



**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
[INFORMATION RIGHTS]**

**Case No. EA/2011/0166**

**ON APPEAL FROM:**

**Information Commissioner's  
Decision Notice No: FS50312123  
Dated: 28<sup>th</sup> June 2011**

**BETWEEN:**

**MIKE WAITES**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

**and**

**NHS WAKEFIELD DISTRICT PRIMARY CARE TRUST**

**Second Respondent**

**On the papers**

**Date of decision: 23 January 2012**

**Before**

**CHRIS RYAN**

**(Judge)**

**and**

**HENRY FITZHUGH**

**GARETH JONES**

**Subject matter:**

**Inhibition of free and frank provision of advice s.36(2)(b)(i)  
Inhibition of free and frank exchange of views for purposes of  
deliberation s.36(2)(b)(ii)**

## DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

### REASONS FOR DECISION

#### Background to the Appeal

1. The Appeal arises out of the refusal by NHS Wakefield District Primary Care Trust ("Wakefield PCT") to disclose to the Appellant correspondence between the Wakefield PCT and NHS Yorkshire and Humber concerning plans to build a specialist centre for cancer and urology surgery at Dewsbury and District Hospital.
2. Proposals for such a development were published in August 2009 as part of a process of public consultation on the possible centralisation of certain specialist services at particular locations within the Mid Yorkshire area. The consultation was instigated by the Mid Yorkshire Hospitals NHS Trust ("MYHT") in collaboration with Wakefield PCT and the NHS Kirklees Primary Care Trust ("Kirklees PCT"). It proposed the creation of:
  - (a) A centre within Pinderfields Hospital, Wakefield for the treatment of neonatal intensive and high dependency care, in-patient surgery for children and in-patient orthopaedic trauma surgery; and
  - (b) A centre within Dewsbury and District Hospital for the treatment of patients needing kidney or bladder surgery or surgery for bowel or lower intestinal cancer.
3. The outcome of the consultation process was announced on 16<sup>th</sup> February 2010. A press release of that date recorded the agreement of Wakefield PCT, Kirklees PCT and MYHT to proceed with the development of

dedicated specialist centre for neonatal intensive and high dependency care and for children's in-patient surgery at the Wakefield location but to *"put on hold plans to build a new facility for a specialist urology and lower gastro-intestinal cancer surgery centre at Dewsbury and District Hospital."* The development of a specialist centre for orthopaedic trauma was also said not to be possible due to lack of space at Wakefield *"at least for the foreseeable future"*.

4. The request for information which has led to this appeal was made on the following day, 17<sup>th</sup> February 2010. It was refused and the refusal was upheld, following an internal review, on 15<sup>th</sup> April 2010. The basis of that refusal was that the information requested was exempt from the obligation of disclosure under section 1 of the Freedom of Information Act 2000 ("FOIA") by virtue of section 36(2), and that (invoking FOIA section 2(2)(b)) the public interest in maintaining that exemption outweighed the public interest in disclosure.

5. The relevant part of section 36 is as follows:

- (1) ...
- (2) *Information [held by a relevant public authority] is exempt information if in the reasonable opinion of a qualified person, disclosure of the information under this Act-*
  - (a) ...
  - (b) *would, or would be likely to, inhibit –*
    - (i) *the free and frank provision of advice, or*
    - (ii) *the free and frank exchange of views for the purpose of deliberation*
- (3) ...
- (4) *In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".*

The relevant part of section 2 is as follows:

- (1) ...
- (2) *In respect of any information which is exempt information by virtue of [various provisions including section 36], section 1(1)(b) [the obligation of a public authority to provide requested information] does not apply if or to the extent that –*
  - (a) ..., or

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

The Decision Notice against which the Appeal has been made

6. On 6<sup>th</sup> May 2010 the Appellant complained to the Information Commissioner about the refusal to disclose. The Information Commissioner investigated the complaint and issued a Decision Notice on 28<sup>th</sup> June 2011 in which he concluded that Wakefield PCT had been entitled to refuse to disclose the requested information. He decided that an opinion had been formed by Mr A Wittrick, the Chief Executive of Wakefield PCT, (who was the appropriate person to selected as a “qualified person” for the purpose of section 36), that disclosure would, or would be likely to, inhibit the free and frank provision of advice or the free and frank exchange of views for the purpose of deliberation. He decided, too, that the opinion was reasonable in substance and reasonably arrived at. Accordingly, the Information Commissioner concluded that the exemption was engaged. He then considered the public interest balance under FOIA section 2 and concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.

The Appeal

7. On 25<sup>th</sup> July 2011 the Appellant launched an appeal from that decision. On such an appeal the Tribunal must consider whether or not the Information Commissioner’s decision was “in accordance with the law” (FOIA section 58(1)). If it considers that it was not it may issue such other notice as it considers appropriate, in substitution for the Decision Notice. The Tribunal may review any finding of fact on which the Decision Notice was based.
8. Wakefield PCT was joined as a Second Respondent but chose not to play an active role in the Appeal. The Parties agreed that the Appeal should be

determined on the papers, without a hearing, and we consider it appropriate to have dealt with it in that way. We have therefore based our decision on an agreed bundle of documents and written submissions from the Information Commissioner (the Appellant and Wakefield PCT having waived their right to lodge any). We were also provided with copies of the documents containing the information which Wakefield PCT had refused to disclose.

