



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice: FS50730159**

Appeal Reference: EA/2019/0136

**Considered on the papers
18 December 2019**

Before

JUDGE CHRIS HUGHES

NIGEL WATSON & ANDREW WHETNALL

Between

MATTHEW HILL (BBC)

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

1. The tribunal allows the appeal and substitutes the following Decision Notice.

SUBSTITUTED DECISION NOTICE

Dated 31 December 2019

Public authority: **NORTH DEVON HEALTHCARE NHS TRUST**

Address: Raleigh Park, Barnstaple EX31 4JB

The substituted decision

For the reasons set out in the Tribunal's determination, the public interest in disclosing the information identified in the confidential annex outweighs the public interest in maintaining the exemption.

Action required

The public authority disclose the identified information within 28 days of the date of this notice.

Judge C Hughes

REASONS

1. Mr Hill, a BBC journalist, wrote to the North Devon Healthcare NHS Trust on 12 February 2018 seeking information (decision notice paragraph 4):-

"I am applying under the FOI Act for the report mentioned in the link below. This is a report provided to a public body by another public body, and so it is in the public interest to publish the report in as full a form as possible. In order to overcome any concerns about identifying individual patients or staff I am happy to accept a report that redacts individual names and job titles.

<http://www.northdevonhealth.nhs.uk/about/reports/invited-reviewroyal-college-obstetricians-gynaecologists/>

2. The link led to the further information:-

"In September 2017, the Trust asked the Royal College of Obstetricians and Gynaecologists to visit us to provide independent support as part of a review of recent incidents in our maternity services. Following their visit, the RCOG made some recommendations which the Trust followed immediately.

We understand the anxiety this might cause, but the Trust would like to reassure people that this has been a rigorous process, where we actively identified concerns, acted on them and learned from them, and that ensuring the on-going safety of the unit is our top priority. As part of this process, we have also asked for support from an external head of midwifery and we have taken immediate action to address the recommendations made by the Care Quality Commission (CQC), following their visit in October 2017.

The CQC report (published January 2018) recognised the Trust's commitment to making improvements in the maternity department, stating:

“The Trust was responding to the safety concerns within the maternity unit. There was a line of sight up to the board. The executives and relevant stakeholders were having regular oversight of the department. External reviews had been requested and completed separately by a head of midwifery and the RCOG. The Trust were learning from incidents and making changes to improve safety and governance.”

The Trust received the full report from RCOG in December 2017, and has taken action to address the further recommendations within it.

The Trust has taken the following actions in line with the RCOG visit/report:

*Implemented changes to working rotas
Increased medical cover in the unit
Started recruiting to new posts
Increased our focus on training and skills
Made improvements to governance and incident review processes*

We are not able to publish the full report because we have a duty to respect the confidentiality of staff and patients. However, in the interests of being open and transparent, we have published the executive summary of the report here, which outlines its contents.

Review of the Obstetrics and Gynaecology Services at North Devon Healthcare NHS Trust (executive summary) (pdf)

3. That link in turn led to:-

“ 1. EXECUTIVE SUMMARY

This is the second review by the Royal College of Obstetricians and Gynaecologists (RCOG) commissioned by the North Devon Healthcare NHS Trust (NDHT). The first review, which took place in 2013, highlighted difficult working relationships within the maternity department with the potential to affect patient care.

This review was requested following a series of clinical incidents, and the assessors were also tasked to evaluate the relationships between medical and midwifery staff. The review also aimed to assess the clinical governance processes that follows clinical incidents, in terms of escalation and the quality of the investigation, as well as staff adherence to (and quality of) the local clinical guidelines.

The assessors found that staff at all levels were willing to engage in the review process. Working and interpersonal relationships appeared to be a major issue within the unit and had broken down at multiple levels. This was particularly evident between medical and midwifery staff.

Medical staff (particularly at consultant level) appeared deskilled, demotivated and over reliant [material redacted] for all nonclinical leadership aspects of the running of the unit. The consultants seemed reluctant to follow guidelines, unwilling to cooperate with each other and unhappy to accept (even constructive) challenge from midwifery colleagues.

By converse, a majority of well-motivated and progressive midwives seemed driven to act as advocates for women, in the attempt to guarantee their safety.

Working patterns, job planning and clinical governance processes (unwittingly promoting a blame culture) also appeared to play a major destabilising role. The assessors have made recommendations that they hope will be constructive and help to improve the care provided to women and their babies."

4. The Respondent initially and on review refused the request relying on exemptions in section 36(2)(b) and (c) of FOIA:-

"36 Prejudice to effective conduct of public affairs

....

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

.....

(b) would, or would be likely to, inhibit-

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

5. The effect of the s36 exemption applying is that before information is disclosed a consideration of the consequences of disclosure is undertaken. FOIA s2 provides:-

"Effect of the exemptions in Part II.

...

