



Appeal number: EA/2016/ 0125

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

SID RYAN

Appellant

- and -

THE INFORMATION COMMISSIONER

Respondents

WYE VALLEY NHS TRUST

TRIBUNAL: JUDGE ALISON MCKENNA

**Sitting in public at Alfred Place, on 18 January 2017
and in Chambers on 7 April 2017**

**The Appellant appeared in person, assisted
by Ms. Megan Waugh.
The Respondents did not appear.**

DECISION

1. The appeal is allowed in part:

- 5 (i) Decision Notice FS50590687 is substituted to the effect that the Trust did hold the “Arup Report” at the time of the Appellant’s information request. This information has now been disclosed;
- (ii) The Decision Notice is confirmed in respect of the “Carillion Report”.

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REASONS

Background to Appeal

2. This appeal concerns information requested in connection with a dispute between Wye Valley NHS Trust (“the Trust”) and its PFI provider Mercia Healthcare, about the construction and maintenance of Hereford County Hospital. The Appellant (an investigative journalist) had already obtained some information about this dispute from previous information requests and the Information Commissioner has issued two previous Decision Notices.¹

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3. The Appellant made an information request to the Trust on 29 April 2015 in the following terms:

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“I am making this request under the Freedom of Information Act.

Can I please be provided:

1.A copy of the complete “Arup Report” or reports into fire safety at Hereford Hospital.

25 *I understand that this study was commissioned by Mercia Healthcare in late 2012 going into 2013 and refers to fire safety within the hospital so it would be held on behalf of the Trust. Although Mercia sought to argue that this was a legally privileged document within the dispute resolution procedure I note that this argument was rejected by the adjudicator.*

30 *2.A copy of the “Carillion Report” which I understand was carried out in mid-2012 in response to the identification of fire safety defects in the CT scanner room but prior to the commissioning of the Leviathan Report.*

3.The PAT testing certificates between the period 1 January 2010 and present for the birthing bed involved in a serious electric shock.

¹ FS50519100 and FS50572001

4. Copies of all documentation submitted to any further Dispute Resolution Procedure between Mercia Healthcare and the Trust. I would expect this to include the submissions of both parties, any procedural correspondence with the adjudicator and any judgements given on the case”.

5 4. The Trust responded on 1 June 2015 as follows:

“1. *The Trust does not hold a report from Arup, which we understand was commissioned by Mercia Healthcare;*

2. *The Trust has no copy of any report from Carillion during this period;*

10 3. *The Trust has no copy of a PAT test certificate for the specialist birthing bed which was investigated following a RIDDOR incident”.*

15 The Trust claimed exemptions from the duty to provide information in respect of item 4 of the request (sections 41, 32 (2) and 42 of the Freedom of Information Act 2000 (“FOIA”). The Trust’s stance was upheld on internal review and the Appellant complained to the Information Commissioner.

5. The Trust later disclosed some of the information requested under item 4. It also later disclosed the Arup Report requested under item 1, but this was after the Decision Notice had been issued.

20 *The Decision Notice*

6. The Information Commissioner issued Decision Notice FS50590687 on 30 March 2016, upholding the Trust’s stance that the information requested under items 1, 2 and 3 was not held by the Trust and requiring no steps to be taken.

25 7. Paragraph 16 of the Decision Notice recorded the scope of the Information Commissioner’s investigation as being whether the information requested in parts 1, 2 and 3 of the request was held by the Trust either directly or by virtue of its being held on the Trust’s behalf by Mercia Healthcare.

30 8. The Information Commissioner understood the Carillion Report to concern a structural survey commissioned by Mercia Healthcare following the Trust’s discovery of fire safety issues in the hospital and the Arup Report to concern an engineering report also commissioned by Mercia after parts of the hospital were declared unavailable for use due to the fire safety defects.

35 9. The Information Commissioner asked the Trust for information about its relationship with Mercia Healthcare, including the terms of the legal agreements between them. The Trust explained that Mercia Healthcare does not provide services to the Trust under a contract but under the terms of a PFI Agreement (“the Agreement”). The Trust owns the freehold of the hospital site but leases the hospital building from Mercia. The terms of the lease include the provision by Mercia to the

Trust of portering, domestic services, cleaning, maintenance and some other ancillary services.

