ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50503556

Dated: **10th. December, 2013**

Appeal No. EA/2014/0005

Appellant: **Michael Sheaff ("MS")**

First Respondent: **The Information Commissioner ("the ICO")**

Second Respondent: **Department of Health ("DoH")**

Before

David Farrer Q.C.

Judge

and

Anne Chafer

and

Jean Nelson

Tribunal Members

Date of Decision: 17th. June, 2014

The Appellant appeared in person.

The ICO did not appear but made written submissions.

The DoH was represented by Alan Bates

Subject matter:

FOIA s. 40(1) and (2). Personal data - whether disclosure would be fair.

Reported Cases:

Common Services Agency v Scottish Information Commissioner [2008] 1 WLR 1550
Waugh v Information Commissioner and Doncaster College EA/2008/0038

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

Dated this 17th. day of June, 2014

David Farrer Q.C.
Judge
[Signed on original]

REASONS FOR DECISION

The Background

1. MS was for over ten years prior to November, 2011 a non - executive director and vice chair of Plymouth Primary Care Trust ("PCT"). In 2011 PCTs were engaged in a process known as "clustering", that is adopting shared governance arrangements, pursuant to re-organisation of the National Health Service to be introduced in the Health and Social Care Bill.

2. In May, 2011 non - executive directors of three west country PCTs met to consider the formation of such a Cluster. The Chair of one of the three, Torbay, was elected Chair of the Cluster.

3. MS raised concerns as to this appointment in an email dated 11th. July, 2011 to the elected Chair, which she forwarded to the Chair, Charles Howeson, and the Chief Executive of the South - West Strategic Health Authority ("the SHA") and to the NHS Appointments Commission ("the AC"). On 12th. September, 2011 MS provided a much more detailed account of these concerns in a letter to the Mr. Howeson, which he copied to local MPs, to the Chief Executive to the Cluster and to the Chair and non - executive directors of Plymouth PCT. He also complained of a lack of transparency in the scrutiny of this appointment.

4. On 15th. September, 2011, a telephone conference call took place. It involved Mr. Howeson, his Vice - Chair and the Chair of Plymouth PCT, David Connelly. Mr. Howeson criticised both MS for airing his grievances to an audience outside the PCT and SHA and Mr. Connelly for acquiescing in such conduct. On the same day Mr. Howeson wrote a letter ("the letter") to Ms. Penny Bennett, a Commissioner of the AC for the South West. It was one of a number of documents referred to by Mr. David Cain of the AC when conducting a review of the appointment referred to at paragraphs 2 and 3, following representations made by MS. The letter is the requested information giving rise to this appeal.

The Request

5. By email dated 4th. April, 2013 MS requested a copy of the letter. NHS South of England had evidently not discovered a copy when responding to an earlier request . On 2nd. May, 2013 DoH provided a heavily edited copy, which contained almost nothing of substance. It relied on s.40(1), as regards the personal data of MS and s.40(2) as to the personal data of three third parties. It modified its position to a limited extent when complying with MS's request for an internal review by removing redactions relating to matters that were clearly not personal data.

6. MS complained to the ICO on 2nd. July, 2013.

The Decision Notice

7. The ICO found that, as to MS and three individuals named in the letter, it contained their personal data. Whilst the letter was concerned with performance of their public functions, the professional reputations of two of the third parties were engaged. Disclosure would be unfair, hence would breach the first data protection principle so that the first condition for application of the absolute exemption was satisfied (see FOIA s.40(3)(a)(i)). It would be unfair because the letter was marked "Private and confidential" and referred to matters affecting professional reputations and none of the third parties would have reasonably expected its content to be disclosed to the general public.

8. MS appealed.

The Appeal

9. Two broad grounds of appeal are relied on -

    (i) The ICO had too little regard to the public interest in disclosure, considering the circumstances, namely the implementation of major NHS changes in governance in advance of the necessary legislation and the use that was made of the letter

    and

(ii) He attached undue weight to the rights of the relevant data subjects who were senior personnel and whose decision - making must be transparent if public confidence was to be secured or preserved.

