



**IN THE FIRST-TIER TRIBUNAL Case No. EA/2011/0055**  
**GENERAL REGULATORY CHAMBER**  
**INFORMATION RIGHTS**

**ON APPEAL FROM:**

**The Information Commissioner's  
Decision Notice dated 31 January 2011  
FS50297286**

**Appellant: Mr CJ Johnston**

**First Respondent: Information Commissioner**

**Second Respondent: South Warwickshire NHS Foundation Trust**

**Hearing held at Coventry Magistrates Courts on 12 November 2014**

**Date of Decision: 24 November 2014**

**Date of Promulgation: 25 November 2014**

**Before**  
John Angel  
(Judge)  
and  
Henry Fitzhugh and Marion Saunders

Subject: section 40(2) FOIA personal information

**Decision**

**The Tribunal upholds the remitted appeal in part. The Tribunal orders the Second Respondent to disclose the redaction at page 29 (5 of the closed bundle) and the first 16 words of the redaction at page 34 (8 of the closed bundle) within 30 calendar days of the date of this decision.**

## **Reasons for Decision**

### **Background**

1. This appeal concerns a request for information relating to an investigation into a complaint made by Mr Johnston concerning his late mother's treatment by NHS Warwickshire at the Arden Ward rehabilitation unit. NHS Warwickshire disclosed some information to Mr Johnston but withheld other information. The Commissioner issued a Decision Notice dated 31 January 2011 in which he found that the withheld information was exempt under section 41 FOIA.
2. Mr Johnston appealed to the First-tier Tribunal ("FTT") which held an oral hearing of the appeal on 20 June 2011. Mr Johnston represented himself. The Commissioner was not represented, relying on his written submissions alone. Following the hearing, the FTT issued directions on 11 July 2011 inviting the parties to make further submissions upon the applicability or otherwise of section 40 FOIA to any part of the withheld information. Both parties did so in writing.
3. The FTT issued its decision on 19 October 2011. The FTT allowed Mr Johnston's appeal in substantial part, finding that the withheld information was not exempt under section 41 FOIA. The FTT ordered that it be disclosed subject to the redaction of a limited amount of information which it found to be exempt under section 40(2) FOIA. The FTT's decision included two Confidential Schedules. Confidential Schedule 1 was ordered to remain confidential only until after disclosure of the withheld information. Confidential Schedule 2 described the information found by the FTT to be exempt under section 40(2) FOIA (the "redacted information") and was therefore ordered to remain confidential.
4. The withheld information was subsequently disclosed to Mr Johnston, subject to the specified redactions.
5. Mr Johnston appealed against the FTT's decision in relation to the redactions to the Upper Tribunal ("UT"). By way of a decision dated 15 April 2014 GIA/510/2012 the UT set aside the FTT's decision and remitted the case for rehearing by a differently constituted FTT. The sole reason for this decision

was that the UT had found the FTT erred by failing to give Mr Johnston the opportunity to make his submissions on section 40(2) FOIA orally at a hearing, which he had been able to do in relation to section 41 FOIA.

6. Due to a reorganisation within the NHS, the information is now held by the Second Respondent, South Warwickshire NHS Foundation Trust.
7. The sole issue for this Tribunal on remittal is whether the redacted information is exempt under section 40(2) FOIA.

### **Statutory framework**

8. In so far as relevant to this appeal, section 40 FOIA provides as follows:
  - (1) *Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.*
  - (2) *Any information to which a request for information relates is...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 ...*
9. Personal data is defined under section 1(1) of the Data Protection Act 1998 (“DPA”) as *data which relates to a living individual who can be identified*
  - a. *from those data*
  - 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.*

10. Under section 2 DPA “*sensitive personal data*” means personal data consisting of information as to-

*(e) his physical or mental health or condition.*

11. It is the first data protection principle that is relevant in this case and it states:

*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, and*

*(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.*

12. Thus, for personal data to be lawfully disclosed, it must be “fair” and one of the conditions in Schedule 2 of the DPA must apply and in relation to sensitive personal data also one of the conditions in Schedule 3 to the DPA must apply.

#### Fairness

13. The Commissioner argues that the key considerations in assessing fairness include:

- the reasonable expectations of the data subject, taking into account, for example, their expectations both at the time the information was collected and at the time of the request; their rights to privacy under article 8 European Convention of Human Rights (“ECHR”); the nature and content of the information itself; the circumstances in which the information was obtained; whether the information is in the public

domain; any particular circumstances of the case; and whether consent has been given or explicitly refused.

- the possible consequences of disclosure on the individual;
- any legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the individuals who are the data subjects.

Although we are not bound by these considerations unless they have been upheld by higher courts or tribunals or are part of the legislation they are considerations that tribunals have taken into account in such cases as the current one.