10. Paragraphs 26 and 27 of the Decision Notice state that the Trust had told the Information Commissioner that it had requested copies of the Carillion and Arup Reports from Mercia Healthcare but had been unsuccessful in its attempts to obtain them, including at a formal Adjudication. In relation to the Arup Report, the Trust had confirmed to the Information Commissioner that it had received a verbal summary of it from Mercia only.

11. The Information Commissioner had considered whether Mercia had a legal obligation to provide the requested information to the Trust. The Information Commissioner concluded at paragraph 32 of the Decision Notice that she had no reason to doubt the Trust's assertion that the Agreement did not impose a general obligation in respect of information sharing. She noted that the Adjudicator had not ordered disclosure and concluded that, if such an obligation had existed, Mercia "would have done so when it was requested".

12. The Information Commissioner also considered whether Mercia Healthcare might be said to be carrying out any functions of the Trust on its behalf which affected the basis on which it held the requested information. She concluded at paragraph 34 that the commissioning of the Reports was not a function of the Trust but rather Mercia's own responsibility as the Trust's independent PFI partner.

13. The Information Commissioner concluded that she had not seen any compelling evidence to suggest that Mercia held either of the Reports on the Trust's behalf or that it had an obligation to disclose them to the Trust. Accordingly, the information requested at items 1 and 2 of the information request were found not to be "held" by the Trust for the purposes of FOIA. The Information Commissioner was also satisfied that the Trust did not hold the information requested under item 3 of the Information Request (that matter was not appealed).

Appeal to the Tribunal

14. The Appellant's Notice of Appeal dated 27 April 2016 confirmed that only items 1 and 2 in his request were the subject of his appeal. As noted above, the Arup Report was disclosed after the issue of the Decision Notice. Therefore, by the time of the hearing of this appeal, the question of whether the Trust "held" the Carillion Report for the purposes of FOIA was the sole issue for determination.

15. The Appellant relied on Grounds of Appeal which I summarise as follows. The Appellant submitted that the Decision Notice had incorrectly assessed the relationship between the Trust and Mercia Healthcare, and also the relationship between the information requested and the Agreement. He argued that the Information Commissioner had failed to consider whether there was an "appropriate connection between the information and the Trust" following the Upper Tribunal's Decision in *University of Newcastle v IC and BUAV* [2011] UKUT 185 (AAC). He also cited a First-tier Decision, *Visser v IC and London Borough of Southwark* EA/2012/0125.

16. The Appellant argued that the Decision Notice failed to take into account that the request concerned information about the safety of a public building for which the Trust had responsibility. Also, that Mercia Healthcare is a SPV created specifically to provide this building for the Trust, so does very little on its own behalf. He submitted that the Adjudicator had not ordered disclosure of the Reports to the Trust for reasons concerned with his own powers and remit and that the Decision Notice's inference that the Adjudicator's failure to order disclosure supported the Trust's position that there was no obligation to do so was erroneous. He noted that the Agreement was drawn up before the enactment of FOIA so that its information sharing provisions did not take account of freedom of information considerations. In conclusion, he invited the Tribunal to find that there is a clear, legally-defined relationship between the Trust and Mercia Healthcare involving a shared responsibility to the public, so that the Reports were "held" by Mercia on behalf of the Trust in connection with this shared obligation and disclosable under FOIA.

17. The Information Commissioner's initial submissions dated 15 June 2016 (originally closed but later open) invited the Tribunal to join the Trust to the appeal and requested up-dated information from it in respect of the belated discovery that it held the Arup Report. In the Commissioner's formal Response dated 4 January 2017, it was submitted that the Tribunal should issue a substituted Decision Notice to the effect that the Trust did hold the Arup Report at the time of the request. In respect of the Carillion report, the Commissioner maintained the analysis as set out in the Decision Notice. She noted that Mercia had withheld the Report from the Trust, and that the Trust did not have a contractual right to obtain it under the terms of the Agreement.

