



**IN THE FIRST-TIER TRIBUNAL Case Nos: EA/2011/0261 & EA/2011/0303**  
**GENERAL REGULATORY CHAMBER**  
**INFORMATION RIGHTS**

**ON APPEAL FROM:**

**The Information Commissioner's  
Decision Notices No: FS50391625 and FS50406747  
Dated: (respectively) 10 October 2011 and 23 November 2011**

**Appellant: LORD DUNBOYNE**

**Respondent: INFORMATION COMMISSIONER**

**Second Respondent: CENTRAL & NORTH WEST LONDON  
NHS FOUNDATION TRUST**

**Third Respondent: CHELSEA & WESTMINSTER HOSPITAL  
FOUNDATION TRUST**

**Heard at: Competition Commission**

**Date of hearing: 20 February 2012**

**Date of decision: 15 March 2012**

**Before**

**Robin Callender Smith**  
Judge

**Paul Taylor and Nigel Watson**  
Tribunal Members

**Attendances:**

For the Appellant: Lord Dunboyne (in person)  
For the Respondent: James Cornwell, Counsel for first Respondent  
For the Second and Third Respondents: Eleanor Grey QC, Counsel for Second and Third Respondents

**IN THE FIRST-TIER TRIBUNAL** Case Nos: EA/2011/0261 & EA/2011/0303  
**GENERAL REGULATORY CHAMBER**  
**INFORMATION RIGHTS**

**Subject matter:**

**FOIA**

Whether information held s.1

Absolute exemptions

- Personal Data s.40
- Confidential information s.41
- Prohibitions on disclosure s.44

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**GENERAL REGULATORY CHAMBER**  
**INFORMATION RIGHTS**

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal dismisses the appeals.

## **REASONS FOR DECISION**

### Introduction

1. The background circumstances to these two appeals relate to the tragic death of the Appellant's daughter on 28 April 2006 when she was an inpatient of the Chelsea & Westminster Hospital (the Third Respondent), a hospital for which the Second Respondent is responsible.
2. Ms Genevieve Butler fell to her death from the fourth floor, outside the Edgar Horn Ward at the hospital, at around 19:00 hours on the evening in question as the process for her to be discharged from hospital was being completed.
3. There was an inquest into the circumstances of Ms Butler's death and the Deputy Coroner recorded a narrative verdict on 20 September 2007. That recorded that Ms Butler died of multiple injuries.
4. In the first appeal (in time) the Appellant wants information about the disciplinary records of "Nurse B", a mental health nurse employed by the Second Respondent. In the second appeal his request has been for the "Root Cause Analysis" relating to the death of his daughter or the surrounding circumstances.
5. At the appeal hearing itself the Appellant indicated that he wished to deal with the Root Cause Analysis issues first and the information in relation to Nurse B second. The appeal hearing was conducted to accommodate this.

### The requests for information

6. On 21 November 2010 the Appellant asked the Second Respondent for access to information relating to any personnel or disciplinary records of Nurse B in the following terms:

The CNWL Report and Action Plan contained two recommendations relating to disciplinary action against [Nurse B]. *The Panel recommended that the Trust should address the matter of the inadequate mental health and risk assessment that was carried out by Nurse B under their own internal management procedures and the panel further recommend that the Trust should investigate further under their own internal management procedures the decision by Nurse B to destroy the contemporaneous records on the assessment of GB.* Please advise me of the date of these proceedings, the findings, the date of the judgement and the sanctions imposed.

