



**Tribunals Service**  
Information Tribunal

**Information Tribunal**

**Appeal Number: EA/2006/0030**

**Freedom of Information Act 2000 (FOIA)**

**Determined upon the Papers**

**25<sup>th</sup> April 2007**

**Decision Promulgated**

**9<sup>th</sup> May 2007**

**BEFORE**

**INFORMATION TRIBUNAL DEPUTY CHAIRMAN**

**Fiona Henderson**

**And**

**LAY MEMBERS**

**Michael Hake**

**And**

**Rosalind Tatam**

**Between**

**S**

**Appellant**

**And**

**Information Commissioner**

**Respondent**

**And**

**The General Register Office**

**Additional Party**

**Decision**

The Tribunal upholds the decision notice dated 5<sup>th</sup> May 2006 and dismisses the appeal.

### **Reasons for Decision**

1. The Tribunal has seen the disputed information which has been withheld from the Appellant in this case and is able to explain its reasoning without detailing the content of the letter. Consequently there is no confidential addendum to this decision.

#### **The request for information**

2. This is an appeal by the Appellant to the Information Tribunal under section 57 of the Freedom of Information Act 2000 (FOIA).
3. The Appellant's brother died suddenly on 20<sup>th</sup> November 2004. His partner, with whom he lived and was intending to marry, (hereafter the Informant) registered the death at the Northampton Registry Office on 25<sup>th</sup> November 2004. Her qualification for being the informant was given as "present at the death". The Appellant states this registration took place without the knowledge of the deceased's family, who sought subsequently to have the death certificate amended to reflect the fact that the deceased's Mother was in the same room as the deceased at the time of death, not the Informant.
4. A Registrar is required to have regard to a specified order of preference for the category of person entitled to register a death. The family felt that in allowing the Informant (who was not a relative of the deceased and therefore was lower in the order of preference of qualified informants than a relative) to register the death, the Death certificate was factually inaccurate and they had been deprived of their right to be recorded as the ones who had registered the death. After an investigation, the General Register Office declined to amend the certificate.
5. On 18<sup>th</sup> January 2005 the Appellant wrote to the General Register Office (GRO) asking them to:

“..send me all of the documents you hold on which this decision is based. In particular, I would like a copy of the question and answer session, which the Registrar conducted, during which you say the Registrar gained impressions regarding the ability of my parents to register their son’s death. In addition I would like details of the legal definition of “present at death”.

6. A reply from Mr. Woodward for the GRO dated 15<sup>th</sup> February 2005 provided the Appellant with:
  - a) The GRO interpretation of the definition of “present at the death”,
  - b) A letter from the Registrar to the Informant seeking clarification of her whereabouts at the time of the death, dated 22<sup>nd</sup> December 2004,
  - c) A note dated 5<sup>th</sup> January 2005 from the acting receptionist at the Northampton Register Office, to the Northamptonshire registration service manager (Mr Wall) detailing the contents of a telephone call that she had with the Informant’s Mother on 25<sup>th</sup> November 2004 who rang to make the appointment to register the death. The qualification for the Informant to register the death was discussed in this call.
  - d) Fax correspondence between Mr Wall and the General Register Office dated 6<sup>th</sup> January 2005 detailing enquiries made of the funeral directors by the GRO in relation to a letter in the possession of the Informant from the Appellant’s Mother addressed to the funeral directors authorising the release of the Deceased’s body to the Informant.
  
7. The letter of 15<sup>th</sup> February 2005 withheld one document (the disputed information), a letter from the Informant to the Registrar dated 4<sup>th</sup> January 2005 in response the letter disclosed at 6b above. Mr Woodward indicated:

“However, I will not release a letter of 4 January... as I feel that this was sent under a confidence and to release this letter would be an actionable breach of this confidence. As such, this item of correspondence is exempt under section 41 of the FOI Act”.

8. The Appellant wrote to the GRO on 24<sup>th</sup> February 2005 challenging the decision to withhold the disputed information and further challenging the decision to allow the Informant to register the death. Additionally, the Appellant referred to a telephone conversation that her brother had had with Mr Wall when he had  

“...quoted verbatim from a document relating to the interview with [name of the Informant] which was at the time in his possession. Please provide a copy of this document without delay.”
9. Holding replies acknowledging receipt were only sent by the GRO after persistent chasing by the Appellant and no substantive reply was received by the Appellant until 8<sup>th</sup> April 2005 when two letters were sent. One letter was from the GRO upholding the decision to allow the Informant to register the death and one was from the Office of National Statistics (ONS) who had conducted an internal review on behalf of the GRO. The internal review upheld the decision not to release the disputed information.
10. The letter from the ONS also responded to the request for the document relating to the interview with the Informant:  

“Following enquiries, I have been advised that no such documents exist on file. It is my understanding that Mr Wall [the Northamptonshire Registration Services Manager] was referring to rough notes when speaking to your brother and that these notes were disposed of in the normal course of business”.

#### The Complaint to the Information Commissioner

11. The Appellant wrote to the Information Commissioner on 27<sup>th</sup> April 2005 under section 50 of FOIA 2000 to appeal the decision by the General Register Office not to release the disputed information. In her letter she raised the following matters:
  - a) The letter of 8<sup>th</sup> April 2005 was received more than 20 working days after the Appellant’s letter dated 24<sup>th</sup> February 2005 and was consequently out of time, an acknowledgement was only received in

the interim (despite having been specifically asked for by the Appellant) following several letters to the GRO.

