



**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL
(INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF
INFORMATION ACT 2000**

APPEAL: EA/2011/0119

**On Appeal from:
The Information Commissioners
Decision Notice: FS50350093
Dated: 7 April 2011**

**Heard at Field House,
On 4th October 2011.**

**Decision Promulgated
30^h December 2011**

**Before
Brian Kennedy QC
And
Lay Members
Gareth Jones and John Randall**

B E T W E E N:

WILLIAM STEVENSON

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

-and-

NORTH LANCASHIRE PRIMARY CARE TRUST

Second Respondent

JUDGMENT

INTRODUCTION

1. This judgment relates to the Appellant's appeal against the Respondent's decision notice dated 7 April 2011 which related to a request for information made by the Appellant to the Second Respondent on 5 August 2010. By a majority this Tribunal refuses the appeal.

BACKGROUND

2. On 5 August 2010 the Appellant made the following request to the Second Respondent concerning correspondence between the Chief Executive of the Second Respondent and the Chief Executive of University Hospitals of Morecambe Bay NHS Trust ("the Trust"):

"This is a formal FoI request for an electronic copy (no paper letter requested or required in connection with this request) of the letter described as being dated 3.6.10 from Janet Soo-Chung (or possibly William Bingley) to Tony Halsall Chief Executive of UHMB NHS Trust concerning the meeting between Ms Soo-Chung and Mr Halsall which reportedly took place on 1.6.10. This meeting reportedly was arranged to discuss 'service issues at UHMB'. If there is a response to this letter from Mr Halsall or any other UHMB employee or director, I formally request an electronic copy of that as well."

3. The Second Respondent responded to this request on 3 September 2010. It stated that it held two letters falling within the scope of the request: one dated 3 June 2010 from the Second Respondent to the Trust, the other dated 14 June 2010 from the Trust to the Second Respondent.
4. The letter of 14 June 2010 was subsequently disclosed to the Appellant in redacted form, as its substance had been placed in the public domain (though not by the Second Respondent). There is some disagreement between the Respondent and the Second Respondent as to whether the disputed information that comprises this appeal still includes the letter dated 14 June 2010. The Respondent states that since it has been disclosed already, it no longer forms part of the disputed information. The Second Respondent, however, contends that the letter dated 14 June 2010 does form part of the disputed information on the basis that a significant amount of exempt information in the letter dated 14 June 2010 remains withheld. The Tribunal ruled that the letter dated 14 June 2010 in its redacted form, as already disclosed to the Appellant, no longer forms part of the disputed information.
5. In relation to the letter dated 3 June 2010 ("the disputed information"), the Second Respondent in its letter dated 3 September 2010, sought to rely on s. 31(1)(g) with s. 31(2)(j) FOIA, as well as s. 36 and s. 40(2) FOIA. On 17 September 2010, the Second Respondent informed the Appellant that it no longer wished to rely on s.36 FOIA, and that it had concluded that the public interest in maintaining the exemption at s. 31(1)(g) with s. 31(2)(j) FOIA outweighed that in disclosing the disputed information. It also continued to rely on s.40 FOIA. The Second Respondent maintained this position in its response

of 15 October 2010 to the Appellant's request for an internal review of its refusal to provide him with the disputed information.