7. The Appellant knew of the recommendations contained in a report commissioned by the Second Respondent – the *Report of the Clinical Review Panel into the Care and Treatment of GB* – because he had been sent a copy as her father. The report had not been placed in the public domain by either the Second or the Third Respondents. The recommendations in respect of Nurse B were not general public knowledge.
8. On 10 December 2010 the Second Respondent refused to confirm or deny whether or not disciplinary action had been taken against Nurse B or to supply further information in response to the request and upheld its decision on review.
9. On 6 April 2011 the Appellant wrote to the second Respondent and requested a Root Cause Analysis in respect of the death of his daughter. On 12 May 2011 the Second Respondent wrote to him and said that no separate Root Cause Analysis was held.
10. There was an internal review after which the Second Respondent wrote to the Appellant on 16 September 2011 explaining that the Root Cause information was incorporated into a report already completed in November 2006. That report had already been disclosed to the Appellant. It indicated that no further information which could constitute a Root Cause Analysis was held.

## The complaint to the Information Commissioner

11. In respect of the first Appeal (in time) the Information Commissioner (IC) considered the application by the Second Respondent of s. 40 (5) (b) (i) of FOIA in terms of confirming or denying whether third party personal data was held, particularly if – in doing so – the confirmation or denial would breach any of the data protection principles. The IC considered the requested information – if held – would amount to personal data of the named nurse.
12. The IC had gone on to consider whether it would breach any of the data protection principles to confirm or deny whether the requested information was held. In particular he had examined the issue of fairness and whether to confirm or deny whether the information was held would be fair.
13. In terms of the likely expectations of the data subject, the named nurse's anonymity had been preserved in the case review panel report. The IC did not consider that the report was publicly available. The Second Respondent maintained that the named nurse had an expectation that employment records would remain confidential. Its policies and procedures ensured that access to employment information was restricted. Internal records of performance and disciplinary matters could be accessed solely on a "need to know" basis. The named nurse had a legitimate expectation that internal disciplinary matters of an individual would remain private in line with *Waugh v Doncaster College* EA/2008/0038.
14. Although the Appellant was aware of the identity of the named nurse that did not mean the case review panel report was in the public domain. The IC considered that the named nurse would not expect the existence of internal disciplinary proceedings to be disclosed into the public domain.

15. The IC considered that confirming or denying whether the information relating to internal disciplinary proceedings were held by the Second Respondent would cause damage and distress to the named nurse.
16. The Second Respondent had acknowledged that there was a legitimate public interest in knowing that NHS professionals were fit to practice. Apart from its own internal disciplinary code there was the professional registration body for nurses, the Nursing and Midwifery Council (NMC). The IC was aware that if the Second Respondent was unable to deal with an issue through internal disciplinary procedures then, as an employer, it was under a duty to refer the case to the NMC. If an NMC case went to the stage of a public hearing then the existence of the case, the name of the nurse along with the other information relating to the case would be made public at that stage. The IC did not consider therefore that there was a legitimate public interest in knowing whether internal disciplinary proceedings had or had not taken place prior to any such public hearing.
17. On that basis the IC considered that the Second Respondent was correct to neither confirm nor deny whether the requested information was held.
18. In terms of the second appeal the IC decided that the Second Respondent had provided the Appellant with its November 2006 report and that that incorporated the root cause information. No further information was held by the Second Respondent which could fall within the scope of the request.
19. The Second Respondent had stated that the root cause analysis was never drafted. The root cause information was incorporated into a report completed in November 2006 which had been provided to the Appellant. A copy had been provided to the IC. The Second Respondent had explained that section 12 – the “*Incident Decision Tree*” – contained an analysis of the case. The Second Respondent had stated that the panel concluded that no one individual was responsible for the incident. Its own investigation dated January 2009, although not a root cause analysis, was

the most exhaustive review of the care and treatment of a patient that had been undertaken. It had provided a copy of the 2009 report to the IC and the Appellant.

20. The IC considered that, on the balance of probabilities, there was no further information held by the Second Respondent relevant to the scope of the request.

