IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

Appeal No: EA/2013/0131

BETWEEN

JOHN ILLINGWORTH

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

NHS COMMISSIONING BOARD

Second Respondent

Before

Brian Kennedy QC
Malcolm Clarke
Paul Taylor

Representation:

For the Appellant: **John Illingworth**
For the Second Respondent: **Rory Dunlop of counsel**

DECISION

The Tribunal, by a majority, refuses the Appeal.

Accordingly we direct that the requested information should not be disclosed and the Closed Hearing Bundle should remain confidential.

Introduction:

[1] The appeal is brought under section 57 of the Freedom of information Act 2000 ("FOIA"). The Tribunal and the parties worked from an open Trial Bundle ("OHB") indexed and paginated and from a smaller Closed Bundle ("CHB") also indexed and paginated. We have also been provided with an indexed Authorities Bundle ("AB").

[2] The impugned decision under appeal is the Decision Notice ("DN") from the Respondent dated the 4 June 2013: Reference FS50479721.

[3] The National Health Service Commissioning Board ("the Board") has been joined as the Second Respondent to this appeal.

[4] Background to the Appeal:

The background to the appeal is helpfully summarised by the solicitor on behalf of the Respondent in his Response (to the Notice of Appeal) dated 31 July 2013 thus;

1. On 5 July 2012, the Appellant wrote to the Board, the Public Authority herein, and requested information relating to the Review which led to the decision to close the paediatric cardiac surgery unit at Leeds General Infirmary ("LGI") some of the requested information was supplied.

2. On 29 October 2012 the Appellant made a formal request under FOIA in four parts a - d. It is part d of that request which is relevant to this appeal and it was put in the following terms: *"d) Please can we see the individual scores prepared by each of the Kennedy panel Assessors under each of the assessment criteria for each of the institutions that they assessed? Please can we see these detailed scores, or at least a valid reason for your refusal that would meet the requirements of the Freedom of Information Act? Pleas will you confirm or deny whether you actually hold this requested information as provided in the Freedom of Information Act."*

3. The "Kennedy Panel" was an independent expert panel chaired by Professor Sir Ian Kennedy. It comprised experts from various disciplines. Its task was to make an assessment of the ability of the various paediatric cardiac surgery centres in England to provide a safe and sustainable service. Its own assessment was made by reference to the wider Review which it informed. The Review was, as at February 2013, the largest single service reconfiguration exercise in the history of the NHS.

4. The Board responded to the Appellant's request on 21 December 2012. This response was its primary response as well as a result of its internal review. It provided an estimated 3,600 pages of information, in addition to other information which the Appellant had previously received outside of the FOIA, or which was already in the public domain. This information related largely to parts a - c of the Appellants information request.

5. In its response of 21 December 2012 the Board also stated that it was in the process of finalising its response to part d) of the Appellant's request. It explained that there were hundreds of individual sub-scores which fell within scope and it advised the Appellant that it considered some aspects of the information to be exempt under sections 40 and 41 FOIA.

6. The Appellant contacted the Commissioner on 4 January 2013, following this response from the Board.
7. The Commissioner contacted the Board on 10 January 2013. On 18 January 2013 the Board provided further information to the Appellant including background information relating to the methodology of the Kennedy Panel. It also provided the individual Kennedy Panel member's scores in an anonymised format, each associated with a specific anonymous denominator relating to a given Panel member. At that point, the names of the Kennedy Panel members themselves were already in the public domain. The Board cited section 40(2) and section 41 FOIA as its basis for withholding the links between the individual scores and the Panel member's real names.

8. In correspondence with the Commissioner, the Board also sought to rely on the exemption at section 38 FOIA. The Commissioner therefore considered the scope of his investigation to be to determine if the PA had correctly applied sections 38, 40(2) and 41 FOIA to the disputed information.

[5] <u>Relevant Statutory Provisions:</u>

1. By virtue of section 2(3)(f) FOIA, section 40 FOIA is in the main an absolute exemption to disclosure of personal information.

2. Section 40(2) FOIA provides, insofar as is relevant here:

> *(2) Any information to which a request for information relates is also exempt information if—*
>
> *(a) it constitutes personal data which do not fall within subsection (1), and*
> *(b) either the first or the second condition below is satisfied.*
>
> *(3) The first condition is—*
>
> *(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—*
> *(i) any of the data protection principles, or…*

3. The definition of "personal data" is found at s. 1(1) of the Data Protection Act 1998 ("DPA"). This provides:

> *"personal data" means data which relate to a living individual who can be identified –*
> *(a) from those data, or*
> *(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.

4. The data protection principles are set out at Part I of Schedule 1 to the DPA. The first data protection principle ("DPP1") is that:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—
(a) at least one of the conditions in Schedule 2 is met...

5. The relevant condition from Schedule 2 in this case is condition 6(1), which provides that:

The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties 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.

[6] <u>The Commissioner's Decision:</u>

1. At the time of the Commissioner's DN, the only remaining information in dispute which fell within the scope of the request was the link between the names of the individual Kennedy Panel members and the individual scores for each hospital which those Panel members had given ("the disputed information"). The scores themselves had been disclosed and the names of the panel members were also in the public domain (DN §24).

2. In his investigation, the Commissioner initially considered whether the Board was entitled to rely on section 40(2) FOIA as a basis for withholding the information within the scope of the Appellant's request.

3. The Commissioner was satisfied that the disputed information was the personal data of third parties (DN §28). He therefore went on to consider whether disclosure of the disputed information would be in breach of DPP1 (DN §29).

4. The Commissioner first considered whether the disclosure of the disputed information would be fair for the purposes of DPP1 (DN §30).In doing so the Commissioner took into account the factors set out at DN §31, namely:

- *the individual's reasonable expectations of what would happen to their information;*
- *whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned; and*
- *whether the legitimate interests of the public are sufficient to justify any negative impact to the rights and freedoms of the individuals concerned.*

5. The evidence before the Commissioner was that the individual Panel members were not, in this context, public facing figures but were independent experts in their particular

fields. The Panel itself had a 'collective' identity and it was only public facing through its chairman. All of the formal scoring undertaken by the Kennedy Panel and which was ultimately used by the JCPCT was understood by those members to be by consensus of the Panel, and not as members individually (DN §§ 32 -33).

6. The Board therefore maintained that individual panel members never had any expectation that their individual scores would be published (DN § 34). The Board referred to the Terms of Reference for the Kennedy Panel in support of this contention (DN § 36). It also noted that even the JCPCT, as decision maker, did not itself receive the Panel members' individual scores (DN §38).

7. In light of this evidence, the Commissioner was satisfied that it was likely that the Panel members would have had a reasonable expectation that the disputed information would not be disclosed under FOIA (DN §39).

8. The evidence before the Commissioner also suggested that disclosure could, in this case, lead to incorrect aspersions, such as allegations of bias, being cast about particular individual named Panel members (DN § 40).

9. Exceptionally, in the circumstances surrounding this case, the Commissioner accepted that disclosure of individual Panel members' scores linked to individual names could lead to a skewed interpretation or a selective use of data. He accepted that, unusually in this case, there was some merit to the argument that the Board would not be able to provide satisfactory context to aid correct understanding of the disputed information (DN § 41).

