



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]**

EA/2015/0041

ON APPEAL FROM:

Information Commissioner's Decision Notice: FS50543355

Dated: 19 January 2015

Appellant: Huw Morgan, obo Peter O'Keefe

Respondent: The Information Commissioner

Date of hearing: 13 May 2015

Date of Decision: 2 June 2015

Date of Promulgation: 10 June 2015

**Before
Henry Fitzhugh
Annabel Pilling (Judge)
Nigel Watson**

Subject matter:

FOIA – Qualified exemptions – s.31(1)(g)

Representation:

For the Appellant: Huw Morgan

For the Respondent: Julianne Kerr Morrison

Decision

For the reasons given below, the Tribunal refuses the appeal and upholds the Decision Notice of 19 January 2015.

Reasons for Decision

Introduction

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 19 January 2015
2. The Decision Notice relates to a request made on 8 April 2014 by the Appellant under the Freedom of Information Act 2000 (the 'FOIA') to the Cardiff and Vale University Local Health Board (the 'UHB') for:

“a copy of the Report from Edgecumbe Consulting into team-working and communication in the Cardiac Services directorate of its Specialist Services Division.”

3. The UHB did not initially recognise this as a request for information under FOIA request; the request was made by letter from a law firm on behalf of their client at a time when proceedings were ongoing. Following intervention by the Commissioner, the UHB responded on 4 July 2014. It refused to provide the requested information relying on section 31(1)(g), 31(2)(j), 36(2)(b)(i) and 40(2) FOIA. This position was upheld following an internal review.
4. The Appellant complained to the Commissioner who investigated the matter, viewing the requested information in order to reach a decision.
5. In summary, the Commissioner concluded that section 31(1)(g) is engaged and that the public interest arguments in favour of maintaining the exemption outweigh the public interest arguments in favour of disclosure. He did not go on to consider the application of the other exemptions cited.

The Appeal to the Tribunal

6. The Appellant now appeals to the Tribunal on the basis that (i) the Commissioner was wrong to conclude that the exemption in section 31(1) is engaged in respect of the requested information and (ii) even if the exemption is engaged, the Commissioner erred in his consideration

of the public interest arguments and was wrong to conclude that arguments in favour of maintaining the exemption outweigh the public interest arguments in favour of disclosure.

7. The parties agreed that this appeal could be decided without an oral hearing.
8. In advance of the hearing we were provided with and had read a bundle of agreed documents, and further written submissions from the Appellant.
9. We were also provided with and read a small closed bundle, containing the disputed information and the unredacted version of pages which appeared in redacted form in the open bundle. We kept under review the question of whether any of this material could be disclosed to the Appellant, but concluded that to do so would have defeated the purpose of these proceedings.
10. Although we may not refer to every document in this Decision, we have considered all the material placed before us. We read all of the disputed information and based our conclusions on a careful consideration of this, as indicated in paragraphs 32, 35 and 41, below,

Legal framework

11. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.
12. The section 1(1)(b) duty of the public authority to provide the information requested will not apply where the information is exempt by virtue of any provision of Part II of FOIA. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions. Where the information is subject to a qualified exemption,

it will only be exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (section 2(2)(b)).

13. Section 31(1) of FOIA is a qualified exemption and the relevant parts provide as follows:

(1) "Information ... is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

...

(g)...the exercise by any public authority of its functions for any of the purposes specified in subsection (2).

(2) The purposes referred to in subsection (1)(g) to (i) are-

...

(j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.

14. Whether the exemption is engaged in respect of the requested information requires consideration of the following:

- (I) Whether UHB exercises a relevant function for the purposes specified in section 31(2)(j) FOIA;
- (II) The likelihood of prejudice to that function if the requested information were to be disclosed

15. If the exemption is engaged in respect of the requested information, consideration must then be given to whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

Is the exemption engaged?

16. There is no appeal against the Commissioner's finding that UHB

performs a relevant function in relation to section 31(1)(g) FOIA for the purposes of protecting persons (patients) other than persons at work against health and safety arising out of or in connection with the actions of persons at work. Section 45(1) of the Health and Social Care (Community Health and Standards) Act 2003 (the 'HSCA') places a duty on all NHS bodies to put in place arrangements for the purpose of monitoring and improving the quality of that health care provided by and for that body. This in turn places a duty on NHS bodies to protect the health and safety of patients against risks arising out of or in connection with the services it provides. The Commissioner accepted the submissions of UHB that as part of its statutory function of providing NHS services to the public it is necessary to ensure that the services are provided in a manner which protects patients against risks to their health and safety which arise out of or in connection with the actions of its staff.

