First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2016/0240

Heard at Field House, Breams Buildings, London
On 28 and 29 March 2017

Before

JUDGE
CHRIS RYAN

TRIBUNAL MEMBERS
ANNE CHAFER
MELANIE HOWARD

Between

WILLIAM STEVENSON

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

DEPARTMENT OF HEALTH

Second Respondent

Appeal Reference: EA/2016/0246

Between

DEPARTMENT OF HEALTH

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

WILLIAM STEVENSON

Second Respondent

Decision and Reasons

IN THE FIRST-TIER TRIBUNAL **Cases EA/2016/0240 and 0246**

GENERAL REGULATORY CHAMBER

Attendances:

Mr Stevenson represented himself via a video link from Manchester.
The Department of Health was represented by James Cornwell of Counsel
The Information Commissioner was represented by Rupert Paines of Counsel

Subject matter:

FOIA: Whether information held s.1
Personal data s.40
Confidential information s.41

Cases: Indata Equipment Supplies ltd v ACL [1998] FSR 248

Ash v McKennitt [2006] EWCA Civ 1714

Goldsmiths International Business School v Information Commissioner and The Home Office [2014] UKUT 0563 (AAC)

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal of Mr Stevenson (Appeal 0240) is refused. The appeal of the Department of Health (Appeal 0246) is allowed in part, as appears below.

REASONS FOR DECISION

Introduction

1. These Appeals both arise from Decision Notice FS50612561 issued by the Information Commissioner on 20 September 2016 ("the Decision Notice"). The Decision Notice followed an investigation into how an information request submitted by William Stevenson ("Mr Stevenson") had been handled by the Department of Health ("the Department").

2. The Information Commissioner directed the Department to disclose some, but not all, of the information requested by Mr Stevenson. The information under consideration all related to certain interviews conducted in 2014 during an independent investigation into the Maternity and Neonatal services of the University Hospitals of Morecambe Bay NHS Foundation Trust. We will refer to the Trust as "the Hospital Trust" and the investigation as "the Investigation".

Background History

3. The Investigation was established by the Secretary of State for Health in September 2013 in the light of concerns about the deaths of women and babies at the Hospital Trust's maternity unit and the perceived inadequacies of previous investigations. It was established as an investigation and not as a statutory public inquiry (under the Inquiries Act 2005). It therefore lacked the power to compel witnesses to attend, but was free of other procedural requirements, which might have caused it to take longer to complete its work.

4. The terms of reference for the Investigation were to consider the management, delivery and outcomes of care provided by the maternity and neonatal services of the Hospital Trust from 2004 to 2013, to include the actions of its Board and of relevant regulators. The report produced at the end of the Investigation focused particularly on the maternity service at the Furness General Hospital, which it found to have been seriously dysfunctional. Its conclusions are summarised in the following passage from the Executive Summary, which recorded that there were:

> *"..major failure at almost every level. There were clinical failures, including failure of knowledge, team-working and approach to risk. There were investigatory failures, so that problems were not recognised and the same mistakes were needlessly repeated. There were failures, by both maternity unit staff and senior Trust staff, to escalate clear concerns that posed a threat to safety. There were repeated failures to be honest and open with patients, relatives and others raising concerns. The Trust was not honest and open with external bodies or the public. There was significant organisational failure on the part of the* [Care Quality Commission], *which left it unable to respond effectively to evidence of problems. The* [North West Strategic Health Authority] *and the* [Parliamentary and Health Service Ombudsman] *failed to take opportunities that could have brought the problems to light sooner and the* [Department] *was reliant on misleadingly optimistic assessments from the* [North West Strategic Health Authority]. *All of these organisations failed to work together effectively and to communicate effectively, and the result was mutual reassurance concerning the Trust that was based on no substance."*

5. Mr Stevenson remains concerned about the independence and rigour of the Investigation, with particular regard to the approach adopted towards available statistics on mortality rates and the handling of the Hospital Trust's application for Foundation Trust status. In pursuit of those concerns he made a request for information under section 1 of the Freedom of Information Act 2000 ("FOIA"). The request was for transcripts of the interviews of individuals who had given evidence during the Investigation. Records of certain interviews (in the form, in each case, of an original transcript showing changes suggested by the witness) have now been published. The subject of this appeal is the material which has been withheld, either in its entirety or as a result of the redactions in the published documents.