18. The Trust's Response to the appeal dated 12 September 2016 confirmed that it now accepted that it held the Arup Report for the purposes of FOIA at the date of the request and had recently disclosed it to the Appellant. Secondly, it submitted that it has never held either a hard or electronic copy of the Carillion Report and neither was that Report held on its behalf by Mercia Healthcare.

19. The Trust described its relationship with Mercia Healthcare as follows. The relationship is governed by the Agreement signed in 1999, which is due to run until 2029. The Trust owns the freehold of the hospital site but the hospital building is owned by Mercia. The Trust pays Mercia to lease the hospital building and Mercia provides the associated facilities management services. The Agreement provides expressly at clause 64 that there is no agency or partnership between Mercia and the Trust. The Agreement provides at clause 17 for Mercia to maintain certain records and for the Trust to inspect or copy them, but these are only those records specifically mentioned in the Output Specifications, namely records of regular inspections and of certain one off incidents. There is no wider obligation to make information available to the Trust.

20. The Trust explained that the Carillion Report was commissioned by Mercia after the Trust had expressed concerns in April 2012 that a localised fire safety issue might indicate more widespread problems. Mercia had, in response to these concerns, commissioned a survey of the hospital building by the firm Carillion. It had given a verbal assurance to the Trust that it had confirmed through that survey that there were

no further fire compartmentalisation problems. The Trust explained that it has subsequently sought disclosure from Mercia of the Carillion report on a number of occasions but has not been successful. It had commissioned its own report, which indicated that there were further problems, and this led on to the commissioning of the Arup Report by Mercia. The parties had entered into a Dispute Resolution procedure through a formal Adjudication, but neither the Carillion nor the Arup Reports had been disclosed to the Trust during that process.

21. In conclusion, the Trust submitted that it cannot reasonably be said to have “held” the Carillion Report for the purposes of FOIA in circumstances where it has tried but been unsuccessful in obtaining it from Mercia despite repeated requests. It submitted that the report was commissioned by Mercia for its own purposes, did not fall within the information sharing provisions of the Agreement, and finally that Mercia cannot be said to be an agent or partner of the Trust so does not hold the report on the Trust’s behalf.

15 *The Hearing*

22. The Appellant requested an oral hearing of his appeal. The Tribunal sat in public on 18 January 2017 and heard the Appellant’s oral submissions. He was assisted at the hearing, with the permission of the Tribunal, by Ms. Megan Waugh who is a PhD student with an interest in the Private Finance Initiative and information rights. The Information Commissioner and the Trust did not attend the hearing but made written submissions.

23. The Appellant accepted that the Trust did not hold the Carillion Report itself but submitted that Mercia holds it on the Trust’s behalf. He submitted that there was another over-arching agreement/memorandum of understanding between the Trust and Mercia Healthcare, which governs their relationship outside of the terms of the Agreement considered by the Information Commissioner. He believed this was called the “Trust Construction Requirements”. He submitted that the relevance of this document (if any) to any information-sharing requirements between the Trust and Mercia Healthcare should have been considered in the Decision Notice. I decided that it would be fair and just to make further enquiries about whether such a document existed.

24. In his oral submissions, the Appellant argued that the Trust and Mercia were, in effect, inseparable so that the Tribunal’s analysis should not depend upon a close reading of the terms of the Agreement. As an example of the close operating relationship he described, he submitted that they had joint responsibility to comply with a Fire Safety Notice served on them, also that they have a continuing joint responsibility for the safety of staff working in the building, so it could not be right for the Information Commissioner to have concluded that the Report was commissioned by Mercia purely on its own behalf. The Appellant pointed to the fact that the Carillion Report was commissioned in order to reassure the Trust, and further to its “Good Faith” obligations in the Agreement. The Appellant was critical of the Decision Notice’s conclusion that the fact that Mercia had not provided the Reports to the Trust was evidence of the absence of an obligation for it to do so.

25. The Appellant submitted that the “Good Faith” provision at clause 3.2 of the Agreement may have imposed obligations on the parties over and above the strict terms of the Agreement and that the relevance of this clause (if any) to any information-sharing requirements between the Trust and Mercia Healthcare should have been considered in the Decision Notice.

