the basis that even after death disclosure of this type of information to a third party could constitute an actionable breach of confidence i.e. from the Next of Kin and/or family members. The MOD explained that it had been criticised by the families of deceased Service personnel for releasing details of their loved ones' Service careers to general enquirers, where this has allowed these individuals access to information which was not known to the family, but they felt was private and should not have been made public without their prior knowledge. As a result of complaints, the MOD explained that it has made a commitment to protecting Service families from such intrusion and distress as far as is reasonable.
58. The MOD noted that the decision notice cited above also contained a request for similar data to that redacted from form B199A and that paragraph 81 of that notice stated that:
- 'Having considered the public authority's arguments, the Commissioner believes it is reasonable to conclude that Flying Officer Foster provided information about his previous occupation, his home address, the name and contact details of his next-of-kin and his religious affiliation with the expectation that it would be kept confidential'
59. And paragraph 83 stated that:
- 'The withheld information under consideration here is private domestic information relating to Flying Officer Foster. As set out above, the Commissioner believes it is reasonable to conclude that he provided that information with an expectation of confidentiality. As such, the Commissioner believes that unauthorised disclosure of such private information would, of itself, give rise to detriment to the privacy of Flying Officer Foster and his family'.

⁴ https://ico.org.uk/media/action-weve-taken/decision-notices/2010/557256/fs_50229110.pdf

60. The MOD explained that this decision was upheld by the First Tier Tribunal.⁵ The MOD noted that the Tribunal also determined that section 41 of FOIA can be extended to information, whilst not provided in confidence by the individual themselves, remains of sufficient personal significance to them that it should be treated as if it had been acquired by the MOD in circumstances giving rise to an obligation of confidence.
61. With regard to the complainant's comments above, the MOD responded as follows:
62. In terms of point (a) the MOD explained that it had no way of knowing what Mr Dickinson's belief was when he provided his personal information to the Army on commissioning but in the case of *Foster* quoted above the Commissioner agreed with the MOD that the withholding of such information was reasonable and that any release would be detrimental to the privacy of the individual and his family. With regard to point (b), the MOD explained it was in no position to determine whether there will be living persons with a credible cause of action for breach of confidence and in such circumstances has no choice but to err on the side of caution. It explained that it was also aware of cases where the release of the name of a child/dependent listed on the Service Record has caused distress or upset to surviving family members who were not previously aware of his/her existence. In relation to point (c), the MOD suggested that this appeared irrelevant. It argued that the quality of confidentiality does not rest on whether a document is classified to be handled in confidence by the public authority but whether the information itself provided by the data subject has the necessary 'quality of confidence' to render its release without consent an actionable breach.
63. With regard to point (d) the MOD conceded that the decision to release Mr Dickinson's knowledge of foreign countries, his bank, and dates of his wartime hospitalisations is a matter of fine judgement. The MOD suggested that Mr Dickinson's knowledge of foreign countries appears to it to only enhance his reputation and therefore was not harmful to provide. The details (timings) of Mr Dickinson's wartime hospitalisations were considered releasable on the grounds that they did not disclose the reason for hospital attendance. In effect, this information was not considered to constitute a medical record but was the equivalent of a the details of a location of particular posting on a form B199.

⁵ EA/2010/0186

<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i503/20110330%20Decision%20EA20100186.pdf>

64. However, the MOD acknowledged that the name and address of Mr Dickinson's bank were undoubtedly provided in confidence to the Army and it accepted that these should not have been released. The MOD explained that the rationale for providing them in this case was the assumption that the 'details are long defunct'. However, the MOD explained that it could not be certain of this position and such information should have been withheld.
65. With regard to the information about medical records, the MOD explained that these had been withheld in line with its policy on handling medical records.