Issues arising on the two appeals

6. As the matter comes before us we are required to determine whether or not the Information Commissioner was right when, in the Decision Notice, she decided that:
    i. A record of the evidence given in a closed session by Tony Halsall, (the Chief Executive of the Hospital Trust at the relevant time), should be disclosed in part. The Information Commissioner considered that, although much of the information was exempt from disclosure under section 41 of the Freedom of Information Act 2000 ("FOIA") (third party confidential information), some of it was not. It was, in her view, information on organisational issues regarding the Hospital Trust and was therefore less sensitive than the parts of the evidence that dealt with the medical treatment of patients or the disciplinary issues affecting staff members. The Department argues in its appeal that the whole of the record should be withheld and Mr Stevenson argues in his appeal that the whole of it should be disclosed. The Information Commissioner, in responding to each of those appeals, argues that her decision on the point should stand. (We will refer to this as "**Issue 1**")
    ii. Two passages in the part of the Halsall closed session record that was directed to be disclosed under i. above, should be redacted under FOIA section 40(2) (third party personal data) as they referred to a junior employee of the Hospital Trust. The Department supports that conclusion (although, of course, it argues that the point should not arise because, on its case, section 41 applies to the whole of the record). Mr Stevenson challenges the application of section 40(2). ("**Issue 2"**)
    iii. A record of the evidence given in a closed session by Ms Jackie Holt, then the Director of Nursing at the Hospital Trust, should not be disclosed because, as in i. above, it was exempt information under section 41. Mr Stevenson argues in his appeal that it should be disclosed. The Information Commissioner and the Department argue that it should not. ("**Issue 3"**)
    iv. Some passages of the evidence given by various witnesses in open sessions should be withheld because they contain information which was exempt from disclosure under FOIA section 40(2). Mr Stevenson raised a general challenge to the application of that exemption in his appeal, but the Department argued, in its own appeal, that the Information Commissioner had not gone far enough and that additional passages should also be redacted. ("**Issue 4"**)
    v. Two redactions appearing in the record of evidence given in an open session by Steven Vaughan had been made before the document came into the

Department's possession, so that the redacted version constituted the entirety of the requested information held by the Department at the relevant time. Mr Stevenson challenges that conclusion in his appeal. ("**Issue 5"**)

7. We address each of those issues by reference to the scope of this Tribunal's jurisdiction under FOIA section 58. Under that section, we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, she ought to have exercised her discretion differently. We may, in the process, review any finding of fact on which the notice in question was based. Frequently, as in this case, we find ourselves making our decision on the basis of evidence that is more extensive than that submitted to the Information Commissioner.

Evidence

8. The status of the Investigation and the interviews conducted during its course were addressed in a witness statement filed on the Department's behalf and signed by the secretary to the Investigation, Mrs Oonagh McIntosh. She was appointed to the role of secretary in September 2013, after many years of public service, and remained in that post until the report of the Investigation had been published in March 2015 and the investigation's secretariat closed down.

9. Mrs McIntosh provided a detailed description of the establishment of the Investigation, stressing that, although sponsored by the Department and the recipient of its logistical support at the outset, it operated independently. She also explained that, as witnesses could not be forced to attend, attempts were made to persuade them to do so, stressing their professional obligations and an assurance that oral evidence sessions would not be open to the public or media. However, members of the family of affected patients could attend and/or listen to recordings on the understanding that they would not release information about what they learned. Interviews conducted on this basis were described as "open sessions".

10. Transcripts were prepared of each open interview session and made available to interviewees who could annotate them to indicate any points which they felt should be corrected. These were reflected in a "track change" version of the document, which was retained by the Investigation secretariat. For this reason, Mrs McIntosh wished each of the documents covered by the information request to be regarded as a "record" of an interview, rather than a transcript of it.

