IN THE FIRST-TIER TRIBUNAL **Case No. EA/2011/0055**

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS
ON APPEAL FROM:

Information Commissioner's Decision Notice No: FS50297286
Dated: 31 January 2011

Appellant: **Mr C M Johnston**

Respondent: **Information Commissioner**

Heard at Coventry Magistrates Court on 20th June 2011

And then on the papers thereafter.

Representation: **The Appellant represented himself,**

The Commissioner relied upon written submissions and was not represented at the oral hearing.

Date of decision:18TH October 2011

BEFORE:

Fiona Henderson (Judge)

Pieter De Waal

And

Jacqueline Blake

Subject matter: FOIA – s 41 information provided in confidence
s 40 data protection

Cases:

Ince v Information Commissioner EA/2010/0089

Higher Education Funding Council (HEFCE) v IC EA 2009/0036

from *Coco v AN Clark 1969RPC 41* at

Douglas v Hello Ltd [2006] EWCA CIv 59

Home Office v Information Commissioner GIA/1694/2010 and GIA/2098/2010

Home Office v Information Commissioner GIA/1694/2010 and GIA/2098/2010

Home Office v Information Commissioner GIA/1694/2010 and GIA/2098/2010

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2011/0055**
GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal in part and amends the Decision Notice FS50297286 dated 31st January 2011 as follows for the reasons set out in main body of the Decision.

SUBSTITUTED DECISION NOTICE

Dated:	18TH October 2011
Public authority:	NHS Warwickshire,
Address of Public Authority:	Westgate House Market Street Warwick CV34 4DE
Name of Complainant:	Mr C M Johnston

The Substituted Decision:

For the reasons set out in the Tribunal's determination, the substituted decision is that NHS Warwickshire did not deal with the complainant's request in accordance with the requirements of Part I of the Freedom of Information Act 2000 in that the disputed information was wrongly withheld under s 41 FOIA. The Tribunal does, however, find that some of the disputed information (as set out in Confidential Schedule 2) should have been withheld under s40 FOIA because disclosure would breach the 1st data protection principle.

Action Required:

NHS Warwickshire shall provide a copy of the said information with redactions made as specified in Confidential Schedule 2 to the Complainant within 28 days from today.

Dated this 19th day of October 2011

Signed

Fiona Henderson (Judge)

REASONS FOR DECISION

Introduction

1. The Appellant's Mother was admitted to Warwick Hospital following a fall at home in which she broke her arm. She was transferred to Arden Rehabilitation Ward at Heathcote Hospital (now administered by NHS Warwickshire -NHSW[1]) in December 2005 and remained there until her death on 2nd March 2006. On the Appellant's account despite her advanced age[2] she had been living successfully at home and remained active prior to this admission. The Appellant was unhappy with her continued admission and has told the Tribunal that his Mother was being held against her wishes. He considers that the way that she was managed in hospital caused her death.

2. He complained to NHSW in May 2006. An investigation was carried out by a member of staff who had not had any prior involvement with the Appellant's Mother. She interviewed staff members and a report was compiled. The Appellant was provided with details of the outcome (but not the report) by letter dated 11th August 2006. He was dissatisfied with this investigation which in his words "*wholly failed to address reasons HOW/WHY Patient/Prisoner's health, strength "steadily deteriorated" under 04 months of their claimed 24 hr care (Abuse)*"[3]. There was no mention of the use of antipsychotics/Haloperidol in this report.

3. From subsequent disclosures from NHSW the Appellant became aware that his Mother had been given Haloperidol (an antipsychotic medication) whilst in Arden Ward. The Appellant complained to the Health Care Commission (HCC) in November 2007 who commenced their own review. The result was conveyed to the Appellant in a 15 page letter dated 27th February 2008 in which his complaint was upheld because the HCC considered that NHSW could have done more to resolve his complaint. It also recommended that further work be carried out in particular in relation to the reasons for having given Haloperidol (usually considered a drug of last

[1] Formally Warwickshire PCT
[2] She was 101 at her death
[3] Letter to Commissioner dated 27th September 2010

resort for very short term use only, in geriatric patients) and the poor record keeping surrounding the use of this drug.

4. The hospital provided further information to the HCC and the Appellant on this and other points after which the HCC reconsidered its conclusions at the Appellant's request; the outcome of which was communicated to him in a letter dated 9th May 2008. They reviewed the matter on 2 further occasions the results of which were communicated to the Appellant on 22nd July 2008 and 12th March 2009. The HCC then closed the case. The Appellant has indicated that he is seeking information under FOIA with a view to taking the case to the Parliamentary and Health Services Ombudsman.

The request for information

5. On 6th July 2009 the Appellant made an information request to NHSW, in the context of:

> *"...my earlier requests for access to my mother's medical records at yr Heathcote "Hellhole" (her word)... AND 2008 FOI requests for her Post Mortem Data, OR Warwickshire PCT "Complaints File"; Esp for disclosure of the Data Processing re this itemised list of esp Signed Witnessed Interviews". [sic]*
>
> He specifically requested
>
> *"Disclosure of what maybe you describe as the "Complaints File". Esp the Data from the itemised list of Interviews ...*
>
> And
>
> *"...All the Appendages of PCT Investigator [Named individual]'s Report".*

6. NHSW refused the request on 20th July 2009 relying upon s41 FOIA[4] but invited the Appellant to request anything from the file which was not considered confidential. In this letter they were explicit that "*the interview notes etc*." were considered to be

[4] Information given in confidence

confidential by them. The Appellant was told of his right to appeal but was not offered an internal review.

