



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2012/0145

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FS50427343
Dated: 12 July 2012**

Appellant: Rob Waugh

1st Respondent: The Information Commissioner

2nd Respondent: Rotherham NHS Foundation Trust

Heard at: Field House by telephone

Date of Hearing: 4 December 2012

**Before
HH Judge Shanks
Judge
and
David Wilkinson and Andrew Whetnall
Tribunal Members**

Representation

Appellant: in person

First Respondent: did not attend telephone hearing

Second Respondent: Eleanor Tunnicliffe

Subject matter

s.31	Qualified exemption: Law enforcement
s.36(2)(c)	Qualified exemption: Prejudice to effective conduct of public affairs
s.40	Absolute exemption: Personal data

DECISION

For the reasons set out below the appeal is dismissed and the substituted decision notice is issued.

HH Judge Shanks
28th December 2012

IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2012/0145**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

SUBSTITUTED DECISION NOTICE

Public authority: Rotherham NHS Foundation Trust

Name of Complainant: Rob Waugh

The Substituted Decision

For the reasons set out in the Tribunal's decision, the Tribunal substitutes the following decision notice in place of the decision notice dated 12 July 2012:

- (1) All the disputed information was exempt information by virtue of section 40(2);
- (2) The Public Authority were therefore not obliged to communicate that information to the Complainant under section 1(1)(b).

Action Required

None.

Dated 28th December 2012.

HH Judge Shanks

REASONS FOR DECISION

Introduction

1. This is an appeal against a decision notice of the Information Commissioner dated 12 July 2012 relating to a freedom of information request made by Rob Waugh, a journalist with the Yorkshire Post, to the Rotherham NHS Foundation Trust (“the Trust”) for information about to a consultant orthopaedic surgeon, Manjit Bhamra.

Facts

2. Mr Bhamra was employed by the Trust full-time from the mid-1990s until September 2007 and part-time from April 2008 until March 2009. While at the Trust he undertook a wide variety of orthopaedic surgery, in particular hip replacements. In March 2009 he started to work full-time for the Mid-Yorkshire Hospitals NHS Trust.
3. In November 2009 and June 2010 the Trust referred Mr Bhamra to the General Medical Council. Around that time the Trust also instituted a review of all the orthopaedic procedures performed by Mr Bhamra while at the Trust.¹ Neither of these matters were publicly known at the time.
4. In early August 2011 there were media reports, including one by Mr Waugh in the Yorkshire Post published on 8 August, that claims by five patients who had suffered complications following surgery by Mr Bhamra while working at Rotherham had been settled for a total of £750,000. The Trust issued a press release stating that subsequent to September 2007 they had become aware of concerns with Mr Bhamra’s practice and that following investigations they had referred him to the GMC. The press release also stated that the GMC investigation was still on-going and that no further comment could therefore be made at the time.

¹ The date when this review had started was somewhat clarified in the course of the closed evidence from Ms Rogers.

5. On 12 August 2011 the GMC wrote to the Trust stating that they had concluded their enquiries into the Trust's complaint and that, having reviewed the complaint and all the available evidence, their case examiners had concluded that there was no realistic prospect of success in establishing that the doctor's fitness to practice had been sufficiently impaired to justify action on registration and that no further action would be taken. The existence of that letter and the contents described above were only made public some time later following the Commissioner's decision notice in this case, which required a redacted version of it to be supplied to Mr Waugh.

6. On 26 September 2011 Mr Waugh made his request for information. A certain amount of the requested information (including that relating to the GMC letter of 12 August 2011 referred to above) was subsequently supplied to him but his requests to be provided with (a) copies of the referrals to the GMC, (b) copies of any formal findings by the GMC (in effect the balance of the GMC's letter dated 12 August 2011) and (c) details of information shared with Mid-Yorkshire NHS Trust about Mr Bhamra, remain in dispute. There is no dispute that the Trust holds information in each of those categories and we shall refer to it all as the "disputed information."

7. On 29 September 2011 Mr Waugh wrote another report in the Yorkshire Post which stated that 10 compensation payments exceeding £1 million in total had now been made following complaints about Mr Bhamra and that another 85 people had approached Irwin Mitchell, described as one of the firms co-ordinating legal action, since the August publicity. The report also stated that lawyers were to meet their counterparts at the Trust the following week to discuss how to manage claims; the Trust confirmed in evidence that around this time it was negotiating a protocol with certain solicitors for dealing with claims relating to Mr Bhamra and that one was subsequently agreed. Mr Waugh's report of 29 September 2011 also quoted the Medical Director of the Mid-Yorkshire Hospitals NHS Trust as saying that they had no concerns about Mr Bhamra's current clinical practice.

8. On 24 October 2011 the Trust responded to Mr Waugh's request for information and on 28 November 2011, following a review, they confirmed their refusal to supply the

disputed information. November 2011 is therefore the relevant date for assessing what information the Trust was obliged to supply under the Act.

