IN THE FIRST-TIER TRIBUNAL **EA/2009/0113**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:
The Information Commissioner's Decision No: FS50202562
Dated: 17 November 2009

Appellant: Andrew Bousfield

Respondent: Information Commissioner

Second Respondent: Liverpool Women's Hospital NHS Foundation Trust

Determined at an oral hearing on: 19 & 20 July 2010

Date of decision: 11 October 2010

Before

Anisa Dhanji
Judge

and

Henry Fitzhugh and Dave Sivers
Panel Members

Representation:

For the Appellant: John MacDonald QC, Counsel
For the Information Commissioner: Fiona Banks, Counsel; Richard Bailey, Solicitor
For the Second Respondent: Timothy Pitt-Payne QC, Counsel; Anne Greenwood, Solicitors

Subject matter:

FOIA, section 40(2) – whether processing of personal data is in breach of the first data protection principle.

Cases:

Common Services Agency v Scottish Information Commissioner [2008] UKHL 47;
Corporate Officer of the House of Commons v Information Commissioner [2008] EWHC 1084 (Admin);
Durant v Financial Services Authority [2003] EWCA Civ 1746;
Guardian News & Media v Information Commissioner (EA/2008/0084);
House of Commons v Information Commissioner and Norman Baker MP (EA/2006/0015 and 0016);
Johnson v Medical Defence Union [2007] EWCA Civ 262;
Kelway v Information Commissioner & Chief Constable of Northumbria Police (EA/2008/0037);
Waugh v Information Commissioner and Doncaster College (EA/2008/0038).

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DECISION

The Tribunal upholds the Decision Notice and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. This is an appeal by Mr Andrew Bousfield (the "Appellant"), against a Decision Notice issued by the Information Commissioner (the "Commissioner"), on 17 November 2009, upholding a refusal by the Liverpool Women's Hospital NHS Foundation Trust (the "Trust"), to provide the Appellant with certain information he had requested under the Freedom of Information Act 2000 ("FOIA").

The Request for Information

2. On 3 December 2007, the Appellant made a request for information to the Trust, in the following terms:

   (i) Please provide the text of any compromise agreements the Trust has entered with doctors that have been paid off or "taken voluntary early retirement". In particular, please provide a list of exploratory or illustratory issues that have been covered by the gag clause.

   (ii) Further, please provide the Trust's policy on free speech, and the use of gag clauses.

3. The Trust responded on 19 December 2007. It refused to provide the information in (i) above, on the basis that any compromise agreements were covered by reciprocal confidentiality clauses.

4. In relation to (ii), the Trust explained that it did not use gag clauses, and that it did not have a policy on "free speech", although it had a number of other policies which explicitly promote and encourage openness and free speech.

5. The Appellant was dissatisfied with this response. The Trust undertook an internal review, following which, it upheld its refusal, relying on the exemptions contained in sections 40 and 41 of FOIA.

The Complaint to the Commissioner

6. On 19 May 2007, the Appellant wrote to the Commissioner to complain about the Trust's response to his request. The Commissioner deferred

its investigation until the Trust had conducted its internal review. After the Trust upheld its refusal, the Commissioner conducted an investigation.

7. The Appellant confirmed to the Commissioner that request (ii) should not form part of its investigation. As regards request (i), during the course of the Commissioner's investigation, the Trust provided the Appellant with the compromise agreements it had entered into, but it redacted the information which would identify the parties. The Trust considered that this redacted information was exempt under section 40(2) of FOIA. There were 12 compromise agreements in total. The Trust also provided the Appellant with a list of exploratory or illustratory issues covered by the compromise agreements.

8. The Appellant was dissatisfied with the redactions made, and the Commissioner proceeded to issue a Decision Notice.

9. In the Decision Notice, the Commissioner set out his findings as follows:

   (a) the Trust had correctly applied section 40(2) in order to redact the names of the parties and dates of the compromise agreements; and

   (b) the Trust had breached sections 1(1)(b), 10(1), and 17(1)(b) and (c) in its handling of the request. The Commissioner did not require any steps to be taken in respect of these breaches.

Scope of the Appeal to the Tribunal

10. On 9 November 2009, the Appellant appealed to the Tribunal against the Decision Notice. The Trust was joined as a party. There has been no cross-appeal against the Commissioner's findings set out in paragraph 9(b) above

11. All parties have accepted that only 2 of the 12 compromise agreements relate to doctors, and therefore, only 2 agreements correctly fall within the scope of the request. However, during the course of the oral hearing, the Appellant sought to persuade the Tribunal to extend the scope of the request to cover those other agreements. Clearly however, the Tribunal has no power to re-write the request, particularly where, as here, the request is clear and unambiguous. The Appellant is of course free to make a further FOIA request in respect of those other agreements.