- b) The correspondence sent by the Appellant and her family had been disclosed in part to the Informant. The GRO were not applying their standards of confidentiality consistently.
- c) There could be no expectation of confidence on the part of the Informant since no explicit undertaking of confidentiality had been given or sought, and  
“every detail disclosed during a question and answer session is a matter of public record and will in due course be reproduced as the relevant details on a death certificate.”
- d) The disputed information should be released as the GRO would have 2 defences to breach of confidence (that it was in the public interest, or that it was not substantial and hence actionable).

12. The Commissioner issued a decision notice (FS50102683) dated 5<sup>th</sup> May 2006 and found that the request had been dealt with in accordance with Part I of the Act. In coming to this decision he found that:

- a) There was no statutory time scale for the conduct of internal reviews and that 31 working days was not an unreasonable period of time to conduct such a review,
- b) The disclosure of part of the correspondence from the Appellant’s family was justified in order to ensure the proper function of the registration service and in any event would not undermine the obligation of confidence owed to the Informant in relation to the disputed information,
- c) Although no explicit undertakings of confidentiality were sought or given in relation to the disputed information, the expectation of those providing information to the GRO, in circumstances such as those applying in this case, was that the information would be treated as confidential.
- d) To provide the disputed information would involve the disclosure of confidential information and none of the accepted exceptions to the duty of confidence existed in this case.

### The Appeal to the Tribunal

13. The Appellant appealed to the Tribunal by way of a letter dated 25<sup>th</sup> May 2006 and an appeal form dated 10<sup>th</sup> June 2006 accompanied by further written material was provided to the Tribunal explaining the basis of the appeal.
14. The Tribunal is satisfied that the Appellant brings the appeal, having made the request for information, appealed to the Information Commissioner and signed the appeal form, notwithstanding the fact that the original letter of Appeal to the Tribunal was sent on her behalf by her Father as she was not in a position to deal with correspondence at the time. Equally, the Tribunal is satisfied that the Appeal was brought in time it having been initiated by the letter of 25<sup>th</sup> May 2006 and the later appeal form having been completed at the request of the Tribunal as a clarifying measure.
15. The General Register Office (GRO), part of the Office for National Statistics, was joined as an additional party on 17<sup>th</sup> August 2006.
16. With the consent of all parties the case has been determined upon the papers. The substantive paper determination commenced and was later adjourned on 30<sup>th</sup> January 2007. Further representations were sought pursuant to closed directions dated 7<sup>th</sup> February 2007. The further evidence and submissions related to:
  - The status of the question and answer session which took place at the time that the death was registered,
  - The reasons for the disclosure of apparently confidential information which had been obtained by the GRO from the Informant and her Mother (as set out in paragraph 6 et seq above),
  - The reasons for the disclosure of information provided in confidence by the Appellant's family and the apparent disclosure

of information from the Informant which took place during the Commissioner's investigation,

- The effect of the disclosures as set out above.
17. During the adjournment a redacted copy of the "closed" statement of Ceinwen Lloyd on behalf of the GRO, and a redacted copy of the directions dated 7<sup>th</sup> February 2007 along with the evidence and submissions provided pursuant to those directions were served on the Appellant. The disputed information remains withheld as does the telephone note of the conversation between David Trembath (of ONS) and the Informant on 9<sup>th</sup> December 2005 in which she indicated that she did not consent to the disputed information being disclosed to the Appellant.
  18. Upon receipt of further representations from all parties pursuant to the directions of 7<sup>th</sup> February and 19<sup>th</sup> March 2007 the Tribunal further considered and determined the case on the papers on 2<sup>nd</sup> April 2007.

#### The Issues for the Tribunal to decide

19. It is clear that the motive for requesting the disputed information is that the Appellant feels that the Informant was not entitled and should not have been permitted to register the death and other related matters. FOIA is, however, applicant and motive blind. It is about disclosure to the public, and public interests. It is not about specified individuals or private interests [see paragraph 80 below].
20. The question whether the Informant ought to have been allowed to register the Deceased's death is not, therefore, a question that this Tribunal has the authority to decide. Neither can this Tribunal resolve the question whether the Informant was involved in any alleged misconduct following the Deceased's death. The only relevance to this appeal of the evidence and submissions relating to these allegations is in relation to whether the balance of public interest lies in disclosing the disputed information. (see paragraph 56 below)

21. The issues before the Tribunal are therefore limited to:
- a) whether the Commissioner was right to conclude that the disputed information was exempt from disclosure under FOIA 2000, by reason of section 41 of the Act; and
  - b) whether the Commissioner ought to have made any findings in relation to the notes referred to by Mr Wall requested by the Appellant in her letter of 24<sup>th</sup> February 2005.

### The Powers of the Tribunal

22. The Tribunal's powers in relation to appeals under section 57 FOIA are set out in section 58 of FOIA, as follows.

*(1) If on an appeal under section 57 the Tribunal considers-*

- (a) that the notice against which the appeal is brought is not in accordance with the law, or*
- (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

*the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*

- (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

23. The question whether the exemption in section 41 applies to the disputed information is a question of law based upon the analysis of the facts. The Tribunal may substitute its own view for that of the Commissioner on this issue if it considers that the Commissioner's conclusion was wrong.