11. In other circumstances, Mrs McIntosh explained, "closed sessions" were arranged. An Interview Protocol was prepared which included the following statement:

> *"Should the Panel need to ask an interviewee about a specific patient or member of staff, and personal sensitive data will be referred to, all observers will be required to leave the interview room. Any evidence provided regarding personal sensitive data will be heard in a closed session by the Panel. Appropriate redaction will be made of the record of the interview. Observers will not be permitted to listen at a later date to the recordings of any closed sessions."*

12. Mrs McIntosh explained in her witness statement that:

> *"The closed sessions were introduced to enable interviewees to respond to questions regarding individual patients or members of staff, their own personal circumstances and/or any matters of concerns they wanted to raise in confidence with the Investigation Panel. All of these matters might have involved personal sensitive data being discussed."*

And later:

> *"In short, the closed sessions provided opportunities for all interviewees to unburden themselves of any additional piece of information that they were aware of in an environment of safety and protection."*

13. It was acknowledged by Mrs McIntosh that on occasions a closed session discussion extended beyond matters affecting individuals and covered the sort of generic information the Information Commissioner termed "*organisational information"*, but she stated that the purpose of this arrangement was to put into context information provided about specific individuals in response to questions from the panel conducting the Investigation. She also conceded that, in order to overcome nervousness and reluctance to disclose material on the part of interviewees, it became necessary on some occasions to allow evidence to be given on a "closed" basis, even though it did not concern sensitive personal information and could, again, be regarded as dealing with "*organisational information".*

14. Although, therefore, the information provided by interviewees during a closed session sometimes extended to information beyond that which could strictly be categorised as sensitive data about individuals, Mrs McIntosh said that she and her colleagues nevertheless gave oral assurances that no record of any part of the closed session interview record would be published by the Investigation's secretariat. She also said that interviewees were told that, when the materials created during the Investigation were, in due course, transferred to the Department, the Investigation secretariat would make representations that they should remain confidential. This was in recognition of the fact that information in the hands of the Department would be subject to obligations to disclose under FOIA, which was not the case while it was retained by the Investigation team.

15. Mrs McIntosh attended the hearing of the Appeal and answered questions. She was questioned, in particular, about the wide oral assurances of confidentiality she had described in her witness statement, which appeared to have extended to categories of information that were far wider than those referred to in, for example, the Protocol. Mrs McIntosh conceded that there was a difference and said that this resulted from the realisation, after the Protocol and template letters to interviewees had been drafted, that the task of persuading individuals to overcome their nervousness and to co-operate in the Investigation was more difficult than had originally been anticipated. More extensive assurances as to confidentiality were therefore given, but, due to time pressures on the secretariat the written materials were not updated to reflect that change. She was clear in her recollection that in every case the interviewee was left with a clear assurance, derived from the documentation and conversations with Mrs McIntosh herself, that the whole of the closed session would be conducted

in confidence and that no part of it would be disclosed by the Investigation secretariat.

16. During a closed session, Mr Paines for the Information Commissioner challenged Mrs McIntosh on the suggestion that references in the closed session record to organisational information invariably followed on from, and were linked to, a discussion on an individual patient or member of staff. It is appropriate to record, in this open part of our decision, that Mrs McIntosh maintained her position that they did, although it is really for us to make a judgment on that question, based on our study of the record itself. Similarly, it was put to Mrs McIntosh that the parts of the closed session record that the Information Commissioner had directed should be disclosed covered the same sort of information covered in open session. A point which, again, may be assessed, one way or the other, from reading the relevant material.

17. Mrs McIntosh also confirmed, in answer to questions, that, after the Investigation's report had been issued and the evidence and other documents had been transferred to the Department, a decision was made by the Department to publish the open interview records. She explained that, in accordance with what the Investigation secretariat had told witnesses at the time, it had been able to make representations to the Department about disclosure but could not impose its views. The Department took its own decision on the point, doubtless in recognition that, unlike the secretariat, it was subject to the FOIA.

18. A witness statement was also provided by William Vineall, the Director of Acute Care and Quality at the Department. He provided additional information about the Investigation and the matters that had led to it being established, concentrating in particular on its independence from the Department. He also explained the circumstances in which the Department had decided to release copies of open session evidence, redacted to remove certain personal data, before the Information Commissioner issued her direction to that effect. Mr Vineall also described the process of handling Mr Stevenson's information request, although much of this part of his witness statement consisted of argument and submission, rather than factual narrative.

Issue 1

Section 41 and the arguments based on it.

19. FOIA section 41 provides:

> *"Information is exempt information if –*
> *(a) it was obtained by the public authority from any other person (including another public authority), and*
> *(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*

20. The Department and Information Commissioner are agreed that the information in the closed session records was obtained by the Department from a third person. It was obtained directly from the Investigation secretariat and indirectly from the

interviewees and the patients whose medical records were referred to during interview.