The complaint to the Information Commissioner

7. The Appellant complained to the Information Commissioner on 23rd July 2009. The Commissioner accepted the complaint without an internal review as the matter had been considered by NHSW under the Data Protection Act (DPA 1998) already and this represented their settled position.

8. The Commissioner clarified that the material in dispute related to the material from the Complaints file which was being withheld as confidential[5]. The Commissioner established that the disputed information was:
   - Staff interview notes/statements.
   - Notes of meetings that the complainant was not present at; and
   - The investigating Officer's report.

Findings

9. The Commissioner issued a Decision Notice FS 50297286 dated 31st January 2011 in which he found that s41 FOIA was engaged and there would be no clear public interest defence to an action for breach of confidence as a result of disclosure under the Act and that consequently the information had been correctly withheld under s41.

10. Additionally the Commissioner made observations relating to the fact that the Appellant had not been offered an internal review in this case. This is not part of the Decision pursuant to s50 FOIA and is not dealt with here.

[5] The Appellant had received information including his Mother's medical records (under the Access to Health Records Act 1990 - AHRA) and those elements from the Complaints file which constituted his personal data under DPA. He did not wish to receive non-confidential routine administrative material from the file.

The appeal to the Tribunal

11. The Appellant appealed to the Tribunal on 20th February 2011. His grounds of appeal are lengthy, discursive and recount the history of his Mother's admission and the Appellant's complaints relating to this. At the telephone directions hearing of 15th April 2011 it was confirmed that the grounds which the Appellant required the Tribunal to determine are:

    i. Whether Section 41 FOIA is not engaged as the disputed information was not "*obtained by the public authority from any other person*" but was generated internally. It was obtained by NHSW from its own employees. The Appellant relies in this regard on a number of Decision Notices issued by the Commissioner in other cases;

    ii. Whether NHSW can be precluded from relying on the equitable doctrine of confidence because the maxim "*he who comes to equity must come with clean hands*" is not satisfied. According to the Appellant, the NHSW employees who gave witness statements were involved in the Appellant's mother's "*likely unlawful deprivation of liberty (massively aggravated by likely direct fatal covert administration of anti-psychotic drugs)…contrary to our joint and several human rights*" and are therefore guilty of wrongdoing;

    iii. Whether the Commissioner erred in fact in that he based his decision on the assumption that NHSW were acting in bona fides and in consideration of their rights without giving due consideration to:

        a) their lack of compliance with professional Guidelines & Code requirements or

        b) the Appellant's and his Mother's legal and human rights,

    despite the Appellant having cited examples of NHSW's lack of bona fides.

    iv. Whether the public interest would be served by disclosure of the disputed information as:

        a) It would uncover wrongdoing such as assault and false imprisonment,

b) It would demonstrate how staff conflicts can diffuse/smother any conventional investigation, allowing patterns of endemic default and abuse to continue.

v. Whether the Commissioner erred in concluding that the statements were in fact confidential because:

a) All the statements were gathered for an internal investigation but all appear to have been disclosed to another investigatory body namely the HCC[6],

b) The psychologist's statement was disclosed to the Appellant by NHSW.

c) The RMO[7]'s statement was disclosed to the Appellant by the HCC.

vi. If the Appellant's Mother had been alive, would she have been entitled to disclosure of these statements either under DPA or as part of the access to her medical records, and whether they should be disclosed to the Appellant as his Mother's Executor/successor in title.

12. Much of the Appellant's correspondence with the Commissioner, and his submissions to the Tribunal, relate to the ill-treatment which the Appellant asserts his Mother received at the hands of NHSW. The matters raised by the Appellant concerning his Mother's admission are only justiciable by this Tribunal insofar as they relate to the application of FOIA. The Tribunal is not able to and does not express any view as to the Appellant's Mother's experience whilst in hospital.

What is the withheld material?

13. Prior to considering the grounds of appeal, the Tribunal must first determine what is the withheld material. The disputed information is the outstanding material from the complaints file. The Appellant believes that this comprises items 4-12 and 14 of the handwritten "Chronology of Meetings" attached to his grounds of appeal. The

[6] Healthcare Commission
[7] Responsible Medical Officer

Commissioner notified the Tribunal on 27th April 2011 that the disputed information considered by the Commissioner in his Decision Notice comprised:

- those documents itemised as numbers 4-12 in the Chronology referred to, and
- the investigator's report itself.

However, the disputed information did not include item 14 which is described as "14. April / May Dr Kennedy (basis 2 June 2008 PCT letter)". This appears in different handwriting to items 1-13 and the Appellant told the Tribunal that he had added it to the list.

14. The Tribunal has not seen this document, and it is not clear whether it exists as a separate document. The HCC noted in a letter that NHSW had not confirmed whether statements were taken from Dr Kennedy:

"the trust have not confirmed whether statements were taken from Dr Kennedy and the nurses, involved with the doses of haloperidol. However, [the HCC nursing consultant] is able to ascertain from the Trust's response that it is obvious that Dr Kennedy's opinion was sought,.."

15. The Tribunal also reminds itself that under FOIA there is an entitlement to information rather than specific documents, and it may be that all the information contained in any statement or notes of a meeting are already disclosed by way of the NHSW's letter dated 2nd June 2008.