9. The Appellant's Grounds of Appeal raised a number of issues, which we will deal with in turn.

First Ground of Appeal - The Information Commissioner was wrong to decide that the section 36(2) exemption had been engaged

10. The Appellant did not dispute that Mr Wittrick was the appropriate qualified person. However, he established from the Decision Notice that Wakefield PCT first informed the Information Commissioner that the opinion had been formed in the course of a meeting in March 2010 between Mr Wittrick and two colleagues. At that stage the Information Commissioner was not told the date of the meeting or the substance of all the arguments taken into account to enable Mr Wittrick to form his opinion. Neither was it made clear to the Information Commissioner whether Mr Wittrick had been provided with any of the information to which his opinion was said to apply. The Information Commissioner was forced to determine both the fact that an opinion had been formed, and that it satisfied the reasonableness test, from a letter written to the Appellant by Wakefield PCT at the time. The letter was written by Mr Wittrick himself in response to the original request and was dated 17<sup>th</sup> March 2010. Although it made no specific reference to an opinion it did record the writer's conclusion in the following terms:

*"Section 36 of the Freedom of Information Act allows an exemption if releasing the information 'would or would be likely to inhibit the free and frank provision of advice , or the free and frank exchange of views for purpose of deliberation'.*

*"While I support the public's interest in transparency accountability and participation, I believe that to release the information at this*

*stage of the deliberations would indeed inhibit effective debate and on balance would outweigh the public interest test. I am therefore unable to provide the information you have requested.”*

11. On the basis of that letter, written by the person who constituted the qualified person for the purpose of section 36, the Information Commissioner was willing to accept that the opinion recorded in it had been formed by the qualified person at the relevant time.
12. The Appellant criticised the Information Commissioner’s conclusion because, he said, there was no audit trail or other evidence to show how the refusal decision was taken. He asserted that Wakefield PCT had not discharged the burden on it of showing why the qualified person reached the decision he did.
13. We remind ourselves that section 36 does not impose any formal requirement on a public authority seeking to rely on a qualified person’s reasonable opinion. The absence of what the Appellant has referred to as an “audit trail” did not prevent the Information Commissioner from concluding that the opinion had been formed at the relevant time and we believe that he was justified in adopting that approach. We believe that he had sufficient evidence to reach the conclusion he did. The very fact that Mr Wittrick articulated in his letter a view as to the perceived impact of disclosure demonstrated that he had formed that opinion by the date of refusal.
14. The Appellant also challenges the Information Commissioner’s conclusion that the qualified person’s opinion was a reasonable one. In part his criticism stems again from the perceived lack of documentation which, he says, demonstrates that Wakefield PCT had failed to show why Mr Wittrick reached the decision that he did and that it was reasonably arrived at. We reject that criticism. The letter of 17<sup>th</sup> March 2010 established both the existence and the substance of the opinion. And, having inspected the withheld information, we are satisfied that it was reasonable to conclude that its disclosure at the time (the outcome of the internal review

supporting the original refusal was sent to the Appellant on 15<sup>th</sup> April 2010, just two months after the outcome of the consultation had been published) would have had the detrimental impact set out in FOIA section 36.

15. It is part of the Appellant's case on this point that a final decision had been reached and that no weight should be given to Wakefield PCT's claim that the plans for the Dewsbury unit had been shelved and not abandoned forever. We think that the public statement made at the time was clear on this point: the plans were to be discussed further. That conclusion is supported by the content of the withheld information. We consider that the Information Commissioner was therefore right to assess the potential inhibition on free and frank advice or debate in the context of future deliberations on the same subject matter.

16. We therefore conclude that the exemption relied on was engaged.

Second Ground of Appeal - the Information Commissioner was wrong to conclude that the public interest in maintaining the exemption outweighed the public interest in disclosure.

17. In reaching his conclusion on this issue the Information Commissioner balanced a number of factors. On the one hand he recognised the public interest in transparency of public authority decision making and in the public being provided with information to enable it to participate in a debate affecting public health plans within the region. On the other, he considered the effect of premature disclosure on the future willingness of officials to provide frank advice, and to participate in robust discussion. He did not place great weight on such a "chilling" effect in general: he thought officials ought to be sufficiently resilient to continue doing their job properly, even if the record of a previous set of discussions had been disclosed. However, on the facts of this particular case, he concluded that he should give significant weight to the timing of the request and the

impact disclosure would have on the openness of discussions on future plans affecting the same hospitals.

18. The Appellant has argued forcefully that the public interest in the decision not to make further investment at Dewsbury hospital was overwhelming. He pointed out that the public had been invited to make its views known during a public consultation but had then been denied the right to know what factors lay behind a decision about health services affecting more than 500,000 people in the area.
19. Our conclusion is that, despite the power of the Appellant's argument, disclosure so soon after the February 2010 announcement would have placed a considerable constraint on future discussions on the same subject matter. As mentioned above, we do not accept that the decision brought to an end any further discussion on those parts of the original plan that were not being taken forward. Some reasonable period of time should therefore be left to the decision-makers to consider and debate all available options without concern about the premature disclosure of the records of such debate. Accordingly, the public interest in maintaining the exemption outweighed the public interest in disclosure.

Third Ground of Appeal - the Information Commissioner should have decided that the withheld information contained facts and/or statistics that should have been disclosed, even if the rest of the information could be withheld.

20. We can deal with this point very shortly because it was clear to us from our inspection of the withheld information that the very limited quantity of factual or statistical data contained in it could not be extracted without it losing all meaning. Accordingly, we do not need to consider whether or not the Appellant might have had a right to such data, separated from the rest of the withheld information.



Conclusion

21. In light of the above we have concluded, unanimously, that the Information Commissioner was right to conclude that the public authority had been entitled to refuse the request for information. The Appeal should therefore be dismissed.

Signed:

**Christopher Ryan**

Tribunal Judge

Dated: 23 January 2012