ON APPEAL FROM

THE INFORMATION COMMISSIONER'S DECISION NOTICE NO:FS50492136

Dated: 31st. July, 2013

Appeal No. EA/2013/0176

Appellant: Colleen Foster

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

Second Respondent: The Nursing and Midwifery Council ("The NMC")

Before

David Farrer Q.C.

Judge

and

Andrew Whetnall

and

Dave Sivers

Tribunal Members

Date of Decision: 7th. February, 2016

Subject matter : FOIA S.40(5)(B)(i)

The exemption from the duty to confirm or deny whether information is held where to do either would contravene a data protection principle

The Tribunal's decision

The appeal is dismissed.

Abbreviations (in addition to those above)

FOIA	The Freedom of Information Act, 2000
The DN	The ICO's Decision Notice
The DPA	The Data Protection Act, 1998

The relevant statutory provisions

FOIA 2000

1.— General right of access to information held by public authorities.
(1) Any person making a request for information to a public authority is entitled—
(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
(b) if that is the case, to have that information communicated to him.
. . . . .

2.— Effect of the exemptions in Part II.
(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—
(a) the provision confers absolute exemption, or
(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in

disclosing whether the public authority holds the information,
section 1(1)(a) does not apply.
. . . . .

40.— Personal information.
(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 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,

. .. . . .

(5) The duty to confirm or deny—

. ….
(b) does not arise in relation to (other) information if or to the extent that either—….
(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles

. . . . . .
.
(7) In this section—
"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
"*data subject*" has the same meaning as in section 1(1) of that Act;
"*personal data*" has the same meaning as in section 1(1) of that Act.

Data Protection Act 1998

Schedule 1 The data protection principles

Part I The principles

1.

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,

Schedule 2 Conditions relevant for purposes of the first principle: processing of any personal data

. . . . . .

6.—

(1) 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.

…..

<u>Authorities</u>

Farrand v the ICO and the London Fire and Emergency Planning Authority [2014] UKUT 0310 (AAC)

MC v ICO and the Chief Constable for Greater Manchester [2014 UKUT 0481 (AAC)

Mitchell v the ICO and the NMC [EA/2014/0321]

Corporate Officer of the House of Commons v The ICO and Others [2008] EWHC 1084 (Admin.).

Sunday Times v The United Kingdom (1979) EHRR 245

Appearances

The Appellant appeared in person

Robin Hopkins appeared for the Information Commissioner

Timothy Pitt – Payne Q.C. appeared for the Nursing and Midwifery Council

Reasons for the Decision

The Background

1. Mrs. Foster's son, Gary Foster, died on 14th. October, 2007 as a result of a tragic error or errors involving the administration to him over a period of several weeks of excessive doses of a drug known as Bleomycin,. He suffered from testicular cancer and was participating in a research trial to investigate the therapeutic value of Bleomycin.

2. An inquest followed, together with civil litigation, which apparently settled, two references to the General Medical Council and and a complaint to the NMC as to the conduct of Nurse X, who had important responsibilities within Mr. Foster's care regime. The handling of that complaint by the NMC provides the immediate context for this appeal.

3. In accordance with prescribed procedures, it was considered by an NMC Investigative Committee Panel ("the ICP"), which received evidence in the form of witness statements and conducted its investigation in private. The ICP concluded that the case against Nurse X did not justify a reference to the Fitness to Practice Panel ("the FTPP"), which would have conducted a public hearing, had the complaint been referred to it.

4. As might be expected, Mrs. Foster and her husband were closely involved in all the proceedings arising out of their son's sad death. She made the complaint to the NMC. Entirely understandably, she remains devastated by all that has happened, including the long series of public hearings summarized above.

The Request

5. On 8th. December, 2012, Mrs. Foster requested information from the NMC in the following terms –

   "Please can you forward to us the names of the {number omitted) witnesses interviewed at the Investigative Committee hearing which took place on (Date omitted)

   Also we would appreciate a copy of all the case material which we have not received as yet."