16. The Tribunal has considered whether this statement (if it exists as a separate document) falls within the terms of the request. The Tribunal has seen the investigator's report and notes that this item is not appended[8]. In considering whether it comprises part of the complaints file, the Tribunal notes that this item was created in response to the HCC investigation and not the NHSW investigation which was by then concluded. From the material before the Tribunal it is apparent that, during his investigation, the Commissioner satisfied himself through contact with the NHSW that he had received all the material withheld under s41 from the Complaints file.

[8] NB Item 14 from the Appellant's list is not the same as item 14 appended to the investigative report.

17. The Tribunal is satisfied therefore that if this item exists as a separate document it is not part of the NHSW complaints file and does not fall within the terms of the information request.

18. The Tribunal considers that grounds i) and v) both relate to the issue of whether s41 FOIA is engaged, and in light of its findings it has not been necessary to consider the remainder of the grounds to determine this appeal.

Ground i.

19. S 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 Tribunal first considers whether the information was obtained by the public authority from any other person. In his Decision Notice the Commissioner found that:

"*the information contained in these documents was provided to the public authority by the participants, namely the witnesses, the investigating officer and the attendees at the meetings. Therefore section 41 can be considered in this case."*[9]

21. In his submissions he amplifies this arguing that "two persons" are required to create the relationship of confidentiality; the public authority and another person (legal or natural). The terms of the statute do not exclude an employee from being the person to whom the obligation of confidence is owed. The Tribunal accepts this.

[9] DN paragraph 23

22. The Commissioner argues that NHSW have obtained information in the form of interview notes and reports from other persons who happen to be its employees in the course of a sensitive internal investigation.

23. The appellant relies upon the Ministry of Justice FOI Guidance dated 14 May 2008 which provides:

"The phrase "by another person" will ***usually***[10] *require the information to have been obtained from outside the department and not from an employee... S41 may apply where disclosure would breach a duty of confidence which a public authority owes to an employee in their private capacity (other exemptions may also apply..* ***if the information is disclosed in the course of employment, when an employee is acting on behalf of the public authority and solely in the capacity of employee, there will be no duty of confidentiality for the purposes of s41".***

24. He further relies upon *McLachlan v IC EA/2008/0058* in which reviewers of applications for medical research grants were not paid by the MRC, and other than provision of guidance on how to carry out the review process, were left to form their own views and to give whatever comments they felt appropriate. Some reviewers signed a contract, but others did not.

> *" overall, the position was one of independence from the MRC. [The Tribunal] concluded therefore that the reviewers' comments were information obtained from another person for the purposes of section 41."*

25. With regard to the Board members,

- they functioned as an integral part of the decision making process,
- their decisions were likely to be determinative of a grant application.
- They were thus making decisions on behalf of the MRC.

"Insofar as there was any information obtained from the Research Boards which did not include applicant information or comments on the application by the reviewers, it would not fall within the section 41 exemption. "[11]

[10] Emphasis added by the Tribunal
[11] Paragraphs 21-23

26. The Appellant argues that the report was generated internally; the information was obtained by NHSW from its own employees relating to their employment and that consequently it was not obtained from another. The Commissioner argues that his guidance is meant to cover the situation where there is only one person i.e. the public authority who have e.g. drafted a contract[12] and likens the Appellant's argument to that put forward unsuccessfully in *Ince v Information Commissioner EA/2010/0089* a case dealing with s40 FOIA. In that case the Tribunal held that not all information relating to an employee of a public authority will be public information. In that case the disputed information went beyond information directly concerning the individual's public role or decision making process and related to personal views and opinions on the allegations of fraud.[13]

27. The Tribunal notes that the withheld information falls into 3 categories:

- The investigative report,
- The staff interviews,
- The feedback meetings.

28. In relation to the investigative report, the Tribunal notes that the investigating officer was appointed by NHSW for the purpose of carrying out the investigation. She is an employee of NHSW and not independent of them. She is carrying out the investigation on their behalf and has been trained for that purpose[14] (although she also has an additional role as a clinician). Her report is the basis of NHSW's response to the Appellant. The Tribunal is satisfied therefore that her report is not obtained from another in that it was generated by NHSW and that consequently s41 is not engaged in relation to the report except insofar as the report quotes information from other

[12] Department of Health v Information Commissioner EA/2008/0018
[13] Although on the facts of that case the panel was divided as to whether it all related to the individual's employment or was a hybrid of personal and private information.
[14] See internal email 12th July 2006.

individuals[15] which the Tribunal considers separately under the heading "staff interviews".

29. In relation to the staff interviews the Tribunal notes that whilst the interviews were held in an employment context, the persons concerned performed a different function from their usual clinical role. Whilst they provided the information in the course of their employment, public disclosure could give rise to private consequences for them extending beyond their employment. There is no evidence whether participating in such an investigation forms part of their terms and conditions. But the Tribunal is satisfied that whether the information is obtained from another in relation to these interviews depends upon the subject matter and content of the interview at the time. It is hard to see how providing the public authority with information about its own processes/systems etc. or with information recorded in medical records in the course of their employment for NHSW[16] could constitute information obtained from another. But expressing a subjective and personal opinion or judgment as to e.g. the behaviour of an individual patient, patient's relative or colleague would not be attributable to the employer or made in the usual course of employment, and therefore could be obtained from the employee as "another". Consequently the Tribunal is satisfied that in respect of those elements of the interviews where personal judgment or opinions were obtained beyond the usual scope of employment duties, the information was obtained from another for the purposes of s41.

