



Tribunals Service

Information Tribunal

IN THE MATTER OF AN APPEAL TO THE INFORMATION TRIBUNAL

UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Information Tribunal Appeal Number: EA/2008/0074

Information Commissioner's Ref: FS50122432

**Heard at Procession House, London
On 29th May, 1st, 2nd and 3rd June 2009**

**Decision Promulgated
On 15 October 2009**

BEFORE

CHAIRMAN

Fiona Henderson

LAY MEMBERS

Jacqueline Blake

Pieter de Waal

B E T W E E N :

DEPARTMENT OF HEALTH

Appellant

- and -

THE INFORMATION COMMISSIONER

Respondent

- and -

THE PRO LIFE ALLIANCE

Additional Party

Subject matter:

Freedom of Information Act (FOIA)

Absolute exemptions

- Personal data s.40
- Prohibitions on disclosure s.44

Data Protection Act (DPA):

Personal data s.1(1)

Data subject s.1(1)

- Processing of personal data, Schedule 2
- Processing of sensitive personal data, Schedule 3

Cases:

Common Services Agency v Scottish Information Commissioner [2008] UKHL 47

Johnson v Medical Defence Union 2007 EWCA Civ 262:

Corporate Officer of the House of Commons v IC and Brooke and others [2008] EWHC 1084

Corporate Officer of the House of Commons v IC and Brooke EA/2007/0060 and others

Representation:

For the Appellant: Ms Christina Michalos

For the Respondent: Mr Timothy Pitt-Payne

For the Additional Party: Mr Paul Diamond

Decision

The Tribunal allows the appeal in part and substitutes the following decision notice in place of the decision notice FS50122432 dated 28th July 2008.

Information Tribunal

Appeal Number: EA/2008/0074

SUBSTITUTED DECISION NOTICE

Public authority: Department of Health
Address of Public authority: Skipton House, 80 London Road, London , SE1 6LH
Name of Complainant: Pro Life Alliance

The Substituted Decision

For the reasons set out in the Tribunal's determination, and the attached confidential schedules¹ the substituted decision is that:

- The disputed information does constitute personal data in the hands of the Department of Health pursuant to section 1(1)(b) of the Data Protection Act.
- Disclosure would not contravene the Data Protection Principles and that consequently the Department of Health were wrong to rely upon section 40 FOIA to withhold the disputed information.
- The Commissioner's finding that disclosure would not be in breach of the Abortion Regulations 1991 and that therefore section 44 FOIA was not engaged is upheld.
- By failing to disclose the disputed information the Department of Health have breached section 1 FOIA.

¹ Confidential schedule 1 should remain confidential referring as it does to information which is not the subject of the information request and which is not in the public domain.

Confidential schedule 2 refers to the disputed information and should remain confidential until the disputed information has been disclosed.

Action Required

The Department of Health is required to disclose the disputed information (namely the 2003 version of Table 11 “*legal abortions: principal medical condition for abortions performed under ground E England and Wales residents*” in the same format as it was released in 2002) to the complainant within 28 days from the date set out below.

Dated this 14th day of October 2009

Signed

Fiona Henderson,
Deputy Chairman,
Information Tribunal.

Reasons for Decision

Introduction

1. Since 1968 detailed annual statistical information relating to abortions carried out in England and Wales has been published, initially by the Office for National Statistics (ONS) but since April 2002 by the Department of Health (DOH). These statistics were derived from information contained upon form HSA4 which must be completed and provided to the Chief Medical Officer (CMO) pursuant to Regulation 4 and schedule 2, of the Abortion Regulations 1991 as amended.

2. The information provided upon form HSA4 includes:
 - The name, address and GMC Number of the practitioner terminating the pregnancy.
 - The name and address of any other Doctor who joined in giving certificate HSA1.
 - Patients' details, including date of birth, post code, marital status and number of previous pregnancies and their outcome.
 - Details of place and method of termination.
 - Gestation.
 - Grounds for termination (including abnormality or other reason for termination) and method of diagnosis in cases involving an abnormality e.g. Amniocentesis, Ultrasound or Chronic Villus sampling).
 - Any complications up to discharge.
 - Any maternal fatalities.

3. Abortion statistics are produced as frequency tables (each cell value represents the number of respondents that fall into that cell). Prior to 2003, the statistics had been detailed including cell counts as low as 1 or 0 and had included a breakdown of the principal medical condition for abortions performed under ground E, indicating how many in each category were post 24 weeks. The significance of post 24 weeks being that in other circumstances a foetus born at this age would be considered to be viable and might survive.

4. Ground E reflects section 1(1)(d) of the Abortion Act 1967 which permits medical termination of pregnancy with no gestational limit and provides:

“Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith ...

(d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.”

5. In 2003 the DOH significantly reduced the detail of the statistics released, removing any cell counts under 100, producing no figures for ground E abortions over 24 weeks, and providing only total figures for congenital malformations (subdivided into 2 categories) and chromosomal abnormalities. At the time of publication the DOH had indicated that they were waiting for guidance from the ONS, and when this had been received they would publish additional statistical information. This prompted Ms Julia Millington, Political Director of the Pro Life Alliance (PLA), to make a freedom of information request to the DOH on 21st February 2005.