6. On 11th. January, 2013 the NMC responded that it relied on s.40(5)(b)(i) as relieving it of the duty to confirm or deny ("NCND") that it held the requested information. It maintained that position on 13th. February, 2013, following an internal review. Mrs. Foster complained to the ICO.

The DN and the appeals

7. Following his investigation the ICO issued a DN dated 31st. July, 2013. He upheld the NMC's decision to NCND. He emphasized the reasonable expectations of Nurse X as to disclosure of the fact or substance of the complaint and ruled that to confirm or deny the holding of the information would be unfair to Nurse X and would amount to a contravention of the first Data Protection Principle.

8. Mrs. Foster appealed to the FTT. It will be convenient to summarise her case as set out in the grounds of appeal and subsequent submissions when reviewing the arguments advanced at the hearing, since her oral case followed closely the written submissions made to the FTT and the UT.

9. Following a hearing on 13th. January, 2014, the FTT, differently constituted from the panel which reached this decision, allowed her appeal and ordered the NMC, within 35 days, to inform her whether it held the information requested and, if it confirmed that it did, to disclose it or set out fully its case for refusing disclosure.

10. The ICO obtained permission to appeal to the UT and the NMC was joined as a Respondent.

11. The UT allowed the appeal ("the UT decision") for reasons to which this decision will refer and by which it is bound. It remitted the appeal to a differently constituted FTT for a full rehearing in accordance with the UT ruling. Hence this decision.

12. The UT decision included a request or proposal that the parties consider whether the appeal could be settled by the provision to Mrs. Foster of the requested information on a voluntary basis, hence without the general publication resulting from disclosure under FOIA. The Tribunal received a memorandum from the NMC stating that this had not proved possible.

Matters evidently not in dispute.

13. The wording of this subtitle reflects the fact that Mrs. Foster did not formally admit the matters set out at §14 – 17 but did not dispute them. The Tribunal is satisfied that they are correct propositions of fact or law, as the case may be.

14. The fact that Nurse X was the subject of an investigation by the ICP is her personal data.

15. The names or professional roles of the witnesses who made statements to the ICP and the fact that they made such statements are their personal data.

16. The fact that Nurse X was the subject of such an investigation was known to Mrs. Foster as the complainant but was not otherwise publicized. Mrs. Foster was not bound by any undertaking of confidentiality as to further communication of that fact.

17. Mrs. Foster had these legitimate interests relative to the death of her son -

(i) To discover, so far as possible, the cause(s) of and the circumstances surrounding his death;
(ii) To hold accountable any person whose misconduct or failure caused or contributed to his death;
(iii) To ensure that procedures for the ICP investigation of Nurse X's conduct were thorough, effective and fair to all interested parties.

The issues

18. Given that Mrs. Foster and, presumably, her family knew that Nurse X had been investigated as a result of her complaint, was it open to the NMC to NCND her request for information ?

19. Who is/are the "third party/parties" for whose "legitimate interests" disclosure must be necessary in Condition 6(1) of Schedule 2 to the DPA,? Are we concerned with the personal interests of the requester or the general public interest, given that any disclosure will be to the world at large ? Judge Jacobs gave guidance on this question at §20 - §24 of the UT decision but a different FTT has argued that such guidance may be at odds with an earlier decision of the Administrative Court. Counsel for both respondents, whilst reserving their positions as to the correctness of Judge Jacobs' ruling, argued that, in this case, the Tribunal does not need to decide by which authority it is bound because the interests of the requester and the public are identical. Mrs. Foster did not address us on the point. We consider that it should be treated as a live issue

20. Was disclosure of the requested information "necessary for the purposes of (the) legitimate interests" (identified at §17) pursued by Mrs. Foster ?