21. Those two parties also agreed that information should be treated as confidential if:
    a. it had an appropriate level of confidentiality when disclosed by the relevant witness; and
    b. the circumstances in which the information was disclosed by the witness were such as to give rise to an obligation of confidence.

22. There was less agreement on whether or not there was a third necessary component of the cause of action, namely, that unauthorised disclosure would cause detriment to the witness disclosing the information.

23. Finally, the Department and Information Commissioner agreed that, as the section includes the word "actionable", the exemption would not arise if there would be a sustainable defence to the notional breach of confidence claim on the ground that the public interest in disclosure outweighed the public interest in maintaining confidences.

24. Mr Stevenson did not join issue on any of those points of law. He did, however, assert that the public interest overwhelmingly favoured disclosure. His criticisms of the Investigation, referred to in paragraph 5 above, lay at the heart of his case on this issue, but he also asserted that the Investigation had not been sufficiently independent, particularly in respect of its consideration of the Hospital Trust's application for Foundation Trust status. We have interpreted that as meaning that Mr Stevenson believes that any claim for breach of confidence would not be actionable because the Department would have a public interest defence. We have, therefore, paid particular attention to the public interest in disclosure of those parts of the closed session records under consideration.

25. The Department argued that all the information in the two closed session records satisfied the two-part test set out in paragraph 21 above, but conceded that the issue of detriment could give rise to debate. However, the Information Commissioner did not accept that the first two tests were satisfied. Mr Paines on her behalf argued that the closed sessions had been arranged for the purpose of dealing with personal sensitive data and that there could have been no assurance or expectation of confidentiality in respect of other types of information disclosed during them. He relied on the text of contemporaneous documentation, including the Interview Protocol and standard letter sent to witnesses, and invited us to adopt a cautious approach when considering Mrs McIntosh's evidence, which was to the effect that separate, oral assurances of confidentiality extended to all matters considered during the closed sessions. He argued that her evidence was not supported by either the documentation issued by the Investigation secretariat at the time, or the closed session records themselves.

26. As to the third limb of the test (detriment) the Information Commissioner argued that detriment was a necessary element of a claim for breach of confidence. The Department argued that it was not. We were referred to sections of two textbooks[1] which suggested that the law on the point was uncertain, certainly as regards private

[1] Toulson & Phipps on Confidentiality, Third Edition at 3.162-5, and Gurry on Breach of Confidence, Second Edition at 15.42 / 43

information as opposed to technical or other secrets affecting commercial operations. There certainly seems to be a case for saying that the unauthorised disclosure of private information is governed these days solely by the need to balance rights arising under Article 8 (privacy) and Article 10 (freedom of expression) under the European Convention of Human Rights. The Convention test appears not to include any requirement to show detriment[2]. However, in this case, although the duty of confidentiality was owed to individuals, the information under consideration did not relate to their private lives, but to the performance of duties as senior employees of a public body. The need to prove detriment therefore remains uncertain. However, for the reasons given below, it is not necessary for us to make a final determination, on the facts of this case, whether or not it is an essential component of the notional cause of action anticipated by section 41.

Application of the law to the Record of Closed Session Evidence of Mr Halsall

27. As we have made clear when summarising the evidence above, Mrs McIntosh acknowledged the limitations of the written assurances, but we accept her evidence that she and her colleagues did go further, when speaking to witnesses, in assuring them of confidentiality on a wider scale. We were impressed with the open and thorough approach Mrs McIntosh adopted to the questions put to her and accept her recollections on this point. She was particularly open in conceding during questioning that, in an ideal world, the documentation would have been updated, once it had been realised that potential witnesses would require more extensive assurances, but that, due to the heavy workload the secretariat was facing at the time, this had been overlooked. She was also clear in conceding that it had not been possible to give assurances that evidence would not be disclosed under the FOIA, as this was beyond the secretariat's control. Contrary to criticism made by the Information Commissioner's Counsel in closing about the clarity of the explanations provided by Mrs McIntosh, we found her evidence clear and convincing and are satisfied that the relevant witnesses were given wide-ranging assurances of confidentiality, on which they relied when giving evidence.