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that -

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

6. Mr Hill complained to the Information Commissioner drawing attention to a recent report by the Care Quality Commission which on 10 January 2018 had published a report on the Trust (dn paragraph 8):-

<https://www.cqc.org.uk/news/releases/cqc-inspectors-call-improvements-northern-devon-healthcare-nhs-trust>

The Chief Inspector of Hospitals commenting on that report stated:-

"It is disappointing to report that all four core services that we have inspected remain in need of improvement - and in some cases we have found the same concerns that we had raised during our inspections in 2014 and 2015."

"Although the staff working at North Devon District Hospital are invariably caring and conscientious, I have serious concerns about the quality of some services."

"In maternity we found that staff were not always following best practice, resulting in cases where a baby had come to harm. The relationship between the midwives and the consultants was poor, adding an unnecessary risk to the safety of their patients."

7. Mr Hill also drew attention to data comparing the maternity unit with others across the UK which in his view suggested concerns about standards. The Information Commissioner investigated whether the exemptions applied and where the balance of public interest lay. She considered that the public interest lay in not disclosing the information. In her decision she referred to various reports on the Trust including an Improvement Notice from the CQC issued in October 2017 which had found, inter alia:-

"Maternity services had got worse since our last inspection and were rated as requires improvement, having previously been rated good. Safe and effective were found to have got worse and were rated as requires improvement. Well-led stayed the same and was rated requires improvement. Caring and responsive stayed the same and were rated good."

8. In her decision notice the Information Commissioner considered and accepted the opinion of the Trust's qualified person that 36(2)(b) was engaged and that there was a need for a safe space (decision notice paragraphs 18-21):-

It stated that it needs to be able to conduct rigorous and candid reviews of its services, seek advice and consider the pros and cons of various options without the risk of premature disclosure. If disclosure took place it would be likely to prejudice its ability to carry out free and frank discussions, obtain free and frank advice which would in turn be likely to prejudice its ability to plan and implement solutions.

19. The trust confirmed that if disclosure took place staff would be discouraged from participating in reviews and discussions in the future for the fear of public disclosure. It stated that they would be less inclined to assist, cooperate and provide their honest, free and frank opinions and information. This would be likely to prejudice the trust's ability to carry out such reviews and consider and implement the necessary actions that are required to improve patient care.

20. It also stated that maternity care and any incidents or issues with it are obviously highly emotive and sensitive matters. Disclosure could therefore cause those involved damage, distress and upset and even result in physical violence or harassment of staff.

21. The trust went on to say that disclosure would be likely to lead to reputational damage and attract local and national press. This would then be likely to prejudice its ability to carry out its public affairs effectively. It also mentioned that disclosure would be likely to undermine the trust's willingness to invite external organisations to conduct reviews in the future.

9. The Trust argued that disclosure at the time of request would be likely to discourage staff from participating in such reviews in the future and from participating in discussions to address the current issues. The Information Commissioner recognised the importance of the public interest in disclosure

however her reasoning concluded that the public interest was, in this case, best served by upholding the exemption:-

"The Commissioner considers the public interest test considerations under section 36 of the FOIA require her to consider the extent, severity and frequency of the inhibitions claimed by the public authority.

27. She considers there are strong and compelling arguments in favour of disclosure. It is clear that issues have been identified within the trust which will inevitably affect the quality of patient care and that when the CQC's report was published in January 2018 the trust was still rated as 'improvement required'. In a statement the CQC published its Chief Inspector of Hospitals said:

"It is disappointing to report that all four core services that we have inspected remain in need of improvement – and in some cases we have found the same concerns that we had raised during our inspections in 2014 and 2015."

It is understandable that such matters will attract public interest and be of concern to the patients it serves. Disclosure would enable the public to see exactly what is going on, what has been recommended and why and enable them to participate in the decision making that is ongoing. Disclosure would promote openness, transparency and accountability.

28. However, in this case despite the fact that she considers there are strong and compelling arguments in support of disclosure, the Commissioner considers the public interest is best served by maintaining the exemption. The Commissioner must consider the circumstances at the time of the request. The trust had only been in receipt of the RCOG report for two months. It had also just received the CQC's inspection report following their visit in the October. The trust was still in the process of considering the report(s) received and its options. In order to decide on the steps and resolutions required to address the recommendations made, the trust required the safe space to obtain and consider free and frank internal advice and deliberate openly, candidly and honestly on how to move forward. The Commissioner considers disclosure at this time would have been likely to prejudice this process and the free and frank exchange of advice and views."

10. In appealing against the decision notice Mr Hill re-iterated the arguments he had already advanced. He also submitted a letter dated 4 October 2017 from the lead assessor from the Royal College of Obstetrics and Gynaecology responsible for the review stating "[the assessors] have also recommended that the forthcoming report is transparently disseminated to staff in its original version". Mr Hill stated "This has not been widely disseminated to midwifery staff – which clearly demonstrates [the Trust] failed in its duty to carry out the wishes of experts in order to reduce further risk to patients". He also submitted information from a solicitor representing parents of children born in the unit. The solicitor pointed to failures by the Trust to follow its own procedures with respect to "Serious Incidents".