30. In relation to the feedback interviews the Tribunal has had regard to the purpose of the meetings as stated on the face of the documents, and is satisfied that in relation to the majority of the content s41 is not engaged. This is because the purpose of giving feedback is to enable the conclusions of the investigation to be put into practice.[17] But insofar as individuals expressed a personal opinion relating to a colleague, patient or relative, the Tribunal would repeat the points made in paragraph 29 above.

[15] E.g. DBERR v IC 2010/0072 which cites the example of information from an informant which is recorded by a Police Officer
[16] See confidential schedule 1
[17] See Confidential Schedule 1

Ground v.

31. This ground is a challenge to whether those parts of the disputed information which have been obtained from another are in fact confidential. The Tribunal notes that s41 has been considered by the Tribunal (differently constituted) in *Higher Education Funding Council (HEFCE) v IC EA 2009/0036* which adopted the definition of "confidential" from *Coco v AN Clark 1969RPC 41* at 47[18]:

    - The information must have the "necessary quality of confidence" about it; and
    - The information must have been "communicated in circumstances importing an obligation of confidentiality".
    - There must been "an unauthorised use of the information to the detriment of the party communicating it"[19].

32. In their refusal dated 20th July 2009 NHSW stated:

    "The withheld information contains comments, appraisals, opinions and witness statements which possess the necessary quality of confidence because they are not otherwise accessible and the contents are more than trivial."

33. The Tribunal has had regard to the disputed information and notes that it largely consists of documented facts, policies and procedures.

    - The aim of the meetings is set out in each Minute,
    - The content of the interviews also includes facts, repetition of clinical judgments (from the medical records), processes, methodology i.e. which system is used for which assessment, ward routine, record keeping, job descriptions and responsibilities.
    - Care plan meetings have already been disclosed under AHRA and DPA. They are very detailed and express professional opinions. It is hard to distinguish their content from the type of information in the statements. It is only the purpose that is different, in that the latter is a review of the case rather than ongoing planning.

[18] In light of the Tribunal's findings in relation to the first 2 limbs of Coco v Clark the Tribunal has not found it necessary to make any determinations in relation to what is meant by "actionable".

[19] The Tribunal notes the discussion relating to detriment in *Smart v IC and Glyndwr University EA/2008/0063,* but does not consider this further on the facts of this case.

The Tribunal does not consider that the types of information rehearsed above possess the necessary quality of confidence, however, it does accept that there are also personal comments, appraisals and opinions.

34. In considering the comments, appraisals and opinions, the Tribunal does not here consider patient confidentiality. The Tribunal notes that s41 is being relied upon in terms of the duty that NHSW owes to its employees. Since the information requestor is the patient's next of kin, and the application is made under FOIA which provides for disclosure to the world at large, the Tribunal is satisfied that this confidentiality has been waived.

35. The Tribunal accepts that information is more likely to be confidential if as well as being "worth protecting" it is not otherwise accessible. In *Douglas v Hello Ltd [2006] EWCA CIv 59:* the Court held that:

"it seems to us that information will be confidential if it is available to one person (or a group of people and not generally available to others, provided that the person (or group) who possess the information does not intend that it should become available to others".

36. However, in this case a substantial amount of information that forms part of the disputed information is now within the public domain using the *Douglas* test as set out above:

a) Comments relating to the Patient – the Tribunal is satisfied that these are all to be found within the Patient's medical record. These have been disclosed to the Appellant without restriction through the AHRA. The Tribunal notes that they are referred to in the Tribunal's open bundle, and that they are also referred to in the NHSW correspondence to the Appellant which is made without caveat or restriction. Although it is accepted that they are not yet necessarily available to everyone, the Tribunal is satisfied that their confidentiality is lost in that the information has been disclosed without restriction.

b) Comments relating to the Appellant – ironically these are likely to be the most sensitive of the matters contained within the interviews and yet they have all been disclosed (in redacted form) to the Appellant, so that the direct personal

data of the maker of the comment has been removed. However, it is often apparent who was present at a meeting (e.g. by reference to a particular department), although it requires additional information such as the Appellant's knowledge of those in a particular discipline who had contact with his Mother to attribute the comments. The Tribunal is satisfied that this is a data protection issue rather than one of strict confidentiality since the information is disclosed, but not the author.[20]

c) Comments relating to colleagues. In the main these are based in fact and do not constitute opinions e.g. who has done what and whose role it is. However, the Tribunal does consider whether the comments as set out in Confidential Schedule 1 do have the quality of confidence about them in that there may be personal consequences for the maker of the comment.

37. The Tribunal then goes on to consider whether the information was "imparted in circumstances importing an obligation of confidentiality". The Appellant argues that this cannot have been the case because of the way that the information has been treated by NHSW:

a) All the statements were gathered for an internal investigation but all appear to have been disclosed to another investigatory body namely the HCC[21],

b) The psychologist's statement was disclosed[22] to the Appellant by NHSW.

c) The RMO[23]'s statement was disclosed to the Appellant by the HCC.

d) Summaries of parts of the interviews were disclosed under s7 DPA.