12. One of the two doctors who entered into a compromise agreement with the Trust was the appellant's father. He has provided the Appellant with that agreement. Therefore, the Appellant is now only seeking disclosure of the information that has been redacted from the other agreement (the "Disputed Information").

13. The Disputed Information comprises the details that would identify the doctor (essentially his name, position, employment period, and the date

of the agreement). For convenience, the parties have referred to that doctor, as "Dr X".

14. When the Appellant lodged the appeal, he did so on various grounds, many of which were clearly misconceived, and this led, unfortunately, to much time and effort being wasted – on the Appellant's part, as much as on the part of the Tribunal, witnesses and the other parties. After he became legally represented, however, the Appellant's grounds of appeal were narrowed and clarified quite substantially. The result is that now the only issue in this appeal is whether disclosure of the Disputed Information would breach the data protection principles. For completeness, we note that the Appellant has accepted (quite rightly in our view), that:

- the Disputed Information is the personal data of Dr X; and
- the Tribunal has no jurisdiction to decide whether any provisions of any of the compromise agreements are void under the Public Interest Disclosures Act 1998.

15. There was an oral hearing of this appeal. The Commissioner and Trust had considered that the appeal should be determined on the papers. The Appellant, however, was vigorous in arguing for an oral hearing. The Tribunal convened a directions hearing at which the Appellant was represented, to decide the issue. However, given the lack of clarity, even then, as to the precise scope of the Appellant's grounds of appeal, and what assistance the Tribunal might derive from oral evidence on the issues the Appellant intended to argue, the Tribunal directed that the appeal should be determined at an oral hearing. As it transpired, the issues have become very narrow and oral evidence has been of very limited assistance to the Tribunal.

The Tribunal's Jurisdiction

16. The Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the notice is not in accordance with the law, or to the extent the notice involved an exercise of discretion by the Commissioner, he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.

17. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, the Tribunal will often receive evidence that was not before the Commissioner.

18. Although this appeal started as an appeal to the Information Tribunal, by virtue of The Transfer of Tribunal Functions Order 2010 (and in particular, articles 2 and 3 and paragraph 2 of Schedule 5), we are now constituted as a First-tier Tribunal. The procedural aspects of the

appeal have been governed by the Information Tribunal (Enforcement Appeals) Rules 2005.

Legislative Framework

19. Under section 1 of FOIA, any person who makes a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information.

20. The duty on a public authority to provide the information requested does not arise if the information sought is exempt under Part II of FOIA or if certain other provisions apply. In the present case, the Commissioner found that the information was exempt under section 40(2). Section 41 had been relied on initially by the Trust, but has not been put in issue before us.

Evidence and Submissions

21. The parties have lodged an agreed bundle of documents.

22. The compromise agreement with Dr X, comprises some 13 pages. As already noted, except for the Disputed Information which has been redacted, it has been disclosed to the Appellant in its entirety. The Tribunal has been provided with the agreement without redactions.

23. The agreement states, in the recitals, that the parties have agreed that Dr X's employment with the Trust will terminate on a specified date, and that the agreement is intended to compromise all claims Dr X may have against the Trust. He is to be paid certain amounts due, as well as a specified sum of money by way of compensation for termination of his employment. He agrees not to make public, by speaking to the media, or otherwise, the facts that led to his termination, but he is not restricted from making any disclosures to the NHS regulatory authorities. Both parties agree to keep the terms of the agreement confidential. Dr X acknowledges that prior to signing the agreement he has received independent advice.

24. In addition, the Trust has lodged a letter dated 10 May 2010 from Dr X which we will refer to further below. A redacted copy of that letter has been provided to the Appellant, the only redactions being the identifying details (name and address), of Dr X.

25. One other document that it may be useful to mention, specifically, is the Health Service Circular 1999/98, reproduced at pages 132-139 of the agreed bundle. It has an issue date of 27 August 1999 and is headed "The Public Interest Disclosure Act 1998". The sub-heading is "Whistleblowing in the NHS". Page 3 contains a statement to the effect that every NHS Trust and Health Authority should prohibit confidentiality "gagging" clauses in contracts of employment, and compromise agreements which seek to prevent the disclosure of information in the public interest.