6. The Appellant complained to the Respondent on 19 September and again on 21 October 2010 about the Second Respondent's refusal of his request for the disputed information.
7. The Respondent issued his decision notice on 7 April 2011. He found that s. 31(1)(g) with s. 31(2)(j) FOIA was engaged with respect to the disputed information because:
 - (i) The Second Respondent has a duty under s. 45(1) of the Health and Social Care (Community Health and Standards) Act 2003 to put and keep in place arrangements for the purposes of monitoring and improving of health care provided by the Trust to the Second Respondent. This constitutes a "function" for s. 31 purposes.
 - (ii) Disclosure of the disputed information would be likely to have an impact upon the voluntary supply of candid information, given that the disputed information was current at the time of the request, that the Second Respondent lacked the statutory power to compel the Trust to provide it with information, and that the Chief Executive of the Trust would not have expected the Second Respondent's letter to him to be disclosed.
 - (iii) This impact upon the voluntary supply of candid information would be likely (in the sense of there being a real and significant risk) adversely to affect the working relationship between the Second Respondent and the Trust, which in turn would be detrimental to the Second Respondent's ability to ensure that its patients receive the best care possible. Section 31(1)(g) with s. 31(2)(j) FOIA was therefore engaged.
8. The Respondent found that the public interest in the maintenance of this exemption outweighed that in disclosure of the exempted information:
 - (i) The Respondent gave weight to the public interest in promoting openness, transparency, accountability and public participation. He also gave weight – contrary to the Second Respondent's submission – to the value of the disputed information in showing whether or not the PCT was receiving value for money from the Trust.
 - (ii) As regards the impact of disclosure on the candid flow of information between the Second Respondent and the Trust, the Respondent gave particular weight to the fact that at the time of the request the disputed information was very recent and the matters raised therein were ongoing.
 - (iii) He gave little weight to the Second Respondent's argument that the disputed information could be taken out of context.
 - (iv) He gave weight to the Second Respondent's argument that disclosure would put unsubstantiated claims into the public domain: the purpose of letters such as the disputed information is to give bodies such as the Trust an opportunity to respond to and remedy any potential issues at an early stage.
9. The Respondent concluded that the Second Respondent had correctly applied s. 31 (1)(g) with s. 31(2)(j) FOIA in withholding the disputed information. He therefore did not need to consider s. 40(2) FOIA.

ANALYSIS

Engagement of the exemption

10. The Appellant does not challenge the Respondent's finding that the above exemption was engaged. For the avoidance of doubt, the Tribunal finds by a majority that this finding was correct, given the real risk of prejudice to the Second Respondent's exercise of its functions of monitoring and improving of health care services provided to it by the Trust. The minority view which takes a narrower interpretation of S31(1)(g) with S.31(2)(j), is expressed and set out in full later in this judgment.

Public interest in maintaining the exemption

11. The focus of the Appellant's appeal is that the Respondent gave insufficient weight to the public interest in disclosure of the disputed information. The Appellant only raises discrete and limited points of challenge to the Respondent's findings as to the public interest in maintaining the exemption.

12. First he contends that *by the time of the decision notice*, the disputed information was no longer very recent, and that there was consequently a lower public interest in its being withheld. The Respondent submits that this does not assist the Appellant's appeal since the relevant time for the assessment of the public interest is the *time of the request* (or the time of the handling of the request), not the time of the decision notice. The Respondent referred the Tribunal to *Mersey Tunnels User Assoc v IC & Halton Borough Council* (EA/2009/0001), where the Tribunal stated that "*having due regard to previous decisions of this Tribunal, we consider that the relevant time for the application of the public interest test is the time of the initial request and refusals by the public authority not the time when the Tribunal hears the appeal*". The Tribunal is persuaded by this authority and concludes that the relevant time for the assessment of the public interest is the time of the request, and, that the disputed information was very recent at the time of the request.

13. Second, the Appellant contends that the Respondent ought not to have considered the impact of *routine* disclosures of communications between Chief Executives, but only the impact of *this particular* information. The Respondent maintains that he was entitled to consider the "precedent value" of the disclosure of the disputed information. The Respondent referred the Tribunal to *Hemsley v IC* (EA/2005/0025) as an example of the concept of "precedent value". The Tribunal acknowledges the concept of "precedent value" and, in the particular circumstances of the disputed information, attaches weight to that concept. In particular, the Tribunal accepts that the Respondent was entitled to consider the "precedent value" and to attach weight to it as a legitimate / valid consideration.

14. Third, the Appellant took issue with the Respondent's observation that the Second Respondent was not statutorily empowered to *compel* the Trust to provide it with information. The Respondent submitted that the Appellant's

point is misconceived and that the crucial issue in this case is the impact of disclosure on the flow of candid information between Second Respondent and the Trust. The Respondent argues that that flow of information proceeds on a voluntary basis. Therefore, if the Trust's willingness to provide candid information (not only in letters, but in meetings such as that to which the disputed information refers) were damaged, then so would the Second Respondent's ability to discharge its function of monitoring and improving the health care services it commissions from the Trust.