#### The appeal to the Tribunal

21. The Appellant provided a substantial amount of material for the Tribunal to consider, some of it on CD, and produced on the day of the appeal hearing a statement dated 19 February 2012 made by a former non-executive director of the Second Respondent, Mr Andrew Corbett-Nolan. That witness had been in South Africa at the time of making the informal witness statement. None of the Respondents objected to it being introduced by the Appellant.
22. The Tribunal considered it in the context of the significant amount of hearsay evidence it contained, the fact that the statement was prepared without the maker being able to refer to any original documentation – because he had properly destroyed all relevant paperwork on terminating his office – and the fact that the Respondents and the Tribunal itself could not test the evidence in his absence.
23. Shortly before the appeal hearing the Tribunal was aware a decision had been published on 8 February 2012 that might have had a bearing on the additional arguments that might be offered on s.40 FOIA issues – *Cobain v IC and CPS EA/2011/112 and 113* – and invited all parties to make written submissions having considered that decision.
24. All did so and, in the event, the Tribunal did not find that the issues in that appeal had any direct relevance to the issues being considered in these appeals because of the peculiar and particular facts in relation to the



Cobain decision (which related to the CPS decision to prosecute Mr Nick Griffin, the leader of the British National Party, and whether sensitive personal data relating to him could be made public).

25. The Appellant believed that the IC's Decision Notice in the second appeal did not summarise the facts of the case accurately. He felt that the IC should have established "beyond reasonable doubt" that no further information existed in relation to the Root Cause Analysis. During the course of the appeal he agreed that the IC had established that it did not exist "on the balance of probabilities" but maintained that the IC should have gone further in his endeavours.

26. In relation to the issues in the first appeal the substance of the Appellant's argument was that, when looking at the factors that had to be weighed and balanced in terms of s. 40 FOIA – and issues in relation to the data subject's data – there was a distinction to be drawn between information concerning an individual's private life and information concerning that individual's public duties.

27. Particularly in cases involving medicine, nursing and medical issues he believed it was in the public interest to have greater scrutiny and publication of the personal data of those who were medically qualified – when their actions were being questioned or investigated – to stop FOIA (and issues within the Data Protection Act 1998) being used as a shield behind which individuals and organisations could hide.

### Conclusion and remedy

28. Firstly, dealing with the issue in the second appeal – the existence of any additional information held in relation to a Root Cause Analysis - the Tribunal has no difficulty in concluding that there is no further information being held on this topic. There is no reason to doubt the bona fides of the Second and Third Respondents on this point given the information already provided to the Appellant; the IC used the correct test – the balance of probabilities – and that is the same test used in this appeal by the Tribunal itself.

29. The issues in the first appeal fall to be decided within the carefully drafted framework of s.40 FOIA and the cross-referencing to the Data Protection Act 1998 Principles.
30. The key Principle in this area is Principle 1. This requires that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met. Condition 6 of Schedule 2 states:
- The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or third 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
31. S.40 (2) FOIA establishes an absolute exemption. This was confirmed and emphasised at Paragraph 33 of *Waugh v Information Commissioner and Doncaster College EA/2008/0038*:
- ....This meant there was no requirement to apply the public interest balancing test under section 2 (2) FOIA. The only question of law was whether disclosure of the personal data would contravene any of the data protection principles. If the disclosure of the information would be unfair and contrary to the first data protection principle, it was exempt from disclosure under s.40 (2) FOIA read together with s.40 (3) (a) (i) and/or s.40 (3) (b).
32. The Tribunal has – and will continue to – recognise the strong expectation of staff members that disciplinary matters are personal and to be kept private. Nothing in the factual matrix of this individual appeal case leads the Tribunal to consider departing from that approach.
33. The Tribunal notes that the Appellant is properly using a complaint to the regulatory structure embodied in the Nursing and Midwifery Council (NMC) in respect of Nurse B. An investigation in respect of that is on-going. He has also referred the matter to the police for investigation.
34. The Tribunal is satisfied that – in terms of this appeal – Nurse B has a reasonable expectation that any disciplinary records (if they exist) will be kept private.

35. For all these reasons, these appeals for the requested information must fail.

36. Our decision is unanimous.

Robin Callender Smith

Judge

16 March 2012