Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0116
Information Commissioner's Ref: FS50150404

Heard at Field House, London, EC4
On 4th & 7th March 2008

Decision Promulgated
14th March 2008

BEFORE

CHAIRWOMAN

Melanie Carter

and

LAY MEMBERS

Dr Henry Fitzhugh

Rosalind Tatam

Between

HEALTH PROFESSIONS COUNCIL

Appellant

and

INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: William Hoskins
For the Respondent: Elisa Holmes

Decision

The Tribunal upholds the Information Notice dated 1 October 2007 and dismisses the appeal.

Reasons for Decision

Introduction

1. This appeal arises from an Information Notice issued by the Information Commissioner to the Health Professions Council (HPC) on the 1 October 2007. The Information Notice related to an information request under the Freedom of Information Act 2000 (FOIA) by Ms Sue Lee in a letter dated 1 January 2007. That request was refused by the HPC and Ms Lee applied to the Information Commissioner under section 50 of the FOIA. As part of the Information Commissioner's investigation, he issued an Information Notice requesting sight of the disputed information which the HPC had refused to disclose to Ms. Lee. The HPC has appealed the Information Notice under section 57(2) of FOIA.

2. The Tribunal noted that the investigation of Ms Lee's section 50 application has been put on hold pending the determination of this appeal. Hence there is still no resolution of her request for information under FOIA made in January 2007. For this reason the Tribunal had sought to expedite the hearing of this appeal and was grateful to the parties for their observance of what was a relatively tight timescale for bringing the case to hearing. The Tribunal did not call for the disputed information as it was of the view that this case should be decided without regard to the subject matter of the request or the correctness or otherwise of the exemptions claimed.

Background

3. The HPC is established under the Health Professions Order 2001 (the 2001 Order) and has responsibility for the regulation of 13 different types of health professionals. Its main functions are set out at article 3(2) of the 2001 Order as:

"…to establish from time to time standards of education, training, conduct and performance for members of the relevant professions and to ensure the maintenance of those standards."

The main objective in exercising its functions is *"to safeguard the health and well-being of persons using or needing the services of registrants."*

4. The HPC's functions include the maintenance of a register of health professionals and a mechanism, called the Fitness to Practise process (the Process) whereby the conduct and performance of registrants may be investigated and called to account. An adverse adjudication on a registrant's fitness to practise may lead to, amongst other things, a registrant being removed from the register (such that they could not work in their chosen profession) or conditions being attached to the performance of their profession.

5. Members of the public, employers etc. may make allegations to the HPC with regard to the fitness to practise of particular registrants. Such cases are investigated by the HPC and as a preliminary step in the Process a decision will be taken by a Panel of the Investigating Committee (the Investigating Committee) whether there is 'a case to answer'. Where it is decided that there is not, that will be the end of the case against the registrant. Where the Investigating Committee decides there is case to answer this is referred to a different Committee for a full hearing.

The original request for information

6. Ms. Lee made an allegation to the HPC that a particular registrant's fitness to practise was impaired. This was investigated and papers duly put before the Investigating Committee. The Committee decided that there was no case to answer. Ms. Lee, who was unhappy with this decision, then made a FOIA request in relation to the papers that were put to the Investigating Committee. This was refused by the HPC on the grounds that certain exemptions applied, namely sections 30 (investigations and proceedings conducted by public authorities), 40 (personal data) and 41 (confidentiality).

The application to the Information Commissioner

7. Ms. Lee then made an application under section 50 of FOIA for a decision by the Information Commissioner as to her whether request had been dealt with in accordance with law. As part of his investigation, the Information Commissioner sought to be provided with the disputed information which had not been provided to Ms. Lee. Initially he sought this without recourse to the issuing of an Information Notice. The HPC resisted on the basis that, absent a formal Information Notice, it did not have the power to disclose the information.

8. The HPC set out its concerns in correspondence over the months of July to September 2007 as to the potential damage to the Process were registrants to be aware that information had been passed to the Information Commissioner.

9. The Information Notice was issued on 1 October 2007 and the HPC filed a Notification of Appeal against the Notice on 29 October 2007.