Public interest in disclosure of the disputed information and balance of the public interest

15. The crux of the Appellant's case is that the Respondent ought to have found the public interest in disclosure of the disputed information to equal or outweigh that in the maintenance of the exemption.
16. He contends that, as its rankings in various assessments since 2006 illustrate, the Trust has consistently performed very poorly in recent years. In particular, the Appellant focuses on the performance of stroke care delivered by the Trust. He refers to the concerns expressed in the recent inquiries into the quality of health care in Mid Staffordshire, and to the fact that the Trust's application to become a Foundation Trust has been refused. He further contends that the Second Respondent is not in a sufficiently strong financial position to assist the Trusts from whom it commissions services should the need for such financial assistance arise.
17. The Respondent states that it is unable to assess the performance of the Trust or to comment on the Appellant's allegation that adverse publicity was "suppressed" or problems "kept quiet". The Tribunal agrees that any such issues relating to the assessment of the performance of the Trust are firmly outside the remit of the Respondent.
18. The Respondent contends that the public interest in disclosure of the disputed information does not equal or outweigh that in maintenance of the exemption for the following reasons.
19. First, the Respondent contends that it gave due weight in his decision notice to the public interest in openness, transparency and accountability and public participation in the relationship between the Second Respondent and the Trust.
20. Secondly, the Respondent contends that there are already mechanisms in place for the scrutiny of the Trust's performance and its relationship with the Second Respondent, including Care Quality Commission assessments and, where concerns are particularly acute, public inquiries.
21. Thirdly, the Appellant's case is premised on his belief that the disputed information will shed substantial light on his concerns about the Trust's performance – particularly as regards stroke care – and/or its relationship with the Second Respondent. The Respondent contends that the Appellant's arguments for the public interest in disclosure are general and speculative. The

Respondent contends that the particular information in dispute in this case does not shed light on the Appellant's concerns that is sufficient to equal or outweigh the public interest in the maintenance of the exemption.

CONCLUSION

22. The Tribunal agrees with the Respondent's submissions that the disputed information in the circumstances of this case does not shed light on the Appellant's concerns that is sufficient to equal or outweigh the public interest in the maintenance of the exemption.
23. Second the Tribunal attaches significant weight to the concept of the "precedent value" and the chilling effect that disclosure in this instance and on the particular facts in this case, would be likely to have on future communications between the Second Respondent and the Trust.
24. Third, the Tribunal attaches significant weight to the fact that there already exist mechanisms for scrutiny and assessment of the quality and performance of the Second Respondent and the Trust.
25. For the above reasons, the appeal is dismissed.
26. As stated above this is a majority decision and the minority view is now set out.
27. The minority lay member, John Randall, disagrees with the majority decision to support the Commissioner's view, expressed in his Decision Notice, that section 31(1)(g) with section 31(2)(j) is engaged. His reasons for dissenting are as follows.
28. Broadly, the purpose of section 31 is to exempt information if its disclosure would, or would be likely to, prejudice the law enforcement activities specified therein. Section 31 must be read with section 30. Section 30 provides an exemption for information held for the purposes of investigations and proceedings conducted by public authorities in, primarily, criminal matters. However, many public authorities have other law enforcement roles, which do not necessarily, or solely, involve criminal proceedings. Section 31(1) lists a number of specific matters, some of which are ancillary to the functions covered by section 30, and some of which (such as tax collection or the operation of immigration controls) are free standing law enforcement functions. The link between the two sections is made clear by the opening words of section 31: "*Information which is not exempt information by virtue of section 30 is exempt information if ...*" the requirements of section 31 are met.
29. Section 31(1)(g) is a general provision: "*the exercise by any public authority of its functions for any of the purposes specified in subsection (2)*". The purposes listed in section 31(2) relate not only to the activities specified in section 31(1), but also to investigations or civil proceedings provided for in section 30(2)(a)(iii) and (iv).