21. If so, did Nurse X have legitimate interests which might be prejudiced by the requested disclosure ?

22. If so, having regard to the competing interests of Mrs. Foster (and the public) and the necessity of disclosure for the pursuit of those interests, would disclosure nevertheless be unwarranted by reason of such prejudice ?

23. If the answers to these questions require disclosure of the information, would disclosure otherwise be fair ? (Nobody argued that it would be unlawful.)

<u>The case for Mrs. Foster</u>

24. Her basic submission, eloquently made in written argument and orally at the hearing, can be very shortly summarised ; given what happened to my son, as a result of uncontestable negligence in his treatment on the part of doctors and nurses, specifically Nurse X, it is quite wrong for the NMC to refuse even to state whether it holds the information which I know that it holds.

25. As to the issues, she submitted that she wanted simply to know whether those who made statements were themselves members of the team charged with Gary's care during the extended trial of Bleomycin. If they or any of them were, it would show that the ICP reached its decision that there was no case for Nurse X to answer on the basis of tainted and biased evidence from those who had every reason to hide their own and others' failings.

26. That would justify a demand that their finding be set aside and the case of Nurse X be reconsidered by another ICP.

27. Such a disclosure was not just necessary but essential to her purpose of seeking justice for her son's memory and holding to account those responsible for this tragedy.

28. By comparison with what Gary had suffered and the effect on Mrs. Foster and her family, the prejudice to Nurse X's interests resulting from disclosure would be trivial, whatever her expectations as to confidentiality.

29. There is reason to suspect a deliberate cover – up of the truth.

30. Mrs. Foster should have been fully informed as to the content of the investigation.

The case for the Respondents and the Tribunal's findings on the issues identified

31. The NMC submitted evidence from John Lucarotti, its Head of Fitness to Practice Policy and Legislation. He explained the regulatory role of the NMC, its disciplinary procedures and published policy regarding confidentiality and disclosure of personal data in relation to such procedures. He produced the NMC Fitness to Practice Publication and Disclosure Policy current at the date of the Complaint in 2011 and referred us to its provisions as to confidentiality in respect of the investigative process. The NMC fitness to practice procedures drew a clear line between the private investigative stage conducted by the ICP which culminated either in a referral to the FTPP for a public hearing or, as here, a finding that the member had no case to answer. A complaint would enter the public arena as soon as a referral to the FTPP took place. This was a model adopted by other professional regulators and was designed to strike a balance between transparency on an important public issue and a proportionate respect for the privacy of a member against whom no adverse finding had been made.

32. Mr. Pitt – Payne presented the detailed case of both Respondents. Mr. Hopkins added a number of submissions pertinent to the role of the ICO.

33. The first issue (§18) arises, at least in part, as a result of Judge Turnbull's emphatic observation in *MC v ICO and the Chief Constable for Greater Manchester [2014 UKUT 0481 (AAC) ("CCGM")* at §22 –

"In my judgment it is a nonsense to say that the public interest demands that a public authority give a "neither confirm nor deny" response when the fact that the information exists is already in the public domain"

34. Judge Jacobs quoted that passage in his decision on the UT appeal (§25). He rejected an argument advanced by Mr. Hopkins for the ICO to the effect that existing knowledge was relevant only where it had a necessary authoritative quality but concluded that he did not need to rule on the relevance of CCGM.

35. Mr. Pitt – Payne submitted that there was a significant difference between knowledge disclosed to a complainant, albeit without restriction as to further dissemination, and information which any member of the public was entitled to request and obtain. He relied on the potentially damaging effect of fresh publication where confirmation is given long afterwards that X has been investigated. He did not rely on the line of argument apparently developed in the UT. Mr. Hopkins submitted that the source of confirmation was relevant to its effect and argued that the knowledge of the complainant alone could not render an NCND response meaningless.