The Request

6. The request was entitled “*RE; Freedom of Information – Abortion Statistics 2003 published 27th August 2004*” and referred back to previous correspondence prior to the implementation of FOIA in which the PLA had expressed concern about:

“the significant change to the format of the statistics for abortions performed under ground E.”

In her request Ms Millington noted:

“We are especially concerned by the decision of the Department of Health to withhold the breakdown of abortions for congenital malformations, chromosomal abnormalities and other conditions which together with the gestational age of the foetus have been included since 1995...

We are therefore writing to you again under the newly implemented legislation to request that you release this information to us.”

7. There is no dispute between the parties that what was being sought was the 2003 version of Table 11 “*legal abortions: principal medical condition for abortions performed under ground E England and Wales residents*” in the same format as it was released in 2002. The Tribunal has had sight of this document and has compiled confidential schedule 2² which refers specifically to the withheld information. Wherever possible the Tribunal will refer to the statistics which are publically available by way of example.

8. They were provided with a substantive reply on 22nd April 2005 where the DOH stated that data could only be disclosed if it was sufficiently abstract from the information sent to the CMO. They had asked the ONS for guidance and when this was received, they would:

“ publish what further abortion data for 2003 we feel able to given the need to protect the identity of those involved”. The DOH were at that time relying upon section 36 FOIA (prejudice to the effective conduct of public affairs).

9. The PLA applied for an internal review on 24th May 2005. The internal review was completed and its conclusions set out in the letter dated 7th April 2006 from Jill Moorcroft (Freedom of Information Unit Head). She upheld the decision not to disclose the disputed information relying upon:
 - Disclosure being prohibited under the Abortion Regulations 1991,
 - Section 40 FOIA (the information constituted the personal data of the patient and the Doctors concerned),
 - Section 36 FOIA,
 - The review also noted that more detailed statistics had been disclosed in July 2005, in line with the advice given by the ONS.

10. The 2005 disclosure included aggregated figures for 2003-2005 wherein individual cell counts which were considered unsafe on an annual basis had been aggregated over 3 years to provide a total of 10 or more in certain categories.

² (Footnotes in the open decision will cross reference with the matters dealt with in the confidential schedules).

11. The PLA's complaint to the Commissioner on 23rd May 2006 was investigated and resulted in the Commissioner's Decision Notice dated 28th July 2008.

12. During the Commissioner's investigation the DOH had ceased to rely upon section 36 FOIA and were instead relying upon section 40 FOIA (personal data protection) and section 44 FOIA (disclosure prohibited by an enactment namely the *Abortion Regulations 1991*). The Commissioner decided that the DOH:

- breached section 1 FOIA in that they wrongly relied upon sections 40 and 44 FOIA to withhold the information,
- breached section 17(1) of the Act in that they did not issue a refusal notice within twenty working days of receipt of the request.

The DOH were required to disclose a copy of the requested information.

The Appeal

13. The Appellants appealed to the Tribunal by notice of appeal dated 28th August 2008.

The Questions for the Tribunal

14. The issues for the Tribunal are:

- a) With reference to section 40 FOIA:
 - i) Do the statistics constitute personal data in the hands of the DOH?
 - ii) Should zero or low cell counts be protected as they may lead to identification of individuals?
 - iii) Would disclosure contravene the Data Protection Principles?
- b) With reference to section 44 FOIA would disclosure breach the *Abortion Regulations 1991*?

15. The Tribunal's powers are set out at section 58 of FOIA, which states:

“(1) If on an appeal ... the Tribunal considers –

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

16. Consequently although the Commissioner did not go on to consider whether disclosure of the disputed information would contravene the Data Protection Principles, in the event that the Tribunal concluded that it was personal data, it was common ground that the Tribunal should then go on to consider the application of the DPA to the disputed material. The grounds of appeal are mixed questions of fact and law. This is not a case where the Commissioner was required to exercise his discretion.

Evidence

17. The Tribunal summarizes the evidence material to the context of the case in the paragraphs below. The Tribunal heard closed evidence both in relation to the disputed information (which is dealt with by way of footnotes in confidential schedule 2) and in relation to information not in the public domain pertaining to identification (by way of footnotes in confidential schedule 1). The rest of the evidence insofar as it is material to the issues to be decided in this case is referred to in the paragraphs dealing with the arguments submitted by all parties.

Context

18. The Rev. Joanna Jepson asked the Metropolitan Police to investigate a late abortion for cleft lip and/or palate which was recorded in the 2001 statistics (published in 2002). The Metropolitan Police were the “wrong” force to investigate the termination because it had not taken place in their area. The Metropolitan Police issued a press release indicating that the case was to be investigated by West Mercia Police which identified the general area where the termination had taken place (they had obtained that

information from form HSA4 (which the DOH had disclosed to the Police pursuant to the 1991 Regulations). A local newspaper wrote an article stating that the hospital concerned was in Hereford. From the evidence of Angela Duncan (who has been part of the DOH sexual health team since 1996), there is only one NHS hospital in Hereford and the press made an assumption and began to hazard a guess at who the practitioner was that terminated the pregnancy.