The appeal to the Tribunal

10. The HPC's grounds of appeal have been refined during the course of the proceedings and certain have been dropped. Counsel for the HPC at the hearing set out the appeal on the grounds that the Information Commissioner had either (a) erred in exercising his discretion to issue an Information Notice and/or (b) the Information Notice was not in accordance with the law on the basis that the Commissioner had failed to have regard to relevant matters, namely the way in which the Process would be undermined as a result of the Notice. It was argued that, as registrants believed that the information they provided to HPC at the 'case to answer' stage was confidential, the effect of the Information Notice would be to discourage the provision of information at this early stage, for fear of disclosure to the Commissioner and onward disclosure by the Commissioner to the public. Counsel for the HPC accepted at the hearing that the two grounds of appeal were, for practical purposes, identical.

The questions for the Tribunal

11. The Tribunal considered:

a. whether the net effect of:

   i. the practises and procedures of the Information Commissioner; and

   ii. the prohibition against disclosure under section 59 of the Data Protection Act 1998 (DPA),

   was a sufficient guarantee of the Information Commissioner keeping the disclosed information confidential to negate or at least substantially reduce the perceived fears of registrants and therefore the purported damage to the Process;

b. whether, in the light of the above, the purported damage to the Process was, as argued, sufficiently serious to mean that the Information Commissioner ought to have exercised his discretion differently and not to have issued the Information Notice;

c. whether the Information Commissioner had failed to take into account relevant considerations, namely the potential damage to the Process in the exercise of his discretion.

Evidence

12. The Tribunal heard evidence from Mr Jonathan Bracken from Bircham Dyson Bell, solicitors for the HPC. Mr Bracken has been involved in the setting up of the HPC, had advised on many of its processes and drafted its rules.

13. Mr Bracken explained to the Tribunal that the HPC had moved away from a punitive disciplinary scheme and had put in its place the Fitness to Practise regime, common to many health profession regulators. The HPC seeks to strike a balance between the regulator's primary function of public protection and having non-punitive methods of addressing concerns about the competence and conduct of registrants.

14. The Process is in two stages. The first is to investigate the allegation, including taking statements where appropriate. The investigation papers are put before the Investigating Committee which decides in a private meeting, whether there is a

case for the registrant to answer. If so, the allegation is publicised and the matter goes forward to either a Conduct and Competence or Health Committee hearing which is normally held in public. If it is decided that there is no case to answer, the papers are 'sealed' and kept confidential. They are retained however for three years should a further similar matter come to light.

15. The test to be applied by the Investigating Committee in the first stage of the Process is whether there is a case to answer that the fitness to practise of the registrant is impaired by reason of one of several specified grounds (e.g.: misconduct, lack of competence, ill health etc.). As this test is expressed in the present tense (vis "is impaired") the Committee is looking for evidence of the registrant's current and possibly future conduct and competence.

16. Mr Bracken explained that the Process had been designed to promote the maximum level of frankness from those providing information at this stage. In practise, registrants provide a wide range of information that would not have been provided under the old model of a disciplinary regime (in which registrants keep back their mitigating evidence until a finding of breach). This information often involves expressions of regret, apologies or private matters as to health and relationships etc. The HPC's aim is, in appropriate cases, to avoid striking from the register those registrants who, perhaps with remedial help, could properly remain in service - hence the non-punitive approach.

17. Mr Bracken gave evidence that it was his belief that registrants were only prepared to give this wider range of information to the HPC, as they received assurances of confidentiality and understood that their information would not be made public. He was concerned that were registrants and others to be aware of the possibility of disclosure to the Information Commissioner and then possible further disclosure to the public (including the original complainant), that this source of information would be undermined. He felt that this would have a major negative impact on the HPC's ability to carry out its functions and therefore the protection of the public.

18. The Tribunal asked Mr Bracken to point out any documentary evidence of the confidentiality assurances given. It appeared however that HPC officials gave these over the telephone (see, however, paragraph 22). The Investigation Manual

provided to the Tribunal and the standard letters did not reflect this practise. Indeed, the standard letter to registrants subject to a complaint states that *"any representation you make may also be sent to the person who made the allegation against you (to clarify any points raised) and you should bear this in mind in preparing your response"*. Mr Bracken felt that this was perhaps not as well worded as it might be and that in reality it rarely happens that information from a registrant is sent to a complainant (and if information is sent it is restricted to a selection of the information provided). He pointed out that as a matter of law, the HPC was not obliged to share this information with a complainant.