24. The question whether the handwritten notes of the Registration Services Manager should have been considered and ruled upon by the Information Commissioner is a mixed question of law and fact. Should it become relevant, whether they were held by the GRO at the time of the request, is a question of fact. Section 58(2) would entitle the Tribunal to substitute its own finding of fact where the Commissioner has wrongly failed to consider the issue.

Whether the disputed information should be withheld under section 41(1) FOIA

25. Section 41(1) of FOIA 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.*

26. In this case the exemption is an absolute exemption under section 2(3)(g) of the Act. Consequently the public interest test provided for under section 2(2)(b) does not apply. However, it was common ground between the parties that there is a public interest defence available to an action for breach of confidence and so a public interest balancing test does apply if the exemption is otherwise engaged.
27. All parties have adopted the Department of Constitutional Affairs – Freedom of Information Act – Understanding the Act guidance (Chapter 3) in setting out the test to be applied in relation to section 41 FOIA. This largely accords with the test that was adopted in *Derry City Council v*

*Information Commissioner EA/2000/0014.* In consequence we are satisfied that the issues in this case to be determined under section 41 FOIA are:

(a) was the Information obtained by the GRO from a third party, for the purposes of section 41 (1) (a)? and, if so

(b) would its disclosure (otherwise than under FOIA) constitute an actionable breach of confidence, that is:

(i) did the information have the necessary quality of confidence to justify the imposition of an obligation of confidence? if so

(ii) was the information communicated in circumstances that created such an obligation? and, if so

(iii) would disclosure be a breach of that obligation?;

and, if this part of the test was satisfied:

(c) would the Public Authority nevertheless have had a defence to a claim for breach of confidence?

28. This Tribunal notes that the defences to a claim for breach of confidence that are relied upon by the Appellant are:

a) the public interest in the disclosure of this information.

b) De minimis non curat lex (that the disclosure must be substantial and not trivial)

c) The information does not have the necessary quality of confidence and is not worthy of protection.

However, the Tribunal considers that the “defences” raised in 28(b) and (c) above should not be categorized as defences, but rather considered as part of the definition of whether information is confidential (paragraph 27(b)(i) above).

29. The Tribunal also considers whether some of the information contained within the disputed information would appear to have been disclosed by the GRO/ONS to the Appellant already and that the Informant states that

the Appellant “already knows” the information that she seeks would provide a defence to a claim for breach of confidence.

Information Obtained from another

30. There is no dispute that Section 41(1) (a) is clearly engaged as the information was obtained from the Informant (the Deceased’s partner with whom he lived) who registered the death.
31. The Tribunal must next consider whether its disclosure (otherwise than under FOIA) would constitute an actionable breach of confidence. We agree with the arguments put forward by the information Commissioner that the significance of “otherwise than under FOIA” has no greater significance than specifying that a public authority cannot rely upon FOIA as a justification for disclosing confidential material, if to disclose it in other circumstances would give rise to an actionable breach of confidence claim.

Confidentiality of the Information.

32. The disputed information was created in response to a letter from the Registrar to the Informant dated 22<sup>nd</sup> December 2004. This letter stated the following:  
“...[the Deceased’s Father] is questioning the fact that you are shown as being “present at the death” on [the Deceased’s] death certificate. Will you please let me know if you were at [the Deceased’s] bedside when he died or within the hospital building or the hospital grounds.”
33. The disputed information is the letter dated 4<sup>th</sup> January 2005 that was received from the Informant in response to this request for clarification.
34. When considering whether the disputed information has the necessary quality of confidence to justify the imposition of an obligation of

confidence, the Tribunal has taken into account the following matters that are self evident from the nature of the Registrar's enquiry:

- a) From the nature of the Registrar's enquiry the letter must contain details of the Informant's whereabouts at the time of the death of her partner;
- b) The provision of this information would be upsetting and emotionally significant; and,
- c) The letter must therefore contain the private information of an individual (as opposed to an enquiry relating to a job or a business or some commercial matter).

35. The Informant clearly feels that the information is sufficiently important (and worthy of protection) to object to its disclosure. Whilst the note of the telephone call between David Trembath and the Informant on 9<sup>th</sup> December 2005 has been withheld from the Appellant, a synopsis of her position was set out in the letter to the Commissioner from the ONS dated 13<sup>th</sup> January 2006 which states:

“[The Informant] has indicated to us that she would not be happy for this letter to be released to [the Appellant]. ... She indicated to us they (sic) she was very grateful that we had withheld this letter and she was not prepared to give her consent to its release. [The Informant] also stated that there was nothing in this letter that [the Appellant] was not already aware of, and that she saw no reason why the family would need or even want this letter”.

36. The ONS letter also refers to difficulties between the Informant and the Appellant's family. The Tribunal has not taken any of these claims and counterclaims into account in reaching its decision. It is clear from the ONS account, however, that the Informant has attached a great deal of emotional significance to this information and that she feels that to have it disclosed by a third party against her wishes would cause her distress. On this basis we are satisfied that to the Informant it is clearly information worthy of protection.