19. The press began to name the Doctor they believed was the terminating practitioner. His name and photograph were published, he was door-stopped by journalists and unpleasant leaflets were distributed in his local community. A campaign was started against him by the "UK Life League" who posted his name and address on their website and encouraged people to write to him. Eventually the Doctor confirmed his identity and gave a press interview. In evidence the DOH witnesses accepted that no-one knew how Hereford had been identified. It was presumed that the practitioner whose name was circulated in the press was chosen by process of elimination, but it could have been a leak to the press from someone with inside knowledge. The second certifying Doctor was never publicly identified by the press and neither was the patient.

20. Mr Geoff Dessent had been deputy director for sexual health and substance misuse at DOH in 2003 when a review of the information disclosed in statistics had been undertaken and independent advice was sought from the ONS. The main driver of the review was the "Jepson case" (referred to in the Decision Notice as the 2002-4 case) but the department was conscious that it needed a review in light of the availability of the internet and advances in information spread.

21. The DOH also considered that there had been a second case relating to the statistics involving the supposed identification of a 9 year old girl. In 2002 the DOH received a call from a journalist who believed that she had managed to identify a particular 9 year old girl as having had an abortion. She had been told about the girl by that girl's friend and had checked this information against the 2000 statistics which recorded one termination for a 9 year old. A data check by the DOH revealed that the data subject was in fact 19.

22. The DOH's concerns were that:

- This demonstrated the considerable lengths a journalist would go to, to track down cases with an unusual element,
- Local knowledge put together with information from the statistics caused the journalist to believe that she had traced the individual,
- The risk of such identifications happening was rising with the increase of the use of social networking sites such as Facebook,
- There was an increase in sharing of data across government departments,
- There had been improvements of technology including the internet,
- There had been a reduction in price and improvements of software and hardware enabling data to be searched for and linked more effectively.

23. The ONS were asked to provide guidelines for *“interpreting the National Statistics Code of Practice and associated protocols in the handling of health statistics across the health community in a way that balanced data confidentiality risks with the public interest in the use of the figures.”* Mr Dessent agreed in his evidence that the standards were not framed with reference to FOIA but FOIA advice was sought. Working paper 1 of the Review of the Dissemination of Health Statistics: Confidentiality Guidance specified that the conclusions of the review were to be “consistent with” FOIA and other responsibilities that already exist e.g. DPA. Mr Frank Nolan (Director of Census and social Methodology of the ONS) agreed in his evidence that whilst legal advice was sought the guidance was not a document detailing what needs to be done to comply with legal advice but rather a document giving statistical but not legal advice.

24. Mr Nolan explained that the ONS is the executive office of the UK Statistics Office a non ministerial department which reports directly to parliament. He did not write the guidance but he had read and understood it.

25. The review concluded that:

- for ordinary data for the Government Office Region in England, the country of Wales or any larger geographical area a cell of 5 was considered safe.
- For ordinary data in smaller geographical regions a cell of 10 was considered safe,

- For highly sensitive variables (e.g. a patient less than 15 years of age, gestation over 24 weeks, termination for medical conditions) a cell of 10 was considered safe.
- Cells of up to 2 practitioners were considered unsafe.
- Counts associated with at most 2 hospitals were considered unsafe
- Zeros were considered unsafe unless no other value was logically possible (e.g. if a procedure is only available before 24 weeks it must be 0 after 24 weeks). Whilst a zero alone does not lead to disclosure, by eliminating some possibilities an intruder can deduce something new from the data.

26. Methods of perturbation of data were not considered suitable here because it would lead to misinformation, some of the methods discounted were:

- Pre-tabular techniques such as record swapping (where geographical variables are substituted for another based upon control variables such as age) would require a large number of swaps which would result in an unacceptable level of distortion to the statistics.
- Rounding (adjusting the values in all cells in a table up or down to a specified base e.g. to the nearest 5) a post-tabular technique; cannot protect statistics where there is concern around cell values (which can be large) that are associated with one or two individuals (e.g. a single doctor carrying out a large number of terminations in a particular category).
- Barnardisation (modification of every cell with a value by e.g. +1 or 0 or -1 to specified probabilities) is another post tabular technique. This damages the utility of the statistics and can lead to inconsistencies between tables.

27. Cell suppression and table redesign was the method suggested because the loss of information was not significant due to the small number of cells affected, it was highly visible and could not be unpicked as long as its usage was consistent. Consequently all sensitive cell values from 0 to 9 were suppressed, certain categories were aggregated to provide totals of 10 or more. Additionally, aggregated values were to be released after 3 years or 10 years if during that time period the total value of a cell reached 10 or more. However, since this had to be applied consistently and the 2003-5 value for cleft palate abortions post 24 weeks was a value between 0 and 9, the next opportunity for release of

a figure would be the 2003-2012 statistics and then only if the combined value was 10 or greater.

Legal Submissions and Analysis

Was the statistical data personal data within the meaning of the DPA 1998?