The Commissioner's decision notice and the appeal

9. The Commissioner decided that the Trust were entitled to withhold the referrals to the GMC and the information shared with Mid-Yorkshire NHS Trust under section 36(2)(c) of the Freedom of Information Act 2000 ("prejudice to effective conduct of public affairs") but not under section 31(1)(g) ("law enforcement") and that they were entitled to withhold the balance of the letter from the GMC dated 12 August 2011 under section 40(2) ("personal information"). Mr Waugh appeals against the decisions on sections 36(2)(c) and 40(2) and the Trust cross-appeals against the Commissioner's decision on section 31(1)(g); the Trust also seek to rely on section 40(2) in relation to all the disputed information, rather than only a portion of it, a position which the Commissioner now supports.

10. The Tribunal issued directions on 7 September 2012 adding the Trust as Second Respondent and, with the agreement of the parties, fixing a "paper hearing" for the week commencing 3 December 2012. The Trust served a substantial witness statement from Kerry Rogers, their Chief of Corporate and Legal Affairs, explaining the Trust's position and exhibiting the disputed information, although for obvious reasons certain parts of the statement and the disputed information were not served on Mr Waugh. In response to questions from the Tribunal the Trust also served a "closed" letter dated 22 November 2012 from their solicitors, DAC Beachcroft, whose contents were then summarised in open form so far as possible in their final submissions.

11. Because the Tribunal remained concerned to establish the facts as clearly as possible and wished to question the Trust further, a telephone hearing was arranged which was attended by Mr Waugh and Ms Tunnicliffe from DAC Beachcroft along with Ms Rogers. Mr Waugh and the members of the Tribunal were able to question Ms Rogers closely, though Mr Waugh was necessarily excluded from much of the questioning by the Tribunal. Because the outcome of the appeal would inevitably

affect the interests of Mr Bhamra the Tribunal also received written submissions on his behalf (though he was not made a party to the appeal or invited to attend the hearing).

12. Because it was not really in issue that all the disputed information was Mr Bhamra's personal data and section 40(2) is (in form at least) an absolute exemption by virtue of section 2(3) we considered the issues arising under section 40(2) first.

Section 40(2)

13. Section 40(2) provides that information is absolutely exempt if it constitutes the personal data of a third party and (by virtue of section 40(3)(b) in this case) its disclosure to a member of the public otherwise than under the Act would contravene any of the data protection principles which are set out in Schedule 1 to the Data Protection Act 1998.
14. We are satisfied (and as we say it was not really in issue) that all the disputed information constituted Mr Bhamra's "personal data" as defined in section 1(1) of the Data Protection Act. It is right that the information concerns his professional as opposed to his "personal" life but there can be no doubt that it "relates to" him in the relevant sense, in that it has him as its focus and it is biographical in a significant sense.²
15. The relevant data protection principle in this case is the first which provides that personal data shall be processed (a concept which includes disclosure) "fairly" and not processed unless at least one of the conditions in Schedule 2 to the Data Protection Act is met. The only candidate for a condition which would be met in this case is condition 6 which provides as follows:

The processing is necessary for the purposes of legitimate interests pursued by a third party to whom the data are disclosed [Mr Waugh in this case], except where the processing is

² *Durant v Financial Services Authority* [2003] EWCA Civ 1746.

unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject [Mr Bhamra in this case].

It seems to us that the balancing act required by condition 6 is essentially a refinement on the concept of fairness in the first data protection principle and that we should concentrate on its terms in deciding whether disclosure would be fair. We observe at the outset that the legitimate interests of Mr Waugh naturally take account of the fact that he is a responsible journalist with a legitimate interest in informing the public about the subject matter of his request and that any public interest in the publication of the disputed information is therefore the most relevant consideration in assessing his legitimate interests. We turn therefore to consider the nature and extent of the respective “interests.”

Mr Bhamra’s interests

16. We are satisfied that disclosure of the disputed information to Mr Waugh in late 2011 would inevitably have led to further substantial adverse publicity for Mr Bhamra in relation to his professional life as a surgeon, which would have been intrusive and would potentially have caused further damage to his professional standing. Without being put in the context of other evidence that may have been considered by the GMC its publication may also have given a distorted picture.

17. We are also satisfied that the general understanding was that referrals by NHS organisations to the GMC relating to medical practitioners were made on a confidential basis and that the GMC’s policy was that, once they had decided to take no further action, they would only disclose information relating to such referrals in limited, defined circumstances (none of which applied in this case). It follows that we accept that Mr Bhamra had a legitimate expectation that, after the GMC had decided to take no further action in his case, the disputed information would remain confidential. We also accept his related point that, having been through a (no doubt) stressful investigatory process with the GMC lasting some two years, he had a legitimate expectation that that would be the end of the matter and that he would not then be subjected to a further “trial by media.” Mr Waugh makes the point that until he was told that no further action would be taken against him Mr Bhamra would not

have known whether the information would be placed in the public domain; that of course is quite true but it does not undermine the point: until a decision was made Mr Bhamra could reasonably have expected that the information would be confidential and, once the decision was made to take no further action, he could reasonably expect that it would remain confidential.