37. We deal at this stage with the “defence” to an actionable breach of confidence raised by the Appellant namely that of “de minimis non curat lex” or the law will not concern itself with trivialities, which perhaps ought more properly be considered as whether the information is worthy of protection i.e. confidential. Information cannot be said to be trivial if it is of importance to the person whose privacy has been infringed. We raise Article 8 (the right to a family life) of the European Convention of Human Rights at this point; although we have not been addressed on this point and in consequence it has not played a part in our deliberations, we mention it here as a factor that we would have been obliged to take into consideration were we not already satisfied that the disputed information is not trivial. Having seen the disputed information and for the reasons set out above we are satisfied that the information contained within the disputed information is not “trivial” or tittle tattle.
38. The Appellant argues that the information cannot be considered confidential because it must be inaccessible in the sense of not being in the public domain. The Informant has said (as set out above) ”there is nothing in this letter that [the Appellant] was not already aware of”.
39. The Tribunal received submissions in relation to how much of the disputed Information may be said to have been in the public domain at the relevant time. The Information Commissioner points us to *Department For Education and Skills v Information Commissioner EA2006/0006* which defines the relevant time for considering the public interest test as the time when the initial request was dealt with:
- “The competing public interests must be assessed by reference to the date of the Request or, at least around that time. This is particularly important where considerable time has elapsed and the timing of the disclosure requested may be a significant factor in deciding where the public interest lies”.

40. We are satisfied that this analysis of the relevant time is applicable to our consideration of how much of the disputed information may be said to have been in the public domain at the relevant time.
41. It is agreed between the parties that there have been disclosures by the GRO of information obtained from the Informant and her Mother prior to 15<sup>th</sup> February 2005. This information has been obtained from the telephone call by the Informant's Mother to make the appointment to register the death, and the question and answer session which took place at the registration of the death (paragraph 6 et seq above).
42. Whether the information is in the public domain is a matter of degree and whilst it is acknowledged that the disputed information may be known to the Appellant and her family and parts of it are likely to be known to other individuals, it is not information that has been widely disseminated and publicized to the general public. Additionally this is a personal account of private events and since personal recollection of events varies, we are satisfied that this specific information as provided by the Informant is not public knowledge.
43. Whether the disclosures referred to above, affect the Informant's ability to bring an actionable breach of confidence claim are dealt with at paragraph 69 below.

Obligation of confidence.

44. From the Registrar's letter dated 22<sup>nd</sup> December 2004 requesting clarification of the Informant's whereabouts, it is clear that no specific undertaking of confidentiality was given and that the request was in response to a challenge from a named person. Similarly it is not suggested that the disputed Information was itself marked as being provided on condition that it was kept confidential.

45. The Tribunal is satisfied that the investigation of the qualification of the Informant to register the death re-covers material that would normally be the subject of the question and answer session at the time of registration. The Registrar is clearly acting in an official capacity at this time and seeking clarification of information the answer to which was necessary for her to ensure that one of the mandatory particulars on the death certificate and a condition precedent to registering the death was accurately recorded.
46. As a result of the nature of the information sought, the person from whom the request came and the reason for seeking the information, the Tribunal is satisfied that this enquiry was an extension of the question and answer session, which would take place at the time of the registration of the death. In our view, there is no distinction to be drawn between answers furnished at that interview and clarifications sought at a later date.
47. The Appellant argues that every detail disclosed during the question and answer session is a matter of public record and will in due course be reproduced as the relevant details on the appropriate certificate. This argument cannot be sustained as the following paragraphs demonstrate.
48. The GRO has provided a copy of the relevant chapters of the Births and Deaths handbook (the Code of practice for Registrars) which sets out the procedures to be followed when registering a death.
  - D3.1 “The registration of Births and Deaths Regulations 1987 (as amended) prescribe the information to be registered following a death. All details except the cause of death, must be obtained by direct personal questioning of the informant.”
  - D3.2 “Before beginning to register a death a Registrar must be satisfied in accordance with D1 and D2 that he/she can complete the registration in the presence of the informant. The Registrar must then prepare either on computer or manually a draft of the particulars to be registered, on Form 310”.

- D3.3. “The form 310 is also a source of statistical information which it is the statutory function of the Registrar General to collect...If a Form 310 is used for checking purposes in a computerized office it must be destroyed as confidential waste after use”.
- D3.53 relates to the collection at registration of certain particulars from which statistical analyses are compiled. “Because these particulars are of a personal nature, they are not entered in the register but are recorded solely on the draft entry Form 310 and they are always to be treated as confidential”.
- D3.54 “Anyone disclosing any of the particulars obtained except for the purposes of the [Population (Statistics) Act 1938] is liable to a heavy penalty. So that the public will be aware of the requirements of the Act and the safeguards against irregular disclosure of information, a notice is provided (Form 173) which must be prominently exhibited in the office of every .. Registrar of deaths and in any waiting room used by informants. To guard against accidental disclosure, precautions to ensure that the interview is not overheard must be strictly observed”.
- D3.55 “No unauthorized person should in any circumstances be allowed access to any completed or partially completed Form 310...”

49. The Tribunal’s attention was also drawn to the following by the GRO:

- it is an offence for a person who has a duty under the Act to give information about a death; to willfully refuse to answer questions put to him by the registrar *Sec 36 Births and Deaths Registration Act 1953.*
- *Regulation 10(2) of the Registration of Births, Deaths and Marriages Regulations 1968* states:  
“An Officer shall not, without the express authority of the Registrar General, publish or communicate to any person, otherwise than in



the ordinary course of the performance of his official duties, any information acquired by him while performing those duties”.