26. The Appellant told me that a Fire Enforcement Notice had been served jointly on the Trust and Mercia Healthcare in November 2012. I had not seen this document and asked him to provide a copy (he has subsequently e-mailed it to all parties). As this information had not previously been provided to the Information Commissioner, its relevance (if any) was not considered in the Decision Notice. It appears from the terms of the Notice that the Trust and Mercia were required to comply with it jointly. As I was unclear whether the Carillion Report had played any role in their joint compliance with the Notice, I considered it fair and just to make relevant enquiries of the Trust about this document.

27. The Decision Notice had concluded that the Trust did not hold the Arup Report, but the Tribunal was told that it had subsequently come to light and was invited by the Information Commissioner to amend the Decision Notice in this regard. As I did not know precisely how the Arup Report had come into the Trust’s possession and whether the circumstances of its discovery had any bearing on the question of whether the Trust also held the Carillion Report, I considered it fair and just to request further information before determining this appeal.

28. As neither the Trust nor the Information Commissioner attended the oral hearing (having sent written submissions), I adjourned the oral hearing in order to put some further questions to them in writing. I am grateful to them both for their further submissions and to the Appellant for his final comments, which are considered below.

29. The further questions put to the Respondents were:

(i) *Did the Trust and Mercia Healthcare enter into an agreement/memorandum of understanding known as “The Trust Construction Requirements”? If so, did it impose any information sharing requirements as between them?;*

(ii) *Does clause 3.2 of the Contract (page 139 open bundle) impose any obligation on Mercia Healthcare and the Trust to share information with each other over and above the specific provisions in the contract?;*

(iii) *How did the Arup Report come into the possession of the Trust? Do the circumstances in which it was discovered that the Arup Report was held by the Trust (after the Decision Notice was issued with the contrary conclusion) have any bearing on the question of whether the Trust holds the Carillion Report?;*

(iv) *What was the relationship between Mercia and the Trust in respect of their joint or several duty to comply with the Fire Enforcement Notice that was served on them both in 2012?*

30. It was agreed by all parties that, following the receipt of the further written submissions from the Respondents and the Appellant's final written submissions, the Tribunal would make its final decision on the papers and without convening a further oral hearing. In making my Decision, I have carefully considered an agreed open
5 bundle of evidence comprising some 700 pages, plus the additional submissions made by all parties. By the time of the hearing there was no closed material.

31. After the conclusion of the oral hearing, I received some late submissions on behalf of the Trust. In view of certain issues raised in those submissions and for the avoidance of doubt, I clarified that, if the Appellant were to be successful in this
10 appeal, the only step I could require the Trust to take would be to direct it to respond to the information request on the basis that it did "hold" the information when requested. This would give it an opportunity at that stage to claim any exemptions under FOIA. There was never any question of this Tribunal ordering immediate
15 disclosure of the Carillion Report without considering first whether any exemptions applied or of the Trust being required to commence litigation to obtain a copy of the report. Such steps would not be within my powers in determining the present appeal under s. 58 FOIA.

The Law

32. S. 1 (1) of FOIA provides that an individual who requests information from a
20 public authority is entitled to be informed whether the information is held and, if it is held, to have that information communicated to him unless it is exempt from disclosure.

33. S. 3 (2) of FOIA provides that information is held by a public authority if (a) it is held by the authority, otherwise than on behalf of another person, or (b) it is held by
25 another person on behalf of the authority.

34. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

"If on an appeal under section 57 the Tribunal considers -

30 *(a) that the notice against which the appeal is brought is not in accordance with the law, or*
(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
35 *the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*

40 *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."*

35. The parties referred me to the Decision of the Upper Tribunal in *University of Newcastle upon Tyne v Information Commissioner and Another* [2011] UKUT 185

(AAC) in which Judge Wikeley at [22] supported the First-tier Tribunal's analysis of s. 3 (2) FOIA as follows:

5 “[47] *The effect of this subsection is to confirm the inclusion of information within the scope of FOIA s.1 which might otherwise have been arguably outside it. The effect of paragraph (a) is that information held by the authority on behalf of another is outside s. 1 only if it is held solely on behalf of the other. The effect of paragraph (b) is that the authority ‘holds’ information in the relevant sense even when physically someone else holds it on the authority’s behalf*”.