10. The Board produced evidence to show the nature of personal attacks which had already occurred publicly in respect of other individuals involved in the Review (DN §§ 42 – 45). It argued that the Panel members may suffer similar attacks if the disputed information was disclosed.

11. In favour of disclosure of the disputed information, the Appellant argued that there was a legitimate interest in the public knowing how each Panel member scored each hospital as he considered that at least one of the Panel members may have had a bias towards a particular centre (DN §46).

12. The Appellant also referred to the possibility of statistical analysis of the scores. He did not explain specifically why personal data, as opposed to the anonymised data set previously released to him, was necessary for such an analysis.

13. The Commissioner accepted that there is a general public interest in terms of the transparency and accountability of public sector organisations and specifically in accessing information about the way a public authority has reached decisions. However, the Commissioner did not consider that any legitimate interest extended to disclosure of the individual Panel member's names linked to the individual scores they gave (DN §48). Consequently, the Commissioner was unable to conclude that disclosure of the disputed information was necessary to meet such a legitimate public interest (DN §49).

14. The Commissioner therefore concluded that section 40(2) FOIA was engaged by the disputed information and that it would be unfair to the data subjects for their personal data to be disclosed (DN § 50).

15. As the Commissioner determined that it would be unfair to disclose the disputed information, it was not necessary for him to go on to consider whether disclosure was lawful or whether one of the conditions in Schedule 2 of the DPA was met (DN §51). Likewise, it

was not necessary for him to go on to consider the application of section 38 or 41 FOIA (DN §52).

[7] The Issues:

1. The Appellant's grounds of appeal ("the grounds") are set out at section 6 of his Notice of Appeal.

2. The Appellant does not take issue with the Commissioner's finding that the disputed information is personal data (DN § 28).

3. Essentially, therefore, the Appellant's case is that he disagrees with the Commissioner's decision concerning the application of section 40(2) FOIA to the disputed information. He says that, contrary to the Commissioner's findings, it would not be unfair, and would not breach DPP1, and be contrary to Schedule 2 Condition 6 of the DPA, to disclose the disputed information.

4. The Appellant's grounds are not particularised. However, in so far as the Commissioner understands, the Appellant's arguments in support of his position may be summarised as follows:

Ground 1

5. There is authority from the Commissioner's previous decision notices[1], that even where information is "personal data", if this relates to a person's public role and life, it will "*deserve less protection"* than if it relates to their private life.

Ground 2

6. There is nothing inherently "private" about the scores prepared by each of the Kennedy Panel members. Therefore the starting point should be that only a low level of protection is appropriate. The Commissioner erred in not considering the proper sensitivity or otherwise of the personal data concerned, or the level of protection appropriate to that data.

Ground 3

7. The Appellant disputes that the extract from the Terms of Reference for the Kennedy Panel (DN §36) is sufficient evidence of the expectation of the Panel members that only the collective consensus scores, and not their private scores would be used by the JCPCT and publicly disseminated.

8. The Appellant argues that the Panel members were, or should have been, aware of the significance of the Review for both cardiac surgery units and the public they serve. He argues, because of that significance, there would need to be a much more explicit provision in the Terms of Reference to displace what he calls the *"normal"* expectation on the

[1] He cites the Commissioner's Decision Notice, Reference FS50305568 in this regard.

part of the Panel members that their work, whether individually or collectively, would be open to "*public scrutiny and debate"*.

Ground 4

9. The Commissioner gave insufficient weight to the legitimate interests which would be served by disclosure of the disputed information. If individual scores are not disclosed, the public cannot assure themselves that there was no bias on the part of individual Panel members. The Appellant asserts that such a bias may have tainted the collective consensus scores, and, consequently, the ultimate decision of the JCPCT.

Ground 5

10. The Appellant asserts that there is in fact *"evidence of apparent bias, and therefore there is a significant public interest in the individual scores being disclosed so that sufficient public assurance can be given on this matter."*

11. The Appellant considers that the Commissioner failed to acknowledge how significant such an individual Panel member's bias could be for the JCPCT decision, *"given that the JCPCT apparently did not itself analyse or inquire into the consensus scores".*

Ground 6

12. That the JCPCT did not itself receive the individual scores is not a reason why they should not be disclosed to the public. The Appellant asserts that, in fact, the opposite is true: any bias will go undetected unless these scores are disclosed.

Ground 7

13. The Commissioner did not properly weigh the legitimate interests which would be served by disclosure, against the likelihood of prejudice to individual members, and he did not properly apply the test of "necessity".

The Commissioner's Response to the Grounds of Appeal:

14. In response to this appeal the Commissioner relies principally on his DN as summarised above. The Commissioner remains content with the conclusions reached in that DN. However, he added the following points in response to the appellant's grounds :

Ground 1 - There is authority that personal data relating to a person's public role will deserve less protection than personal data relating a person's private life.

15. Notwithstanding that the Commissioner's previous decision notices are issued on a case by case basis and do not in fact constitute any binding "authority" on the Commissioner, much less this Tribunal, the decision which the Appellant cites provides no support for his position in this case. Decision Notice *FS50305568* involved locally elected officials using a Council provided information service. The current case involves independent experts co-opted to sit on an advisory Panel which was governed by clear Terms of Reference. The members of the Panel were not either "public officials", "public facing" or "employees" in the sense the Appellant appears to suggest in citing *FS50305568.*

Ground 2 - There is nothing inherently "private" about the scores of the Kennedy Panel members. Therefore the starting point should be that only a low level of protection is

appropriate. The Commissioner erred in not considering the sensitivity of the personal data concerned.

16. The Commissioner argues this ground is misconceived. The individual scores themselves are not the subject of this appeal. It is the link between the specific scores and the Panel member's names which comprises the disputed information.

17. The Commissioner agrees that there is nothing inherently "private" about the anonymised scores themselves. Furthermore, the Panel member's names are in the public domain. However, it appears to be agreed by both parties that the link between the two is the personal data of the individual Panel members.

18. Consequently, where the Commissioner disagrees with the Appellant is with regard to the appropriate level of protection afforded to such personal data. Contrary to the Appellant's assertion, third party personal data is accorded special protection from disclosure under FOIA; that is why Parliament made it subject to an absolute exemption. It is therefore, the Commissioner argues, wholly incorrect to assert that the *"starting point should be that only a low level of protection"* for such personal data.

19. The Commissioner is content that he was entirely correct in his assessment of the sensitivity of both the personal data which is the subject of this appeal and the wider issues involved. He rejects the Appellant's assertion to the contrary.

Ground 3 - The Terms of Reference for the Kennedy Panel are not sufficient evidence of the expectation of the Panel members. Explicit provision in the Terms of Reference was needed to displace the "normal" expectation that the work of the Panel would be open to public scrutiny and debate.

20. The Commissioner is content that his analysis concerning the expectations of the Panel members regarding the handling of their personal data was correct. In addition to the Terms of Reference of the Panel, the fact that they were tasked with providing a consensus score for each centre, as opposed to providing individual scores is, the Commissioner submits, a clear indication that they would not reasonably expect their own private "snapshot" scores to be disclosed publicly.