These grounds were extensively developed and supplemented in both written and oral submissions which are reviewed later in this Decision. However, the Tribunal emphasises before any scrutiny of detailed argument that this appeal concerns personal data and absolute exemptions as to which questions of the public interest do not arise, save in so far as they affect the fairness of disclosing the requested information. Lord Hope's guidance in *Common Services Agency v Scottish Information Commissioner [2008] 1 WLR 1550* at paragraph 7 is of cardinal importance -

". . . .there is no presumption in favour of the release of personal data under the general obligation that the (the FOIA legislation) lays down.. . . . The guiding principle of (the Data Protection Act) is the protection of the fundamental rights and freedoms of persons and in particular their rights to privacy with respect to the processing of personal data"

The Law and the issues

10. It is unnecessary to do more than summarise the familiar statutory framework applicable to FOIA requests for the disclosure of personal data.

11. FOIA s.40(1) provides an absolute exemption for information of which the applicant (here MS) is the data subject. That is because the DPA 1998 s.7 makes provision for a subject access request, which is the appropriate route for disclosure. Accordingly, in so far as the letter contains the personal data of MS, the appeal must fail. There is nothing more to be said.

12. S.40(2)(b), read in conjunction with s.2(3)(f)(ii), confers on all other personal data an absolute exemption, provided one of two conditions is satisfied. The first such condition is that disclosure other than under FOIA would contravene one of the data protection principles. The relevant principle here, as in most s.40(2) cases, is the first which provides -

" Personal data shall be processed fairly and lawfully" (see *DPA 1998 Schedule 1 Part 1 para. 1).*

It further requires *"in particular"* that at least one of the conditions specified in Schedule 2 be satisfied. Condition 6 (1) is the only condition which could require consideration, if the primary requirement for fairness were met.

13. Two issues require determination, in our opinion.

    (a) Who are the data subjects other than MS, whose personal data would be processed, if the letter were disclosed.

    (b) Would disclosure of the relevant data be fair ?

    An assessment of fairness includes a consideration of fairness to the public, where appropriate.

Submissions of the Parties

14. MS served a considerable volume of documentary evidence in support of this appeal. It included a report and correspondence covering in detail the background to his Request for the letter and some subsequent exchanges. Further, it contained a statement dated 28th. April, 2014 made by one of the data subjects of the letter, in which he stated that the letter was designed as part of his annual personal appraisal by Mr. Howeson and that he consented to disclosure of his personal data.

15. MS's submissions focussed on the issue of fairness, generally presented as a balancing of public interests. He argued that greater transparency in the governance of the NHS is required if public confidence is to be restored. That included in 2011 public scrutiny of how decisions were taken at a senior level and the management of risk, which would be assisted by disclosure of the letter. Disclosure of the letter was also required as a check on whether the investigation of his complaints as to a particular appointment had been wrongly influenced by what had been written. NHS accountability was undermined by the fragmentation of responsibility and the uncertain jurisdictional boundaries separating one body from another. Disclosure would do something to rectify these weaknesses.

16. He argued that holders of statutory offices, such as Chair and non - executive director of a PCT should be distinguished from employees, when considering whether they had a legitimate expectation that internal matters relating to them should remain private. They should expect and accept publicity in the role that they perform. In any case, these were

senior personnel who, unlike more junior staff, must expect exposure of their performance in the interests of public accountability, which is to be balanced against the risk of reputational damage.

17. In a final written submission dated 30th. April, 2014 and entitled "Summary points of Appellant's case" he returned to the "substantial public interest in disclosure of the (letter)", of which the principal element "concerns processes used for investigating concerns raised in the NHS". That, he submitted, involved a "substantial public interest" in "the quality, accuracy and relevance of evidence submitted by one public authority to an investigation conducted by another public authority . .". These submissions were reflected in his oral argument at the hearing, which also embraced what he submitted were the salient documents supporting his appeal.

18. The DoH supported to a substantial degree the written submissions of the ICO. The case for maintaining the exemption was fairly simple. The content of the letter was confidential and disclosure could be unfairly damaging to two of the third party data subjects. There was no evidence nor basis for the inference that the investigation into the appointment which troubled MS had been influenced in any way by the letter. There was no basis for adopting a different test of fairness in data processing in the case of statutory appointees. The value to the public of disclosure was much too slight to make it fair to publish such potentially prejudicial personal data, especially as regards the questioned appointment since the subsequent investigation had exonerated the data subject and found no significant fault with the process.

Our Decision

19. The letter contains personal data, but not sensitive personal data, of four individuals other than MS. One of them was the subject of an appraisal, which inevitably involves the expression of a candid opinion. The second was a subject of MS's complaints to SHA. The third is proposed in the letter to perform a particular task in Mr. Howeson's stead and the fourth is Mr. Howeson himself whose opinions are his personal data. He is identified as author in the disclosed redacted version of the letter and no further consideration of his rights is necessary since such personal data are the personal data of one or more of the other data subjects in any event.