26. We heard evidence from Dr Peter Bousfield and Mr David Ednay on behalf of the Appellant. Statements from two further witnesses had been submitted by the Appellant, but they dealt largely with opinion and argument, not evidence. Mr MacDonald conceded, at the hearing, that those points would better be dealt with in submissions. Therefore, those witnesses were not called.

27. Dr Peter Bousfield (the appellant's father), adopted his statements. He says that during the last 3 years of his employment with the Trust, he became increasingly concerned about standards of medical care on one of the Trust's site. He voiced his concerns, but no action was taken. When he threatened to take his concerns outside the Trust, he was told that his services were no longer needed. Payment due to him was withheld until he signed a compromise agreement which included a "penal gag clause". In cross-examination, he confirmed that he had never brought a claim against the Trust in the Employment Tribunal, nor has he raised his concerns with the NHS regulatory authorities, even though under the compromise agreement, he can do so.

28. Mr David Ednay also adopted his statement. He says that he was employed by the Trust and its predecessor for 21 years as the ultrasound/clinical imaging manager. He raised certain concerns, including about staff undertaking certain tasks without proper qualifications. He was suspended and eventually left the Trust. He was offered financial compensation by the Trust provided he signed a confidentiality agreement, but he refused. He, too, has never brought a claim against the Trust in the Employment Tribunal, nor has he raised his concerns with the NHS regulatory authorities.

29. The Commissioner did not call any witnesses. On behalf of the Trust, we heard evidence from Ms Erica Saunders. Since 2005, she has been the Director of Corporate Affairs and the Secretary to the Trust. In her statement, she sets out the history of the dealings between the Trust and the Appellant following the Appellant's request for information. There was some discussion at the hearing as to whether the matters on which the Appellant wished to cross-examine Ms Saunders, were properly within her knowledge. In the event, we permitted cross-examination, but she could not in fact assist, since the matters she was asked about were outside her remit.

Section 40

30. In so far as it is relevant, section 40 provides as follows:

Personal Information

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.

(3) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the [1998 c. 29.] Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress) …….

(7) In this section—

"the data protection principles" means the principles set out in Part I of Schedule 1 to the [1998 c. 29.] Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

Issue

31. As already noted, the only issue for the Tribunal is whether disclosure of the Disputed Information would breach the first data protection principle. If so, then section 40(2), read together with sections 40(3)(a)(i) or 40(3)(b), means that there is an absolute exemption for such information. Otherwise, the information must be disclosed.

32. As also already noted, the Appellant accepts that the Disputed Information amounts to personal data of Dr X. It has also been accepted by all parties that only the first data protection principle is in issue. There has been no suggestion that the Disputed Information is sensitive personal data or that section 10 of the DPA applies.

Findings

Would disclosure breach the first data protection principle?

33. We will first set out the law and general principles. We will then apply them to the Disputed Information.

34. To the extent relevant, the first data protection principle provides as follows:

"*Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-*

i. at least one of the conditions in Schedule 2 is met..."

35. *"Processing"* is defined in section 1(1) of the DPA to include disclosure.

Fair processing

36. The first question is whether disclosure of the Disputed Information would amount to fair and lawful processing. If not, then the information is exempt. If disclosure would amount to fair and lawful processing, then it is necessary to look further to establish whether processing would also meet the conditions in Schedule 2. The Commissioner found that disclosure of the Disputed Information would not be fair. Having made this finding, he did not go on to consider the Schedule 2 conditions.

37. It is not disputed that fairness is a broad concept, capable of embracing a range of considerations. It should not be considered from the point of view of the data subject alone. Rather, it is necessary to consider also the interests of the data user (here, the Appellant), and where relevant, the wider considerations of accountability and transparency implicit in FOIA.

38. We have found the following observations of Arden LJ in **Johnson v Medical Defence Union**, to be helpful on the proper approach to take when assessing fairness:

> *"Recital (28) [of Directive 95/46] states that "any processing of personal data must be lawful and fair to the individuals concerned". I do not consider that this excludes from consideration the interests of the data user. Indeed the very word "fairness" suggests a balancing of interests. In this case the interests to be taken into account would be those of the data subject and the data user, and perhaps, in an appropriate case, any other data subject affected by the operation in question."*

39. This does not mean, however, that one starts with the scales evenly balanced. Although a consideration of fairness requires other interests to be taken into account, where section 40 is engaged, the data subject's interests are clearly paramount. We remind ourselves of the emphasis placed by Lords Hope and Rodger in **Commons Services Agency v Scottish Information Commissioner**, on the continued primacy of the DPA, notwithstanding the passage and implementation of FOIA

Schedule 2 conditions

40. Schedule 2 contains 6 conditions which are relevant to the processing of any personal data. At least one condition has to be met if the data controller is to comply with section 4(4) of the DPA. The conditions include whether consent has been given by the data subject, whether processing is "necessary" to comply with a legal obligation, or whether it is "necessary in the interests of justice".