10 At [29], Judge Wikeley commented as follows: “...*I do not regard the tribunal’s reference to the need for ‘an appropriate connection between the information and the authority’ as a misguided attempt to replace the statutory language.....On the contrary, the tribunal was simply pointing to the need for the word “hold” to be understood as conveying something more than the simple underlying physical concept, given the intent behind section 3(2)*”.

15 36. I was referred to some first-instance Decisions (which do not bind me) concerning various fact-specific circumstances in which information was or was not found to be held “*on behalf of*” a public authority due to the nature of the relationship between the public authority and another entity: *McBride v IC and MoJ* (EA/2007/0105); *Chagos Refugees Group v IC and FCO* (EA/2011/0300); *Conscap Ltd v IC and DRD (Northern Ireland)* (EA/2011/0246); and *Visser v IC and LB Southwark* (EA/2012/0125).

25 37. I was also referred to the Information Commissioner’s Guidance on Outsourcing and FOIA. This refers to the above cases and provides at paragraph 26 that, whilst the contract between the parties is an important reference point, it may not necessarily provide the definitive answer to the question of whether information is held by another on behalf of a public authority.

38. I note that the burden of proof in satisfying the Tribunal that the Commissioner’s Decision Notice was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

30 *Submissions and Evidence*

39. The Trust provided the other parties and the Tribunal with a copy of the relevant parts of the Agreement (pages 78 to 369, open bundle). I note that clauses 64 and 17 appear to have the effect relied on in the Trust’s Response.

35 40. The Tribunal was also provided with a copy of the Adjudicator’s Preliminary Decision (undated) following an oral hearing in April 2013 (pages 370 to 486, open bundle). This was his Decision on Liability, with another decision to follow on the financial remedy (if any). The Adjudicator describes the dispute on which he is to adjudicate as “...*whether the Trust is entitled, pursuant to Declarations of Unavailability dated 30 October 2012 and 28 November 2012, to make Availability Charge Deductions and Notional Permitted Deductions from sums otherwise due to Mercia*” (page 376, open bundle).

41. The Carillion Report is referred to by the Adjudicator at paragraphs 25 (b) and 26 (page 378, open bundle). The Adjudicator records that “*No report, whether by Carillion, Sodexo, or Faithful and Gould, from any survey carried out on behalf of Mercia between April and October 2012, has been provided by Mercia to the Trust so far as I am aware*”. The Adjudicator’s list of the documents he considered does not include the Carillion Report.

42. The Adjudicator’s findings of fact as to the verbal-only assurances given by Mercia to the Trust are at paragraph 131 (page 417, open bundle) in which the Adjudicator concludes that there was “*no attempt by Mercia to evidence to the Trust what it had done to provide the reassurance*”. At paragraph 135 (page 419, open bundle) the Adjudicator concluded that “*the reassurance the Trust received from Mercia was belated and wrong*”.

43. In the Adjudicator’s Declarations and Directions (pages 485 to 486, open bundle) he declined to order disclosure of the Arup Report and does not mention the Carillion Report².

44. The Information Commissioner’s written submissions in response to additional questions from the Tribunal (see paragraph 29 above) were as follows. The Commissioner had no evidence in respect of question (i) so could not assist the Tribunal. In relation to question (ii), the Commissioner took the view that whilst the “Good Faith” obligation at clause 3.2 of the Agreement “*may impose an obligation on the parties to share information*”, that obligation was subject to the subsequent clauses 3.2.1 to 3.2.7 which specified that the good faith obligation did not oblige either party to take action which (to summarise) was not in its best interests, could increase its costs, cause it to incur liability or place it in breach of an obligation to a third party. It was submitted that it was outside the Commissioner’s knowledge whether any of these limitations applied. Even if the good faith provisions did apply, the Commissioner took the view that Mercia may still have been entitled to withhold the Carillion Report and so it did not alter the conclusion reached in the Decision Notice that the report was not held by Mercia “on behalf of” the Trust.