19. It was his evidence that where the Investigating Committee found a case to answer, registrants would understand that they would have a choice whether anything they said to date would be passed on to the next stage. That way, the registrant was given the maximum opportunity for frankness at the early stage without any prejudice to a final fitness to practise determination. Mr Bracken confirmed that this assurance was again given over the telephone and was, as far as he was aware, not reflected in the HPC standard documentation.

20. Mr Neil Willis, a Biomedical Scientist, registrant and Council member, gave evidence with regard to registrants' perceptions and the possible fears they would have if the Information Notice was to be upheld. He said that he would be reluctant to provide detailed personal information if he believed it may be handed over to a third party or made public. This was especially since, if the complaint proceeded, he would be offered the chance to decide what information went forward to the full hearing. He was particularly concerned at the possibility of disclosure of witness information to the public and possible embarrassment for the registrant's colleagues. Mr Willis' evidence supported Mr Bracken's but as he had never had an allegation actually made against him he was unable to help on how and in what terms assurances of confidentiality were given to registrants.

21. Finally, the Tribunal heard from Ms Kelly Johnson, the Director of Fitness to Practise. Ms Johnson pointed out that the complainant may be contacted during the investigation to clarify specific points of fact arising from the registrant's observations. The observations themselves were not provided to the registrant.

She told the Tribunal that the standard letter referred to at paragraph 18 above was a “carry-over” from an old letter and not in line with the HPC’s current procedures.

22. It was Ms Johnson’s evidence that not all registrants would in fact contact the HPC by phone and she accepted that given this, not all registrants would have been given an assurance as to the confidentiality of the information provided.

23. Ms Johnson was asked why, if the confidentiality of the registrants’ information was considered so important by the HPC, their guidance and standard documentation did not reflect this. She responded that their practice and procedure guidance were living documents and in certain respects in need of revision. She was of the view however that given that the Investigating Committee decision was made in private, a matter made clear to all registrants in their leaflets and letters, they would assume from this that their information would be treated confidentially.

24. Finally, she told the Tribunal that there was a theoretical possibility that fitness to practise information at this early stage could be shared with the competent authorities of other European Union states. In addition, circumstances could arise in which the HPC gave the police a registrant’s information prior to a no case to answer determination. Registrants were not warned of these possible public interest disclosures.

25. The real concern, she said, was the disclosure to the public that may follow a disclosure to the Information Commissioner. In particular, registrants would fear that complainants would thereby have access to the information. The examples given were where the registrant had raised physical or mental health or relationship issues. She accepted however that this information would likely all be personal data such that the Information Commissioner would not be free, on account of the DPA, to make disclosure to third parties.

26. In the light of this Ms. Johnson further accepted that, given the possible applicable exemptions, the Information Commissioner’s own policies on non-disclosure and the operation of section 59 DPA, the registrants’ fears might be said to be misplaced or exaggerated.

27. She was asked as to the possible implications of the damage to the Process. She felt that there would be a significant rise in the number of cases where the Investigating Committee found there to be a case to answer. This would in turn place an additional cost on the HPC and as a consequence push up its registration fee. She pointed also to the hardship that a registrant may face where it became public that there had been an allegation made against him or her in circumstances in which there was in fact no case to answer. She accepted however that it was in the registrant's self-interest to be open with the HPC at this early stage as this might be said to be the best way of ensuring that the matter went no further and did not become public.

Legal submissions and analysis: HPC

28. Counsel for the HPC argued that the Council was under a duty of confidence owed to the registrant, arising from the nature of the relationship. He took the Tribunal through the relevant powers and duties of the HPC to substantiate his assertion that there was nothing in the Order which obliged disclosure at this early stage. He did acknowledge however that article 22(10) of the Order provided:

> *"The Council may disclose to any person any information relating to a person's fitness to practise which it considers to be in the public interest to disclose".*

29. This reflected the so-called 'public interest disclosures' that would fall within a public interest defence to a claim of breach of confidence. So, for instance, the HPC was unlikely to be in breach of a duty of confidence if it disclosed a child protection matter to the police or social services.