Ground 4 - The Commissioner gave insufficient weight to the legitimate interests which would be served by disclosure; without it the public cannot assure themselves that there was no bias on the part of individual Panel Members which may have tainted the collective consensus scores, and therefore the decision by the JCPCT.

21. This is denied by the Commissioner whose position is that the legitimate interest of the public is properly served by the current disclosure.

22. The Commissioner argues that it is simply incorrect to assert, as the Appellant appears to do, that without the link between individual scores and Panel member's names being disclosed, it would be impossible to identify whether there was bias. The full set of individual scores in relation to each hospital has been disclosed, albeit in anonymised format. Those scores are linked to specific anonymised descriptors – in this case, numbers

1 to 8 – to the individual Panel members. It is therefore entirely possible for the public to track the individual scores given by a specific Panel member (albeit in an anonymous form) for each hospital assessed.

23. A review of the anonymised scores does not, in the Commissioner's analysis, reveal any bias on the part of one or other Panel member in favour or against one or other surgery centre.

24. Furthermore, as the consensus scores were exactly that – a consensus reached by the eight-member Panel and not an average score - the Commissioner does not accept that any alleged, but unproven, bias on the part of one Panel member would have had the significant skewing effect which the Appellant suggests.

25. The Commissioner submits that he was correct to find that any further disclosure would be unfair to the Panel members as data subjects.

Ground 5 – There is "evidence of apparent bias, and therefore there is a significant public interest in the individual scores being disclosed". The Commissioner failed to acknowledge how significant any bias by individual Panel Members could be for the JCPCT decision.

26. The Commissioner rejects this argument and notes that the Appellant has failed to provide any evidence whatsoever of the bias he alleges on the part of Panel members.

27. However, the Commissioner is aware that the Appellant is particularly concerned with the scoring given to Leeds General Infirmary ("LGI"). An analysis of the average consensus and average weighted scores is therefore informative:

Ranking	Panel Consensus Score	Weighted Score
Highest	142	535
Lowest	69	237
Mean Average	116	437
LGI	109	401

28. This clearly shows a picture of LGI falling well into the middle band of both the Panel's consensus scoring and that of the National Specialist Commissioning ("NSC") Team which undertook the weighting: if anything, it is the weighting process, and not the Panel's consensus scores which is less generous to LGI. Nevertheless, LGI is clearly by no means the lowest scored of the surgery centres assessed.

29. The Commissioner does note that that there is evidence within the disclosed individual scores that some Panel members marked more stringently than others in general terms. That is not evidence of bias.

30. Accordingly, the Commissioner sees no basis, either on the figures presented, or the matters advanced by the Appellant to consider that there is any realistic suggestion of bias on the part of the Panel members, much less that any such supposed bias may have influenced the final decision of the JCPCT.

31. This view is reinforced by the fact that the consensus scores provided by the Panel were subject to weighting, independent of the Panel, by the NSC Team *before* being used by the JCPCT. The JCPCT itself did not see either the individual Panel members' scores, or the Panel's consensus scores.

32. The Commissioner submits that the mechanism of consensus scoring and the weighting of scores by an independent team prior to consideration by the JCPCT was clearly sufficient to ensure that any such risk was, in practice, avoided.

Ground 6 - The fact the JCPCT did not itself receive the individual scores is not a reason why they should not be disclosed to the public. In fact, the opposite is true.

33. The Appellant's position here is, in the Commissioner's view, unarguable; the fact that the JCPCT did not receive the individual scores is very clear evidence indeed of the expectation of the Panel members in relation to both their personal data and the question of whether it would be fair or not to disclose that data to the public at large.

34. With regard to detecting the bias which the Appellant alleges has occurred, the anonymous scores linked to specified denominators relating to individual Panel members have been disclosed, as have the Panel's consensus scores and the NSC Team's weighted scores, which are the *actual* scores used by the JCPCT.

35. Even without names, the disclosed figures clearly display whether or not there is any evidence of bias on the part of one or other specific anonymous Panel member or another. The Commissioner can see no evidence of any such bias and therefore maintains that there is no legitimate purpose for which it is necessary to the link between the named Panel members and their individual scores to be disclosed.

36. The Commissioner notes, however, that he has had the benefit of reviewing the individual panel scores linked to the names of the individual panel members.

Ground 7 - The Commissioner did not properly weigh the legitimate interests which would be served by disclosure, against the likelihood of prejudice to individual Panel Members, and did not properly apply the test of "necessity".

37. This point initially repeats the Appellant's argument at Ground 4 above. In so far as it repeats that argument, it is rejected by the Commissioner for the same reasons.

38. However, the Commissioner argues, the Appellant appears also to misunderstand the nature of the test set out at Schedule 2 Condition 6 of the DPA. It is not a straight forward "balancing" exercise. Even where processing of third party personal data may be

necessary for the *legitimate* purpose (in this case of the general public), such processing will still breach DPP1 if it "*is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."* (DPA, Schedule 2 Condition 6).

39. The Commissioner submits that he was correct to find on the evidence before him that disclosure may lead to attacks on named Panel members. Accordingly he was correct to find disclosure would amount to an unwarranted prejudice to the rights and freedoms or legitimate interests of those data subjects.

40. Whilst the Commissioner does not underplay the importance of transparency in public exercises such as the Review, the matters advanced by the Appellant in this case do not amount to a legitimate interest of the public which *necessitates* disclosure of the link between the names of the Panel members and their initial individual scores. That is particularly so because it was a weighted version of the consensus scores, and not the individual scores, which formed the basis of the evidence taken into account by the JCPCT for the Review. Any legitimate interest which may reside in disclosure is, the Commissioner submits, clearly insufficient to warrant the prejudice to the rights and freedoms or legitimate interests of the individual Panel members.

41. The Commissioner remains content that the extent of disclosure in this case – namely the disclosure of the individual scores provided by individual Panel members in anonymised format - is sufficient to meet any legitimate interest the public may have in respect of those scores and that further disclosure would be unfair and a breach of DPP1. Accordingly, the absolute exemption at section 40(2) FOIA is engaged.

42. In the Commissioner's submission, the Appellant has failed to advance any matters which materially challenge that conclusion. Consequently, he argues, this appeal must fail.

The Second Respondent's Response to the Grounds of Appeal:

43. The Second Respondent is the function successor to London Strategic Health Authority (NHS London), which organisation hosted the Safe and Sustainable Review of Paediatric Congenital Cardiac Surgery Services (the "Review").

45. The factual background set out in the First Respondent's response is agreed and the Second Respondent agrees with the First Respondent's submission that the Disputed Information is the Kennedy Panel members' individual sub-scores presented in a way which links them with the specific individual panel members that made the sub-scores.

46. The Second Respondent agrees with the First Respondent's analysis of the law in relation to s. 40(2), and the summary of the reasons set out in the Decision Notice upholding the use of the s. 40(2) exemption set out in the First Respondent's response.

47. The Second Respondent agrees fully with the submissions made by the First Respondent in relation to the grounds of appeal as set out in the First Respondent's response and referred to above.