28. Section 40 FOIA reads:

(2) Any information to which a request for information relates is also exempt information if—

*(a) it constitutes personal data [where the requestor is not the data subject],
and*

(b) either the first or the second condition below is satisfied.

(3) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

(i) any of the data protection principles, ...”

29. Section 40(7) imports definitions from the DPA:

“ (7) In this section—

“the data protection principles” means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

“data subject” has the same meaning as in section 1(1) of that Act;

“personal data” has the same meaning as in section 1(1) of that Act.”

30. Section 1(1) of the DPA states:

“Personal data means data which relate to a living individual who can be identified –

- a) *from those data, or*
- b) *from those data and other information which is in the possession of, or is likely to come into the possession of, **the data controller**³.*

31. The Commissioner argues that anonymous information is not personal data and that consequently as long as the data subject is not identifiable upon disclosure it is not personal data. In the Decision Notice he found that neither the Doctors nor the patients were identifiable from the statistics and consequently the statistics were not personal data.

32. The Department of Health argues that the statistical information is not anonymous in the **hands of the data controller**. They rely upon section 1(1)(b) DPA as they have “other information” in their possession namely the original forms from which the statistics are derived and can trace back each statistic to an actual case.

33. Both parties rely upon the *Common Services Agency v Scottish Information Commissioner [2008] UKHL 47* (CSA case) in support of their arguments. This was a case where a request was made for the incidences of childhood leukaemia by year for the Dumfries and Galloway postal area by census ward. The Scottish Information Commissioner had ordered the disclosure of the data in “Barnardised” form to prevent identification. This involved adjusting low cell count figures that were not 0 by + / - 1 or 2.

34. In the leading judgment Lord Hope of Craighead noted that the Scottish Commissioner “*did not ask himself whether the Barnardised data would be personal data within the meaning of section 1(1) of the 1998 Act and if so, whether its disclosure ... would satisfy the disclosure principles*”. For this reason the case was remitted back to the Scottish Commissioner to enable him to undertake that exercise.

³ All emphasis is that of the Tribunal

35. Lord Hope found that the Scottish Commissioner had made an error in law in ordering the disclosure in Barnardised form:

*“18. ...Its release would only have been appropriate if he was satisfied that it was not personal data **in the hands of the agency to which the [section 40(2) equivalent] applied** or, if it was that disclosure of the information in this form would not contravene any of the data protection principles”*

36. When considering the duty of the data controller Lord Hope said at paragraph 22:

*“He cannot exclude personal data from the duty to comply with the data protection principles simply by editing the data so that, if the edited part were to be disclosed to a third party, the third party would not find it possible from that part alone without the assistance of other information to identify a living individual. Paragraph (b) of the definition of “personal data” prevents this. **It requires account to be taken of other information which is in, or is likely to come into, the possession of the data controller.**”*

37. The Information Commissioner argues that rendering the disputed information anonymous to a third party would enable the information to be released without having to apply the data protection principles. He relies upon paragraphs 24 and 25 of Lord Hope’s judgment. Paragraph 24 considers the definition of 1(1)(b) DPA and concludes that *“The formula which this part of the definition uses indicates that each of these two components must have a contribution to make to the result.”* He then outlines 2 scenarios:

1. *“... Clearly, if the “other information” is incapable of adding anything and “those data” by themselves cannot lead to identification, the definition will not be satisfied. The “other information” will have no part to play in the identification.”*

The Tribunal is satisfied that this scenario does not apply here since the “other information” (the HSA4 forms) would add something to the data (the statistics), at the least, the identity of the data subjects.

2. *“The same result would seem to follow if “those data” have been put into a form from which the individual or individuals to whom they relate cannot be identified at all, even with the assistance of the other information from which they were derived.”*

The Tribunal is satisfied that this scenario does not apply here, since, with the assistance of the HSA4 forms, the data subjects can be identified.

38. Lord Hope goes on to add that in relation to the second scenario:

“In that situation a person who has access to both sets of information will find nothing in “those data” that will enable him to make the identification. It will be the other information only, and not anything in “those data”, that will lead him to this result.”

The Commissioner argues that if the statistics are anonymous to a third party, there is nothing in “those data” to lead to identification and it is the other information only which would lead to identification. The Tribunal is satisfied that what is being referred to here is a situation where the statistical information can no longer be cross referenced to the other information by the data controller, and not a situation where the data is anonymous to a third party but can still be cross referenced using the forms retained by the DOH.

39. Lord Hope relied upon the wording of recital 26 of the preamble to the Directive [95/46/EC] in support of his approach. Recital 26 provides:

*“Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas, to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used **either by the controller** or by any other person to identify the said person; whereas the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable.”*

40. In paragraph 25 of his judgment he notes that section 1(1)(a) and (b) DPA gives effect to the first 2 phrases of recital 26.

“The third phrase casts further light on what Member States were expected to achieve when implementing the Directive. Rendering data anonymous in such a way that the individual to whom the information from which they are derived refers is no longer identifiable would enable the information to be released without having to apply the principles of protection. Read in the light of the Directive, therefore, the definition in section 1(1) DPA 1998 must be taken to permit the release of information which meets this test without having to subject the process to the rigour of the data protection principles”.