38. In their refusal dated 20th July 2009 NHSW stated:

" The circumstances in which the information was obtained will import an obligation of confidence because the witnesses and participants to the

[20] See paragraph 51 below
[21] Healthcare Commission
[22] With redactions. It is not clear the basis upon which this interview was disclosed, whether the Appellant was told it was redacted, or
the reasons for the redaction.
[23] Responsible Medical Officer

> *meetings are not compelled to provide this information but it is important that there is no reticence in providing frank and honest responses to such enquiries. That is only likely to be achieved if the parties are assured that the information they impart will be treated in confidence, and there is thus a general expectation that such information is given and received in confidence."*[24]

39. This is the only direct evidence before the Commissioner (and the Tribunal) on this point. There is no evidence that there was an explicit undertaking of confidentiality. In determining this, the Tribunal notes that none of the disputed information is marked Confidential, neither was the Commissioner provided with any pre interview protocol indicating or explicitly specifying that the interviews would be confidential.

40. The circumstances in which information was obtained may impose an implied duty of confidence. The Commissioner argues that because the information was provided voluntarily this should attract an implied duty of confidence. The Tribunal disagrees and considers that if a public authority can legally oblige a party to provide information under threat of compulsion, there is a greater implication of confidentiality as the interviewee is more exposed, having no option but to answer the question.

41. Additionally there is no evidence of a longstanding, consistent and well known practice on the part of the public authority of protecting similar information against disclosure. The Tribunal has been given no clear evidence on this point and reminds itself that the burden of establishing that s 41 is engaged before the Commissioner lies with the public authority.

42. The Tribunal is not satisfied that the circumstances are sufficient to establish an implied undertaking of confidentiality. The Tribunal notes that NHSW states that the parties are "*assured that the information they impart will be treated in confidence"*, however, the Tribunal notes that Dr Campbell specifically asked what the process was for and was not told that the process is confidential. He was told that "*the investigating officer .. carries out an investigation...will then submit a report and a*

[24] Paragraph 25 Decision Notice

response letter is drafted for Teresa French to sign". Significantly it was not specified to what extent the interview would be repeated or disclosed in the response letter or who would see the report.

43. Additionally the Tribunal takes into consideration the use that is made of the information from the investigation and notes. The Commissioner argues that the fact that 2 of the statements have been disclosed to the Appellant means that they no longer form part of the disputed material and are therefore irrelevant to the question before the Tribunal. The Tribunal disagrees, and considers this indicative that NHSW did not treat the staff interviews as though they were confidential.

44. All the statements and the report were sent to HCC for review. There is no evidence before the Tribunal that the HCC were restricted in their use of the information in responding to the Appellant's complaint. The HCC have taken detailed quotes from the disputed information and included attributable quotes in their report. But it is noted that this did come with the caveat:

> *"this letter may include information that is subject to legal duties of confidentiality. Certain information in this letter may be personal data for the purposes of the DPA or may be information to which the s136 of the Health and social CARE (community Health and Standards) Act 2003 applies.*

45. The Tribunal observes that this appears to be standard terms which are appended to various letters to the Appellant from HCC regardless of their content, and that (contrary to the situation which the Tribunal would expect if the information had been explicitly marked as confidential) it does not assert that the information from the interviews **is** confidential. No information has been provided as to any restrictions that were placed upon the HCC when the information was provided to them. They appear to have disclosed at will to the Appellant without referring back to the interview subjects. The Tribunal does not consider the confidentiality rider to be indicative that the report and statements were handed to the HCC in confidence because in disclosing it to the Appellant (complainant) any confidence would have been breached.

46. Additionally NHSW has quoted information from the interviews in the response letter of 11th August 2006 sent to the Appellant notifying him of the outcome of the review. This letter names staff members and attributes explanations to individuals e.g. a very full account is given of Dr Campbell's interview and detailed information from the named Social Worker[25], Occupational Therapist and the Psychologist.[26]. This information was disclosed without any caveat as to use or and without any statement of confidentiality.

47. In some cases information from the disputed information has already been provided to the Appellant e.g. through AHRA or DPA . The Tribunal notes that the provisions of s7 DPA (subject access requests) require a data controller to consider confidentiality prior to disclosing under this section. The Tribunal accepts that the names of those making the comments have been redacted from the disclosure (pursuant to 7(5) DPA) but acknowledges that:

- Because of the small number of those involved in his Mother's case, and
- The fact that many had unique roles e.g Occupational Therapist, dietician etc.

the mere redaction of names is insufficient to protect the identity of those making the remarks. In those circumstances the data controller is required either to obtain consent[27] or determine if

"it is reasonable in all the circumstances to comply with the request without the consent of the other individual."[28]

Guidance is given upon how to apply s 7(4)(b) in s7(6) in that the data Controller shall have regard to (inter alia):

(a)any duty of confidentiality owed to the other individual.,

Consequently the Tribunal is satisfied that in disclosing the information under the DPA, NHSW must have considered any duty of confidentiality owed to the maker of the statements, and still felt able to disclose.

[25] P206 Open Bundle
[26] P208 Open Bundle
[27] S7(4)(a) DPA
[28] s7(4)(b)

48. The Commissioner relies upon *Ince v IC EA 2010 0089*:

> *"..there will be aspects of employment which are private and over which one would expect to have a certain level of confidentiality. In this instance whilst it relates indirectly to the professional roles of the individuals, the disputed information does not relate to a public aspect of their employment but amounted to a personally held opinion"*[29].
>
> *"...In this case, the disputed information goes beyond information directly concerning the individual's public role or decision making process and relates to personal views and opinions on the allegations of fraud..."*[30]
>
> The Commissioner draws a parallel between the expectation of confidentiality material to s40 and the interviewees' implied expectation of confidence because of the circumstances of the interviews.