28. The assurances of confidentiality are central to the second limb of the test (circumstances giving rise to an obligation of confidence). But they are also relevant to the first test (the confidential nature of the information under consideration). Counsel for the Information Commissioner argued that the passages that were proposed to be redacted from the record of Mr Halsall's record of closed evidence were no more sensitive than others that had been included in the, now-published, open session records. He relied, in particular, on a concession by Mrs McIntosh that "very similar evidence" about Mr Halsall's role in events could be found in the open evidence sessions. Counsel for the Department argued that the distinction between categories of information, as proposed by the Information Commissioner, was artificial. He said that, once an interview had been arranged on the basis that it was to be confidential, everything the witness said, whether a factual statement about a particular event that occurred at the Hospital Trust, or his reflections on those events, fell within the meaning of confidential information. This, it was said, would include anodyne facts or comments on matters of general hospital administration.

[2] See Ash v McKennitt [2006] EWCA Civ 1714 at paragraph 11.

29. It is certainly possible to characterise some of the proposed-to-be redacted information as "organisational". We would not go so far as to say that all such information, (no matter how anodyne and regardless of whether it had been placed in the public domain in some other way), would inevitably fall to be treated as confidential just because an assurance of confidentiality had been given. If a witness were to have been asked at the time whether a particular item of information was covered by the assurance of confidentiality, he or she might well have recognised that it clearly did not – it might clearly have been in response to a question that had no relevance to the subject matter of the Investigation. But in other cases, the distinction might be less easy to determine. We have decided that we should adopt a cautious approach in this regard and only separate out for disclosure, statements that we think the witness would reasonably have conceded fell outside the assurance of confidentiality, if asked at the time. In all other respects, we think that the Department was right to say that the information, although not as sensitive as matters affecting patients or staff discipline, still retained an element of confidentiality that was sufficient for it to be treated as satisfying the first limb of the test[3].

30. We set out our detailed findings on this issue in Confidential Annex 1 to our decision. In summary, we have found that substantially all the passages that the Information Commissioner directed should be disclosed in fact fell within the definition of confidential information. Most flowed from a discussion of an individual incident being investigated and we felt that the Information Commissioner's approach was unjustified.

31. As to the third element of the cause of action, we are satisfied that, if it is necessary to show detriment, that was done on the facts of this case. The witness in question agreed to give evidence about matters that might well impact on his future career prospects and/or lead to public criticism or complaint. He put himself in the hands of those conducting the Investigation and thereby accepted that they might rely on what he told them to criticise his management of the Hospital Trust. But he did so on terms that the interview would be conducted in private and that, whatever conclusions might appear in the final report of the Investigation, there would be no premature or piecemeal disclosure of what he said. The detriment he would suffer if disclosure were to be made, in breach of the assurances he had been given, would be the publication of the information separated from the Investigation's final, balanced conclusions and in greater detail than would appear in those conclusions. This would include the precise language used when replying, "off the cuff" and in a highly-pressured environment, to the questions put to him.

32. There is a small amount of information, identified in Confidential Schedule 1, which does not qualify for protection on the basis set out above, but it forms such a small element of the complete document that it would be rendered meaningless, when read in isolation, and we have therefore concluded that the record as a whole should be treated as falling within the definition of confidential information.

33. Having examined the content of the withheld information carefully, we are satisfied that it has no material relevance to the public issue interest that Mr Stevenson put

[3] See the statement of law in Thomas Marshall v Guinle [1979] Ch 227 approved by the Court of Appeal in Indata Equipment Supplies ltd v ACL [1998] FSR 248 at page 257

forward. There would therefore be no public interest defence to any claim brought against the Department for disclosing the withheld information.

34. On this issue, therefore, we reject Mr Stevenson's appeal but allow the Department's appeal.

Issue 2

Personal data within the Closed Session Evidence of Mr Halsall

35. Having decided that none of the closed session evidence should be disclosed it is not necessary for us to consider whether or not FOIA section 40(2) would also be engaged in respect of the Hospital Trust employee mentioned in the course of the evidence. However, were we to be found to be wrong in respect of Issue 1, we are satisfied that, applying the law set out below in respect of Issue 4, the disclosure of the identity of the employee in question, who held a junior rank, would breach the data protection principles. The information would therefore be exempt under section 40(2) and Mr Stevenson's appeal on the point is rejected.