41. The Commissioner argues that this is authority for the release of information which is anonymised in the hands of a third party without recourse to the DPA. However, this could only apply in the context which recital 26 permits: where there are no means by which the data controller or another person may identify the data subject.

42. Lord Hope did not decide whether Barnardisation would make the information anonymous in the hands of the data controller. He stated:

“23. ... Barnardisation is a method of rendering the information so far as it is possible to do so, anonymous. ...

*27. In this case it is not disputed that the Agency itself holds the key to identifying the children that the Barnardised information would relate to, as it holds or has access to all the statistical information about the incidence of the disease in the Health Board’s area from which the Barnardised information would be derived. But in my opinion the fact that the Agency has access to this information does not disable it from processing it in such a way, consistently with recital 26 of the Directive, that it becomes data from which a living individual can no longer be identified. If Barnardisation can achieve this, the way will be then open for the information to be released in that form because it will no longer be personal data. **Whether it can do this is a question of fact for the respondent on which he must make a finding.***

43. The Commissioner argues that what is being envisaged here is the question of whether the statistics are anonymous to a third party. The Tribunal is satisfied however that the question of fact for the Scottish Commissioner was whether the process of Barnardisation would mean that the data could not be reconstituted to its original form by the Agency, in which case it could be released without further reference to the DPA. Consequently the Tribunal is satisfied that for the purposes of section 40(2)(a) FOIA, the statistics derived from the HSA4 forms constitute personal data pursuant to section 1(1)(b) DPA in the hands of the DOH, because the data relate to individuals who may be identified from those data and other information held in the HSA4 forms.
44. The Tribunal considers separately the question of the cells with a value of zero. If they are not personal data then their disclosure would not be subject to compliance with the Data Protection Principles. The Commissioner argues that if “no-one” is the subject of a cell the information cannot be personal data. The DOH argues that a zero in combination with other cells can lead to identification in other cells i.e. releasing the zeros risks publishing personal data in other cells. The Tribunal considers this to be a question of formulation - somewhat like a negative answer to a question. For example if A had been identified as having had a post 24 week abortion and the cell count for cleft palate terminations post 24 weeks was zero, it would reveal that A did not have a cleft palate abortion. There would be no dispute that this fact would be personal data relating to A. The Tribunal is satisfied that, through a process of elimination, zero cell counts can add information to the totality of the data, to reveal personal data.
45. The Tribunal derives support for this, from the comments of Lord Rodger of Earlsferry in the CSA case:

“85. The Commissioner held, however, that the Agency should, at least, have disclosed the cells which contained zero, since those cells did not contain personal data. Although perhaps at first sight attractive, that argument must be rejected since, inevitably, by publishing the cells with zeros, ISD would have identified those other cells which contained a count for any year. And, given the small counts and the small areas involved, this would have created very much the same risk of individuals being identified as publishing the counts of 1 or more for the other cells.”

Would disclosure to the PLA contravene any of the data protection principles?

46. The first data protection principle (which is found in Schedule 1 of the DPA) states:

(1) Personal data shall be processed fairly and lawfully, and in particular, shall not be processed unless –

a) at least one of the conditions in Schedule 2 is met, and

b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met, ... (see para 105 et seq below)

Schedule 2 provides inter alia:

6.(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or 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.

47. It is agreed between the parties that the statistical information relates to 2 categories of person. The patient who has had the termination and the Doctor or Doctors who authorised and carried out the termination. Whilst the information relating to both sets is personal data, the information relating to the patients is also “sensitive personal data” (see para 108 below).

48. It is the DOH’s case that disclosure would breach the first data protection principle in that it would be unfair, unlawful, and would not meet the test set out in schedule 2 or 3. However, it is important to note that, although it is the DOH’s case that ALL the statistical information in the hands of the DOH constitutes personal data (and in the case of the patients sensitive personal data), the disclosure of statistics including cells with numbers of 10 or more does not contravene any of the data protection principles. The distinction relied upon by the DOH is that there is greater abstraction with higher cell counts and therefore lower risk of identification, while cell counts of 9 or less carry a higher risk of identifiability.

Fairly

49. In determining whether the disclosure would be fair, the Tribunal has regard to the method by which the personal data was obtained. Part II Schedule I DPA provides:

1 (1) “... regard is to be had to the method by which they are obtained, in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed”.

50. The Tribunal took into account the following factors:

- Patients would expect their medical records to be kept confidential,
- The Tribunal assumes that they are likely to have been notified that form HSA4 had to be submitted. (In her evidence Professor Nathanson (Executive Director of Professional Activities at BMA) said that patients were aware that data was given to the CMO).
- There was evidence from Professor Nathanson that patients who asked about the confidentiality of their information were told that it was passed on but currently they would be reassured that publication was anonymous.
- Disclosure of the information on form HSA4 is compulsory and not based upon consent.
- Since the data is published as national statistics the Tribunal infers that any patient is likely to understand that their information would be included in the data.

The Tribunal is satisfied therefore that the patients were not misled as to the use of form HSA4 for the compilation of publically available statistics; however, they would have the expectation that they would not be identifiable from the statistics.