49. The Tribunal reminds itself that *Innes* is a s40 FOIA case, and s40 does not rest entirely upon the participant's expectation but also includes considerations of fairness.[31] As set out above, the Tribunal is of the view that the majority of the disputed information does relate to the normal aspects of the employment of the persons concerned, namely their actions and that of their colleagues and the processes and systems utilized in relation to the case. Whilst there are some elements which amount to a private opinion or judgment, the Tribunal is not satisfied that this is sufficient to impute an expectation of confidence into what was otherwise a non confidential process.

50. For the reasons set out above the Tribunal is satisfied that s41 is not engaged and does not therefore go on to consider the additional grounds of appeal. However, the Tribunal adjourned the case and issued further directions on 11th July 2011 inviting the parties to make submissions upon the applicability or otherwise of s40 FOIA (personal data) to any or any part of the withheld information. This exemption was not raised by the public authority but the Tribunal considers that prior to ordering the disclosure of information the Tribunal should have regard to those who might be

[29] Paragraph 45
[30] Paragraph 49
[31] See paragraph 51 below

affected by the disclosure but are not a party to the information request. In so doing the Tribunal takes into consideration that it is inquisitorial and the Upper Tribunal decision in *Home Office v Information Commissioner GIA/1694/2010 and GIA/2098/2010* which recognised that in limited circumstances the Commissioner might identify a possible new exemption and invite the parties to consider whether it applied[32], and that

> "*the nature of the appeal before the First-tier Tribunal requires it to consider the response that the public authority should have made afresh. It must apply the law afresh to the request taking account of the issues presented at the hearing or identified by the First-tier Tribunal*"[33].

Section 40 FOIA

51. There is no dispute that the disputed information contains personal data. The Appellant has placed the personal data disclosure relating to himself in the open bundle, along with elements of his Mother's medical record. Additionally the Appellant is seeking disclosure under FOIA which is disclosure to the world at large, consequently the Tribunal does not consider the Appellant or his Mother's personal data but only that of the employees of NHSW.

52. S40 FOIA provides that:

> *... (2) Any information to which a request for information relates is also exempt information if-*
>
> *(a) it constitutes personal data [of which the data requestor is not the data subject], 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 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,...*

[32] Paragraph 47
[33] Paragraph 60

53. The first data protection principle provides:

> *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…*

54. Guidance is given as to what is meant by "fairly" in paragraph 1(1) of Part II of Schedule I:

> *(1) In determining for the purposes of the first principle whether personal data are processed fairly, regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed.*

Whilst it is arguable that the data subjects may not have contemplated disclosure of this information to the world at large, the Tribunal repeats paragraph 42 above and observes that there is no evidence that they were told that it would be exempt from a FOIA request or that if disclosed there would be any restrictions on its use. Indeed the disclosures made in NHSW's letter of 11th August 2006 carried no restriction on public disclosure or disclosure by the Appellant.

55. Whilst section 40 FOIA is an absolute exemption and there is no public interest test under the Act, the application of the data protection principles does involve striking a balance between the reasonable expectation of the data subject with general principles of accountability and transparency.[34]

56. In respect of the names of the staff members as the subjects of interviews, the Tribunal is satisfied that where a staff member has been directly attributed to information e.g. in the HCC report or the letter of 11th August 2006 it would not be

[34] *The Corporate Office of the House of Commons v IC and Norman Baker MP EA/2006/0015 and 16*

unfair to disclose their names in relation to that information under the Act, for the reasons set out in paras 46 & 47 above.

57. Where the name of a staff member is not directly attributable, but might be derived through a jigsaw of information, the Tribunal is also satisfied **on the facts of this case** that it would be fair to disclose that name because there were a limited number of individuals who had contact with the Appellant and who carried out assessments etc. They are named in the medical records which have already been disclosed, redaction therefore serves no further purpose. For example, reference to a nutritionist who wrote certain letters will inevitably lead back to the nutritionist whose letters have already been disclosed pursuant to the AHRA.

58. In relation to the specific comments and opinions as set out in Confidential Schedule 2 the Tribunal is satisfied that it would not be fair to disclose them. The identity of the maker of the statement and the subject of the statement cannot be redacted with the content remaining because they would remain identifiable from either the context or the subject matter. The Tribunal is satisfied that disclosure would cause some distress in the context of colleagues working in close proximity. The Tribunal also observes that a personal opinion would attract some sensitivity. In this case the disputed information goes beyond information directly concerning the individuals' employment or roles or the decision making process; it relates to personal evaluations and opinions, and although it concerns the individuals' employment (in the sense that it arose in the context of a complaint relating to a patient), it is not information so directly connected with their public role that its disclosure would automatically be fair[35].

59. The first data protection principle requires one of the conditions in Schedule 2 DPA to be met before disclosure can be made. Condition 6 provides*;*

> *(1)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.*

[35] *Ince v IC EA 2010 0089*

60. The Appellant has raised reasons why he says that the data is necessary for the purposes of the legitimate interests pursued by him and the wider public. These are rehearsed in his grounds of appeal, submissions and correspondence with the Commissioner and include:

    i. The NHSW investigation was flawed as it was entrusted to an inexperienced person who asked to be discharged and lacked the necessary forensic capacity. The information is therefore necessary to hold the NHSW to account.

    ii. The "flawed" NHSW investigation was used as the basis for the HCC review and once a history has been compiled it is routinely adopted as the truth.

    iii. Disclosure would further the debate as to the treatment of the elderly and the use of Haloperidol in NHSW hospitals.

    iv. Disclosure would demonstrate that the Appellant's Mother was unlawfully detained and inappropriately medicated.

    v. Disclosure would highlight NHSW and their employee's lack of compliance with professional Guidelines & Code requirements.

    vi. It would demonstrate how staff conflicts can diffuse/smother any conventional investigation, allowing patterns of endemic default and abuse to continue. (By this the Tribunal understands the Appellant to be referring to the conflict between the duty to the patient, professional obligations of good practice and the obligation to one's employer). The Appellant argues that staff are not frank in investigations and record keeping because they are acting in the interests of their employer).