48. The Second Respondent has previously made extensive submissions to the First Respondent during his investigation of the Appellant's complaint to the effect that it

would not be fair to the data subjects to release the Disputed Information. For ease of reference these are summarised again below:

a. The Second Respondent accepts that the membership of the Kennedy Panel itself is already publicly known. However, whilst the individual panel members were nominated by professional associations to provide services to the Review, they were not "public facing" figures, but rather were independent experts in their particular fields. Furthermore, the panel had a 'collective' identity and it was only public facing through its chairman. All of the formal scoring that the panel undertook and which was used by the JCPCT was understood to be by consensus – that is, the panel members coming together and discussing their views before collectively agreeing a score for the panel as a whole;

b. When making their individual scores, the respective panel members had no expectation that those individual scores would be used by the JCPCT, or released more widely. They were a 'snapshot' of the relevant panel members' thinking early on in the process, before the issues were discussed collectively and before the panel as a whole reached consensus. Had there been any bias, this would have been apparent in the consensus scores that the panel as a whole developed. The panel members had no expectation of that their individual scores would be used further or disclosed to the world. They were only an "aide memoire" to the individuals;

c. The expectation referred to above, that the individual panel members' scores would be treated confidentially and that the papers would not be shared after they were returned to the National Specialised Commissioning Team as secretariat to the panel and the wider Review was informed by the panel's terms of reference. The panel members had a clear expectation that their personal data (i.e. their individual sub- scores) would not otherwise be processed;

d. The JCPCT, as decision maker, did not receive the Disputed Information or the panel members' anonymised individual scores (which have previously been disclosed to the applicant). It only made use of the consensus scores. The Disputed Information was not, of itself, material to the decision which the JCPCT took. The panel members did not have regard to the weightings that would be applied to the consensus scores, which was carried out by the National Specialised Commissioning Team (see paragraphs 64 – 67 of the First Respondent's Response). The Disputed Information has not previously been put into the public domain. It remains unclear why the Appellant should have the Disputed Information contrary to the expectations of the panel members or what legitimate statistical analysis could be carried out in relation to the Disputed Information;

e. The process by which the scores were determined is complex, and deals with an emotive subject. Whilst the Second Respondent is now developing an alternative process for the review of heart surgery services in England, the climate into which the Disputed Information would be released remains heated. Release of the Disputed Information could lead to a skewed interpretation or selective use of the personal data, and incorrect aspersions being cast about a particular individual panel member (for instance, that they were biased towards or against a particular centre). Given the emotive nature of the assessment, the panel members may receive unsolicited correspondence, innuendo, or other smears. Personal attacks have previously been made against other individuals involved in the Safe and Sustainable review on social media, including plans announced on Facebook to make phone calls at the programme director's home in the middle of the night. Other distressing comments were made about other NHS staff involved in the Re-

view on social media, and this is evident even now in some of the commentary on the new review which has replaced the Safe and Sustainable Review. The Second Respondent considers that similar attacks on panel members would still be likely if the Disputed Information was released and that the disclosure therefore could cause damage or distress to the panel members/data subjects. The First Respondent has found that, in this case, this is a relevant consideration;

f. Some of the independent panel members also contribute to other NHS reviews, for instance the cardiac surgery reviews for Scotland and Northern Ireland. There is a very significant risk that these individuals (and others) would not assist the NHS further if they felt that their personal data would be mishandled. There would therefore likely be wider adverse consequences if the Disputed Information was disclosed.

49. Notwithstanding these points (some of which are referred to in the Decision Notice), and the further analysis of the issues put forward in the First Respondent's submissions on the Appellant's Notice of Appeal, because of other complaints made by the Appellant, the Second Respondent has again asked the members of the Kennedy Panel for their views on the release of the Disputed Information. The members of the Kennedy Panel maintain their view that they do not want the Disputed Information to be released. Weight should be afforded to this by the Tribunal. The individual subscores have already been released by the Second Respondent, albeit in an anonymised form, and the Second Respondent agrees that this satisfies the public's legitimate interests. Releasing the Disputed Information would go no further in this respect.

[8] <u>The Evidence:</u>

1. The Tribunal has the benefit of extensive evidence by way of witness statements and oral evidence given at two hearings.

2. We have considered the following witness statements:

   That of Sharon Cheng, and Councillor Lisa Mulherin on behalf of the appellant, and Andrew Martin (with appendices), Chris Whitehill (with annexed letter from Jeremy Glyde, dated 29 November 2013)), and Professor Sir Ian Kennedy on behalf of the Second Respondent.

   We further have the benefit of a letter from Capsticks, Solicitors for the Second Respondent, dated 14th April 2014, regarding a query raised by the Tribunal on a statistical analysis of the Disputed information to detect bias.

3. We heard oral evidence from Mr. Illingworth on his appeal and from Chris Whitehill. and Jeremy Glyde on behalf of the Second respondent. We also heard extensive evidence from Maria Bernadette Von Hildebrand who was a member of the Kennedy Panel.

4. We do not propose to rehearse all the oral evidence before us and will highlight only the most relevant aspects pertinent to the issues as set out above.

<u>Councillor John Illingworth:</u>

5. The evidence of Councillor John Illingworth follows the detailed background of his Skeleton argument and in effect the Grounds of his appeal alleging bias as referred to above. Clearly an emotive topic about which he is passionate. Interestingly he alleged that bias *“could be unconscious bias”* and proceeded to recount how in the case of individual members of the Kennedy Panel he perceived bias on their parts. In essence his evidence was that only the disclosure of the disputed information would lead to conclusive evidence of bias and FOIA was the only means of providing the transparency and accountability to test conclusively for such bias. He argued that the Kennedy Panel Members did not have a reasonable expectation that the link between their names and scores would be kept confidential because, they were public facing, the terms of reference relied on we're not those provided to them and the assertions by Panel members as to their expectations should be dismissed as *“self-serving”.* He further argued the disputed information would not put them under threat as any such threats would be *“low level”* and at low risk of execution. He provided little by way of evidence to support any of his assertions of fact.

6. He was cross examined at length on the detail of his Skeleton argument. When asked about the explanations provided by Jeremy Glyde, he accepted that Mr. Glyde *“ - - -was telling the truth because he is not deliberately trying to mislead us.”*

7. When taken to a reference from Dr. Carroll about the detail of a summary report providing access to the subcomponents of the Panel’s original scoring’s, (at page 81 of the OB) in part of his own Reply to the First Respondents Response, he agreed of Dr. Carroll ;*” No! I don’t dispute the truth of what he said”.*
8. When taken to a reference from Dr. Carroll about the detail of a summary report providing access to the subcomponents of the Panel’s original scoring’s, (at page 81 of the OB) in part of his own Reply to the First Respondents Response, he agreed of Dr. Carroll ;*” No! I don’t dispute the truth of what he said”.*
9. Questioned about the evidence of Mr. Martin on attacks on panel members on Facebook etc., he was asked whether he disputed these attacks happened, he answered *“No”.*
10. The written witness statements from Councillor Lisa Mulherin and Sharon Cheng did not assist the Tribunal on the issues pertinent to the appeal and nor did the oral evidence of Chris Whitehill although he did present a letter dated 29 November 2013 from Jeremy Glyde which was referred to in evidence in relation to alleged *“attacks against personnel connected with the review”.*

Maria Bernadette Von Hildbrand:

11. This member of the Kennedy Panel gave detailed evidence about her involvement on the Panel. She confirmed that it was made clear to the Panel members that their individual personal Data would not be disclosed. She confirmed that Professor Kennedy had mentioned FOIA. Her specific evidence on the first meeting of the Kennedy Panel members (convened before the assessment visits to the units, so that panel members could discuss the process) was; *"...it was very clear that* [the individual scores] *were personal scores that would not be made public.”* When questioned further about this she replied; “*-there was a discussion where Sir Ian made clear the personal data would not go into the public domain”.*

12. She was adamant under questioning that she was there as an expert panel member and not in any public facing capacity. She denied any bias and discussed the robust and healthy exchange in discussions on scoring and on reviews.