17. The Appellant submits that the Commissioner was wrong to conclude that the exemption was engaged as there is no likelihood of the prejudice alleged occurring:

(i) – the Commissioner was wrong to conclude that disclosure would be likely to deter members of staff from cooperating with future investigations or make full and frank contributions. In light of the post Mid-Staffordshire climate, the recently introduced statutory duty of candour, and the professional obligations upon all clinicians under Good Medical Practice, such a conclusion was not only wrong, but perverse.

(ii) – as the Commissioner stated that the Report “*focussed on interpersonal professional relationships*” or “*internal departmental matters rather than the delivery of clinical services to patients*” he was wrong to have concluded that disclosure might prejudice patient safety.

18. The Commissioner accepted the arguments from UHB that disclosure

under FOIA of information collected in connection with a highly sensitive investigation would be likely to deter staff members from cooperating with such an investigation in future and would make staff members less likely to make full and frank contributions to such investigations. This, in turn, would adversely affect the quality of information available to reviewers in future cases to the detriment of UHB's ability to exercise its functions under section 45(1) HSCA.

19. The Appellant has not had sight of the requested information and has made certain assumptions in respect of its focus and content. His submissions are based upon his understanding about the focus and content of the Report and not the wider considerations.

20. We acknowledge that there are various obligations on clinicians to raise and act on concerns about patient safety and to contribute to confidential inquiries to help keep patients safe. It does not follow however, that those with an obligation, or following guidance, to act in a particular way in respect of patient safety would do so as freely and frankly if there were no balance of the competing interests as to whether the information they had provided were to be made available to the public with no restrictions. In our view disclosure of this Report, with its sensitive focus, would impede the frankness of future responses to confidential investigations and we agree with the Commissioner that this in turn would be likely to prejudice UHB's ability to perform the relevant function of ensuring health and safety of patients against risks from staff.

21. We are also aware that others who are not clinicians or bound by similar professional obligations may also provide information to such investigations. They may not be bound by the same duties in respect of overriding patient safety or any other requirement that they take part in the investigation. Disclosure of the information under FOIA, that is, disclosure "to the world at large" without restriction, would be likely to deter such people from conducting discussions in a free and frank manner with the expectation of confidence.

22. Having considered the requested information, we are aware of its focus and the sensitive information it contains. The report focussed on interpersonal professional relationships and those interviewed were asked to provide candid assessments of individual working relationships and given the assurance that their contributions would be kept confidential. While the report was not focussing directly on issues relating to patient care and safety, we agree with the Commissioner that the interpersonal relationships of the type investigated in the report have a not insubstantial indirect impact on patient care and safety. We also accept that the voluntary provision of sensitive information about personal relationships is more likely to be affected by disclosure under FOIA than information in relation to the provision of care and safety generally.

23. We consider that disclosure of the requested information would be likely to prejudice UHB's function of ensuring the health and safety of patients and that the Commissioner was correct to conclude that the exemption in section 31(1) is engaged.

Public interest

24. Having concluded that the Commissioner was correct to conclude that the exemption is engaged, it necessary to consider whether he erred in respect of the public interest balancing exercise.

25. The following principles, drawn from relevant case law, are material, both generally and with particular reference to section 31 of FOIA, to the correct approach to the weighing of competing public interest factors. We remind ourselves that the principles established by previous cases do not form a rigid code or comprehensive set of rules and we are, of course, not bound by decisions of differently constituted Panels of this Tribunal, and regard them as highlighting some of the matters that we should properly take into account when considering the public interest test and remind ourselves that each case must be decided on its own facts.

- (i) The “default setting” in FOIA is in favour of disclosure: information held by public authorities must be disclosed on request unless the Act permits it to be withheld;
- (ii) The balancing exercise begins with both scales empty and therefore level. The public authority must disclose information unless the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- (iii) The balance of public interest factors must be assessed “*in all the circumstances of the case*” (section 2(2)(b) of FOIA). This will involve a consideration of both direct and indirect consequences of disclosure.
- (iv) Since the public interest must be assessed in all the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought. Any policy that the public interest is likely to be in favour of maintaining the exemption in respect of a specific type of information must be applied flexibly, giving genuine consideration to the particular request.
- (v) The assessment of the public interest in maintaining the exemption should focus on the public interest factors associated with that particular exemption and the particular interest which the exemption is designed to protect.
- (vi) The public interest factors in favour of maintaining an exemption are likely to be of a general character. The fact that a factor may be of a general rather than a specific nature does not mean that it should be accorded less weight or significance.
- (vii) Considerations such as openness, transparency, accountability and contribution to public debate are regularly relied on in support of a public interest in disclosure. This does not in any way diminish their importance as these considerations are

central to the operation of FOIA and are likely to be relevant in every case where the public interest test is applied. However, to bear any material weight each factor must draw some relevance from the facts of the case under consideration to avoid a situation where they will operate as a justification for disclosure of all information in all circumstances.