20. We have already observed that the s.40(2) exemption generally involves the question whether disclosure of the personal data would be fair to the data subject. The public interest is not the primary test. It may become relevant to fairness in some cases but it is not the starting point. In focussing predominantly on the public interest in transparency, MS put the cart before the horse.

21. We consider that the right approach, once it is established that personal data are involved, is first to consider the nature of the disputed document, the circumstances of its creation and what the data subject would reasonably have expected as to the publicity to be given to his personal data. If disclosure appears to be unfair, are there nevertheless, in the particular case, ulterior factors which alter that assessment ? An obvious example is where the information reveals that the data subject, holding a public office, has abused his position in a manner which merits public exposure. The fact that all concerned had intended the matter to remain confidential might well be outweighed by the public's right to know what happened. Similarly, disclosure of a document containing personal data which is contradicted by other publicly available information so as to show that the author of the document was guilty of serious falsehoods may be judged to be fair. The public dimension may affect the assessment of what is fair but each case must be judged on its particular facts.

22. Adopting such an approach, we have no doubt that, viewed at the date of the Request, the letter contained personal data of two data subjects, disclosure of which the DoH could properly deem embarrassing to them and potentially damaging to their professional reputations. The belated statement from one of them indicating his consent to disclosure does not greatly assist because it was not available to the DoH at any stage when dealing with MS's Request and subsequent application for a review. Moreover, it is far from clear that that data subject had seen the unedited letter even on 28th. April, 2014. The DoH was under no obligation to canvass his consent before refusing further information from the letter. The other two data subjects have never given their consent to disclosure. The personal data of the proposed replacement for Mr. Howeson consist simply of the fact that he was proposed as a substitute. If his role was to be kept confidential, then disclosure would probably be unfair, since there is no discernible public interest in identifying him as the substitute. In reality very little hinges on this point; publication of his name is not the point of this appeal.

23. We have already noted the "Private and Confidential" marking. As the Tribunal observed in *Waugh v Information Commissioner and Doncaster College EA/2008/0038* at paragraph 40, there is a general expectation that internal staff matters will remain confidential. We do not accept the distinction made by MS between disciplinary issues and other expressions of opinion as to staff members nor the argument that public office holders are not entitled to the same protection of personal data as employees. We find that all concerned reasonably expected that the matters referred to would remain confidential within a limited circle of senior personnel in the SHA, and the AC, including Mr. Cain in the conduct of his investigation.

24. By the time of the Request Mr. Cain had long since dismissed personal criticisms of the appointment and the office to which the appraisal was relevant had disappeared as a result of reorganisation. These were further reasons for regarding the disclosure of these data to the public, hence a belated raking over the ashes, as unfair to these data subjects.

25. The Tribunal acknowledges that the governance of major structures within the NHS is a matter of great public concern and that there could be cases where fairness demanded disclosure of information of the kind involved here, perhaps where there were substantial grounds for believing that its author had deliberately misled the recipient of his report.

26. The letter, however, provides nothing whatever of that kind. It contains nothing which could have influenced Mr. Cain to any significant degree in his findings as to the appointment, which is hardly surprising since the purpose of the letter was the appraisal of someone other than the person whose appointment was under investigation. Disclosure would in no way serve the purpose identified by MS in his final submission (see paragraph 17 above). MS is entitled to disagree with Mr. Cain's conclusions but there is no basis for an allegation that he was misled by anything in the letter.

27. The Tribunal can find nothing in the redacted passages of the letter which could render disclosure fair. Unlawfulness is not in issue here.

28. For the sake of completeness we refer summarily to the further requirement for disclosure that at least one condition in Schedule 2 to the DPA be fulfilled. Condition 6(1), the only possible condition to be considered, so far as material, reads -

" The processing is necessary for the purposes of legitimate interests pursued by the. . . third party . . .to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject".

For reasons already stated disclosure is not necessary nor even useful for the entirely legitimate purposes of MS's quest for greater transparency and accountability. It would also be unwarranted.

29. For these reasons we dismiss this appeal.

30. This is a unanimous decision.

David Farrer Q.C.

Tribunal Judge

17th. June, 2014

27/06/2014: Corrections made to typographical errors in accordance with rule 40 of the Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009.