36. As the Tribunal of fact we are bound to confront this issue, as it arises on the facts of this case. It seems to us to be relevant at the outset of our consideration of this appeal, because, if Judge Turnbull's decision in CCGM applies to this appeal, the NCND response was unjustified, regardless of the substantive merits of a subsequent reliance on s.40(2). As the FTT observed in *Mitchell v the ICO and the NMC [EA/2014/0321],* with specific reference to the UT decision in this case, the lack of any restriction on dissemination of the complainant's knowledge may also be relevant to the balancing exercise required by Paragraph 6(1) of Schedule 2 to the DPA.

37. Mindful of Judge Jacobs' strictures on the dangers of treating findings of fact as rules of law, we emphasise that our finding is confined to the particular evidence before us.

38. In every case involving a complaint to a professional regulator the complainant will know that the subject of the complaint is or has been investigated. So far as we are aware, he/she will never be subject to any requirement of confidentiality. If the "public domain"(a term which does not appear anywhere in FOIA) is the relevant arena, it must be one which extends beyond the complainant and

his/her family. The complainant's communication of the fact to friends and family is no different from his passing on news of his child's exam results to the same social group, which would not normally be regarded as publication to the world at large. There is no evidence here of any communication at all by Mrs. Foster or her family. It may be that different considerations could arise where a complainant broadcast the news on Facebook or some other organ of the social media but that is not this case and we therefore make no ruling upon such a hypothetical situation.

39. There is no evidence of any other publication of the fact of this complaint and investigation.

40. We do not consider, therefore, that Judge Turnbull's trenchant ruling applies to the facts before us.

41. We accept Mr. Pitt – Payne's submission that there is a valid distinction between knowledge acquired by a complainant who is free to disseminate it but not obtainable from the relevant public authority by anybody else and knowledge accessible to anybody who requests it from that authority. In practice the distinction may be of little effect but that is not necessarily the case. The complainant may not choose to relay the information widely where it has painful connections to a family member. He or she may be strongly averse to media intrusion.

42. We find that, in this case, the NMC was entitled to use the NCND response.

43. As to the second issue (§19), the question whether the "third party" whose legitimate interests are involved is the requester or the general public is linked logically and in the UT decision to the analysis of the structure of Condition 6(1)(see UT §18 – 24).

44. To summarise, Judge Jacobs, referring to his own decision in *Farrand v the ICO and the London Fire and Emergency Planning Authority [2014] 0310 (AAC)* stated that there were three stages in the application of condition 6(1) namely to decide –

(i) Is the disclosure necessary for the purposes of legitimate interests pursued by the party to whom the data would be disclosed ? If not, no disclosure.
(ii) If so, what are the rights, freedoms or legitimate interests of the data subject ?
(iii) If the data subject has such rights, freedoms or legitimate interests, would disclosure be unwarranted by reason of prejudice to them ?

45. That analysis – indeed the wording of condition 6(1) - gives rise to the second issue, whether the party to whom the data would be disclosed is to be regarded as the requester or any member of the public. The effect of Judge Jacobs' ruling is to treat the relevant interests as those of the requester not of any member of the public. It is based on the principles that the policy of s.40 is DPA protection of the data subject and that construing condition 6.1 as referring in the first line to the legitimate interests of any member of the public could involve disclosure under FOIA involving a breach of the DPA.

46. The public interest, on this analysis, would come into play only at stages 2 and 3.

47. However, the authorities provided to the Tribunal included the report of *Mitchell v the ICO and the NMC [EA/2014/0321]*, a subsequent FTT decision which draws attention to the approach of the Administrative Court in *Corporate Officer of the House of Commons v The ICO and Others [2008] EWHC 1084 (Admin.). ("Corporate Officer")*. *Mitchell* was very briefly cited in one of the written submissions but not further considered either in the responses or in oral argument. *Corporate Officer* was not cited, presumably because it was not thought material to our decision.