51. In relation to Doctors the Tribunal is satisfied that there is a lesser expectation of confidentiality because:

- It is their profession,
- They have a public role,
- It is not sensitive personal data,
- There is a criminal sanction for failure to comply with the laws of abortion,

- It is difficult to control the voluntary disclosure of the information by the patient.

Nevertheless they would not expect their treatment of a particular patient to be made public in the ordinary course of events.

Identifiability

52. The Tribunal is satisfied that the question of the likelihood of identifiability of individuals from the statistics (and by whom) is integral to the question of fairness.

53. The Article 29 Working Party set up in 1995 under the EU Data Protection Directive indicated that “*a mere hypothetical possibility to single out the individual is not enough to consider the person as identifiable*”.

54. At the time of the request and the publication of the ONS guidance, internationally agreed standards had been adopted within the UK through the introduction of the *National Statistics Code of Practice and Protocol on Data Access and Confidentiality 2002* which stated:

“The National Statistician will set standards for protecting confidentiality including a guarantee that no statistics will be produced that are likely to identify an individual unless specifically agreed with them”.(emphasis added).

The Tribunal notes that this is not an absolute guarantee of anonymity.

55. Mr Nolan explained that this was interpreted as meaning that a theoretical intruder was deemed to have “*access to powerful data processing software and hardware equivalent in standard available in the ONS [...and] the intruder would have some statistical and mathematical expertise equivalent in standard to those found in an ONS statistical officer and to be prepared to dedicate a number of hours of their time to the task of identifying an individual.*”

56. Mr Nolan acknowledged that it is not possible to protect against all situations, so scenarios that were analysed in the ONS guidance were selected, based on what was “most likely” to occur in light of the time, effort and expertise available i.e

- Information potentially available to an “intruder”,
- How the intruder would use the information to identify an individual.

57. Mr Nolan indicated that the risks of identification fell into the following categories:

- i) **Self identification** – an individual will be able to deduce the cell in any published table which relates to them.

The Tribunal notes that a data subject, by virtue of conscious experience, is likely to be able to self identify no matter how large the cell and that this applies to a cell of 10 as much as a cell of 1. This does not enable a data subject to be identified by another.

- ii) **Attribute disclosure** - Where someone knows something about an individual discovered from the statistical information and not previously known e.g. if a woman is known to have had a termination for cleft palate and there are none recorded at gestations after 24 weeks, her termination must therefore have taken place before 24 weeks.

The scenarios used as examples of this category generally relied upon self disclosure (e.g. Facebook and individuals with intimate knowledge of the patient e.g. family) or those involved in a professional capacity. Here the data subject is already identified and what is being discovered is more particular detail of the case. Whilst there is the theoretical possibility that a stranger could use this method to narrow the field to search for a data subject, all the examples cited by Mr Nolan relied upon sets of circumstances which whilst theoretically possible, the Tribunal did not consider were likely to arise or were not applicable in relation to the disputed information⁴.

- iii) **Disclosure by differencing** – a profile can be built up by combining data from different tables e.g. comparing a table relating to 16-19 year olds with a table for 17-19 year olds would reveal, by elimination, the figure for 16 year olds.

⁴ See Confidential Schedule 2

Mr Nolan had not seen the disputed information and had not been asked to conduct a cross referencing exercise to assess whether disclosure by differencing was possible with reference to the disputed information, and if so, whether it would increase the risk of identification in relation to the low cell counts in that information. However, the DOH did not point to any example of cross-referencing from the disputed information to show how this would be of assistance to find out the identity of a data subject⁵.

iv) Motivated Intruder –someone who sees from the published statistics that there have been very few cases of a certain type and is therefore motivated to try to find out the identity of the patient or Doctor.

The Tribunal accepts the PLA’s argument that it is not just the smallness of the cell which may motivate the intruder, but also the underlying condition. A cell count of 20 post 24 weeks cleft palate terminations would be more likely to motivate investigation and attract attention than a cell count below 10. The Tribunal notes that there are all sorts of different reasons (apart from and disconnected from the statistics) why people might be motivated to find out information about others. It may be due to people’s personal experience, media interest or a high profile criminal investigation.

58. It is to protect against the aforementioned risks that the guidance has been formulated. The Tribunal is satisfied that the ONS guidance is heavily influenced by the DOH’s fears following the Jepson case and to a lesser extent the “9 year old girl” incident. The Review of Dissemination of Health Statistics states that representatives from the Health Departments, Public Health Observatories and the Devolved Administrations were consulted. It was also released for public consultation. No details were provided as to the make-up of the stakeholders consulted (although it is known that the PLA were not part of this exercise.)

59. The Tribunal is satisfied that the figure of 10 for a safe cell reflects the DOH’s “comfort threshold” and was not a statistical consideration. The figure of 10 had to be “*higher than 5*” to reflect the sensitivity of the material and was arrived at by:

⁵ See Confidential schedule 1

“assessing the risks of confidentiality along with discussion with and agreement between ONS and DOH experts and is based on a judgement of what is considered to be likely to be reasonable taking into account the very sensitive nature of abortions and the increased impact of an identification where cells have small counts”.