61. Having regard to the redacted material as set out in confidential schedule 2 the Tribunal is satisfied that the information is not central to the complaint or the Appellant's Mother's experience in hospital and consequently its disclosure would not further any of the aims identified by the Appellant; and that its disclosure would constitute an unwarranted breach of the privacy of the data subjects.

Conclusion

62. For the reasons set out above, and in the confidential schedules, the Tribunal allows the appeal in relation to grounds i and v and finds that the disputed information was wrongly withheld under s 41 FOIA. The Tribunal does, however, find that some of the disputed information (as set out in Confidential Schedule 2) should have been withheld under s40 FOIA because disclosure would breach the 1st data protection principle.

Dated this 19th day of October 2011

Fiona Henderson

Judge

16th November 2011: Schedule 1 appended to the Decision following expiry of the 28 day period after which, as directed by the Substituted Decision Notice, the information with redactions made as specified in Confidential Schedule 2 was to be provided to the Complainant. (Schedule 2 will remain confidential.)

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2011/0055**
GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM:

Information Commissioner's Decision Notice No: FS50297286
Dated: 31 January 2011

Appellant: Mr C M Johnston

Respondent: Information Commissioner

Date of decision: 19TH October 2011

BEFORE:

Fiona Henderson (Judge)

Pieter De Waal

And

Jacqueline Blake

CONFIDENTIAL SCHEDULE 1

To remain confidential until after disclosure of the information so ordered.

1. This Schedule supports the reasons given in the open decision by reference to specific examples from within the disputed information. Because of its description of and reference to material which is currently withheld but which the Tribunal orders should be disclosed, this table should remain confidential until after disclosure of the information so ordered.

Paragraph 29 Open Decision

2. The Tribunal cites the meeting of July 3rd 2006 with the ward manager as an example of an interview where the interviewee is providing the Trust's information back to the Trust. Where the stated aim is:

   "to find out how Arden ward operates, criteria for admission etc."

   This information is purely administrative and not confidential. It expresses no opinion and provides background as to the nature and processes of the ward. It is the type of information that the Tribunal would expect to be provided to patients and their carers upon admission e.g. the type of patients that the ward caters for, how many staff, that the ward is GP led etc.

Paragraph 30 Open Decision

3. As stated in the open decision, in relation to the feedback interviews the Tribunal has had regard to the purpose of the meetings as stated on the face of the documents, e.g. the Meeting on 2nd November 2006:

   "The purpose of today's meeting was to provide the team with feedback and to instigate discussion and gain agreement as to who would take responsibility for implementing / considering the recommendations."

Investigating Officer's report

4. The Tribunal directs that the entirety of this document be disclosed save the sentence identified in confidential schedule 2.

   a) There are opinions expressed relating to the Appellant e.g:

   "Members of staff reported that every time he was on the ward, Mr Johnston tended to speak to members of staff on an individual basis and they needed a lot of spare time to speak to him"

   And

   "It was verbally reported that female staff felt intimidated and threatened by Mr Johnston and thought he might respond more appropriately to a male member of the team"

This has already been disclosed under DPA.

b) The names of the staff appear throughout the report e.g. those attending the meeting on 6.12.05. The names of the treating team are apparent from the medical notes, and, consequently the Tribunal does not consider it unfair to disclose them (notwithstanding that they are not generally of managerial rank) unless the specific content breaches the first data protection principle.

c) There are some attributed facts relating to the state of a member of staff's knowledge eg:
"Staff Nurse Stevenson did not know that the amplification device had been provided by Dr Church".[36]

This is not critical, it is factual, and it would not be unfair to disclose this.

The interviews between the investigator and individual staff members

5. The majority of the statement from Dr Campbell on 3rd July 2006 has been disclosed to the Appellant. It is not clear whether this was under FOIA, DPA or AHRA. The Tribunal notes that it has been redacted and because it is not specified why these redactions have been made considers each of the following excluded passages.

a) *"The reason Dr Campbell was asked to chair the meeting was because other staff members felt that they had not been able to explain the situation to Mr Johnston or find out details that they needed to know.*
Whilst Dr Campbell is giving his opinion as to why he was asked to chair the meeting, and he is recounting the feelings of his colleagues; the substance of his response has already been disclosed e.g. in the data protection disclosure, notes in the medical records and the minutes of the meetings at which he was present.

b) *Maggie asked if it was usual for Dr Campbell to chair meetings such as this and he replied no. Maggie asked if a home visit had already taken place at this point and Dr Campbell replied that* no*[37].*"

[36] P9

This extract relates to establishing the normal procedure for the chairing of a meeting. In relation to the home visit this is a documented fact and the answer is given already in the redacted document.

c) "*In hindsight Dr Campbell felt that Mr Johnston should have been informed about the purpose of the meeting beforehand"*
This has been disclosed and attributed in NHSW's letter of 11th August (p207 OB)

d) In the context of questioning whether Mr Johnston thought the references to 24 hour care meant care at home:
"whereas the medical team had meant Nursing Home." Dr Campbell replied "*that this may have been a possibility"*.
The substance of this is disclosed in NHSW letter 11th August at p 209 OB

e) *Maggie asked why this [the social worker did not address financial issues] had not happened and Dr Campbell said from memory there was not a social worker available or there had been a change of social worker.*
This has been disclosed in substance in the NHSW letter which states (p206 OB):
"It would appear that around this time there had been a change of social worker and one was not attached to Arden ward".