48. Put shortly, the FTT in *Mitchell* expressed the view that the court in *Corporate Officer* had approached condition 6(1) quite differently from the UT decision. It had not advocated a three – stage process but had approved the approach adopted by the Tribunal, namely to decide that the public interest in information about the process for paying expenses to MPs readily justified any damage to their privacy likely to result from disclosure (§31). That involved a single test and a focus on the public rather than the requester's interest. At §33 it concluded that the Administrative Court had proceeded on the basis that the public interest "should be taken into account as a relevant factor" when considering whether there was a legitimate interest at the material time. Whether that implies that the requester's interest is also relevant was not spelt out.

49. Accordingly, said the FTT in *Mitchell*, there was some confusion or conflict between the relevant authorities.

50. With respect, we doubt whether the UT decision is inconsistent with *"Corporate Officer"*, the "MPs' expenses" case because the focus of the two decisions was quite different and the arguments apparently advanced on both sides were not directed at the same issues. The Court was not concerned with any distinction between individual and public interests. There was none. It is true that the judgment of Latham L.J. refers repeatedly to the "public interest"

both as to MPs' claims and their private addresses but that is hardly surprising where the individual requesters were three investigative journalists with no personal interests, carrying out investigations into what Tribunal and Court found to be an important public issue. The issue as to the expenses claims was not whose interests were involved nor whether disclosure was necessary for the pursuit of those interests but whether, having particular regard to MPs' expectations of privacy and prejudice to their interests, disclosure was unwarranted. On the secondary issue of addresses, the justification for disclosure was, the Appellant argued, not sufficiently weighty to make disclosure necessary. The Court refused to interfere with the Tribunal's finding (§44). The need for any analysis of the structure of 6(1) did not arise and there is no indication that any was undertaken.

51. The position was quite different when this appeal reached the UT. It appears that the main purposes of the three – stage analysis were to emphasise (i) the need to identify the relevant legitimate interests and (ii) the critical requirement that disclosure should be necessary for the pursuit of those interests, a requirement which, Judge Jacobs ruled (§33), the FTT had not properly assessed, given the alternative available sources of the information that Mrs. Foster requested.

52. She had described her interests in the information as "unique" and the decision described them as "personal to her" (§22). Whether or not those descriptions are correct - and, as will be made clear, this Tribunal does not share those views - it was plainly essential that the UT give guidance as to the stage at which the public interest came into play in cases where public and requester interests might diverge. Data protection issues arise frequently where FOIA is quite legitimately used in pursuit of private interests of little consequence to the general public.

53. So we do not consider that there is any relevant conflict in the decisions in *Corporate Officer* and the UT appeal in this case. We approach this appeal in accordance with the UT guidance on condition 6(1) by which we are bound.

54. That being so, we find that the legitimate interests with which we are concerned are those of Mrs. Foster on the one hand and Nurse X and the makers of witness statements on the other. The undisputed interests of Mrs. Foster are set out at §17 of this decision. Though, in a sense, personal to her, they coincide in this case with those of the public in any event, in our opinion. Learning the truth as to the death of a young man resulting from clinical negligence, holding those culpably responsible to account and ensuring a proper investigation of complaints against those who had the care of the deceased are all matters in which members of the general public have a legitimate interest.

55. We received careful submissions from the Respondents as to the meaning of "necessary" in Condition 6(1) and its application to the facts of this case. Those submissions are reflected in our findings to which we now turn. This is, in our judgment, the critical issue in this appeal.

56. "Necessary" in Condition 5 of Schedule 2, hence also in Condition 6(1) has the meaning attributed to it by the ECHR when assessing the justification for interfering with a recognized right, namely that it implies the existence of a pressing social need. It does not mean indispensable neither has it the flexibility of such terms as "admissible", "ordinary", "useful", "reasonable" or "desirable" (see *Corporate Officer* at §43, applying the ECHR explanation of the term in this context in *Sunday Times v The United Kingdom (1979) EHRR 245* at §59). Unlike the legitimate interests, the question of necessity, the "pressing social need", apparently requires us to have regard to wider considerations than the concerns of the requester.