60. The Tribunal notes that the statistics are at a national level and reflect a large base pool of data subjects within the UK population (namely all females of child bearing age). The Commissioner put a figure on this in his Decision Notice, estimating that an individual appearing in the statistics would be one in approximately 14.1 million.
61. Mr Dessent explained that there is no publicly available list of Doctors who carry out ground E terminations, and he was unable to put a figure upon the number of practitioners. There are 420 NHS hospitals in addition to licenced clinics where terminations can take place. In 2003, terminations actually took place at 368 of these. There are very few hospitals in the country that perform late abortions and very few Doctors who are specialised or willing to perform them.⁶ *“The number of hospitals and doctors may be narrowed down considerably if unsuppressed national level data are combined with other information in the public domain.”* However, no witness was able to point to any methods or information in the public domain that would facilitate or assist in this process of elimination. The examples given of scenarios that may lead to identification all required or assumed significant additional knowledge such as unspecified information from “local sources”.
62. The DOH have repeatedly asserted that the Jepson case is an example of an individual being identified from statistics. The Tribunal disagrees because:
- The Rev Jepson complained to the Metropolitan Police Force because she was unable to tell from the statistics where the termination took place.
 - The DOH have not been able to point to anything in the published statistics themselves that would have enabled the general area, town, hospital or Doctor to be identified.
 - The general area was identified by the Police press release which named the investigating force. The source of this information was form HSA4 and not the

⁶ See confidential Schedule 1

statistics. The Tribunal is satisfied that the area was therefore identified as a consequence of a press article relating to the criminal investigation, and was not linked to the statistics.

- There is no evidence that either the hospital or Doctor were identifiable from the general area.
- There is no evidence to explain how Hereford was identified by the press.
- There is no evidence either way to suggest whether the Doctor was nominated by process of elimination or from some other source.
- His identity only became fact when he confirmed his identity.
- Despite the media frenzy neither the 2nd certifying Doctor nor the patient were ever identified.

63. The Tribunal considers the press release and the article identifying Hereford to have been intervening acts which had nothing to do with the statistics. There is no evidence that the source of any of the leaked information was the statistics. The Tribunal considers this case to be perhaps the best evidence that ordinarily it is not possible to identify the data subjects who appear in the statistics. They would only be identifiable through the use of outside information. This relies upon either: deliberate identification (e.g. an informant insider) or a theoretical series of improbable coincidences which (in light of the Tribunal's findings in relation to the Jepson case) despite the publication of detailed statistics every year since 1968 have never yet come to pass.

64. In the "9 year old girl" case the girl was identified from another source without reference to the statistics. The statistics did not provide any information confirming her identity or enabling her to be traced. The journalist sought confirmation of her identity from the DOH. Mr Dessent was clear that had the case involved a 9 year old they would not have confirmed her identity. Consequently it provides no support for the contention that the publication of the statistics would lead to the identification of patients.

65. Mr Nolan accepted that although the ONS guidance attaches weight to risks posed by the motivated intruder, it does not acknowledge the concept of a "motivated defender" - hospitals and Doctors who do not want to be identified and who would be expected to

take steps to protect personal data and to prevent identification by implementing appropriate policies and measures and neither confirming or denying involvement.

66. The Tribunal gives particular weight to the Commissioner's concept of the motivated defender in relation to the hospitals carrying out terminations under ground E post 24 weeks:

- The hospitals could be said to be specialist,
- They should be aware of the controversy surrounding this procedure,
- They are experienced hospitals (unlike a hospital which carries out terminations very infrequently),
- They would be expected to appreciate the importance of neither confirming nor denying involvement.

In the Tribunal's view this is a relevant factor that ought to have been taken into account in the assessment as to where the risk lay and what was an acceptable level of public disclosure of statistics.

67. The DOH argue that having obtained expert advice from the ONS the Tribunal should not substitute its own view for that of the ONS. However the Tribunal notes the following from the evidence of Mr Dessent and Mr Nolan:

- The ONS guidance was focussed upon statistical advice rather than obligations under FOIA (although the conclusions were to be "consistent with" FOIA),
- The DOH acknowledge that this is guidance and that each case must be looked at individually.

68. The DOH have previously disclosed (case FS50069392) figures of 0 with reference to the number of 11 year olds who had terminations in 2003 and 2004. In that case the ONS concluded that cross referencing the 0 count for 11 year olds with published material would disclose other low cell counts⁷. Disclosure would also enable anyone who knew of a pregnant 11 year old in either of those years to determine that she had not had a termination and therefore gave live birth or had a miscarriage. From National birth data, pregnant 11 year olds are rare, they are likely to be conspicuous and the group from which they come (11 year old girls) is a much smaller group than the

⁷ See Confidential Schedule 1

general child bearing population. In light of their immaturity the Tribunal anticipates that they would be considered to be extremely vulnerable were they to be identified. The ONS concluded in that case that disclosure of the information did not involve an unacceptable risk. Mr Nolan, who gave evidence on behalf of the DOH, had not been permitted by the DOH to see the disputed information in this case and had not therefore conducted a similar exercise in relation to the disputed information in this case.