The Commissioner's position

66. With regard to the information redacted from form B199A, the Commissioner is satisfied that it was clearly provided to the MOD by Mr Dickinson and therefore section 41(1)(a) is met.
67. With regard to section 41(1)(b) and this information, the Commissioner agrees with the MOD that there can be no certainty as to the basis on which Mr Dickinson provided the Army with this information. Furthermore, though some of the information may be considered to be relatively innocuous, and potentially available via public registers to a determined researcher, the Commissioner accepts that as with the information in the *Foster* case such information could be considered, by the imparter, to be private domestic information.
68. The Commissioner is also conscious of the comments of Eady J in a case involving a request to the Home Office to which section 41 of FOIA was applied: '... [it was] beyond question that some information, especially in the context of personal matters, may be treated as private, even though it is quite trivial in nature and not such as to have about it any inherent "quality of confidence".⁶
69. Therefore, taking into account these decisions the Commissioner is satisfied that the information redacted from form B199A does have the quality of confidence to meet the first limb of the *Coco* test and furthermore that it was imparted with the expectation that it would remain so, and therefore the second limb is also met.

⁶ Secretary of State for the Home Office v British Union for the Abolition of Vivisection & Anor [2008] EWHC 892 (QB) (25 April 2008), paragraph 33
<https://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/QB/2008/892.html&query=british+and+union+and+abolition+and+vivisection&method=boolean>

70. With regard to the third limb, the Commissioner appreciates that given the nature of the redacted information it is more debatable in this case than for example in the *Foster* case which included next of kin and details of an individual's religion, whether disclosure of this would be detrimental. However, the Commissioner also appreciates the MOD's previous experience of disclosing information from service records and the potential consequences for relatives of service personnel of doing so. In light of this experience, he understands the MOD's cautious approach to the disclosure of information from historical service records. As result, the Commissioner is persuaded that the third limb of the test is met in respect of the information redacted from form B199A. In any event, as case law has established, as the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.
71. The Commissioner has considered whether there is any overriding public interest in the disclosure of this information that would provide a defence to an actionable breach of confidence. He notes that the complainant has explained that he was researching the life of Mr Dickinson in relation to a book that he was writing.
72. However, the Commissioner believes that there is a general and very compelling public interest in protecting confidences even if the information which is confided is relatively innocuous and was obtained many decades ago. The Commissioner also believes there is a public interest in ensuring that an employee can give their employer all necessary private or domestic information about themselves with the certainty that it will be held by the employer in confidence and only used for specific purposes that are within an employee's reasonable expectations. Taking the above into account, the Commissioner has concluded that there is no compelling argument in support of a public interest defence against an action for breach of confidence. The Commissioner has therefore concluded that the information redacted from form B199A is exempt from disclosure on the basis of section 41(1) of FOIA.
73. With regard to medical information which the MOD holds about Mr Dickinson, the Commissioner accepts that medical records contain information obtained from a third party, ie either the patient or the medical professional making the record. Such information therefore meets the requirements of section 41(1)(a).
74. In terms of whether section 41(1)(b) is met, the Commissioner is satisfied that the information clearly has the quality of confidence as it is more than trivial.
75. In terms of whether the information was imparted in circumstances importing an obligation of confidence, the information relates to the

medical care of the deceased patient and includes information provided in confidence by the patient to the health professionals involved in his care. When patients receive treatment from doctors and other medical professionals, they do so with the expectation that information will not be disclosed to third parties without their consent. The Commissioner is satisfied that an obligation of confidence is created by the very nature of the doctor/patient relationship and that the duty of confidence is therefore implicit.

76. With regard to the third limb of the test and whether disclosure of the information would be to the detriment of the confider, case law has found that the loss of privacy can be a detriment in its own right.⁷ The Commissioner considers that, as medical records constitute information of a personal nature, there is no need for there to be any detriment to the confider in terms of tangible loss, in order for it to be protected by the law of confidence. In this case, the Commissioner considers that disclosure would be contrary to the deceased person's reasonable expectation of maintaining confidentiality in respect of his private information. He therefore considers the absence of detriment if the information were to be disclosed does not undermine the MOD's position that the information was confidential.
77. As with his findings in relation to the information redacted from form B199A, the Commissioner is satisfied that there is no compelling argument in support of a public interest defence against an action for breach of confidence. The Commissioner has therefore concluded that the medical information which has been withheld is also exempt from disclosure on the basis of section 41(1) of FOIA.

⁷ Bluck v ICO & Epsom and St Helier University Hospital NGHS Trust [EA/2006/0090] paragraph 15.
<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i25/mrspbluckvinformationcommissioner17sept07.pdf>

Right of appeal

78. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

79. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

80. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Jonathan Slee
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