18. Mr Waugh emphasises that the data in question concerns Mr Bhamra's professional (as opposed to his purely personal) life: we of course bear that consideration in mind in relation to assessing the strength of the interests on both sides. Mr Waugh also drew our attention to the fact that in early 2007 Mr Bhamra appeared in the BBC documentary "Can Gerry Robinson fix the NHS?" and to some disparaging remarks he apparently made about the qualifications of those managing the NHS as against those of the medical staff. Mr Waugh suggested that this weakened his entitlement to keep other aspects of his professional life private. We have not heard from Mr Bhamra about these points but in any event it seems to us that they are very peripheral and would not serve to undermine in any substantial way the strength of his legitimate interest in the disputed information remaining confidential.

Mr Waugh's interests

19. Mr Waugh's case is that the disputed information ought to be disclosed to him so that he can place it before the public. He reminds us of the obvious public concern raised by the number of cases brought or contemplated against the Trust arising out of Mr Bhamra's work as a surgeon and the amount of public money paid out in settlement. He says that it is essential that the disputed information is placed before the public to provide proper transparency and accountability for the way the Trust and the GMC have responded to the very important concerns raised about Mr Bhamra.
20. So far as the Trust is concerned, it was public knowledge at the relevant time (a) that they had referred Mr Bhamra to the GMC twice, (b) that there had been a number of settlements with claimants arising from Mr Bhamra's employment with the Trust and (c) that they were negotiating a protocol for dealing with future claims with lawyers. We accept that disclosure of the referrals to the GMC and the information shared with

the Mid-Yorkshire NHS Trust would have given the public a much fuller picture as to what steps the Trust had taken in relation to Mr Bhamra. On the other hand, we have not seen anything which gives us reason to think that the Trust may have acted inappropriately in its response to concerns about Mr Bhamra.

21. As for the GMC, the only part of the disputed information which might have enabled the public to judge how the GMC had acted was the letter of 12 August 2011. As we record above, part of that letter has now been disclosed to Mr Waugh. Since no details of the evidence considered by the case examiners are set out anywhere in the letter, it is clear that its full disclosure would not have contributed in any substantial way to transparency or accountability in relation to the decision of the GMC to take no further action against Mr Bhamra. We are told by the Trust (and must accept) that the level of detail provided in the letter is in accordance with standard GMC practice in a case like this. Mr Waugh suggests that the GMC ought to follow the recent practice of the Crown Prosecution Service of giving detailed explanations in high profile cases where it decides to take no further action. Such a policy would no doubt promote transparency and accountability in relation to GMC decisions to take no further action; however, the GMC were not themselves asked for any information and they are not parties to the appeal and, for the reasons we have already indicated, disclosure of the disputed information in this case would not have promoted those ends.

22. For Mr Waugh's benefit we should mention that we are satisfied that nothing in para 81 of Ms Rogers's witness statement impinges on these considerations and we confirm that there is no evidence of any fresh investigation being launched into Mr Bhamra's fitness to practice and that in any event the timing of the matters referred to in para 81 means that they are not relevant to this appeal.

The balance of interests

23. We have to consider whether disclosure of the disputed information by the Trust to Mr Waugh was "warranted" taking into account the respective legitimate interests. Taking account of all the circumstances we have outlined, and given in particular Mr

Bhamra's legitimate expectation that the disputed information would not be made public after the GMC's decision and the somewhat limited light that disclosure would have thrown on the whole process so far as the Trust and GMC are concerned, we have decided that disclosure would not have been warranted in this case.

24. It follows from that conclusion that the disputed information was absolutely exempt under section 40(2) and that the Trust were entitled (and indeed obliged) not to disclose it to Mr Waugh. In those circumstances it is strictly unnecessary for us to consider the other exemptions relied on by the Trust and considered by the Commissioner, namely sections 31(1)(g) and 36(2)(c), but we wish to record certain observations about them below.

Section 31(1)(g)

25. The Trust rely on section 31(1)(g) read with sections 31(2)(b) and (j) of the Act.

Those sections provide:

(1) Information ... is exempt information if its disclosure under this Act would, or would be likely to, prejudice:

...

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)

...

(2) The purposes referred to in subsection (1)(g) ... are-

...

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

...

(j) 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.

