



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2017/0282

**Decided without a hearing
On 6 August 2018**

**Before
JUDGE CARTER
GARETH JONES
DAVE SIVERS**

Between

BARRY TOPPING-MORRIS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

THE WELSH GOVERNMENT

Second Respondent

DECISION AND REASONS

1. This is an appeal by Barry Topping-Morris (“the Appellant”) under s.57 of the Freedom of Information Act 2000 (“FOIA”) against the Information Commissioner’s (“the Commissioner”) Decision Notice dated 6 November 2017 with reference number FS 50665464 (“the DN”). The Appellant had requested information under FOIA from the Welsh Government, the Second Respondent.
2. This appeal is not upheld for the reasons set out in part in this open decision and in part in the Confidential Annex to this decision. The Tribunal was of the view that all of the matters in the Annex, were they to be made public, would be likely to give rise to the risks to health and safety set out in the Annex.

Background

3. The request for information made by the Appellant arose from events in 2003 when, an individual (“AB”) with a long history of mental health problems killed a man in North Wales. At the time, AB was under the care of a community mental health team and living in independent accommodation. He later pleaded guilty to manslaughter by reason of diminished responsibility.
4. Following this incident, what is now known as the Welsh Government, asked the Local Health Board to commission a panel of experts from outside Wales to review the case. This exercise resulted in the Independent External Review (“IER”) into the murder, which was published on 1 December 2004. The IER made a series of recommendations about care practices in this area.
5. In response to the IER, the Welsh Government asked the Chief Executive of the Health Inspectorate Wales (“HIW”) to review the IER and the suitability of the Root Cause Analysis that had been used for the first time in Wales in a case of this kind.
6. Separately, in response to the IER, the Health Commission Wales (“HCW”), assisted by HIW, undertook a review and audit of discharge planning arrangements; and HIW undertook a clinical governance inspection of NHS-funded adult medium-secure services in Wales.
7. On 28 September 2016, the Appellant requested information from the Welsh Government under FOIA as follows:

“[...] all documents – including letters, emails, notes of meetings, notes of telephone conversations – between the then Chief Executive of NHS Wales and those advising her on this matter. The scope of this request relates to all such material generated between the date of the incident, the publication of the Health Inspectorate Wales, Health Commission Wales and Cardiff Local Boards’ reports on the circumstances surrounding the case and any subsequent responses from the Chief Executive of NHS Wales.”

8. The Welsh Government responded on 22 November 2016. It confirmed that it held information within the scope of the request but was withholding it in reliance on s.38(1)(a) FOIA (danger to physical or mental health) and s.40(2) (third-party personal data). It upheld this position on 23 January 2017 following an internal review. The Appellant complained to the Commissioner. During the course of the Commissioner’s investigation, the Welsh Government stated that it wished to rely in addition on s.38(1)(b) (danger to safety).
9. On 6 November 2017, the Commissioner issued the DN. She found that s.38(1)(a) and (b) were engaged and that the balance of public interest favoured maintaining these exemptions. The DN contained a Confidential Annex in which the arguments put forward by the Welsh Government were set out. This case is an appeal against the DN.

The Law

10. Section 38 provides a qualified exemption to the general right of access contained in s.1 of FOIA:

“38 Health and safety.

(1) Information is exempt information if its disclosure under this Act would, or would be likely to—

(a) endanger the physical or mental health of any individual, or

(b) endanger the safety of any individual.”

11. In *PETA v ICO & University of Oxford* (EA/2009/0076), the Tribunal on that case, took the view that there was no material difference between the word ‘endanger’ and the word ‘prejudice’ as used in several other FOIA exemptions:

“All parties agreed that in the context of section 38 ‘endangering’ and ‘prejudicing’ came to the same thing and that consequently the Tribunal could read across the existing body of case law.”

12. Thus, the approach to assessing whether s.38 is, in the Tribunal's view, engaged should be no different to the approach to prejudice-based exemptions, set out in *Hogan v IC and Oxford City Council* (EA/2005/0026 and 0030) and applied in numerous Tribunal decisions since then:

“The application of the prejudice test should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption [...] Second, the nature of the ‘prejudice’ being claimed must be considered [...] A third step for the decision-maker concerns the likelihood of occurrence of prejudice.”