- The Handbook for Registration Officers includes the following advice at II.F:

“1. ...It is essential that the public should have complete confidence that the registration service will discharge its functions efficiently and discreetly.

17. A Registrar of births and deaths must always be most careful to prevent unauthorized persons overhearing an interview between himself and a person giving information concerning... a death...”.

50. From the material set out above the Tribunal is satisfied that the public record is the entry created in the Death Register. Only the specific information required to be put on the death certificate is accessible to the public. This is apparent from the fact that a copy is available following the payment of a fee by any member of the public. There are no provisions in any of the regulations and the guidance for any of the other material or detail that will be gleaned during the question and answer session, to be provided to the public. It is obtained and held with an expectation of confidence.

51. From the general guidance that we have seen in D1-3 of the handbook and the summaries of the question and answer session which have already been disclosed to the Appellant (paragraph 6 et seq above) it is clear that considerably more information will be gleaned during the question and answer session than will appear on the death certificate. The information recorded on the death certificate is as it were the conclusions that have been drawn from the answers that have been given which will include supplementary questions and clarification. To give a hypothetical illustration, in order to complete box 6, the “Occupation and usual address” section of a death certificate more details might be given relating to the deceased’s job history, former occupations, the duration of this employment, the organization that was worked for and career ambitions.

There is no provision for this to be recorded on the public document (the death certificate).

52. We are further satisfied that the purpose of the interview is to obtain from the appropriate person the information required to register the death, demonstrate their qualification to do so and to furnish the statistical information required by law. It is explicit that any answers given in relation to the statistical information gathering are not for public dissemination.
53. The only guidance upon making notes relates to form 310, the rough draft of the death certificate and form upon which the statistical information is gathered. This form is an explicitly confidential document and not a public document. There is no other guidance upon note taking but in keeping with the status of the form 310 and the general prohibition on disclosing information obtained in the course of their duties without leave of the Registrar General, we are satisfied that a registrar would be expected to keep any notes that they had made in confidence.
54. In relation to an Informant's understanding of the status of the question and answer session we are satisfied that the fact that the interview is conducted in private, the display of notices (the form 173) indicating that the statistical information provided in the same interview is confidential and the nature of the information being sought is such that they would expect any information provided which did not appear upon the death certificate to be kept in confidence.
55. We are satisfied that the Informant is entitled to assume that the information given at the question and answer session (in so far as it does not appear on the death certificate) is to be kept in confidence and that this letter having been obtained in relation to a request to clarify the information given at that meeting, that the Informant would expect the subsequent provision of information arising out of that meeting to be treated similarly. We are therefore satisfied that the nature of and

circumstances in which the information was provided gave rise to an implied obligation of confidence.

Defence of public interest.

56. In light of our findings above, we are satisfied that disclosure would be an actionable breach of that obligation unless a defence can be established. There is no dispute between the parties that a defence of public interest is available to a claim for breach of confidence and that the Tribunal must therefore decide whether the Commissioner erred in law in deciding that the balance lay against disclosure. The Information Commissioner refers the Tribunal to the formulation at paragraph 3.4.3 of the DCA guidance: that is, disclosure will not constitute an actionable breach of confidence if there is a public interest in disclosure that outweighs the public interest in keeping the information confidential.
57. *Derry City Council v Information Commissioner EA2006/0014* considered whether the public interest test for breach of confidentiality was different from that set out in 2 (2) (b) of the Act, because section 2 (2) (b) proceeds from the presumption that information should be disclosed unless one of the exemptions applies, whereas arguably the public interest defence to the tort of breach of confidence has as its starting point the presumption that confidences should be preserved.
58. The Tribunal was not addressed specifically upon this point in relation to this case but was satisfied that the facts of the case were such that the balance of the public interest lay in keeping the information confidential whichever test were applied.
59. The GRO has taken the Appellant's reliance upon the public interest to mean clarifying the circumstances in which people might be permitted to act as informants. The Appellant's case is less that there is a grey area that needs clarification, and more that false information has been provided to enable the Informant to fit into a category of qualified informant

[Handbook D.1 at 7 (a) iv which gives the order of preference of qualified informants] which would not otherwise be available to her and to supplant the legitimate rights of other qualified informants listed in the order of preference specified in the GRO Births and Deaths Handbook..

60. The Tribunal notes that the legal definition of present at the death was provided in the letter of 15<sup>th</sup> February 2005 to the Appellant and there does not appear to be any ambiguity within that legal definition which requires clarification. Neither is there any evidence before us that the public at large are concerned that the law is being misapplied in this regard. We are further satisfied that any public concern can be met by the internal investigations which take place when concerns are raised as to the status of an informant (as reported in the GRO's letter to the Appellant dated 8<sup>th</sup> April 2005).
61. The Appellant argues that the public interest lies in providing evidence of a criminal offence (*Under the Births and Deaths Registration Act 1953, the Perjury Act 1991 or the Forgery and Counterfeiting Act 1981*). She argues that the disclosure of the letter would provide evidence of the unlawful registration of a death and possible perjury and that disclosure of the letter would allow the Appellant's family to take appropriate action.
62. No one has sought to argue that the public interest would be served by covering up criminal conduct. Indeed, the Tribunal is satisfied that if the disputed letter disclosed criminal conduct the GRO would be obliged to disclose it to the Police. Disclosure to the Appellant under FOIA would not necessarily meet their obligations as the GRO cannot stipulate the use to which the information is put (i.e it cannot provide the information on the condition that the Appellant uses it to initiate criminal proceedings). The Tribunal is satisfied that whilst the public interest would lie in favour of disclosure if the disputed information provided evidence of criminal conduct, having regard to the contents of the letter the Tribunal is satisfied that it does not.