41. It is common ground between the parties that the only relevant condition in the present case is condition 6 which requires that:

> *"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."*

42. To assess whether condition 6 is satisfied, one must first consider whether there is a legitimate interest in disclosure on the part of the Public Authority, the Appellant or the wider public.

43. If there is, the next question is whether disclosure is necessary to meet that legitimate interest. In **Corporate Officer of the House of Commons v Information Commissioner**, "necessary" in the context of condition 6 was taken to reflect the meaning attributed by the European Court of Human Rights when justifying an interference with a Convention right, namely, that there should be a "pressing social need" and the interference should be "both proportionate as to means and fairly balanced as to ends".

44. Even if these two questions are answered in the affirmative, disclosure is only permissible if it is not "unwarranted" by reason of "prejudice to the rights and freedoms or legitimate interests" of the data subject.

Application to the Facts of this Case

45. Would disclosure of the Disputed Information amount to fair and lawful processing? As already noted, all the terms of the compromise agreement with Dr X, including the amount paid, have been disclosed. The only information not disclosed relates to the identity of Dr X.

46. We will begin the assessment of fairness from the perspective of the data subject, Dr X.

47. First, by disclosing the Disputed Information, Dr X's identity would become known. On any objective analysis, that will likely compromise his privacy significantly. Apart from other consequences, it would likely make him the target of speculation, as well as approaches from the media, the Appellant, and others, who may have an interest in ascertaining the reasons and circumstances behind the compromise agreement he entered into, and his departure from the Trust.

48. Second, the Trust says, and we agree, that if past events in relation to the termination of a person's employment which that person may have put behind him, come to light, that may cause him considerable distress. Indeed, it was telling that one of the reasons that both Dr Bousfield and Mr Ednay gave for why they did not take their concerns to the NHS regulatory authorities, or, in the case of Mr Ednay, to the media, is because the termination had been distressing and they

wanted to move on. It is not unreasonable to expect that Dr X may feel the same way. Disclosing his identity may therefore re-open matters that may be upsetting for him.

49. Third, and most compelling, there is clear evidence from Dr X that he does not want the Disputed Information to be disclosed. The Trust wrote to Dr X on 26 April 2010. They explained that the agreement had been disclosed in redacted form. He was asked whether he was willing to have his name enter the public domain by disclosure of the Disputed Information. In a letter dated 10 May 2010, he has stated that he is "totally opposed" to the disclosure. This is a factor which we consider it is proper to attach considerable weight.

50. Fourth, the Trust and the Commissioner say, and we agree, that when assessing fairness, Dr X's reasonable expectations in entering into the agreement is a relevant consideration. We have been referred, in this regard, to the Tribunal's decision in **Waugh v Information Commissioner and Doncaster College**, which upheld the refusal to disclose information relating to the dismissal of the Principal of Doncaster College. The Tribunal considered that there is a *"recognised expectation that the internal disciplinary matter of an individual will be private*" (paragraph 40). The present case does not concern a disciplinary matter, but in our view, similar considerations apply in relation to other circumstances in which a person's employment is terminated. Indeed, the Tribunal in **Waugh** went on to say that even in the public sector, compromise agreements may be expected to be accorded a degree of privacy where there is no evidence of wrongdoing or criminal activity. Whatever the public policy arguments may be about whether the Trust should be entering into compromise agreements of the type it has entered into with Dr X, there is no suggestion that there has been any criminal activity or wrongdoing.