13. Where the exemption is engaged, the task is then to consider the so-called public interest balancing test (section 2 FOIA), and it is only if the public interest in maintaining the exemption outweighs the public interest in favour of disclosure, that the information may be withheld. With regard to the application of the public interest balancing test to this exemption, it has been said that there is likely to be a strong public interest in maintaining it, given the nature of the interests the exemption is designed to protect. As the Tribunal commented in *BUAV v IC and Newcastle University* (EA/2010/0064) at ¶53:

“Self-evidently, there would need to be very weighty countervailing considerations to outweigh a risk to health or safety which was of sufficient severity to engage s38(1).”

The Appeal

The Appellant's submissions

14. It appears from the DN that the Appellant's Grounds of Appeal repeat matters raised in the course of the investigation by the Commissioner. He essentially argues that the Commissioner came to the wrong decision on the public interest balancing test. He has not raised arguments to indicate that he challenges whether or not section 38 is engaged. Thus, the role of this Tribunal is to consider for itself the public interest balancing test and to determine whether the public interest in maintaining the exemption, as the Commissioner has decided, does outweigh the public interest in disclosure.
15. The Appellant states that he has tried for more than a decade to bring his concerns to the fore. The events have had an adverse impact on his life as he was caught up in the investigation which followed the death and was subsequently dismissed from his post, in his view, for raising concerns as to the integrity and rigour of the investigation and inquiry processes. Further

submissions by the Appellant are set out in paragraphs 2-6 in the Confidential Annex.

16. The Commissioner relied upon the reasons given in the DN, and in particular the points made in the Confidential Annex to the DN. These are addressed at paragraphs 7 - 13 of the Confidential Annex to this decision. The Commissioner accepts the public interest factors of transparency and accountability in favour of disclosure, including the public interest in investigations of this nature being properly undertaken and their findings appropriately responded to. She has also taken into account the circumstances behind the Appellant's engagement in this matter. Further submissions and evidence are set out at paragraph 14 of the Confidential Annex.
17. The Welsh Government essentially reiterates the points made in the DN and by the Commissioner. In addition, it adduces the witness evidence of Dr Liz Davies, Senior Medical Officer responsible for mental health and vulnerable groups for the Welsh Government (see Confidential Annex). It argued further that the substance of the disputed information is already largely in the public domain (eg: the IER having been published). It asserts that the private interests of the Appellant are not relevant to the public interest balancing test.

Decision

18. The Appellant has not contested that section 38 exemption is engaged and thereby has on the face of it accepted that there is a likelihood of danger to health and safety. In any event, by reason of its views set out in the Confidential Annex, the Tribunal is satisfied that this is the case and therefore section 38 is engaged. The issue under appeal therefore is whether the Commissioner has reached the appropriate conclusion in relation to the public interest balancing test. In this regard, the Tribunal agreed with the BUAV case, that 'very weighty countervailing considerations' are required if the public interest is to favour disclosure where there is a likelihood of danger to health and safety.
19. The Tribunal accepted the submissions of the Commissioner and Welsh Government set out in the Confidential Annex, placed considerable weight on the witness evidence and concluded that the public interests in favour of disclosure, including the general ones of transparency and accountability and the particular concerns of the Appellant did not match the real and significant risk of endangerment to individuals were the disputed information to be

disclosed. See also paragraph 15 of the Confidential Annex. The decision on the public interest balancing test was strongly influenced by the fact that the disputed information does not, in the Tribunal's view (and the Commissioner's) contain information which would address the particular concerns of the Appellant, thereby greatly diminishing the public interest in disclosure.

20. The Commissioner refers to the Grounds of Appeal where the Appellant asserts that he has "sufficient corroborated evidence to demonstrate that the processes involved in reviewing the serious homicide were badly flawed'. The Commissioner argues therefore that he does not need the disputed information in order to be able to raise these issues by the appropriate channels. The Tribunal was not however able to conclude that the Appellant had all the information that he needed in order to demonstrate the validity of his concerns. The Tribunal was, moreover, unable to discern whether or not there was the substance claimed by the Appellant in these concerns. However, having viewed the disputed information, the Tribunal concurs with the Commissioner that it does not address the specific concerns which the Appellant has raised. As such, given the very real and significant risks to health and safety that might arise from disclosure of the information, in the terms set out in the Confidential Annex, the appeal could not be upheld.
21. Finally, just as the Commissioner did, the Tribunal did not consider the application of section 40 (personal data) exemption to this appeal, as it was satisfied that the section 38 exemption justified the non-disclosure of the disputed information.
22. For the reasons above, and those set out more fully in the Confidential Annex, the Tribunal unanimously dismissed the Appeal.

Signed
Melanie Carter
Judge of the First-tier Tribunal

Date: 17 September 2018
Date promulgated: 21 September 2018