11. In responding to the appeal the Information Commissioner emphasised that the issue was whether the Trust was entitled to rely on the exemption at the time of the request and argued that the documents Mr Hill relied on which post-dated the request and response *“are only relevant insofar as they assist the Tribunal in determining the public interest considerations at the time of the request and response.”* She maintained her position that *“the greatest weight must be afforded to ensuring the Trust is able to consider and respond to the matters raised in the Report as effectively as possible”*.
12. While the exemption was based on an appraisal of the likely impact on the Trust on its ability to carry out candid reviews of its services; the tribunal was concerned to understand the wider public interest questions raised by the appeal. In the light of the professional obligations of doctors set out by the General Medical Council the tribunal sought the views of the Royal College on the public interest, whether its ability to carry out reviews such as this effectively would be harmed if the expectation was that shortly after the review was carried out it would be generally disclosed.
13. The tribunal is grateful to the College for setting out its policy with respect to such reviews which included the advice to share with staff quoted by Mr Hill (paragraph 9 above). The college explained that since 2018 it had as a matter of routine sent such reviews to the relevant organisation’s health care regulatory bodies. Furthermore as part of the commissioning process it agreed that it was a matter for the medical director and chief executive of the recipient trust how the report was handled but that it warned recipient organisations that *“reports may reach the public domain as part of a consultation, or be disclosed under a Freedom of Information request”*.
14. The College did not, in the light of its agreement with the Trust address the issues directly raised with it. It seems to the tribunal that in considering whether the ability of the trust to conduct its affairs effectively both at the time of the request or in the future would be impaired by public disclosure of the report when Mr Hill requested it some regard must be had to the professional obligations of the staff involved. The General Medical Council’s Good Medical Practice lays down detailed precepts governing the actions and behaviours of doctors in all aspects of their professional lives. These include:

“22. You must take part in systems of quality assurance and quality improvement to promote patient safety. This includes:

- *taking part in regular reviews and audits of your own work and that of your team, responding constructively to the outcomes, taking steps to address any problems and carrying out further training where necessary*
- *regularly reflecting on your standards of practice and the care you provide*
- *reviewing patient feedback where it is available.*

23 To help keep patients safe you must:

- *contribute to confidential inquiries*
- *contribute to adverse event recognition*
- *report adverse incidents involving medical devices that put or have the potential to put the safety of a patient, or another person, at risk*
- *report suspected adverse drug reactions*
- *respond to requests from organisations monitoring public health. When providing information for these purposes you should still respect patients' confidentiality.*

24 *You must promote and encourage a culture that allows all staff to raise concerns openly and safely.*

25 *You must take prompt action if you think that patient safety, dignity or comfort is or may be seriously compromised."*

15. Similar provisions are enforced by the Nursing and Midwifery Council with respect to their registrants, and a joint statement from the Chief Executives of statutory regulators of healthcare professionals addresses the professional duty of candour is about openness and honesty when things go wrong:-

"Every healthcare professional must be open and honest with patients when something goes wrong with their treatment or care which causes, or has the potential to cause, harm or distress."

16. There are therefore strong professional and cultural forces encouraging those working within this service to co-operate with any inquiry and work to improve care. Indeed the evidence of the report itself shows that despite some staff being demotivated: *"The assessors found that staff at all levels were willing to engage in the review process"* There are therefore grounds for concluding that despite the difficulties in which the unit found itself in February 2018 there was a preparedness to engage and therefore despite the qualified person's opinion there a good grounds to believe that professional staff will seek to discharge their professional obligations conscientiously.

17. Furthermore it seems to the tribunal that the Information Commissioner failed to give due weight to a very significant aspect of the public interest in disclosure of the information. Mr Hill drew attention to the inspections carried out by the CQC and that the CQC in January 2018 had expressed its concerns and found that some concerns were the same as it had raised in 2014 and 2015. The RCOG in 2013 carried out a review and highlighted difficult working relationships. Those working relationships were again highlighted in the 2017 review as a major issue.

18. In the opinion of the qualified person (decision notice paragraph 18):-

".. the trust must be allowed the safe space to review and examine its services, consider the recommendations made and decide on what action to take."

19. In the normal course of events the tribunal would give significant weight to such an opinion. The difficulty is the Trust has had a safe space for a number of years. The issues were identified in a RCOG review in 2013, by the CQC in 2014 and 2015 and yet when the RCOG conducted a further review in 2017 the situation was not materially different. The Trust had had ample opportunity to move forward within the protection of the safe space. It had failed to do so. Perhaps on this occasion the safe space has not served to facilitate clear thinking, but to enable an unsatisfactory state of affairs to continue.
20. The public interest in understanding the difficulties of this unit is substantial. The difficulties had gone on for too long and the public interest in disclosure of the report at the start of 2018 outweighed any likely good that protecting the safe space could achieve.
21. The appeal is allowed and the report disclosed, subject to redaction of names and posts of persons interviewed by the review.

Signed Hughes

Judge of the First-tier Tribunal

Date: 31 December 2019

Promulgation date: 2 January 2020