13. When cross examined by Mr. Illingworth, about the “ *apparent geographical bias”*, she replied; *“These are the top persons with some particular remit. I hadn’t noticed any geographical bias”*

14. On in depth questioning by Mr. Illingworth on the individual scoring by Panel Members she confided that KPMG were taking notes to ensure scrutiny.

15. When cross examined on her use of the word *"compiled"* in relate to the scores she explained that ultimately the scores were compiled from their individual scores. It was put to her by Mr. Illingworth that this meant *"you made it up as you went along",* she replied *"Absolutely not."* She explained the detailed process whereby the individual scores were used to reach a consensus score.

16. When cross examined on Dr. Goodman and in particular *"Should Dr. Goodman have excluded himself"* she answered; "*No, I think he was very balanced."* She added; *"In carrying out the review we looked at them (the hospitals) as they were on the day - No comparisons were made."*

17. When it was put to her in cross examination that she was a very public person she answered; *"We came to a consensus score. I would not want my Personal Data released. They are irrelevant and a distraction to the ultimate decision." - "In the report of July 10th you will see how we arrived at a consensus. We arrived at our conclusion as a panel" - "There was a presentation from KPMG also."*

18. When asked; *"You hadn't made up your minds how you were going to do this"?* she replied; *"It was work in progress. I never believed that the individual panel member scores would ever appear". - "Ian led us in a process that was fair, complete and proportionate".*
19. In summary she concluded; *"My view is that the whole process was effective in avoiding any bias".*

Jeremy Glyde:

20. This witness was the programme director employed by the NHS and had day to day responsibility for the management of the Safe Sustainable review and he accompanied the Kennedy Panel members on the assessment visits to the various units under review.

21. He referred to abuse and threats as described in Mr. Martins' written statement and gave an example of distress that he was personally aware of, caused to panel member Sir Roger Boyle whereby numerous derogatory statements were made about him on Facebook. He described these attacks as being in;*"grotesque and made in a violent way".*

22. In relation to the individual panel scores he explained that they were not recorded at all (other than by the panel members). He said my team should not have had or retained this information at all.

23. When asked by the Chair of the Tribunal if any panel members had come with any bias, he answered; *"Names and scores would not help identify bias".*

24. He gave clear evidence that the Panel members were engaged as independent experts on their subject matter and not because of, or in any capacity as "public figures"

[9] REASONS:

1. By a Majority the Tribunal dismisses the appeal. Members of the Tribunal are divided thus we will set out the majority view and then record the minority view.

[10] The Majority View:

2. **The majority view agrees with the Commissioner's** Decision and reasoning as set out therein and as set out above in his response to the Grounds of Appeal. We adopt this reasoning.

3. **We find that the Kennedy Panel members were not public facing. We accept that they were individual experts in their fields and were engaged in that capacity** and **as such not in a public facing role. The evidence form Ms. Hildbrand in this regard was compelling and was not challenged, contradicted or rebutted in any way.**

4. **We accept that disclosure of the disputed information could and probably would put at least some of the Kennedy Panel members at risk of professional and personal embarrassment together with risk of harassment or personal abuse. Again this is based on the evidence referred to above and was not challenged, contradicted or rebutted.**

5. **We accept on the evidence referred to above and in all the circumstances that there was a legitimate expectation by the Kennedy Panel members that their personal scores would not enter the public domain.**

6. **The appellant does not dispute that the disputed information is personal data. The test then for exemption under section 40(2) of FOIA is a) would disclosure be fair on the data subjects, b) is disclosure necessary for the purposes of legitimate interests pursued by the appellant and c) is any prejudice to the rights and freedoms or legitimate interests of the data subjects warranted.**

7. For the avoidance of doubt we consider that the disputed information contains personal data relating to the panel members. Names are sufficient enough from which to identify someone when set in context such as they are here. Further, whilst the content of the scoring sheets clearly aren't personal data, the fact that these reflect the opinion of a named assessor is, in our opinion.

8. We would also add that we can glean more about a person than just each of their opinions on the hospital units under review, we can also glean that they are sufficiently qualified and knowledgeable to undertake such an assessment. For this reason also we are satisfied that s.40(2) is engaged.

9. Assessment of a data subject's expectations is rooted in the fair obtaining code which is defined under part II of schedule 1 to the Data Protection Act ("DPA"). This is very distinct from the fair processing requirements which require one to satisfy conditions under schedule 2 (and 3 where sensitive personal data is involved) in connection with the processing of personal data. The latter applies to legitimate use (i.e. processing), such as disclosure under FOIA. The former relates to specific information which the data subject must be told at the time their personal data is collected (or, at the very latest, before it is processed).[2]

10. In relation to fair obtaining, of key importance the data subject must be told :

    2.(3)(a)...
    (b)...
    (c) the purpose or purposes for which the data are intended to be processed, and

[2] See schedule 1, Part II, paras.1-2

(d) any further information which is necessary, having regard to the specific circumstances in which the data are or are to be processed, to enable processing in respect of the data subject to be fair.

11. Both requirements relate to "fairness" which is why the two are often conflated but they are nonetheless separate tests in their own right.

12. Consequently, it is, in our view, a cardinal requirement of the DPA that data subjects be told what is going to happen with their personal data and that any other use of that personal data will be unfair except in limited circumstances, not applicable here.

13. In this case therefore, given that panelists were explicitly told by Sir Ian Kennedy that their named scores would not be disclosed, they have no expectation that this might occur.3 Even if we discount Sir Ian Kennedy's evidence we have that of Maria Von Hildebrand who said on oath that it was made clear individual scores would not be made public. We also have a letter from Dame Ruth Carnall which states: "The panel members had no expectation of [sic] that their individual scores would be used. They were only an aide memoir to the individuals."

14. As well as this we have the fact that all but one panel member, after consultation by Sir Ian Kennedy following receipt of the request, stated in writing that they did not want their individual scores to be disclosed. This is a further indication of their expectations.[4]

15. In light of this, disclosure would fail the test of fairness at the first hurdle because it would constitute a breach of the First Principle. This in itself is sufficient to engage s.40(2) FOIA and thus defeat the appeal.

<u>Schedule 2</u>

16. In the alternative, if we are wrong in the above, we say that disclosure of the requested information (i.e. processing) would be unfair by virtue of the fact that no condition under schedule 2 DPA could be satisfied.