45. The Commissioner was unable to assist the Tribunal in relation to point (iiii) but agreed that the circumstances in which the Trust came to hold the Arup Report may have a bearing on whether it held the Carillion Report, although the factual circumstances may be different. In respect of point (iv), the Commissioner suggested that the Trust would be best placed to answer this point. The Commissioner noted that the Carillion Report was already in existence by the date of the Fire Safety Notice.

46. The Trust’s written submissions in response to the additional questions from the Tribunal (see paragraph 29 above) were as follows. As to (i) the Trust had been unable to locate a document by this name and, if such a document existed, it would be likely to relate to the high-level project specifications rather than imposing any

² The Appellant also sent me, after the oral hearing, some witness statements relied on by the parties in the Adjudication. I do not know if the witness evidence was accepted so I have relied on the Adjudicator’s conclusions only.

information sharing obligations. As to (ii), it was submitted that the duty of good faith applied to the performance of obligations under the Agreement and did not impose wider obligations. It also referred me to authority which supported the view that a good faith obligation could not compel a contracting party to act contrary to its own commercial interests. The Trust submitted that it had (reluctantly) accepted that Mercia did have the right to generate and hold the Carillion Report in confidence.

47. The Trust explained under (iii) how it came to be in possession of the Arup Report. This had apparently been provided to the Trust by Mercia on a “without prejudice” basis following the Adjudication. It had thereafter been held securely within the Trust and so had not been revealed by the usual searches. The Trust has apologised to the Tribunal and the other parties for this error but submits that these circumstances have no bearing on the question of whether it holds the Carillion Report.

48. With regard to issue (iv) regarding the Fire Enforcement Notice, the Trust acknowledges that it and Mercia had a joint and several duty to comply with it, but submits that the Carillion Report played no part in that process.

49. The Trust raised concerns about how, if the Tribunal allowed this appeal, it was to obtain a copy of the report in order to comply with its duties under FOIA.

50. The Appellant’s final comments dated 21 March 2017 were as follows. He states that he learnt about the Trust Construction Requirements document from the Trust itself in another case concerning its water systems, so believes it exists. With regard to the “Good Faith” provisions in the Agreement, he once again invited the Tribunal to look beyond the contractual provisions and consider the matter of a shared responsibility for public safety. He agrees that the circumstances of the discovery of the Arup Report would not appear to have any bearing on the Carillion Report. And finally, he submits that the Fire Safety Enforcement Notice demonstrated that there was a shared obligation by the Trust and Mercia to ensure compliance with it and that the Carillion Report, then in the hands of Mercia, was a means by which fire safety could have been assessed for that purpose.

30 *Conclusion*

51. I note that the question of whether information subject to FOIA is “held” by another on behalf of a public authority is highly fact-sensitive. Having considered the evidence and submissions carefully, I am satisfied on the balance of probabilities that: (i) that the Trust does not itself hold the Carillion Report; (ii) that the Agreement did not impose an express obligation on Mercia to disclose the Carillion Report to the Trust; (iii) that the relationship between the Trust and Mercia is not one of agency or partnership so as to impute knowledge from Mercia to the Trust; and (iv) that the Trust had no power within the terms of the Agreement to compel Mercia to provide it with a copy of the Carillion Report. For these reasons, I conclude that Mercia did not hold the Carillion Report on behalf of the Trust and I dismiss the appeal on that topic.

52. I accept the Trust’s apology for providing incorrect information to the Information Commissioner with regard to the Arup Report. I adopt the Information

Commissioner's suggested approach and allow the appeal on that topic, making the substituted finding referred to at paragraph 1 above.

53. Mr Ryan was critical of the Decision Notice in a number of respects. I share some of his concerns, as follows:

5 54. The Decision Notice drew inferences about the non-disclosure of the Carillion Report to the Trust which do not seem to me to have been permissible in the circumstances. Firstly, (at paragraph 32), it was concluded that an inference could be drawn from the Adjudicator's decision not to order disclosure. Having considered the terms of reference for the Adjudication (paragraph 40 above) it does not seem to me
10 that this conclusion is supportable. There is no evidence that the Adjudicator had the power to order disclosure of the Carillion Report even if he had been minded to and, given the express terms of reference of the exercise he was undertaking, I doubt he could be said to have been seized of the issue of disclosure.