- (viii) The relevant time at which the balance of public interest is to be judged is the time when disclosure was refused by the public authority, not the time when the Commissioner made his decision or when the Tribunal hears the Appeal.
- (ix) The “public interest” signifies something that is in the interests of the public as distinct from matters which are of interest to the public.

26. The Appellant submits that the Commissioner attached far too little weight to the promotion of openness, transparency and accountability in the post Mid-Staffordshire climate of healthcare governance. He asserts that it is now undisputed that the public interest is best served by such openness and transparency.

27. We do not agree that because the public authority is a healthcare provider or the requested information relates to healthcare that there is an overriding public interest in favour of disclosure in any such case. As we have indicated above, section 2(2)(b) FOIA requires that the balance of public interest factors must be assessed “*in all the circumstances of the case*”.

28. There is a general public interest in openness, transparency and accountability but the weight to be attached will depend on the relevance to the information in dispute. In this case, this is not a report for example, into standards of care within a Trust or hospital, or investigating anomalies in patient care and safety, when those factors would carry more weight.

29. The Appellant submits that the Commissioner erred in taking account of the fact that the requested information “contains frank comments and singles out individuals as examples of practices”. This, he submits, is irrelevant and should not influence the public interest considerations.
30. We disagree with this. The nature of the information and its degree of sensitivity are relevant to an assessment of the public interest “in all the circumstances of the case.” It would have been wrong for the Commissioner to have ignored this.
31. The Appellant submits that by failing to recognise the focus of the report of internal departmental matters rather than the delivery of clinical services, the Commissioner has failed to recognise that this minimises any public interest against disclosure.
32. We have already noted that the Appellant has not seen the requested information. It is therefore unsurprising that grounds of appeal advanced are based upon the Appellant’s apparent misunderstanding of the remit and focus of the Report. The Commissioner considered the detrimental consequences which would likely flow from disclosure of information relating to an investigation of interpersonal relationships and, having seen the requested information, we agree with his conclusion.
33. The Commissioner has not specifically addressed the Appellant’s assertion that the requested information has already been disclosed to consultants within the UHB, albeit on an apparently restricted basis. The Appellant does not go so far as to submit that as a direct consequence the public interest must favour disclosure, but submits that this was a relevant consideration which the Commissioner ignored. There is no evidence before us to confirm that the requested information has been disclosed, to whom, when and in what circumstances. The simple fact that a piece of information has been seen by individuals within a public authority would not necessarily

amount to a factor giving weight to the public interest in disclosure of the information under FOIA.

34. Finally, the Appellant submits that the Commissioner's consideration of the public interest placed no, or no proper, emphasis on the public interest of those who may be considering undergoing treatment at the department in question, and their right to be informed of information which may affect that choice.
35. This is a factor affecting a small sector of the public rather than the public in general. We have seen the requested information and considered how its disclosure would inform the public, either generally or those considering undergoing treatment and this particular factor is one which carries little weight.
36. The Appellant's submission in respect of the timing of the consideration of the public interest balancing exercise is misconceived. The relevant time at which the balance of public interest is to be judged is the time when disclosure was refused by the public authority, not the time when the Commissioner made his decision or when the Tribunal hears the Appeal.
37. If the report is or may be needed in furtherance of legal proceedings involving the Appellant's client there may be a relevant disclosure or discovery regime available to him which would enable the consideration of whether the report has relevance to his private interests. We are satisfied that the Commissioner properly considered the public interest and was correct in his conclusion. Having viewed the requested information, we consider that the public interest in maintaining the exemption far outweighs the public interest in disclosure of this requested information.

Conclusion

38. The Commissioner was correct to conclude that UHB was entitled to withhold the requested information on the basis of the exemption in

section 31(1) FOIA.

39. We therefore refuse the appeal and uphold the Decision Notice of 19 January 2015. Our decision is unanimous.

40. If we had allowed the appeal on this ground, we would not have been in a position to order disclosure of the requested information as sought by the Appellant. We would have needed to further consider the application of section 40(2) FOIA.

41. Although we have examined the requested information with care, we do not consider that it is possible to redact the requested information in any way.

Judge Pilling

2 June 2015