57. Be that as it may, we accept Mr. Pitt – Payne's submission that the test of necessity is not fulfilled in respect of either Mrs. Foster's or the general public 's legitimate interests, if they are distinct. The implicit confirmation of the fact that this investigation took place could not be necessary or useful to Mrs. Foster since she knew that anyway; it was not part of the request. It is hard to see how disclosure of the fact that y witness statements had been obtained or indeed the names or roles of statement makers, if there were such, would even be useful in the pursuit of the interests identified at §17 above. The first disclosure represents compliance with FOIA s.1(1)(a), if the NCND response were inadmissible and the second a substantive response unders.1(1)(b), if no exemption were available.

58. An investigation seeks evidence from those who can provide information as to what occurred, regardless of their interests or potential partiality. Where a complaint is made to the NMC, it is for the ICP to evaluate the evidence available, whatever its sources, and to decide whether it justifies a reference to the FTPP. Experienced investigators will have well in mind the possibility that a colleague may wish to cover up failings or, on the other hand, impute to the nurse under investigation the blame for his/her own faults. Assuming for present purposes that all or some of the witness statements considered were made by members of Gary's care team, of which Nurse X was a member, knowledge of that fact would not further Mrs. Foster's interests in understanding what had happened or holding Nurse X to account for his death (assuming that she was in any way culpable). Neither would it assist her to demonstrate any misconduct in the investigation by the ICP. On the contrary, a

failure to seek evidence from others involved in Gary's care would look like a dereliction of duty.

59. Regardless of any possibility of obtaining the same information from other sources, which was contemplated by the UT but which now seems doomed to failure, we judge that Mrs. Foster's case fails the test of necessity.

60. We should emphasise that, unlike the position in *Mitchell*, where the ICP subsequently acknowledged serious shortcomings in its findings (indeed, it abandoned its defence to judicial review proceedings) there is no evidence before us of irregularities in this ICP's proceedings and we are not competent nor equipped to pass judgment on its decision to dismiss the complaint without a public hearing.

61. Mrs. Foster's objective of setting aside the refusal of the ICP to refer the complaint "for trial" on the ground that it was tainted would therefore gain nothing from the information she seeks, let alone from confirmation that y statements had been considered.

62. We received a substantial body of evidence from the NMC as to the interests of Nurse X in disclosure of the fact that she had been subject to investigation, the possible effect on her professionally and her reasonable expectation that neither that fact nor any details of the investigation would be publicized, given the outcome, by reason of paragraphs 49 – 52 of the then current Publication and Disclosure Policy, which stated that no information as to cases which are closed by the ICP (i.e., not referred for public hearing) would be published.

63. Since disclosure of the information requested would not, if held, be necessary for Mrs. Foster's legitimate interests nor those of the public, this appeal fails, without consideration of the interests of Nurse X or the balancing of those interests with Mrs. Foster's.

64. We conclude that it would not be helpful to make hypothetical findings in respect of Judge Jacobs' stages 2 and 3 in the absence of the essential premise that stage 1 is passed. It is unrealistic to speculate as to whether, if disclosure had been necessary to Mrs. Foster's the legitimate interests, it would nevertheless have been unwarranted. We acknowledge, nevertheless, the assistance given by all parties on these issues which were certainly live throughout the hearing.

65. For the same reason we say nothing about the independent requirement for fairness in the first data protection principle. Like the UT we doubt anyway that

it adds anything to the requirement for Schedule 2 compliance on the facts of this case.

66. We recognise and regret that this decision will do nothing to assuage Mrs. Foster's continuing anguish and frustration over what has occurred and her perceived lack of information as to the roles of Nurse X and others. We regret but do not criticize the inability of the NMC to provide further information informally and the fact that other possible sources of information have not proved fruitful. The Tribunal can, however, do no more than determine this appeal in accordance with the law as it sees it.

67. For these reasons we dismiss this appeal.

68. This decision is unanimous.

David Farrer Q.C.

Tribunal Judge

7th. February, 2016