30. It was argued by the HPC that the Information Commissioner failed to take into account the way in which the Process would be undermined if registrants were aware of the possible disclosure to the Commissioner. Counsel took the Tribunal to a letter dated 31st August 2007 from the Information Commissioner's Office to the HPC to evidence that the Commissioner had failed to take into account the possible damage that would ensue from disclosure to the Commissioner himself rather than the damage that might flow from onwards disclosure to the public by the Commissioner (emphasis supplied):

"I appreciate the HPC's explanation that the purpose of the fitness to practise process is to protect patients in a non-punitive way. The HPC has provided arguments as to why disclosure may damage this process and that this may harm a registrant. However these appear to be arguments to support its reasons why the information should not be disclosed to the public. They are not grounds to justify not providing the Commissioner with access to the withheld information. This information is necessary to enable him to carry out his role of adjudicating on a public authority's compliance with the Act. It would not be prudent for him to do so without having sight of the withheld information. The information is required to allow him to consider the strength and/or validity of arguments put forward by the public authority to justify its reliance on any exemptions under the Act. "

31. Counsel for the HPC drew the Tribunal's attention to a leaflet entitled *"what happens if a complaint is made about me"*. At page 4 of this document, registrants are informed that the Investigating Committee will meet in private and that if a case to answer is found then the HPC is obliged to publicise referrals (the details to be referred including only name, registration number and the allegation).

32. The HPC argued that with regard to fear of onward disclosure by the Information Commissioner the Tribunal needed to consider whether section 59 DPA provided sufficient guarantees of the Commissioner keeping the information confidential. Section 59 provides:

"59. (1) No person who is or has been the Commissioner, a member of the Commissioner's staff or an agent of the Commissioner shall disclose any information which –

(a) had been obtained by, or furnished to, the Commissioner under or for the purposes of the information Act,

(b) relates to an identified or identifiable individual or business, and

(c) is not at the time of the disclosure, and has not previously been, available to the public from other sources,

unless the disclosure is made with lawful authority."

(2) For the purposes of subsection (1) a disclosure of information is made with lawful authority only if, and to the extent that –

(a) the disclosure is made with the consent of the individual or of the person for the time being carrying on the business,

(b) ……..

(c) the disclosure is made for the purposes of, and is necessary for, the discharge of:

(i) any functions under the information Acts, or

(ii) ……

(d) ……..

(e) having regard to the rights and freedoms or legitimate interests of any person, the disclosure is necessary in the public interest"

Breach of this provision is a criminal offence.

33. He took the Tribunal to paragraph 42 of an earlier case of the Tribunal, Friends of the Earth v Information Commission and DTI (Appeal no. EA/2006/0036)("the FOE case"), in which it considered the effect of section 59(2)(c) of the DPA:

"If a public authority withheld its consent to publish harmless information that could not be regarded as confidential, in the Tribunal's view no offence would be committed if the Commissioner or his staff disclosed it. Although the Commissioner decided on balance in this case that disclosure would have been likely to impede the free flow of information, a decision which was in the Tribunal's view justifiable, an alternative decision was available to him. The Commissioner and his staff should in the Tribunal's view consider themselves free to strike a responsible balance between the conflicting considerations favouring disclosure or non-disclosure as the facts of each case require. Section 59 is a sanction against unauthorised or reckless breach of

confidentiality and it is not a necessary requirement of the directive that it should go any wider than underpinning the duty of professional secrecy with regard to confidential information as required by article 28. The duty to protect individual privacy of third parties whose information is at issue is in many data protections cases likely to be the overriding consideration. But where the Commissioner is exercising functions under the Freedom of Information Act, the broad purpose of which is to confer statutory rights of access to information, an overriding right of the public authority to withhold its consent to disclosure would contradict the purposes of the legislation. It is right that in each case the Commissioner should be able to balance the importance of the free flow of information contemplated by the letter and spirit of sections 58 and 59, and the case for disclosure of information relating to the public authority which would in his opinion, be necessary for the purpose of performing his functions, whether or not the consent of the public authority is forthcoming."