63. The Tribunal also considers whether disclosure would provide public confidence in the GRO decision making process and public confidence that they are applying the law accurately. This is the basis upon which the Information Commissioner argues that the disclosure of information from the question and answer session to the Appellant's Brother by Mr Wall and to the Appellant in response to her FOIA request by letter on 15<sup>th</sup> February 2005 is justified.

“given the legitimate interest of the GRO in explaining the reason for their decision as to registration, there would at the very least be an arguable public interest defence in relation to any alleged breach of confidence”.

64. The Tribunal disagrees with this analysis of where the public interest lies. The Tribunal is satisfied that the public interest could have been met by an explanation of what investigations had taken place by whom and the conclusions that had been drawn without the provision of the detail of the information which had been provided in confidence. The Tribunal finds that the provision of the detail justifying the GRO's position met their private interest in seeking to respond to a complainant rather than any public interest in establishing that the law had been properly applied.

65. The Tribunal fails to see any distinction in status between the information provided in the disputed letter (of 4<sup>th</sup> January 2005) and the synopsis of information from the original question and answer session and telephone call by the Informant's Mother to book the appointment to register the death that was provided to the Appellant and her Brother. If it was in the public interest to disclose confidential information used by the Registrar at the time to make the decision to accept the Informant as qualified to register the death, it would similarly be in the public interest to disclose confidential information provided subsequently pursuant to the investigation by the Registrar of the accuracy of that decision.

66. The Tribunal notes that in their submissions pursuant to the Adjournment directions dated 7<sup>th</sup> February 2007 that the GRO do not rely upon the

public interest as an explanation of their decision to disclose the information that was disclosed (see para 70 et seq below)

67. The Tribunal must balance against all the factors in favour of disclosure, and the factors against disclosure. The Information Commissioner and GRO argue that:

- Disclosure would result in a reluctance of informants to provide full and frank disclosure,
- This would hinder the GRO in the conduct of their statutory obligations,
- The knowledge that confidence might be breached is likely to cause uncertainty and consequential suffering to informants who would not know whether their information was going to be made public or not,
- Where a duty of confidence exists there is a public interest in favour of keeping that confidence.

68. Having considered the types of information that the public do provide to the Registrars in confidence (as set out in the statement by Ceinwen Lloyd) and are compelled to provide in law (as set out in the associated law and regulations applicable to the registration of births and deaths) when coupled with the important statutory functions undertaken by Registrars, we are persuaded that the factors in favour of maintaining confidentiality strongly outweigh any public interest in disclosing the disputed information.

#### Whether a breach of confidentiality is actionable

69. There is the question under section 41(1) of whether any such breach of confidence would be actionable by the Informant or by anyone else. If

disclosure would be in breach of confidence, then clearly the Informant as the confider would be able to take action in response to the breach.

70. In considering this aspect of the case the Tribunal has had regard to the information which has already been disclosed to the Appellant and her family by the GRO (as set out in paragraphs 6 et seq above). The GRO have argued (in response to the adjournment directions of 7<sup>th</sup> February 2007) that:

“in the case of the documents that were released, the GRO had to acknowledge that they were internal documents sent between officials of the Registration Service and GRO and the information contained within was summaries of fact, that the [Appellant’s] family should have already been aware of. There is a lower expectation of confidence than there would be in the case of a document which a member of the public has created and sent to GRO, and so the GRO considered that the second test [namely that the information was given in circumstances that would lead to an expectation of confidence] was not met..... although information which had been gained by GRO was released, at no point was any original documentation or letter created by a member of the public released, abstracts of the information were released, all of which were matters of fact and should have been known to the [Appellant’s] family at the time. There is a distinction between this, and release of actual correspondence between [the Informant] and the Registrar”

71. The Tribunal does not accept this reasoning. Under FOIA there is no entitlement to an actual document. The effect of Section 1.1.b FOIA is that if the public authority holds the information, and no exemption applies, the applicant is entitled:

“to have that information communicated to him”.

72. There is no requirement to provide actual documents, only a requirement to provide the information itself. Therefore the distinction drawn that:

- the information has been summarised,

- the information appears in documents created by other officials
- no correspondence created by the Informant has been disclosed

is not material to the fact that information provided by the Informant in confidence has been disclosed.