Issue 3

Application of the law under section 41 to the Record of Closed Session Evidence of Ms Holt

36. We have concluded that the Information Commissioner was right in concluding that the whole of this information should be withheld. For the reasons given above in respect of Mr Halsall, Ms Holt would have been entitled to bring a claim for breach of confidence if the promise of confidentiality had not been complied with. The Department would not have a defence on the basis of public interest - the evidence given did not address any of the issues which Mr Stevenson put forward as justifying greater transparency. There was therefore no public interest in disclosure to set against the public interest in maintaining confidentiality, either in general or by reference to the manner in which the Investigation was conducted. Mr Stevenson's appeal in respect of this information is therefore rejected.

Issue 4

Section 40 and the arguments based on it.

37. FOIA section 40(2) provides that information is exempt information if it constitutes personal data of a third party the disclosure of which would contravene any of the data protection principles.

38. Personal data is itself defined in section 1 of the Data Protection Act 1998 ("DPA") which provides:

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

39. The data protection principles are set out in Part 1 of Schedule 1 to the DPA. The only one having application to the facts of this Appeal is the first data protection principle. It reads:

> *"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 then sets out a number of conditions, but only one is relevant to the facts of this case. It is found in paragraph 6(1) and reads:

> *"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."*

The term "processing" has a wide meaning (DPA section 1(1)) and includes disclosure.

40. Guidance on the application of condition 6 has been provided by the Upper Tribunal in *Goldsmiths International Business School v Information Commissioner and The Home Office* [2014] UKUT 0563 (AAC), which requires us to consider whether, on the facts of this case, Mr Stevenson is pursuing a legitimate interest in making his information request. Only if we find that he is and the disclosure is necessary for the purpose of that interest should we balance it against the degree of intrusion in the privacy of the individual whose personal data is affected.

41. Mr Stevenson's approach, at the outset, was that the records of open session interviews should have been disclosed in full. Now that they have been published in redacted form, his case naturally focuses on those redactions, which he says are unjustified. The Decision Notice recorded that the redacted information consisted of personal data of persons, other than the interviewee, including information about disciplinary and medical issues. The Information Commissioner concluded that it would be unfair on those persons to require it to be disclosed. She identified the passages of the records which contained this information and ordered it to be redacted before the records as a whole were disclosed.

42. Mr Stevenson challenges that decision and invites us to order the disclosure of the open session interviews in full. The Department opposes further disclosure and in fact argues that the Information Commissioner should have ordered the redaction of additional information which, it argues, is also covered by section 40(2).

43. The relevant passages appear in the Open Session Interview Records of Peter Dyer (the Hospital Trust's Medical Director from 2006 until 2012), Roger Wilson (Director of Human Resources and Organisational Development between 2007 and 2012) and Mr Halsall. It is apparent from the context of each redacted passage that the withheld information relates to the health or disciplinary record of each of the individuals referred to by the witness. It would therefore constitute personal data if there is a sufficient risk of it being connected to an identifiable individual. The Department and the Information Commissioner disagreed on the level of risk that should be applied. The Department argued that we should not order disclosure if the risk of

identification was greater than extremely remote. The Information Commissioner argued that the correct test was whether identification was reasonably likely. In the Confidential Schedule to this decision we have recorded our reasons for accepting (in most cases), and rejecting (in one case) the argument that the risk of identification is at a level that renders the proposed-to-be-redacted information personal data. In each instance where we have ordered redaction we have concluded that identification is very likely to occur, for the reasons we have given. The differences in approach recommended by the parties has not therefore had an impact on our decisions.

44. We are satisfied that, in each case where an individual may be identified, there is no legitimate interest in disclosure, given that disclosure would not provide any information relevant to the issues of concern presented by Mr Stevenson. If wrong on that point, we are nevertheless satisfied that disclosure would constitute an unwarranted interference with the privacy of the relevant individual or individuals. The authors of the report issued at the end of the Investigation, having considered all of the evidence, determined which individuals should be identified. If the role played by the person at risk of identification did not justify them being named in that report, they may reasonably have anticipated that the private health or career issues mentioned by the witness during the Investigation would remain private.

45. As no Schedule 2 criteria would therefore be satisfied, disclosure would involve a breach of the data protection principles. Accordingly, the information is exempt information under FOIA section 40(2) and should not be disclosed.