34. In relation to section 59(2)(e) the Tribunal said at paragraph 44:

"The Tribunal agrees that at least four elements enter into the equation, namely, first the extent of the legitimate interests of the FOE, second, the extent of the DTI's interests, third, the public interest in ensuring that there is a transparent public understanding as to the manner in which the Commissioner discharges his functions and fourth and finally, that perhaps countervailing public interest in protecting the ability of the Commissioner to carry out its statutory function under section 50"

35. Counsel submitted that, further to the above analysis, the terms of section 59(2)(c) and (e) are such that the Information Commissioner may exercise a discretion that he should make disclosure or conclude that he is obliged to disclose to the public in circumstances in which the HPC would not. In this way it was argued that the confidentiality enjoyed by the registrant was diminished by the information being passed to the Information Commissioner. Section 59 was not, it was argued, a sufficient guarantee to assuage the registrants' fears.

<u>Legal submissions and analysis: Information Commissioner</u>

36. Counsel for the Information Commissioner invited the Tribunal to consider the statutory scheme underpinning Information Notices. The Information Commissioner is responsible for the regulation of the compliance by public authorities of their powers and duties under the FOIA. The HPC is listed in Part 6 of Schedule 1 as an authority to which the Act applies. The Act provides powers for the Commissioner to require production of information where a section 50 application has been made or for the purposes of his functions. It was clearly contemplated by Parliament that the Commissioner was to have the power to issue the Information Notice in a case such as this in the furtherance of his functions.

37. Counsel told the Tribunal that very exceptionally the application of exemptions may be evident to the Commissioner without his having to see the disputed information (a simple list of names and addresses, for instance) but in practise he would almost always have to see the information to carry out his duties.

38. It was submitted that there were sufficient guarantees as to safe treatment of such information to assuage, if not negate, the purported fears of registrants. Most notably, section 59 created the criminal offence which prohibited onward disclosure other than with lawful authority.

39. Counsel for the Information Commissioner emphasised that for there to be a disclosure with lawful authority under section 59 a test of necessity would apply – such that there was a high threshold to be met.

40. She also drew the Tribunal's attention to the ICO document *"the Information Commissioner's Transparency Policy: Disclosing Information about Specific Individuals and Organisations"*. This reflected the practise that disputed information would not be disclosed until a final determination either by the Commissioner himself or this Tribunal.

41. Finally, it was submitted that the effect of upholding this appeal would be to declare the HPC beyond review with regard to certain aspects of its FOIA duties. The Commissioner would be obliged to accept the assertions of the HPC as to the correctness of exemptions claimed and would not be able to verify for himself. In this way the statutory scheme and the Commissioner's role would be significantly undermined.

Conclusion

42. The Tribunal noted at the outset that the Information Notice itself did not adequately make clear the matters that the Commissioner had taken into account or the reasons for the need for the Notice. As such it had been necessary to look at the correspondence leading up to the decision to issue the Notice. Inevitably, the letters in question were not as tightly written as a formal document. The Tribunal gave a broad construction of the letter of 31st August 2007 (set out at paragraph 30 above) and concluded that the Information Commissioner had indeed taken into account the alleged damage to the Process. This included the purported damage to the Process that would follow from both disclosure to the Information Commissioner himself and possible onwards transmission to the public. The impugned wording in that letter (underlined and set out in paragraph 30 above) were, in the Tribunal's view, an indication that he had taken the purported damage into account and represented his conclusions why nevertheless the Notice needed to be issued.

43. The Tribunal recommended that in future cases the Information Commissioner set out in greater detail, as he does for Decision Notices, the matters taken into account and the reasons for the decisions taken.

44. The Tribunal did not accept the HPC's argument that the Commissioner should have considered asking for just some of the disputed information as it was self evidently the case that he would not know what to call for without having sight of the documents themselves.

45. With regard to section 59 DPA the Tribunal was of the view that the extent to which it protected information in the hands of the Information Commissioner from onwards disclosure could not be said to be coterminus with the restrictions on disclosure that arose from the duty of confidentiality on the HPC. Thus it was accepted that there could potentially be circumstances in which the Information Commissioner would make onwards disclosure against the wishes of the HPC or the author of that information (registrant, third party witnesses etc.) This was however unlikely to happen given that the protection afforded by section 59 was extensive and in some respects broader than a duty of confidentiality – thus section 59 applies to all

information obtained by the Information Commissioner, not just that which has the quality of confidence. In addition to this, it was noted that the exemptions claimed by the HPC would in all likelihood apply to the Information Commissioner himself. In this regard, the Tribunal noted that the examples given of information which registrants would not want disclosed all fell within the personal data exemption.