30. Between them, sections 30 and 31 provide a scheme of exemption, subject to the balance of public interest test, for information held for the purposes of criminal investigation and prosecution and for a range of other investigatory, regulatory and enforcement purposes provided for in a wide range of enactments. Section 30 is engaged if the information is held for the purposes of criminal investigation or prosecution. Section 31 is engaged only if a prejudice test is satisfied; essentially, if disclosure would, or would be likely to, prejudice investigation and subsequent enforcement activity.
31. The purposes specified in section 31(2) fall in to three broad categories. The first (s.31(2) (a) to (e)) comprises general investigatory activities relating to failure to comply with the law, improper conduct, regulatory action in pursuance of any enactment, fitness or competence in relation to regulated professions or as a company director, or the causes of accidents. The second category (s.31(2) (f) to (h)) is concerned with investigation or enforcement activities pursuant to the legislation governing charities. The third category (s.31(2) (i) and (j)) deals with health and safety.
32. Section 31(2)(i) is concerned with the health, safety and welfare of persons at work, and could well be engaged in relation to investigations relevant to the enforcement powers of a public authority such as the Health and Safety Executive.
33. Section 31(2)(j) is concerned with *“the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work”*.
34. In the view of the minority member, the purposes of the other elements of subsection 2 place section 31(2)(j) in its proper context. That context is, as the nature of the other elements, and the relationship to section 30 makes clear, law enforcement. Section 31(2)(j) might be engaged in relation to the investigatory functions of the Health and Safety Executive, the Air Accidents Investigations Branch, local authorities in relation to their responsibilities for shops and office premises to which the public has access, and similar functions of other public authorities. The purpose of section 31 as a whole is to safeguard a range of law enforcement activities from prejudice that would, or would be likely to, arise from disclosure of information. The overall purpose of section 31 is further indicated by the side heading *“Law enforcement”*.
35. It does not appear to the minority member that section 31 is intended to catch routine monitoring or quality assurance arrangements. It would only be if such activities gave rise to investigation with a view to law enforcement that it would be engaged. He is reinforced in his view by the separate provisions of section 33. These deal with audit functions and, like section 31, are subject to a prejudice test. Section 33(1)(a) deals with financial audit, and section 33 (1)(b) applies to functions relating to:

“the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.”

36. In paragraph 17 of his decision notice the Commissioner records that the Second Respondent explained that its relevant function, for the purpose of section 31(2)(j) is its duty, as commissioner of healthcare services, to oversee the safe and effective delivery of those services. In paragraph 18 of his decision notice the Commissioner said that he required the function identified by a public authority in relation to section 31(1)(g) to be a function which is specifically entrusted to the relevant public authority to fulfil. He noted the duty placed on NHS bodies by section 45(1) of the Health and Social Care (Community Health and Standards) Act 2003 to:

“put and keep in place arrangements for the purpose of monitoring and improving the quality of health care provided by and for that body”.

37. In the view of the minority member, neither the oversight of ‘safe and effective delivery’ of service, nor ‘monitoring and improving the quality of health care’ are law enforcement activities, of the sort caught by section 31. By contrast, it could be argued (although the Second Respondent did not do so) that these activities fall squarely within section 33(1)(b).
38. The minority member has reviewed carefully the content of the disputed information to consider if it relates to any responsibility that the Primary Care Trust may have for law enforcement in relation to the purpose specified in section 31(2)(j). The information is simply not of that genus. It deals with issues of performance, but there is nothing to suggest that any law enforcement activity was in contemplation. Accordingly, the minority member concludes that section 31(1)(g) with section 31(2)(j) is not engaged.
39. The question whether section 33(1)(b) might have been engaged is not before the Tribunal. The Appellant has had no opportunity to make submissions on the point. Given the presumption in favour of disclosure in section 1 of the Freedom of Information Act 2000 and the absence of submissions on the possible applicability of the exemption in section 33(1)(a), if section 31(1)(g) with section 31(2)(j) is not engaged, it is necessary for the Tribunal to consider only the application of the exemption at section 40(2), which was claimed by the Second Respondent, but not considered by the Commissioner.

B. Kennedy QC

Tribunal Judge

30th December 2011.