46. Mr Stevenson's appeal against the redactions ordered by the Information Commissioner is therefore refused and the Department's appeal against her failure to order more extensive disclosure is allowed, with the exception of the redaction sought in respect of the information at Page 26, line 24 last two words to end of line 27, which is refused. The redactions sought are set out in column 1 below, with our decision in column 2.

Redaction Proposed in Open Session Interview Record	Our Assessment
P Dyer	
P7, last eight words of line 8 and first word of line 9	Certain words were redacted in the published document, at the direction of the Information Commissioner. Mr Stevenson objected to the redaction. We are satisfied that an individual would very probably be identifiable, at least within the Hospital Trust, by the information that would be disclosed. The information should remain redacted and Mr Stevenson's arguments for disclosure are rejected.
P23, all line 6 and the first six words on line 7	We are satisfied that the risk of an individual being identified if the proposed-to-be-redacted information were disclosed is high, particularly because of the relatively small size of the Furness General Hospital. The Department was therefore right to say that the Information Commissioner was in error in not ordering redaction and its appeal against this part of the Decision Notice succeeds.

Page 24, line 4 last seven words to end line 8, line 12 (two words identifying an individual) and line 14 last two words	The Information Commissioner directed the redaction of an individual's name but not other identifying information. The effect of Mr Stevenson's request was to seek disclosure of the name. We reject his appeal against that part of the Decision Notice. The Department argued that the other information would enable the individual to be identified and we are satisfied that the disclosure of this information would be very likely to lead to the individual's identification. That information should therefore be redacted and this part of the Department's appeal should be allowed
Page 26, line 24 last two words to end of line 27	In the course of answering questions the witness spoke about a particular group of individuals. In this case there is no one individual concerned and there are various criteria for selecting a person for inclusion in the group, let alone identifying him or her separately. In the circumstances, we have concluded that disclosure would be unlikely to lead to a risk of identification and that the Information Commissioner was right in not ordering the information to be redacted. Accordingly, this part of the Department's appeal fails and the information should be disclosed.
Page 28, start of line 21 to second from last word on line 23	We are satisfied that there is a high risk of an individual being identified given the information that would be disclosed if the Information Commissioner's decision to refuse redaction were not reversed. Accordingly this part of the Department's appeal should be allowed and the information should be redacted.
Page 29 line 17, the name of an individual	The name is that of the individual referred to above. Contrary to the case made by Mr Stevenson, this should be redacted for the same reasons as are set out there.
R Wilson	
Page 13, second sentence of line 5 to end of line 10	The Information Commissioner permitted redaction of information that she thought might lead to the identification of an individual. We reject Mr Stevenson's appeal against that part of her decision. There is more than enough information in the withheld information to enable the individual to be identified.
Page 17, last 7 words of line 6 and all of line 7	The Department's objection to the Information Commissioner's direction that certain words should be disclosed is accepted. Given the size of the organisation and the very specific information about the individual in this part of the record, we think that the risk of identification is high.
Page 19, last ten words of line 5 to sentence ending on line 9	Given the information available about an individual, we are satisfied that the Information Commissioner was right to have ordered the information to be redacted. Mr Stevenson's appeal against that aspect of the Decision Notice is rejected.
Page 21, line 22 to end of page 23, line 9.	The Information Commissioner directed that information relating to an un-named individual should be redacted and

	we reject Mr Stevenson's appeal against that part of her Decision Notice. There is a great deal of information that would be disclosed and would enable the individual to be identified.
Halsall	
Page 49, sentence beginning on line 21 to end line 32	The Information Commissioner directed that a particular passage be redacted, because it contained information about an individual. We reject Mr Stevenson's appeal against that part of the Decision Notice. There is sufficient information in the withheld information to enable the individual to have been identified.

Issue 5

Open session evidence of Steven Vaughan

47. The record published by the Department includes certain redactions. Mr Stevenson has argued that the redactions should not have been made. The Department's evidence, which was not seriously challenged, was that the redaction had been made before the relevant document was passed to it by the Investigation secretariat. Accordingly, we conclude that no unredacted form of the document was held by the Department at the date of the information request and there are no steps that we require the Department to take in respect of this document.

48. Our decision is unanimous.

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Judge Christopher Ryan
September 19, 2017

Signed Judge Christopher Ryan

Judge of the First-tier Tribunal
Date: September 19, 2017

Promulgated:
Date: September 20, 2017