46. Most importantly however, the Tribunal reminded itself of the Commissioner's responsibilities with regard to the protection of data and privacy, such that preserving the information's confidentiality was likely to be an overriding consideration at least until he had made a decision and the conclusion of any appeal.

47. It was accepted by the Tribunal that disclosure to the Information Commissioner might cause a degree of future reticence on the part of registrants in providing information. On testing the evidence, the Tribunal concluded however, that the damage to the Process anticipated by the HPC would not be as significant as feared. Registrants had a self-interest in disclosing a broad range of information at the early stage – this was, after all, the best way to keep the matter out of the public domain (i.e.: by virtue of a no case to answer finding). The Tribunal considered that the HPC was overstating the confidentiality expected by registrants. Not all registrants received the assurances as to confidentiality and even then, the content of their observations were subject to partial disclosure to complainants. The Tribunal noted moreover that registrants were unaware of the fact that HPC on occasion made disclosures in the public interest e.g.: child protection and police matters. The reality was that the 'aura' of confidence, as Counsel for the HPC put it, attached to the information provided by registrants, was not as clear or as bright as contended.

48. The Tribunal was of the view that the HPC would be able to revise its procedures to ensure that those providing information were accurately forewarned that the HPC's dealing with this information would be subject to its duties under FOIA and the DPA. If registrants enquired further they could be provided with a number of reassurances:

a. that the Information Commissioner has responsibility for data protection and privacy and is very likely therefore to be required under the DPA to treat the confidential nature of personal data as an overriding factor;

b. that the exemptions that apply to the HPC would also apply to the Information Commissioner under any request made to it under FOIA;

c. that the Information Commissioner's office is subject to a criminal prohibition against disclosure;

d. as to its Transparency Policy (setting out the information which the Information Commissioner would not normally disclose, including disputed information in the course of an investigation or leading up to an appeal)

e. generally its practices with regard to ensuring the security and confidentiality of information.

49. At paragraph 45 of the FOE decision, a differently constituted Tribunal stated:

"Finally, [it was] contended that…… public authorities should now have fundamentally different expectations in respect of the manner in which their information is liable to be treated."

The Tribunal considered these words particularly apposite to the current case and the HPC's approach to its FOIA responsibilities.

50. Counsel to the Information Commissioner drew the Tribunal's attention to the Memorandum of Understanding that exists between the Information Commissioner and the Ministry of Justice. This includes a number of undertakings as to the way in which information will be dealt with by the Information Commissioner. The Tribunal considered whether undertakings such as these, since it was told these represent normal practise, could be of reassurance to the HPC and its registrants. The Tribunal recommends that the Information Commissioner considers either entering into such an MOU with the HPC or as an alternative the drawing up of a policy or protocol on the provision of information to the Commissioner applicable to all public authorities. Whilst the Transparency Policy goes someway in this direction, it does

not deal fully with the way in which information obtained by the Commissioner in the normal course of his duties or under an Information Notice will be handled.

51. The Tribunal would have welcomed more assistance from the Information Commissioner in the way in which this case was defended (for instance, Counsel for the Information Commissioner could have usefully cross-examined the witnesses). It understood the Commissioner's position that even at its highest the alleged damage to the Process would not outweigh the public importance of his role in reviewing compliance with FOIA duties and the need therefore to see the information. The Tribunal had sympathy for this position but considered it important to assist the HPC's understanding of certain misplaced aspects of its case. It hoped that through the appeal process the HPC had realised that some of its procedures needed revising and that the alleged damage to the Process was not as bad as anticipated and finally, may be avoided with suitable explanations to registrants.

52. The Tribunal concurred that in most circumstances the Information Commissioner would need to see the disputed information and that it would be a very high hurdle to clear to convince a Tribunal that the Information Commissioner could and should carry out his functions without sight of the relevant material. This case came nowhere near that mark. The Tribunal was of the view that the public interest in the Information Commissioner being able to carry out his regulatory function in the way intended by Parliament was so important as to outweigh any negative impact from disclosure under the Information Notice. Thus, it considered that the Information Commissioner had exercised his discretion correctly and, for the reasons given above, that the Notice had been in accordance with law.

53. Our decision is unanimous.

Signed
Melanie Carter
Deputy Chairwoman Date 14th March 2008