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FOI/EIR FOI Section/Regulation s41 Issue Public domain: section 41 arguments

Line to take:

If the requested information is already in the public domain, s41 will not generally be engaged as the information will have lost its quality of confidence.

If related or similar information is already in the public domain, this is not decisive and will not necessarily mean there is no duty of confidence. However, it may be one relevant factor to consider in deciding whether the circumstances in which the information was provided gave rise to an implied obligation of confidence.

Further Information:

This line is intended to assist case officers to identify relevant s41 considerations where it is clear that the requested information (or some related information) is already in the public domain. However, case officers should refer to the s41 lines for a more general discussion of s41 issues.

(1) Quality of confidence

Where it is clear that the information is in the public domain, s41 cannot be engaged as the information can have no "quality of confidence". See LTT94 for more information on the "necessary quality of confidence" test.

However, before reaching this conclusion case officers may need to consider the following issues:

- **Is the information actually in the public domain?**

To decide whether information is in fact in the public domain, see LTT222.

See also LTT94 for a discussion of this in the context of s41. In particular, in the context of s41, note that information may retain its quality of confidence if it has only been disclosed to a limited audience. Also, information may be considered confidential even if all the component items are otherwise available to the public but others would have to spend time or effort in producing them in the form in which they are communicated (this issue is considered in more detail in DN ref 123005).

However, note that commercial confidentiality may also be permanently lost if the information has at any time entered the public domain, even if it no longer remains in the public domain.

- **Would disclosure reveal anything new?**

Even if the information appears to be in the public domain, the request and the exact content of the withheld information should be considered carefully to establish whether disclosure would in fact reveal anything new. For example, the information may be more detailed than what is already in the public domain, could corroborate a previously unreliable source or leak, or give previously unknown context for the information. Any new elements of information may still retain their quality of confidence.

For example, in *S v IC* and *GRO EA/2006/0030* (9 May 2007) the Tribunal considered the content of a letter about the death of the complainant's brother. An argument was made that the complainant already knew the relevant facts about the brother's death. Although this information was not actually in the public domain, the Tribunal also made clear (at para 79) that in any event the letter revealed more information than was already known to the complainant: "*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 letter therefore revealed additional information.

Similarly, in *Bluck v ICO* and *Epsom & St Helier NHS Trust (EA/2006/0090, 17 September 2007)* the applicant argued that medical records had passed into public domain (through court statements, press statements etc) and therefore had lost their quality of confidence. The Tribunal disagreed on the facts at para 16: "*We have [inspected the Medical records] and have concluded that they contain a certain amount of information, beyond that contained in earlier correspondence, press statements and court documents disclosed to the Appellant without restriction. In our view that body of non-disclosed information retains the necessary quality of confidence...*"

(2) Obligation of confidence - previous partial or similar disclosures

Arguments that similar information has previously been made publically available are not decisive and will not prove there is no duty of confidentiality.

In the *S* case, the complainant argued that the PA had disclosed information provided by the complainant herself in similar circumstances, and that this demonstrated that there was no duty of confidentiality in the current case. However, the Tribunal rejected this argument at para 86: "*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.*"

Similarly, arguments that, as part of the information had already been disclosed, there would be no breach of confidence to disclose the rest were rejected (at para 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."*

However, depending on the facts, the Commissioner considers that previous disclosures may be a relevant factor when considering whether there is an implied obligation of confidence in any particular case. For example, evidence that it is standard practice to for some types of information to be routinely published could indicate that there was no expectation of confidentiality and the circumstances in which the information was provided do not therefore give rise to an obligation of confidence.

See LTT95 for more information on implied obligations of confidence.

Source	Details
IT	S / GRO (9 May 2007)
Policy	Bluck / Epsom & St Helier NHS Trust (17 September 2007)

Related Lines to Take

[LTT93](#), [LTT94](#), [LTT95](#), [LTT221](#), [LTT222](#), [LTT223](#), [LTT224](#), [LTT225](#), [LTT226](#), [LTT228](#)

Related Documents

[EA/2006/0030](#) (S); [EA/2006/0090](#) (Bluck)

Contact		LS
Date	26/08/2011	Policy Reference
		LTT227

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- Information Commissioner's Office intranet