17. The only possibly applicable condition to justify disclosure under FOIA if consent is refused is paragraph [6].

18. Paragraph 6 begins by stating that the processing has to be necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed. In this case we must consider the legitimate interests of third parties because the information would be disclosed to the general public, not just Mr Illingworth.

19. It is obviously a legitimate interest to wish to know and to examine the individual scores at the heart of this appeal and to understand how they affected the outcome of the review.

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3 See "*Post-hearing written submissions of NHS England*", para.9

[4] Witness statement of Sir Ian Kennedy, page 19, para.62

20. It is not, in our view however, necessary to examine the individual scores because they had no impact on the outcome at all. The individual scores were used simply as an aide-memoir so that each panelist could take forward their personal scoring into the consensus meeting for discussion. Following discussion consensus scores were agreed upon and it was those and those alone which went forward into the assessment process. These scores have been disclosed. On top of this there were further elements of assessment (such as site visits) which gave rise to the final outcome so even the consensus scores were not determinative.

21. Even if an individual score showed massive bias this would be inconsequential if it wasn't reflected in the consensus scores. Nobody has raised any concerns about glaring inconsistencies in the consensus scores so surely this demonstrates that there are none? If that is right then why is it necessary to examine the individual scores when it is clear that even if there was bias at that stage it wasn't carried forward into consensus, the score that mattered?

22. So far as Councillor Illingworth's argument concerning unconscious bias, even if this did take place it is likely to be reflected by slightly reducing a competing score whereas conscious bias would surely result in significant low scoring. This is something which would be glaringly obvious. In any event we reiterate our point about bias at individual level being inconsequential given that it was the consensus score which mattered.

23. It seems to us that it is not necessary to disclose the individual scores simply to prove a negative (i.e. that there is no bias) because we already know that the consensus scores were the ones that mattered and as the evidence in our papers suggests these show no glaring inconsistencies. Further, we know from the evidence before us and referred to above that there were specific mechanisms in place through which to challenge bias; firstly through the process of coming to a consensus and secondly through the watchful eye of Sir Ian Kennedy.

24. Finally we do not consider disclosure to be necessary because there are other, more appropriate mechanisms through which to have concerns about bias investigated. These include (though there may be others) through Parliament, an approach to the relevant Minister or action through the Courts. Given that such avenues exist we cannot accept that it is necessary to disclose to the general public through FOIA, a method which would

trammel the panelists, devoiding them of their rights under the DPA.[5] We suggest that there probably are alternative ways to determine whether bias has affected a major public decision such as in this case.

25. So far as the rights and freedoms or legitimate interests of the panelists it seems to us on all the evidence before us and referred to above that there would be unwarranted prejudice.

26. Unpleasant and inexcusable though this is, it seems to us that anybody becoming involved in a process which leads to an unpopular and highly emotive decision such as in this case must expect to be targeted in such a way. In no way is that statement intended to excuse such vile behaviour, instead it aims to illustrate that this kind of negativity is to be expected.

27. Turning to those rights, freedoms and legitimate interests which we regard as affected, these can be summarised as follows:

a. the right to be told what will happen to your personal data
b. the right to object to processing which is likely to cause substantial damage or substantial distress
c. prejudice to working relationships across affected hospitals

28. We are of the view that this is not only applicable in relation to an examination of the panelists' expectations, it is relevant to what must happen if, contrary to our views, disclosure was justified. It would be impossible for a data subject to invoke their right to object to processing on the grounds that it would be likely to cause them unwarranted substantial damage or substantial distress if they didn't know that disclosure had been ordered in the first place. Whilst we haven't been addressed on the likelihood of such damage or distress, neither have we seen what was sent to the panelists by Sir Ian Kennedy on this issue. Therefore we cannot know for sure that they were aware of the need to spell out that the risk of damage or distress existed, if indeed it did.

29. Any one or more of the panelists may have valid reasons for fearing such consequences and it is their right to be able to raise an objection. Disclosure is a process, thus they

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[5] Particularly their right under s.10 DPA to prevent unwarranted processing likely to cause substantial damage or substantial distress, (which they would obviously need to substantiate).

must be informed in advance that this is going to happen and have time before the disclosure occurs in which to raise such any objections.

30. So far as prejudice to working relationships with colleagues at hospitals where a low score was given, we endorse and adopt the submissions of NHS England given at para.12. This is not a matter to be taken lightly when viewed in the context of paediatric cardiac surgery where tensions between staff could have severe consequences.

31. In conclusion we say that the processing is not necessary and even if we are wrong on that the prejudice to the panelists is unwarranted when balanced against what would be gained through disclosure of the disputed information.

[11] The Minority View:

Conclusions of Dr.M.Clarke

Background

1.This is a request by Councillor Illingworth, Chair of the Leeds City Health Scrutiny Committee, for the individual scores of members of the independent panel chaired by Sir Ian Kennedy which in 2010 assessed hospitals providing children's cardiac services, as part of the "Safe and Sustainable" review of those services. The panel of 8 visited each of the 11 units and scored them against national criteria. Having produced individual scores both before and after their site visit, they then produced a single, collective score for each unit. Cllr. Illingworth has a suspicion that some members might be biased based on their geographical location and/or their past professional history, although he said his belief is that panel members acted in good faith and that such bias might therefore be unconscious.

2. It is now accepted by all parties that the information requested constitutes personal data and therefore section 40 of the FOIA is engaged. This therefore requires an interpretation of the relevant sections of the Data protection Act, as applied to the facts of this case.

3. My colleagues make the case that that the panellists had no expectation that their individual scores would be disclosed, based on the witness statement of Sir Ian Kennedy; the oral evidence given to us by Maria Von Hildebrand and the letter from Dame Ruth Carnall. On this basis they argue that the relevant tests under schedule I, part II of the DPA are not met, and that therefore it would not be fair, as defined by the DPA , to the data subjects to release these scores. Therefore the First data protection principle is not met, which thereby means that the data is exempt under section 40, without the need to consider Schedule 2. Taking account of the wording of the statute and the evidence, I reach a different conclusion on that point.

4. I first make some comments on the evidence, before looking at the statute. The NHS did not call Sir Ian Kennedy, despite our expectation that he would appear at the re-convened hearing, but we had his witness statement. As a general rule, witness evidence which is not accepted by all parties as being true (which in this case it isn't), which cannot be the subject of cross-examination by the other parties or the tribunal members, must, by virtue of that, be given greatly reduced weight. In fact the NHS agreed with this view in their post-hearing submissions when our attention was drawn (para 3) to the dangers of relying on evidence

“without the opportunity for it to be tested by cross-examination” (in that case referring to Cllr.Illingworth’s reference to a document which the Tribunal refused to accept in evidence). The non-apperance of Prof. Kennedy weakened our ability to assess both the expectations of the panellists on the possibility of disclosure under FOIA, and also the legitimacy of the appellant’s suspicions about possible bias.

5. Furthermore, despite there being two references in the papers submitted by the NHS that the emails sent by panellists in response to Sir Ian’s email asking if they consented to their scores being disclosed, would be placed in the closed material, and an undertaking at the first hearing that they would be provided, we were not provided with them. This reduced our ability to assess the nature and strength of their refusals, and their expectations.