51. In assessing Dr X's expectations, the fact that the agreement expressly requires both parties to keep its terms confidential is clearly a significant factor. We do not accept the Appellant's argument that Dr X can have had no reasonable expectation of confidentiality since the agreement contravenes the Health Service Circular referred to in paragraph 25 above. Given that the agreement permits disclosure to the NHS regulatory authorities, it is by no means clear that the agreement contravenes the Circular. There is also no evidence to suggest that Dr X had any knowledge about the Circular or that it would have had any bearing on his expectations. The agreement he signed stated that it would be kept confidential, and it is reasonable to expect that that is what he anticipated would happen

52. Against these factors, we turn now to consider the public interest and the Appellant's interest in disclosure. Essentially, the Appellant puts himself in the position of the general public. He has not sought to draw a distinction between his interests and the public's. He says that the Disputed Information should be disclosed because there are important matters of principle in issue. He says that the Trust is using public money to stop doctors and others from making public their concerns

about medical or other shortcomings, and that this is contrary to the pubic interest.

53. However, in our view, whatever public interest there is in the compromise agreement with Dr X, can largely be satisfied by the disclosure of the agreement in redacted form. The Disputed Information concerns only Dr X's identity. We do not see how disclosure of his identity furthers, in any material way, the public interest identified by the Appellant.

54. The Appellant puts forward two arguments as to how the public interest is furthered by disclosure of Dr X's identity. First, he says that if his identity were known, Dr X could be approached by the media and interviewed, and the circumstances that led to the compromise agreement being entered into might thereby become known to the public. However, the agreement contains a contractual restraint against disclosure to the media. There is no indication that Dr X would be prepared to breach this term. Indeed, his unwillingness to have his identity disclosed in response to the Appellant's request, is a clear indication that he would be unwilling for it to be disclosed in the media.

55. The Appellant argues that the contractual restraint against disclosure to the media is contrary to the purposes of FOIA. In our view, the Appellant's argument is misconceived. FOIA imposes a duty on public authorities to disclose information on request. It does not purport to regulate confidentiality clauses in contracts between Public Authorities and employees, and the compromise agreement specifically does not prevent Dr X from raising matters of concern with NHS regulatory authorities.

56. Second, the Appellant says that if the position Dr X held with the Trust is disclosed, the public will know where to look to identify problems in the NHS. There is, however, no evidence before us that Dr X's departure had to do with a problem in the NHS. That is simply conjecture. Even if it was the reason for Dr Bousfield's and Mr Ednay's departures (though we make no findings in this regard), it does not follow that Dr X was also a "whistleblower". Disclosure of his identity would not, in any event, give any indication as to the nature or extent of any problem.

57. Taking all of these factors into account, we find that they clearly and strongly weigh in favour of a finding that disclosure would not be fair. There is no substantial interest favouring disclosure. We find, in short, that disclosure of the Disputed Information would not amount to fair processing.

58. Having reached this finding, it is not necessary to go on to consider whether condition 6 in Schedule 2 is met. However, in case we are wrong, and in any event for completeness, we would note that we consider that condition 6 is not met. The question is whether disclosure is necessary for the legitimate interests of the Trust, the Appellant, or

the wider public, and if so, whether it is "unwarranted" by reason of prejudice to the rights and freedoms or legitimate interests of Dr X.

59. The Trust's position is that disclosure is not in its interests. The Appellant's interests and the wider public interests are as set out above. We have already found that those interests are not furthered in any material way by disclosure of the Disputed Information. The factors set out above which show that disclosure would not be fair, also support a finding that on the facts of this case, any prejudice to the rights and freedoms or legitimate interests of Dr X is unwarranted.

60. There is one final observation we would make. It is clearly the Appellant's view that the Trust entered into the agreement with Dr X in order to "gag" him. The Appellant's interest is in transparency as to the circumstances in which the Trust enters into such agreements. He thinks that they do so in order to prevent doctors from going public with concerns that the Trust would prefer to suppress. The Appellant may have believed, when he embarked on this appeal, that it would be the proper vehicle to have a debate on those issues. It is not. We make no findings about the Trust's motivation in entering into the compromise agreements. It would be completely inappropriate, not to mention unfair to the other parties, for the Tribunal to make findings or inquiries on issues outside the proper scope of the appeal.

Decision

61. For all the reasons set out above, this appeal is dismissed. Our decision is unanimous.

62. Under section 11 of the Tribunals, Courts and Enforcement Act 2007 an appeal against a decision of the First-tier Tribunal on a point of law may be submitted to the Upper Tribunal. A person wishing to appeal must make a written application to the First-tier Tribunal for permission to appeal within 28 days of receipt of this decision. Such an application must identify any error of law relied on and state the result the party is seeking. Relevant forms and guidance can found on the Tribunal's website.

Signed **Date: 11 October 2010**

Anisa Dhanji
Judge