#### Schedule 2 DPA conditions

14. The Commissioner submits that the only potentially applicable condition in Schedule 2 DPA is condition 6(1), which says:

*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.*

15. The meaning of “necessary” in this context was recently considered by the UT in *Farrand v Information Commissioner* [2014] UKUT 0310 (AAC). It found that “necessary” did not mean “essential or indispensable” but “connotes a degree of importance or urgency that is lower than absolute necessity but greater than a mere desire or wish”.

16. Finally, the Commissioner brings to our attention that there is no presumption that openness and transparency of the activities of public officials should take priority over personal privacy. In the words of Lord Hope of Craighead in *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47 (referring to the equivalent provisions in the Freedom of Information (Scotland) Act 2002 (“FOISA”).

*“In my opinion there is no presumption in favour of the release of personal data under the general obligation that FOISA lays down. The references which that Act makes to provisions of DPA 1998 must be understood in the light of the legislative purposes of that Act, which was to implement Council Directive 95/46/EC. The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data....”*

17. Mr Johnston brought our attention to the decision in *London Borough of Hillingdon v Steven Neary and The Equality and Human Rights Commission* [2011] EWHC 1377 (COP) because he argues it is factually similar to his case. We have read the case and see that it was considered under different legislation, including the Mental Capacity Act 2005. It does refer to Article 8 ECHR, which provides for certain privacy rights. We do not find this case helpful as it is based on a different jurisdiction. Moreover the current case is being considered under the DPA and as Lord Hope explains in paragraph 16 above its fundamental relationship with Article 8 is already enshrined in the statute.

### **The Remitted Hearing**

18. Mr Johnston was the only party to appear before us. Prior to this the parties were given the opportunity to provide written submissions and agree a bundle for the Tribunal to consider. We were provided with the papers before the first Tribunal and allowed an application by Mr Johnston at the hearing to lodge his UT bundle before us on the basis it contained the case he was ready to put forward before the UT if the judge had been prepared to deal with the matter himself, but he remitted it back to another FTT.
19. Mr Johnston was given the opportunity at the hearing to argue why the redacted material should be disclosed. This is difficult for a party who is not allowed to see the information but Mr Johnston made comprehensive submissions which were very helpful to the panel in helping us to come to a decision.

20. His case was largely based on the legitimate interests he was pursuing and why disclosure of the disputed information was necessary in order for him to pursue these interests. Firstly, he considered that the way his mother had been treated when she was admitted to hospital in 2006 and thereafter up to the time of her death in Warwickshire NHS care was subject to various incidents of medical and administrative incompetence. Secondly, he considered that the way his concerns about her treatment, care and ultimate passing away was dealt with was at best unprofessional and at worst a deceitful cover up, in other words was the subject of wrong doing. These matters were so grave, in his view, that it was necessary for the disputed information to be disclosed in order that he could pursue his legitimate interests in exposing these matters not only on his own behalf but in the public interest. Thirdly, because of the gravity of these legitimate interests the seniority of those involved should not be a determinate factor as to what personal data is disclosed.
  
21. Mr Johnston provided lengthy submissions in order to substantiate his interests both in writing and orally before us. We are grateful to him for the way he assisted the Tribunal. Much of what he provided was his views of his mother's treatment and the way his concerns were then dealt with. There were several investigations but as far as we are aware no disciplinary or other action was taken. At most various recommendations were made as to better practise.
  
22. We are not in a position to decide whether there has been wrongdoing or incompetence. This is not our role and is outside our jurisdiction. However we can say that they appear to us to be legitimate interests to pursue, but what we have to decide is:
  - a. Is the redacted information personal data and if so can it also be sensitive personal data;
  - b. If it is such data then can it be processed lawfully and fairly in a way that allows it to be disclosed to Mr Johnston applying the statutory framework to which we are bound as set out earlier in this decision.

**Our conclusions**

23. We have reviewed the disputed information in the light of all the evidence and submissions and have made the following findings:
- a. of the 7 redacted sections 5 are personal data and 1 has some part of the section which is personal data, but none of the 6 sections contain sensitive personal data;
  - b. the 6 sections (only part of one section) containing personal data are exempt under section 40(2) and should not be disclosed;
  - c. this is on the basis that even though Mr Johnston may be pursuing legitimate interests the nature of the content of the 6 redacted sections does not, in our view, help him to pursue those interests and therefore their disclosure is unnecessary for his purposes;
  - d. in addition, in our view, what is already disclosed in the documents provides relevant information for his purposes. The redacted information adds very little.
24. In contrast the information does contain the personal data of data subjects and its disclosure would prejudice the legitimate privacy rights of those data subjects and any disclosure would be unwarranted in the circumstances of this case. We therefore find that balance of interests favours none disclosure.
25. Our detailed analysis of the six redactions where we find there is personal data is set out in the first confidential annex to this decision. This annex must remain confidential.
26. The seventh redaction and part of another in our view are not personal data and should be disclosed because they are not caught by section 40(2). We have set out the reasons for this in the second confidential annex. This annex can be disclosed once the information has been disclosed or any appeal process has been exhausted.

John Angel

Tribunal Judge

24 November 2014