6. We did have the benefit of oral witness evidence from Maria Von Hildebrand to the effect that panellists were told by Sir Ian that their individual scores would not be disclosed. The question arises as to whether Sir Ian,or anyone else, was in a position to give an absolute undertaking on this point, given the existence of FOIA, which both he, and the panellists, being in senior roles in the public service, would have been aware of, even if not its finer details or points of interpretation. On this point, Ms. Von Hildebrand said in evidence that Sir Ian had explained about the FOIA, although she was less sure about the DPA.

7. I think there is a difference between expectations about the use to which the scores would be put, and expectations about whether they could ever be disclosed under FOIA. In Mr. Martin’s witness statement (para 29), he responds to Cllr.Illingworth’s assertion that “there is no evidence that the panel members did not consider that their individual scores would be treated in confidence” (I assume that the double negative is unintended here) by citing the terms of engagement of panel members which gave no indication that individual scores would be used. That is correct, but it is a different issue to the maintenance of confidentiality of those scores

8. Looking at the statute, Schedule 1, Part II, 1 (1) of DPA requires us to “have regard” to the method by which data is obtained and whether the data subject has been deceived or misled as to the purposes for which they are processed. Section 2 (1) in conjunction with (3) requires the data controller “so far as practicable” to inform the data subject of the purpose for which the data are “intended to be” processed.

9. The DPA, of course, pre-dates the FOIA. It seems to me that these DPA provisions had in mind that the data controller is in complete control of the ways in which data can be processed. Post FOIA this is not, of course, always the case. It surely cannot be right that if an individual in a public authority gives a guarantee that a piece of personal data will remain confidential, he/she can, by that act alone, put it in a space permanently outside the reach of FOIA, regardless of the legitimate interests of someone requesting that information. No-one can ever predict what FOIA requests might be made in the future and therefore the data subject could never be informed that the data is “intended to be” processed through an FOIA request.

10. To illustrate this point, consider in this case that had the individual scores fed directly into the final decision, it surely would not be right, or consistent with the intentions of the FOIA legislators, that they could be placed permanently beyond public scrutiny by such a guarantee being given by an individual involved in the process.

11.In addition to the point made above about “intended to be” , the phrases “have regard” and “so far as is practicable” are not absolutes. Taken together I think there is appropriate flexibility here to allow the matter to be properly assessed under Paragraph 6 of Schedule 2, which is a balancing exercise between the legitimate interests of the data subject and the parties to whom the data might be disclosed.

12. All that said, I agree that the evidence indicates that the panellists did not expect that their individual scores would be disclosed and the large majority do not wish them to be disclosed, although as stated above, Sir Ian's presence and the provision of panellists emails would have assisted us in assessing the strength, nature and basis for this.

Schedule 2 of DPA

13. Turning to paragraph 6 of schedule 2., the NHS, in its post hearing submission, drew our attention to Digby-Cameron v IC (2008/0023) (on which, as it happens, I sat) and the fact that when considering S.40 cases the motive of the requester is relevant. I of course accept that, but do not agree with the remarkably strong attack by the NHS in their post hearing submissions about Councillor Illingworth's motives.

14. He is Chair of the local Health Scrutiny Committee, an important statutory role. On a matter of such importance as this to the local NHS, namely the proposed de-commissioning of a major area of clinical activity, one would expect him to very closely scrutinise every aspect of the decision, indeed arguably he has a duty to do so.

15. He expressed his views at great length to the Tribunal on geographical bias in the choice of individuals involved in the decision-making process, and the possibility of their having individual (albeit unconscious) bias towards certain units. The only relevance of issues about the choice of those involved in the process to this appeal is as evidence to justify release of the scores to enable them to be scrutinised. Otherwise, it is not a matter for the Tribunal. If the scores revealed bias of the type suspected by Councillor Illingworth, I have no doubt that he would vigorously pursue and publicise this, but were this to be the case such an approach would be justified. However, if they don't reveal such bias, I do not see how he could, as the NHS suggests "manipulate it……..to fit his theory of institutional bias". Even if he attempted this, it could be easily refuted. The scores are the scores, whatever they show.

16. In my view, the timing of the request, namely after the recommendation to decommission services at Leeds had been made but before the ultimately successful legal action ended the process, is very significant here. At that time, I conclude that as the Chair of the Health Scrutiny Committee he had a very strong legitimate interest in exploring whether the process had been fair and objective at all stages.

17. But was the release of these scores necessary for that legitimate interest, as required by Paragraph 6 ? The main argument of the NHS against this is that the individual scores did not feed into the decision-making process, only the consensus scores did, and that therefore they are irrelevant to assessing the legitimacy of the decision. They were only an aide-memoire, which panellists could have taken home with them. Any bias, it is said, would have been eliminated by the consensus discussion.

18.Councillor Illingworth drew our attention to the fact that the Steering Group papers from April 2010 state that the final scores for each centre will be "compiled" from the panel's individual scores and outlined the process by which this will be done, with no mention of the concept of "consensus". I agree that this is very surprising if a consensus score was to be arrived at by discussion and challenge. However against that we had both considerable written evidence and the oral evidence from Maria von Haldebrand about the importance of the consensus meetings and the approach adopted in them.

19. Nonetheless, I think it goes too far to say that the individual scores were no more than an individual aide-memoire. Their production formed part of the contract between the NHS and the individual panellists. They were made on the basis of written evidence and then each individual panellist re-scored the centres after the site visits. This clearly fed into the

consensus meeting. There were an integral part of the process, albeit they did not go forward to the higher body, and therefore did not directly feed into the final decision-making process. If they weren't an important and integral part of the process, it is difficult to see why the panellists were contractually required to produce them. The NHS state that the panellists could have taken them home, and not "left them" with the NHS. The fact that none of them did so, and the NHS did not destroy them, as you would expect to be done with casual information merely "left behind", perhaps confirms that they were an integral part of the process and were more than just aide-memoires.

20. Councillor Illingworth has been provided with the scores he seeks in anonymised form, which he has said is acceptable to him, but not in a consistent order, so that it is not possible to compare an individual judge's score across the centres. It was necessary to do this because two panellists had missed the visits to 1 and 2 centres respectively. To have kept a consistent order would have enabled their scores to be readily identified. The NHS state that these data enable him and others to look for "outliers" in the scores given to the individual centres and significant variations between the individuals panellists' scores and the final consensus score which is sufficient to examine bias. Councillor Illingworth responds that because the scores have been permuted, it is not statistically possible to identify bias by an individual panellist.

21. In my view, whilst the NHS are correct to say that it allows some analysis, Councillor Illingworth is right about this. If a judge were, say, generally a low scorer in comparison with other judges, but scored a centre with which he/she had associations much more highly, or conversely was generally a high scorer but scored Leeds (or anywhere else) lowly, there is no way of detecting this from the anonymised information provided.