15 55. Secondly, the conclusion at paragraph 32 of the Decision Notice that the fact of non-disclosure of the Carillion Report supports the view that Mercia had no obligation to do so. This conclusion is in my view untenable, especially in circumstances where the Adjudicator's conclusions (see paragraph 42 above) suggested that Mercia did not have "clean hands" in that matter. The Decision Notice also did not adequately, in my view, explore the effect of the "Good Faith" requirements in the Agreement.

20 56. The Decision Notice did not consider the precise nature of the constitutional (as opposed to the contractual) relationship between the Trust and Mercia. Mr Ryan has suggested that the Trust and Mercia are in fact symbiotic, although I don't think he clearly raised that argument prior to the oral hearing. It seems to me that, if he had put the Information Commissioner on notice that he regarded the Trust and Mercia as
25 not being truly independent of each other, then this should have been investigated further by the Information Commissioner. In *Donoghue v Poplar Housing and Regeneration Community Association Limited* [2001] EWCA Civ 595, the Court of Appeal considered whether a Registered Social Landlord which had been established by a local authority to carry out some of its functions was so closely associated with
30 the public authority that the RSL should also be regarded as a public authority for the purposes of the Human Rights Act 1998. The Lord Chief Justice concluded that "...the role of Poplar is so closely assimilated to that of Tower Hamlets that it was performing public and not private functions". I am not aware of a relevant authority on this point in the context of FOIA, but it seems to me that the Information
35 Commissioner's investigation should have considered whether there was any relationship between the Trust and Mercia, in an extra-contractual sense, which may have had a bearing on the key question of whether the requested information was held on behalf of the Trust by Mercia. This approach would have been consistent with the Information Commissioner's own guidance to the effect that the contractual
40 relationship between the public authority and another entity may not provide the definitive answer to the parties' obligations under FOIA.

57. A relevant example of an "extra-contractual relationship" might well, as the Appellant suggests, consist of a shared statutory responsibility for public safety. The Decision Notice did not consider the Fire Safety Notice served on the Trust in

November 2012 but I don't think that Mr Ryan clearly raised it as an issue before the oral hearing. I have now seen a copy of it and I note that it was served on both the Trust and Mercia as the joint "*Responsible Persons*" and that it specified that certain steps must be taken at Hereford County Hospital to remedy the identified failures to comply with the Regulatory Reform (Fire Safety) Order 2005. I note that the "required action" was to "*assess the adequacy of all existing structure to secure that, in the event of fire, the premises are safe...*". It seems arguable that any response to that Notice made by Mercia may also have been effective to discharge the Trust's joint liability under the Notice. I do not know whether the Carillion Report was used by Mercia to inform its response to the Notice. The Trust has asserted that the Carillion Report played no part in this process (see paragraph 48 above) but I have no evidence from Mercia about that. However, given that the Carillion Report was prepared only a short time before the Notice was served and that it was commissioned in the light of concerns about fire safety in the hospital building, it seems to me that it may well have contained relevant information. I have considered whether these circumstances could have created an "*appropriate connection*" in the context of FOIA between the Carillion Report and the Trust. This would seem arguable in circumstances where Mercia had relied on the information contained in the Carillion Report to discharge a legal responsibility which it shared with the Trust. However, I have concluded that I can take that line of analysis no further on the evidence before me in this appeal.

58. I have considered carefully whether the concerns I have identified in respect of the Decision Notice are such that I should decide that it was wrong. I conclude that, taking into account the unsettled state of the law on some of these issues and the incomplete factual picture before me, the Decision Notice's conclusion that the Carillion Report was not held by Mercia on behalf of the Trust for the purposes of FOIA should stand, notwithstanding the difficulties with the process by which that conclusion was reached. In other words, while Mr Ryan has raised some important points about the relationship between the Trust and Mercia, I find that he has not discharged the burden of proof which rests on him so as to satisfy me that the Decision Notice was wrong.

For all these reasons, the appeal is allowed in part. I make a substituted Decision Notice in respect of the Arup Report but dismiss the appeal in respect of the Carillion Report.

(Signed)

ALISON MCKENNA

DATE: 7 April 2017

PRINCIPAL JUDGE

Promulgated Date 10 April 2017