Interviews from the 2 Staff Nurses.

6. There are 2 staff nurses and it is not confirmed from disclosures already made which interview is which. Although the Appellant's knowledge of the case makes it likely that he can determine the interviewee, the Tribunal accepts that disclosure would add certainty. The Tribunal therefore considers that the names should not be redacted because although they are relatively junior in terms of their role, their identity and involvement (in terms of being one of those responsible for the Appellant's Mother) is already known. Any comments that it would be unfair to disclose can be redacted pursuant to data protection principles. Having had regard to the contents of the

[37] "no" has not been redacted.

statements, the Tribunal is satisfied that with the exception of the redaction set out in confidential schedule 2, there is no unfairness in attributing to them that which they have said. There are no assessments of colleagues or the Appellant; the information largely relates to the processes and procedures on the ward and is fact based.

7. The Tribunal cites as an example the references by Ms Stevenson that delay in holding first MDT was due to the Appellant's Mother:

   " attending out patients to see how the bones were knitting. There was no point in having a meeting without the full facts. There were also suggestions of dates/times Mr Johnston could not make so caused a delay."

   The information is either objective facts or describing processes which ought to be in the notes in any event.

8. An example of a comment relating to a colleague is:

   "*Maggie questioned for her own knowledge not only whether a home visit would have been more appropriate prior to the decision for 24 hour care being addressed but also if there is a misunderstanding about the term "24 hour care as the OT seemed to be suggesting both"*

   This is a question raised by the investigator not information from the interviewee, so there is no unfairness to Ms Stevenson. The fact that there was misunderstanding of 24 hour care is already disclosed in the NHSW letter of 11th August 2006. The new information is that it is the OT who thought it meant both. This is not a criticism or a judgment but the working definition of a clinical term used by an employee and hence disclosure would not be unfair.

9. An example is given of Ms Stevenson making a suggestion as to how to improve processes, she:

   "felt that one set of notes would be beneficial in helping communication between the team"

   In NHSW letter 11th August 2006 the issue is raised that for the hearing assessment to be acted upon would require the nursing staff to know that a report had been submitted, and to read it to pursue the recommendation as it is not

documented elsewhere; as is the fact that the MDT review of the Appellant's Mother's progress is not recorded in the medical notes. *"Communication is highlighted as an issue. The lack of clarification within the medical notes led to miscommunication..."*

10. Consequently the need for an improvement of the processes used on the ward is already disclosed. This suggestion is either part of her paid employment or already disclosed by inference. It is not a criticism of a colleague and the Tribunal does not consider that it has any personal ramifications. Therefore its disclosure is not unfair.

11. Similarly the interview of Staff nurse Jonas consists of facts and clarification of what terminology in notes (already disclosed) meant, although certain explanations are given e.g why was the patient not weighed *"because she was not mobilizing"*. The Tribunal is satisfied that this is not an opinion, but it is a clinical fact and consistent with the documented medical records and the ward processes and protocols. The Tribunal is satisfied that it would not be unfair to disclose this information

Interview of Dietician 13.7.06

12. The dietician's involvement is well documented in the notes and her interview is largely a repetition of that. To the extent that she might appear critical of a colleague e.g. the reference to Dr Campbell being on holiday and Dr Kennedy waiting for him to return, this is in the notes and has already been disclosed, and consequently it is not unfair to disclose it in these circumstances. Similarly in giving her opinion upon the new NICE guidelines, (frequency of weighing and helping to id those at risk) she is not critical of colleagues, and the Tribunal does not consider that disclosing a clinician's professional assessment of the National Standard for identifying those at risk would be unfair. Therefore with the exception of the redaction dealt with in confidential schedule 2, the Tribunal is satisfied that it would not be unfair to disclose this statement.

Interview with Social Worker 14.7.06

13. This interview names another professional, Gareth Bailey. He is a senior manager and the discussion she had with him should have been documented in the notes and therefore it is not unfair to disclose.

14. Additionally she gives her opinion as to whether the" *timing involved was appropriate in this case"*. This appears to be an assessment of her colleague's decision to refer the case, it is not critical, it is a professional judgment and there is no personal ramification.

Occupational Therapist

15. All the potentially sensitive comments relating to the Appellant have already been disclosed under the Data Protection Act. The rest of her interview consists of recounting the assessments from reports in medical notes, the procedures undergone and the professional methodology that went into preparing the assessment and the report.

Feedback meeting of 2nd November 2006

16. The Tribunal is satisfied that subject to the redactions referred to in the closed schedule, this document should be disclosed.

There is another reference to

"whilst Dr Campbell was on annual leave, Dr Kennedy felt it was more appropriate to wait for his return rather than intercept. This contributed to delays in further intervention.

This has been disclosed in the nutritionists notes which form part of the medical record and it would not therefore be unfair to disclose.

Dated this 19th day of October 2011

Fiona Henderson

Judge