73. The circumstances in which the information was given by the Informant are not changed by the fact that they have been summarised or copied into someone else's document. The Tribunal is satisfied that the **information** communicated in the question and answer session was given in confidence and that, that expectation of confidence is not diluted by the fact that it has passed into a different document created for a different purpose before being disclosed.
74. The GRO argues that the information that was disclosed should have already been known to the Appellant and her family. The Tribunal notes that notwithstanding this apparent concession the GRO still maintains that the information in the disputed letter (which the Informant states should already be known to the Appellant's family) is still in their view subject to an expectation of and a duty of confidentiality.
75. The Tribunal notes that the GRO does not rely upon the public interest in support of its decision to disclose the pieces of information that have been disclosed.
76. The Tribunal is satisfied that if information has been disclosed in breach of confidence (as the Tribunal finds that it was in this case), the GRO would not be entitled to rely upon that earlier breach of confidence to support an additional or subsequent breach of confidence.
77. The Informant has stated (in her telephone conversation with the ONS on 9<sup>th</sup> December 2005) that "there was nothing in this letter that [the Appellant] was not already aware of". The Tribunal considers this



evidence from the perspective of the Appellant knowing this information from sources other than the GRO.

78. The Tribunal asks itself the question, does the information lose its quality of confidentiality if it is information already known to the applicant independently? In answering the question in the negative, the Tribunal takes into account the arguments set out in paragraph 38 above, namely that information in the public domain loses the quality of confidentiality but dissemination to a limited number of people does not stop information from being considered to be confidential.
79. Further the Tribunal takes into account that every witness to an event will have an individual perspective and that personal recollections of events vary. Therefore, whilst it may be that the facts within the disputed letter are known to the Appellant the way in which they have been recalled (emphasis given, facts dwelt upon or left out) adds a personal element to the information that comes from its provision by the Informant. The Tribunal is satisfied that even a synopsis of the information provided cannot prevent the personal element from being disclosed, and that this personal element means that the information retains the quality of confidentiality.
80. We wish to emphasise at this point that the Freedom of Information Act is applicant and motive blind. A disclosure under FOIA, is a disclosure to the public [ie the world at large]. In dealing with a Freedom of Information request there is no provision for the public authority to look at from whom the application has come, the merits of the application or the purpose for which it is to be used. Consequently, there is no provision for the public authority to create conditions of use pursuant to a FOIA disclosure or to indicate that such disclosure should be treated in confidence. A disclosure by the public authority of information already known to a party may well prove a more useable form of information to that applicant. Confirmation of information through disclosure legitimises it and creates an “official” version of information.

81. We are therefore of the view that disclosure of this information by the GRO in these circumstances would remain actionable as the information still has the quality of confidentiality about it, its disclosure would be in breach of an implied duty of confidence and its disclosure would be a disclosure to the world at large without limit or caveat. The Informant would suffer distress from this breach of confidence against her wishes and damage by the further dissemination of or legitimising of the confidential information.
82. The GRO were only informed by the Informant that the information “should be known to the Appellant” in the telephone call of 9<sup>th</sup> December 2005. This was after the decision to withhold the letter under s41 FOIA had already been made. In the alternative the Tribunal questions whether the GRO (had they been aware of this information at the relevant time) would have been entitled to rely upon section 21 FOIA which exempts information that is reasonably accessible to the applicant otherwise than under section 1 FOIA. The Tribunal makes no findings on this point as they have not received submissions on this section.

#### Other Disclosures of Confidential Information

83. The Tribunal has been asked by the Appellant to consider the effect of the other disclosures of apparently confidential information which have taken place by the GRO in this case. In the statement of Ceinwen Lloyd the GRO asserts that they would:  
“expect to treat as given in confidence personal information sent to them in a letter or given on the telephone and which would not form apart of the public record”
84. In writing to the Informant on 22<sup>nd</sup> December 2004, the Registrar specified that:  
“..[the Deceased’s Father] is questioning the fact that you are shown as being “present at the death”.

Similarly in the GRO's letter to the Informant on 2<sup>nd</sup> December 2005 (asking whether she would consent to the disputed information being disclosed) a history of the Appellant's complaint regarding this matter is provided to the Informant.

85. The Appellant questions why, if all communications of personal information are considered to be confidential, the contents of her and her family's correspondence with the GRO have been disclosed to the Informant. The Appellant concedes that it was necessary to write to the Informant to ascertain her whereabouts at the time of the death of the deceased, but believes that this could have been achieved neutrally e.g. "where were you exactly at the time of the death". Similarly, the Appellant and her family could have been approached to ask whether they consented to the details being provided to the Informant. The Appellant seeks to use this disclosure to demonstrate that the asserted policy of confidentiality is not genuine and/or is applied selectively and that the stated policy is therefore a false basis for treating the information provided by the Informant as having been provided in confidence since it is not ordinarily applied in practice.
86. The Tribunal agrees with the Appellant that her family's correspondence has not been treated as confidential, and matters could have been dealt with without the need to disclose confidential information to the Informant. However, the Tribunal does not consider that this has any bearing upon its decision that section 41 FOIA applies to the disputed information provided by the Informant. The inconsistency of approach in this case appears to be indicative of a lack of good practice and/or understanding of the scope and remit of FOIA within the GRO rather than evidence that there is no duty of confidentiality.
87. In compiling the document bundle in support of this appeal, the letter from the ONS to the Information Commissioner dated 13<sup>th</sup> January 2006 has been included. This includes a summary of the Informant's reasons for refusing to disclose the disputed information. This has been provided to

the Appellant through service of the papers in this case. The ONS were required to provide that information to the Information Commissioner in support of his investigation. Disclosure of information to the Commissioner in the course of an investigation by the Commissioner under the Act will not constitute an actionable breach of confidence: see section 58 of the Data Protection Act 1998. However, no application was made to withhold or redact this letter from the “open document bundle”. The method of compiling the document bundle that had been agreed in this case relied upon the Information Commissioner providing an index of documents that it was proposed should be included in the bundle with the other parties having the opportunity to object to the proposals or suggest further documents **before the document bundle was actually compiled**. This should have enabled the GRO to view the document and conclude that it should not be included in the bundle in unredacted form and make an application to withhold it from the Appellant before the Appellant had sight of it. This was not done with the consequence that the Informant has again had information provided by her in confidence disclosed to the Appellant.