26. The Trust argued before the Commissioner that disclosure of the referrals to the GMC and the information shared with the Mid-Yorkshire NHS Trust would make it more

difficult to conduct internal investigations and would prejudice the Trust's ability to investigate the conduct of its employees. The Commissioner rejected the Trust's case (a) on the basis that section 31(2)(b) did not apply because it was not the Trust's role to finally determine whether Mr Bhamra "was responsible for improper conduct" and (b) because, in any event, although he accepted that some individuals may be less willing to conduct investigations into fellow medical practitioners if this information was disclosed, he did not consider there to be sufficient evidence of prejudice.

27. So far as section 31(2)(b) is concerned, it is right that the Trust were no longer Mr Bhamra's employers and that it is the GMC (and not the Trust) which has responsibility for any decision on fitness to practice. However, we are satisfied that the Commissioner adopted far too strict an interpretation of the word "ascertaining" in the section. The Trust clearly had the function of investigating Mr Bhamra's practice with a view to deciding whether to pass on information to the GMC or his current employers so that they could if necessary take further action; it seems clear to us that that would involve the exercise by the Trust of its "functions ... for the purposes of ascertaining whether [he was] responsible for any improper conduct" (or, perhaps more appositely, "... whether circumstances exist[ed] which would justify regulatory action" as provided by section 31(2)(c)).

28. As to whether the relevant functions would, or would be likely to, be prejudiced by disclosure of the information, we are afraid we also take a different view to that of the Commissioner. For the reasons set out in the statement of Ms Rogers we are inclined to accept that there was at least "a real and significant risk"³ of relevant prejudice if the disputed information had been disclosed in that it might well have made it more difficult for the Trust to engage appropriate investigators to look into potential clinical failings or improper conduct by practitioners and in that the evidence given to them and their reports might be less detailed and frank. That conclusion would be sufficient to cross the threshold required by section 31(1)(g).

³ The phrase consistently adopted by the Information Tribunal's jurisprudence on section 31(1) and similarly worded sections in the 2000 Act.

29. In our view therefore the Commissioner was wrong to find that section 31(1)(g) did not apply and he ought, if necessary, to have gone on to consider the strength of the public interest in maintaining the exemption provided by that section. Given our conclusions on section 40(2) and the potentially difficult “amalgamation of public interests” issues that might arise where section 40(2) (which is nominally absolute) and other (qualified) exemptions are engaged (on which we have heard no argument), we do not propose ourselves to consider further the weight of the public interest in maintaining the section 31(1)(g) exemption in this case or to reach a conclusion as to whether, had it stood alone, the Trust would have been entitled to withhold the disputed information on that ground.

Section 36(2)(c)

30. Section 36(2)(c) provides so far as relevant:

(2) Information ... is exempt information if, in the reasonable opinion of a qualified person, disclosure under the Act-

...

(c) would ... prejudice, or would be likely ... to prejudice, the effective conduct of public affairs.

31. The Trust maintained before the Commissioner and the Tribunal that section 36(2)(c) was engaged in this case because the disclosure of the referrals to the GMC and the information shared by the Trust with the Mid-Yorkshire NHS Trust would have been likely to prejudice the Trust’s ability to manage existing and future compensation claims made against the Trust relating to operations carried out by Mr Bhamra and that this was the reasonable opinion of the Trust’s Chief Executive, who is said to be the Trust’s “qualified person” for the purposes of section 36(2)(c).

32. Mr Waugh in effect challenges the reasonableness of that opinion and maintains that the public interest in maintaining the exemption did not outweigh that in disclosure. However, it seems to us, on a proper consideration of the material placed before the

Chief Executive,⁴ that section 36(2)(c) was not engaged at all for a logically prior reason: quite simply, there is nothing at all in the material placed before the Chief Executive about the Trust's ability to manage compensation claims and there is therefore no evidence to confirm that he formed any opinion about that matter.

33. It is right to record that the Tribunal did not raise this point with the Trust at the hearing but at that stage the potentially relevant parts of the draft letter provided to the Chief Executive were illegible in our copies and they were only supplied after the hearing. As we understand the decision notice at para 34 the Commissioner must have had a legible copy of the whole draft letter; we would observe that it is important that he scrutinises claims to reliance on section 36 with particular care.

Result

34. For the reasons we have explained in our view the Trust were entitled to withhold all the disputed information by reason of section 40(2). We therefore agree with the Commissioner's conclusion and dismiss the appeal but, since we have reached our conclusion for different reasons, we have also issued a substituted decision notice.

35. Our decision is unanimous.

HH Judge Shanks

[Signed on the original]

Date: 28th December 2012

⁴ Produced by Ms Rogers at KR8; it is not clear whether Mr Waugh has already seen paras 20-22 and 29 of the draft letter put before the Chief Executive which for some reason were redacted in the copy served on him in the appeal but we assume they were in the original refusal letter dated 24 October 2011.