



FIRST-TIER TRIBUNAL – GENERAL REGULATORY CHAMBER  
INFORMATION RIGHTS

Tribunal Reference: EA.2013.0128

Appellant: Paul Breeze

Respondent: Information Commissioner

Second Respondent: NHS Business Services Authority

Tribunal: Judge Melanie Carter, Gareth Jones, Paul Taylor

DECISION

1. This is Mr Breeze's appeal against the Decision Notice of the Information Commissioner dated 20 June 2013 number FS50483305 arising from a request for information under the Freedom of Information Act 2000 (FOIA). The Tribunal met on 11 December 2013 and decided that the appeal should not be upheld.

**Background**

2. The Decision Notice arose from Mr Paul Breeze's request to the NHS Business Services Authority (NHS BSA) for a copy of a report outlining details of an allegation of fraud made against his brother, Mr Andrew Breeze and another individual. The fraud investigation to which the withheld information relates was a very controversial one. It led to a court case which subsequently collapsed due to lack of evidence. The decision to bring the case to court was criticised by the Judge and the accused individuals were later offered an apology in Parliament by the Solicitor General.
3. On 7 September 2012 the Appellant requested the following information:  
*“the summary document which you sent to Norfolk Constabulary informing them that a significant fraud [to the tune of almost £3 million] had, in your view, occurred at Cawston Park Hospital between [I think it was] 2004 and 2006. This particularly relates to the CEO at the time, Andrew Breeze along with his finance Director.”*
4. The NHS BSA refused the request under the exemptions in section 30(1)(a)(i) (investigations), section 40(2) (personal information) and section 41 (information provided in confidence). The Commissioner investigated the complaint and found that section 30(1)(a)(i) exemption was engaged and the

public interest in maintaining the exemption outweighed the public interest in disclosure. Mr Breeze appealed the Commissioner's Decision Notice to this Tribunal.

5. **Section 30(1)(a)(i) provides that:**

*(1) information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of –*

*(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained –*

*(i) whether a person should be charged with an offence*

6. Section 30 is what is known as a class based exemption. That means that it is not necessary for disclosure of particular information to result in any prejudice only that the information must fall within the particular class of information described in the exemption.

7. The NHS BSA's powers to carry out investigations are set out in *The NHS Business Services Authority (Establishment and Constitution) (Amendment) Order 2006* which provides that its functions shall include:

*“the prevention, detection and investigation of fraud, corruption and unlawful activities against or affecting the health service in England and the Secretary of State in relation to her responsibilities for the health service in England including investigations for the purposes of proceedings”.*

8. NHS Protect, a division of NHS BSA, is the lead agency in identifying and tackling crime across the Health Service. It describes one of its three main objectives as:

*“to hold to account those who have committed crime against the NHS by detecting and prosecuting offenders and seeking redress where viable”.*

9. Whilst the Tribunal was aware that in this case it was Norfolk Constabulary and the Crown Prosecution Service (CPS) who were ultimately responsible for investigating the allegations and bringing charges, it is clear that when the withheld information was created it was being used within NHS BSA for the purposes of its own investigation and to consider whether there was evidence of an offence having been committed.

10. It was agreed by the parties that, in this case, the withheld information relates to a particular investigation which the NHS BSA had a duty to conduct and that therefore the exemption is engaged. It was also common ground between the parties that the sole issue before the Tribunal was the application of the public interest test. Thus, the only question was with regard to the test applied under section 2 FOIA, whether NHS BSA and the Information Commissioner in turn, had been correct in concluding that the public interest in maintaining the section 30 exemption outweighed the public interest in disclosure in this particular case.

## Evidence

11. The Tribunal heard evidence from Mr Andrew Breeze. He told the Tribunal, amongst other things, that the person who had reported the alleged fraud to the NHS Fraud line ("Mr X"), had been forced to leave the Hospital's employment under suspicion of misconduct and that he had made the 'whistleblower' report on the very same day that he had been contacted by Nursing & Midwifery Council in relation to a disciplinary investigation against him. This he said supported the suggestion Mr X had been acting maliciously.
12. Mr Breeze had become aware of the NHS BSA investigation towards the end of April 2006, when told by a Primary Care Trust Commissioner. Thus, when actually arrested he had been well aware of the investigation for more than 6 months. He had attempted to bring the investigation to a head in early August, inviting the NHS to come to the Hospital to speak to him. The offer was not accepted as he was told that this could interfere with the investigation. Had they done so, he explained, everything could have been explained at this early stage, thereby making it likely there would never have needed to be a referral to the police.
13. Mr Andrew Breeze's attention was drawn to a document in the bundle which was entitled "Response to issues raised in Mr Breeze's statement" as part of the investigation against Norfolk Constabulary. This document had been previously sent to Mr Andrew Breeze and was in the public domain. This document contained a good deal of information as to the NHS investigation. Mr Breeze commented that he was hoping that the contents of the Summary Report, the withheld information in this appeal, would go over and above this document in terms of explaining what he suspected had gone wrong in the criminal investigation and then proceedings against him.
14. The Tribunal also heard evidence from Mr Derek Johnson, the National Investigations Manager of NHS Protect. He had not been directly involved in the investigation into the alleged fraud at the time, but was able to give evidence in relation to the NHS normal practices in fraud investigations and the interaction with the police. He told the Tribunal that:

*"The usual approach in drafting a summary report is to seek to be balanced in tone and to approach the early information as part of ongoing investigations in a cautious manner, treating information as unchallenged allegations that require further investigation. It is an intrinsic element of our experience to be alert to matters that may undermine the reliability of information. The Summary Report does not differ from this typical approach".*
15. He explained the factors which would normally be taken into account in deciding whether to refer to the police. These included patient safety, risk, degree of complexity, degree of resources required and critically whether any statutory powers, not enjoyed by the NHS, were required to investigate. Mr Johnson told the Tribunal that the NHS did not have the powers of arrest or search and that should this type of investigation be required they would need to involve the police. Mr Johnson explained that the need for a police referral

could also arise on account of needing specialist financial or accountancy input, as proved to be the case here, in relation to the concept of Extra Care.

16. Mr Johnson explained that it would be normal procedure to consider whether any potential witnesses were independent of each other and in particular in relation to any whistleblower. It would also be normal to do an internet search for Health Commission inspectors reports in a case such as this and in general terms, this would have been possible in the timeline of this investigation (ie: it was approximately three months after the allegation was received that it was referred by the NHS to the police).
17. He was asked as to the anonymity offered to whistleblowers and those calling in to raise concerns. He told the Tribunal that the caller would be advised that the matter could end in a court appearance. However, the person would be reassured that their identity would remain confidential until and if they give evidence in court.
18. Mr Johnson commented that, in his view and based on his professional experience, if they were unable to offer this anonymity to whistleblowers it would definitely reduce the flow of information. Mr Johnson also asserted that were Summary Reports, such as in this matter, to be disclosed, it would disclose the NHS investigative methods to the prejudice of their ability to counter fraud.
19. Finally, he said that the police have a case acceptance criteria. Before accepting a matter referred to them they would expect the referral body to do background work, take statements that could support or refute the allegation and then make a judgement if the matter could and indeed needed to be referred on to the police.

### **The public interest test**

20. It was not the role of this Tribunal to assess the adequacy of the NHS BSA investigation. Its role was limited to the application of FOIA and in this case, an assessment of the public interest factors for and against disclosure of the Summary Report. The Tribunal had had sight of the Summary Report.
21. Mr Breeze fairly accepted that just because an investigation had failed to end in a successful prosecution did not necessarily mean that something had been amiss with the investigation procedure. He further accepted that absent some evidence that something was particularly amiss, given the weighty public interests at play in the investigation of potential criminal offences, disclosure of the details of any investigation would not be warranted. The agreed approach of the parties and in turn the Tribunal was that there needed to be something in the Summary Report pointing up some particular negligence or impropriety warranting a departure from the general position. This underpinned the Tribunal's approach to the public interest balancing test.

## Factors in favour of disclosure

22. It was accepted by the parties, that given what had gone wrong in the underlying fraud prosecution, there was a heightened public interest in disclosure. Thus, it was an important starting point for the public interest balancing test, for the Tribunal to recognise that Mr Andrew Breeze had been subjected to a marked set of public and private wrongs and that this gave rise to a particular public interest, calling for a degree of transparency, which might otherwise not be required.
23. Thus, building on this, Mr Breeze's essential argument was that the circumstances which had arisen in the underlying matter were so unusual and concerning that the normal rules protecting investigatory procedures should be put aside. He argued that there was a compelling need for NHS BSA to be rendered accountable and that only a greater degree of transparency could satisfy this.
24. None of the reviews carried out, that is, by the Norfolk Police and the CPS, had, it was said adequately addressed why innocent persons had been pursued at the early stages. As far as Mr Breeze was aware, the internal NHS review (which he and his brother knew something of but had not actually seen) had concluded the NHS BSA had done nothing wrong. Certainly this was the position taken by NHS BSA during these FOIA appeal proceedings. Whilst the CPS had issued a high level and public apology, via the Solicitor General, this did not extend to the NHS' role.
25. Mr Breeze suspected that the justification for investigation by the police beyond the preliminary stage, was caused by the assertive manner in which the suspicions of fraud had been put forward by the NHS BSA in the Summary Report. This was after all an alleged NHS fraud and Mr Breeze asserted that the police would have been unduly influenced by any assessment made by the specialist NHS fraud officials.
26. Mr Breeze believed moreover that there must have been negligent oversights on NHS BSA's part, including a failure to carry out straightforward cross checks (as to Mr X's credibility as against the positive reputation of the Hospital and Mr Andrew Breeze) and the entirely explicable nature of the underlying financial model at the heart of this matter, Extra Care.
27. It was argued that the NHS BSA should have contacted the police to see if Mr X had a criminal record, could easily have found out about his employment record and that had they done so then they could have discerned the malicious nature of his allegations. It was also asserted that this understanding would have unpicked the impression of independence of the other people spoken to by the NHS BSA aside from Mr X. All this could have been gleaned within the first week it was asserted.
28. Mr Johnson had, however, told the Tribunal that in the normal course of events, which he understood would have been followed in this investigation, independent witnesses would be sought to verify the veracity of any whistleblower's allegations, including then an assessment of whether those