**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL
(INFORMATION RIGHTS) GENERAL REGULATORY CHAMBER**

Appeal No: EA/2011/0119

BETWEEN:

WILLIAM STEVENSON

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

NORTH LANCASHIRE PRIMARY CARE TRUST

Second Respondent

APPLICATION FOR PERMISSION TO APPEAL TO THE UPPER TRIBUNAL

INTRODUCTION

1. The Appellant on 27th January 2012 applied for permission to appeal the decision of the First-Tier Tribunal dated 30th December 2011 (“the decision”).
2. The relevant background is set out at paragraphs 1 – 9 of the decision and is not repeated here.
3. The Tribunal has carefully considered the Appellant’s application and his reasons for applying for permission to appeal. The Tribunal finds that the Appellant has

failed to identify any error of law. Therefore permission to appeal is refused. The Tribunal's reasons are set out below.

THE COMMISSIONER'S ROLE

4. The Respondent's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ("the Act").

THE TRIBUNAL'S ROLE

5. The Tribunal's role is supervisory. The Tribunal in its decision concluded that the Respondent, in performing its duty as set out at paragraph 4 above, correctly assessed the balance of the public interest.

APPLICANT'S APPEAL

6. The Applicant's grounds for permission to appeal are set out in his application dated 27th January 2012. In addition, the Appellant also provided the Tribunal with an appended document in support of his application.
7. The Appellant argues that "*the balance of the public interest has been incorrectly found, on the basis of the incomplete consideration of the available information*".

ANAYLSIS

8. The Tribunal finds that there were no errors of law in its decision. Nor does the Tribunal find that it would be in the interests of justice to allow the appeal.
9. The Tribunal finds that the reasons set out in the Appellant's application are largely similar to his grounds of appeal in relation to the Respondent's Decision Notice

- dated 7th April 2011, (“the DN”). In particular, the Tribunal finds that the Appellant’s reasons are premised on his belief that the disputed information will shed substantial light on his concerns about the Trust’s performance – particularly as regards stroke care – and/or its relationship with the Primary Care Trust (“PCT”). His arguments for the public interest in disclosure are general (i.e. they are not based on the particular contents of the disputed letter) and (understandably, given that the Appellant has not seen the letter) speculative (i.e. the Appellant has no basis for his belief that the letter sheds the sort of light with which he is interested/concerned). The Tribunal finds that the particular information in dispute in this case does not shed any light on the Appellant’s concerns that is sufficient to equal or outweigh the public interest in the maintenance of the exemption.
10. The Tribunal noted the Appellant’s concerns when reaching its decision dated 30th December 2011. The Tribunal emphasizes that it is unable to assess the performance of the Trust, or to comment on the allegation that the adverse publicity was “suppressed” or problems “kept quiet”. The Tribunal repeats its conclusion that the Appellant’s concerns do not suffice to disturb the conclusion as to the public interest reached by the Respondent in its DN.
 11. The Tribunal repeats its finding that the Respondent gave due weight in his DN to the public interest in openness, transparency, accountability and public participation in the relationship between the PCT and the Second Respondent Trust (“the Trust”).
 12. Further, the Tribunal finds that, as both the Appellant’s grounds of appeal and his reasons for permission to appeal illustrate, there are already mechanisms in place for the scrutiny of the Trust’s performance and its relationship with the PCT, including Care Quality Commission assessments and, where concerns are particularly acute, public inquiries.
 13. The Appellant in his reasons for this application for permission to appeal highlights paragraph 16 of the Tribunal’s decision wherein the Tribunal erroneously stated that the Trust’s application to become a foundation Trust had been refused. The Tribunal

is grateful to the Appellant for highlighting this error. The error arose due to the Tribunal mis-reading the Appellant's original grounds of appeal, namely the last two paragraphs on page 2 of his grounds of appeal. However, the Tribunal finds that this error in no way invalidates or changes its decision dated 29th December 2011.

CONCLUSION

14. For the above reasons, the Tribunal refuses permission to appeal.

Brian Kennedy QC

Tribunal Judge

7th February 2012