88. The GRO has objected to the entirety of the telephone note of the conversation with the Informant on 9<sup>th</sup> December 2005 being disclosed to the Appellant (although it has been provided to the Tribunal). The Tribunal feels that whilst appropriate in relation to the telephone note, in light of their failure to act in relation to the letter of 13<sup>th</sup> January 2006, this again displays a lack of understanding of and an inconsistent approach to the issue of confidentiality in the context of FOIA on the part of the GRO.

Notes referred to by Mr Wall

89. Mr Wall’s notes, had they still been in existence, were part of the original request for information made by the Appellant on 18<sup>th</sup> January 2005. Therefore the specific request in the letter of 24<sup>th</sup> February 2005 was by way of clarification rather than a fresh request for information. The assertion that the notes had been destroyed in the ordinary course of

business “shortly” after the telephone conversation with the Appellant’s Brother was not challenged in the appeal to the Commissioner dated 27<sup>th</sup> April 2005. We are therefore satisfied that the existence and disclosability of Mr Wall’s notes were not a matter that the Information Commissioner was required to consider.

90. Whilst the request for the notes was reiterated in the letter dated 25<sup>th</sup> May 2006 to the Information Tribunal, the function of this letter was to appeal the decision notice. The issue of Mr Wall’s notes was not before the Commissioner and consequently did not form part of that decision notice. Therefore it is not a matter that can be adjudicated upon by the Tribunal.
91. However, Tribunal makes the following observations:
  - there is no requirement to create notes beyond form 310 (as set out in para 48 et seq above).
  - there is a positive duty upon the Registrar not to disclose any such notes to anyone except in the performance of his/her official duties.
92. Mr Wall makes the point that he is not a Registrar but rather he is a Council employee who managed the provision of the local registration service. We have had no evidence from him relating to the circumstances in which he was provided with the information reportedly in the notes by the Registrar (which itself would appear to be a possible breach of the Registrar’s duty of confidence as he was not an employee of GRO). Neither has he explained the reasons why he felt it appropriate to disclose their contents to the Appellant’s Brother.
93. We would note that any record arising out of the question and answer session with the Informant or any recounting of that discussion to Mr. Wall would have been subject to the same duty of confidentiality as the disputed letter of 4<sup>th</sup> January 2005. Consequently the provision to Mr Wall of notes by the GRO and his recounting of their contents to the Appellant’s

Brother would appear to be another example of the GRO failing to ensure that information provided to them in confidence remained confidential.

### Delays in Responses

94. The Commissioner's finding that the GRO had not breached the regulations in relation to the time taken to respond to the letter of 24<sup>th</sup> February 2005 is not challenged in the letter of 25<sup>th</sup> May 2006 initiating the Appeal or in the notice of appeal. Consequently it is not an issue that the Tribunal is required to consider, the Tribunal does however make the following observations:

- As has already been adjudicated upon by the Parliamentary and Health Service Ombudsman: the time taken to respond to letters, the failure to acknowledge letters when such acknowledgment has been specifically requested and the failure to explain what steps are being taken or to give a timescale when a substantive response will be provided, was not acceptable. A formal apology was issued by the GRO to the Appellant and staff were reminded of the importance of handling correspondence appropriately.
- The investigation by the Information Commissioner took substantially longer than necessary because the ONS (of whom the GRO are a part) showed the same degree of failure to adhere to deadlines, acknowledge receipt of letters or provide an explanation or a timescale by which time responses would be received. The Information Commissioner was forced to send reminders, and contact the ONS on both occasions that information had been requested. Each time the ONS took more than 8 weeks to provide a substantive reply, having made no effort to contact the Commissioner to explain that this would be the case and why.
- Whilst it is acknowledged that there were other delays in terms of case load and legal advice sought before the Commissioner was able to issue his decision notice, the actions of the ONS in dealing with correspondence did delay the conclusion of this aspect of the case.

- It is noted that these delays took place prior to the conclusion of the Parliamentary and Health Service Ombudsman's investigation of the matter and the consequential reminder to GRO staff of the importance of dealing with cases appropriately.
- However, the original date for the adjourned paper determination of this case had to be vacated because the GRO did not adhere to the timescales set out in the directions of the 7<sup>th</sup> February 2007, and this in part was due to the failure of the GRO to provide information to their Solicitors within the timescales that had been set down.

95. The Tribunal feels that this matter has taken longer to reach its conclusion than was acceptable and that this is due in some part to the apparent inability of the ONS (and GRO) to deal with correspondence in a timely fashion. It is to be hoped that these observations will be noted by the GRO and more appropriate procedures adopted in relation to any future FOIA requests.

Fiona Henderson  
Deputy Chairman

Date: 9 May 2007