22. In their opening submission, the NHS said that the Tribunal could inspect the disputed information to satisfy ourselves that there is no bias. In my view this is not statistically feasible There were 8 panellists, scoring 11 centres against 32 criteria, with a before and after visit score for each, i.e over five and half thousand scores. A conclusive examination for bias requires both statistical skills and access to appropriate computer programmes. It cannot be done manually and is beyond the capability of the Tribunal

23. Purely co-incidentally, my own original profession was a social statistician, working on NHS research, and my doctorate is in statistical sociology. However, it would be neither practicable nor appropriate, because it would be inappropriately mixing roles, for me to undertake such a detailed analysis. Nevertheless, the Tribunal having been invited to do so by the NHS, I have inspected the disputed information to look for any *prima facie* evidence of bias of the kind suspected by the appellant. I have done so to assist the appellant in the light of the majority decision not to release the scores.

24. In his post-hearing submission, Councillor Illingworth identified 10 possible relationships between 6 of the 8 panellists and the 11 individual centres (5 for one panellist), which he speculates, could give rise to bias by those panellists in favour of the centres with which they had a relationship. In support of this, he also notes that there were no such relationships between any of the panellists and the 4 lowest scoring centres.

25. I have looked at the total scores (i.e all 32 sub-criteria scores added together) given by those 6 panellists to the centres with whom they were identified by Councillor illingowrth as having a relationship, and ranked them in each case against the scores of the other judges. It reveals the following 1st; 2nd (twice); 4th (3 times); 5th (twice); 6th; 7th. This clearly does not reveal any prima facie evidence of significant bias. Furthermore, in the case of the "1st" ranking, that panellist was also 1st or 2nd highest scorer in the rankings for 6 of the other centres, and in the case of one of the "2nd" rankings, that panellist was in the top three for 6 of the other centres. In other words, both those panelists tended to be comparatively high scorers.

26. I also identified 3 cases of apparently clear “outliers” in the scores – 2 of the highest score and 1 lowest. Neither of the two high outliers was in the 10 relationships identified by Councillor Illingworth. And the low outlier was not given to one of the four lowest scoring centres identified by Cllr. Illingworth as having no such relationship. I stress that none of this is statistically conclusive, but on this limited but relevant analysis, I did not detect any prima facie evidence serious of bias in those individual scores.

27. I have a further comment about the anonymised information already provided to the appellant. As stated above, it does not enable him to do the statistical analysis which would be required to test his hypothesis. It included the scores for the two panellists who did not visit every centre. Had all the scores for those two panellists been omitted altogether, there would have been no need to “mix up” the scores of the other 6. This would at least have enabled the appellant to undertake the relevant tests for the other 6 judges without releasing any personal data. I think this would have been more use to him than the information he was in fact given. Unfortunately, that cannot now be done because “the genie is out of the bottle” . If he were now given the non-randomised information for the other 6, he would be able to quickly identify the scores of the two who missed some visits, because they were absent for different numbers of centres (1 and 2 respectively). I don’t know whether a statistician was involved in the decision as to what to send him, but it does not appear as though those choices were put to him as part of Section 16 discussion, which, with the benefit of hindsight, is unfortunate.

28. The Tribunal originally suggested a possible consent order involving the services of an independent statistician. Although that didn’t happen, the NHS did ask Mr.Mark Svenson, one of its senior statisticians who had no involvement in the Kennedy process, to examine the data for evidence of bias, and he found none. In fact, he took a wider brief, and examined alleged bias on other issues such as the selection criteria for panellists. I am not sure why this was necessary, given that all the relevant information on those issues is already in the public domain, and do not require a professional statistician to interpret them. Neither are they matters for this Tribunal.

29. Also, from his letter which was given to us in evidence, he appears to have slightly misunderstood the issue, because he refers to “prejudice against Leeds” and appears to have therefore focussed on the Leeds scores. As I understand the appellants concern, it is that the bias might have been the other way round i.e in favour of other places because of professional relationships and geographical connections, which did not apply to Leeds and some other “unsuccessful” centres. Also Mr.Svenson does not specify what statistical tests he employed. It might be in the interests of all parties for him to have a conversation with the appellant to elaborate further on that.

30. . I now address the question of whether the panellists were “public facing”. I accept the NHS point that Councillor Illingworth’s comparison with himself, as an elected politician, who expects to receive criticism, even abuse, is not apposite. Nonetheless, the panellists were working on an issue which they knew was very high profile and of great public importance and interest; their individual identities was in the public domain, albeit that the panel wished to only speak with a “collective voice”; they were chosen because of their publicly known professional standing.

31.The NHS uses the word “volunteer” to describe them. This is only true in the sense that they didn’t have to undertake this role, and in the best traditions of British public service, were providing their professional services in the public good, but the whole exercise, including their remuneration, was paid for by public money. I therefore conclude that there is a real sense in which they were public facing (albeit not in the same way as Councillor Illingworth) and must have expected a very considerable degree of public scrutiny of their work.

32. Turning to the issue of threats, allegations and personalised insults from members of the public, it is certainly the case that this occurred following the decision on the future services to be commissioned from each centre. There was no real evidence of a credible physical threat, although that is not to deny or minimise that distress can be caused by such deplorable activities. I agree with the NHS that, at the time of the request, feelings were running high, and that therefore it is likely that release of the scores might cause some unpleasant reaction directed towards those panellists who scored Leeds lower than their colleagues. Conversely, of course, it might lessen the reaction towards those who scored Leeds at the higher end. Whilst in no way defending those actions, I think that to some extent this unfortunately goes with the territory of being involved in a highly controversial public service decisions of this kind. Assessment of this is part of the balancing act required under schedule 2 between the rights and legitimate interests of the data subjects, and the legitimate interests of the Chair of Health Scrutiny Committee, and the public at large.

33. Finally, it was suggested by the NHS that release of the individual scores could prejudice the relationship between clinicians in the centres and the members of the panel because this is a small world and that they are constantly meeting each other, and on occasions, requiring help from each other. If true, this would be very disappointing because it implies a deficiency in the professionalism of those relationships. It is not uncommon in health as in other areas of public life for professionals to be assessed by their peers at both the individual (through appraisals) and the organisational (through regulatory assessments of various kinds) levels. We didn't have the benefit of any evidence on this from professionals working in the centres, and I suspect that this reasoning is actually unfair to those professionals. I am sure that the panelists who made those scores could, if necessary explain and defend their professional reasoning to their colleagues. The overall consensus scores are already in the public domain and, as can be seen even from the anonymised data, many scores increased after the site visits, with only a very small number being reduced.

32. In conclusion, on balance I take the view that Schedule 1, Part II, of the DPA does not prevent the release of these data, and the issue of fairness falls to be resolved by the application of Schedule 2, Para.6. The issue is whether disclosure is necessary for the legitimate interests of Councillor Illingworth, as a democratically elected Chair of a local Health Scrutiny Committee, and the public he represents (and those elsewhere) to whom the data might be disclosed, and, if so, would it be unwarranted because of the rights, freedoms and legitimate interests of the panellists, the data subjects. Taking account of all the factors outlined in the proceeding paragraphs, I conclude that the importance of complete transparency in a process as important to the NHS and as sensitive as this one, particularly given the controversy surrounding various aspects of that process, means that it is necessary and that the balance is in favour of disclosure.

[12] In the factual circumstances outlined above and for the reasons given above the Tribunal (by a majority) refuses this appeal

Signed:

Brian Kennedy QC 31 August 2014.