supposedly independent sources were genuinely to be believed. Mr Johnson also told the Tribunal that he would not expect NHS BSA necessarily to look into the criminal background of any person, or their employment history at this stage. Nor would he necessarily have expected expert financial advice to have been sought. This was, he had stressed a very early stage of the investigation and this kind of step he would expect to take place once a referral had been made.

29. The Tribunal accepted that the referral to the police had taken place just 3 months after the original allegations had been made, and that there was nothing on the face of it to require the above steps to necessarily have been taken by NHS BSA, rather than the police. As such, whether or not these steps had been taken by NHS BSA the Tribunal did not consider that these points materially increased the public interest factors in favour of disclosure.
30. Mr Breeze further argued that there was a positive factor in favour of disclosure that, were the Summary Report to be released, witnesses who were malicious or inclined towards false testimony would be deterred from so doing and thereby wasting public time/money. The Tribunal accepted this as a possibility but considered that any such public benefit would be counteracted by the greater loss of the encouragement of genuine whistleblowers coming forward, who would only do so with the absolute guarantee of confidentiality, not a qualified one, dependent on whether the whistleblower was believed.
31. Finally, the Tribunal took into account the degree to which information as to the NHS BSA was already before Mr Breeze and therefore in the public domain (see paragraph 12 above) in deciding that the public interest factors in favour of disclosure were accordingly lessened.

### **Factors in favour of maintaining the exemption**

32. The Tribunal took into account the public interest inherent in the section 30(1) exemption. This is the effective investigation and prosecution of crime, which inherently requires, in particular:
  - The protection of witnesses and informers to ensure people are not deterred from making statements or reports by fear it might be publicised;
  - The maintenance of independence of the judicial and prosecution processes;
  - Preservation of the criminal court as the sole forum for determining guilt.

In this regard, the Tribunal did not accept that disclosure of the Summary Report would necessarily disclose any particular investigative techniques which could cause future prejudice to counter fraud initiatives. It did accept however that, on a class basis, the disclosure of this type of information might

lead to this prejudice such that this did give some weight to this public interest factor against disclosure.

### **Balance of public interest arguments**

33. As mentioned above, the Tribunal acknowledged the heightened public interest in knowing more about the reasons why this case had been prosecuted. All sides had acknowledged that there were serious flaws in the prosecution case.
34. The Tribunal had reviewed the contents of the Summary Report and was satisfied that there was nothing there by way of any indication of negligence or impropriety on the part of the NHS BSA in its preliminary investigation. As Mr Johnson had told the Tribunal and it was able to confirm having read the Summary Report, there was nothing there that indicated that the investigation had departed from the normal “balanced” and “cautious” approach. As was known by Mr Breeze, the Summary Report had identified the need to follow up on the meaning of Extra Care and also the need for any future investigation to be cautious on account of the possible malicious nature of the allegations made. Whilst unable to disclose the contents of the Summary Report, given its assessment of the public interest factors, the Tribunal did feel able to reassure Mr Breeze that there was nothing there to undermine the information he had already received from NHS BSA, that all steps that should appropriately have been taken in this preliminary stage, had been taken and that there had been a balanced approach.
35. The Tribunal had given particular weight to the arguments surrounding the public interest in protecting the ability of NHS BSA to conduct investigations in future. In particular, the Tribunal accepted that there was considerable weight in the public interest in encouraging potential witnesses to come forward. The information in this case discussed in detail evidence and statements obtained from a number of witnesses and informants. These individuals had given evidence to NHS BSA in the expectation that the information would remain confidential and not be disclosed outside of a court of law. Disclosure in response to a freedom of information request would discourage other potential witnesses or informants from providing evidence to NHS BSA and in particular would undermine the operation of the NHS Fraud and Corruption reporting line.
36. This goes to the heart of what the section 30 exemption is designed to protect and so the public interest in maintaining the exemption must be very strong in such a case. Conversely, given what Mr Breeze already knew and was already in the public domain, there was a decreased public interest in disclosure. The Tribunal was of the view moreover that there was nothing in the Summary Report which would take Mr Breeze’s understanding of what had happened much further than the information already provided to him and his brother and referred to in the document mentioned in paragraph 13 above.

## **Conclusion**

37. For the reasons set out above, the Tribunal took the view that the public interest in maintaining the exemption outweighed the public interest in disclosure such that the NHS BSA and the Information Commissioner in turn, had been correct in not ordering disclosure to be made.
38. The Tribunal decided not to uphold this appeal. Its decision was unanimous.

Judge Melanie Carter

Date: 22<sup>nd</sup> January 2014