69. The Commissioner in his Decision Notice had found several examples of much lower publication thresholds for protected cell counts relating to health data:

- Teenage conception and still birth data had a threshold of 5 for a cell count
- Sub regional data relating to births protected cells counts of less than 3.
- The disclosure rates in Scotland for HIV included figures of 1 and 2.

The ONS were not aware of the thinking behind the Scottish figures, however, Mr Nolan was of the view that this was “less sensitive” than abortion statistics “because there was less interest”. This inserts a subjective assessment of society’s attitude to different medical conditions into the statistical analysis. No evidence was provided in support of this assertion.

70. The Tribunal is satisfied that the possibility of identification by a third party from the statistics is extremely remote and that according to *Johnson v Medical defence Union* 2007 EWCA Civ 262:

“62:”fairness” required consideration of the interests not only of data subjects.. but also of data users...”

“141....the very word “fairness” suggests a balancing of interests .In this case the interests to be taken into account would be those of the data subject and the data user, and perhaps, in an appropriate case, any other data subject affected by the operation in question..”

This is a similar exercise to that required under schedule 2 paragraph 6(1) of the DPA. For the reasons set out (para 73 et seq) below we are satisfied that disclosure of the statistics would not be unfair.

Lawful

71. The DOH contends that disclosure of cell counts below 10 would breach article 8 of the European Convention of Human Rights and that consequently disclosure of the disputed information is unlawful. Article 8 provides:

- (1) *Everyone has the right to respect for his private and family life, his home and his correspondence.*
- (2) *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society .. for the prevention of ...crime, for the protection of health ... , or for the protection of the rights and freedoms of others”*

The DOH contends that disclosure of cells of 10 and above does not breach Article 8, and again the distinction is said to relate to the risk of individual identification. For the reasons set out above (at paragraphs 52 et seq) the Tribunal considers that a risk of interference has not been demonstrated and that Article 8(1) is not engaged.

72. If the Tribunal is wrong and a minimal risk of identification exists, the Tribunal is satisfied that such interference is in accordance with the law (see para 111 et seq re section 44 and the Abortion Regulations 1991) and is proportionate and necessary⁸:

- for the prevention of crime (abortion outside the Abortion Act is illegal),
- for the protection of health (there is an increased risk to women having later terminations, and the statistics are important in planning resources and assessing training needs with the aim of reducing late terminations), and
- for the protection of the rights and freedoms of others (the right to lobby Parliament and stimulate an informed public debate).

Schedule 2 DPA

73. The Tribunal goes on to consider the balance between the legitimate interests of the 3rd party to whom the data would be disclosed and the prejudice to the rights and freedoms or legitimate interests of the data subjects (pursuant to Schedule 2 paragraph 6(1)). It is not disputed that disclosure under a FOIA request is disclosure to the public at large.

⁸ See discussion re Schedule 2 DPA below

Whilst the request has come from the PLA, the information is information which until 2003 had been disclosed to the general public in the form of the annual statistics. For this reason the Tribunal will consider all 3rd party interests in assessing where the balance lies.

74. Corporate Officer of the House of Commons v IC and Brooke and others [2008] EWHC 1084

43. *It was common ground that "necessary" within schedule 2 para 6 of the DPA should reflect the meaning attributed to it by the European Court of Human Rights when justifying an interference with a recognised right, namely that there should be a pressing social need and that the interference was both proportionate as to means and fairly balanced as to ends.*

... The court has noted that, while the adjective "necessary", within the meaning of article 10(2) is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable" and that it implies the existence of a "pressing social need."

75. The test to be applied was considered in the Corporate Office of the House of Commons v IC and Others EA 2007/0060 and others. In that case the Tribunal (differently constituted) identified the questions to be applied in assessing the competing interests (at para 60 – 61)

"... we consider that for the purposes of condition 6 two questions may usefully be addressed:

(A) whether the legitimate aims pursued by the applicants can be achieved by means that interfere less with the privacy of the MPs (and, so far as affected, their families or other individuals),

(B) if we are satisfied that the aims cannot be achieved by means that involve less interference, whether the disclosure would have an excessive or disproportionate adverse effect on the legitimate interests of the MPs (or anyone else).

Question (A) assists us with the issue of 'necessity' under the first part of condition 6. Question (B) assists us with the exception: whether the processing is unwarranted in

the particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects “

This Tribunal adopts that approach and has summarized below the evidence heard and read relating to the legitimate uses to which small cell statistical data is put and considers in relation to each aim the 2 questions set out above.

Checking compliance with the Act.

76. The PLA argue that in the absence of the statistics there is no way of knowing whether terminations are taking place which are outside the provisions of the Act. The data is not there to enable the public to instigate a criminal investigation if it appears appropriate. The DOH argue that the public would be able to ask for the total number of terminations for cleft lip/palate recorded in the aggregated 2003-5 statistics to be investigated by the DOH or the Police (and to investigate whether any of them were post 24 weeks). However, Mr Dessent accepted during cross examination that the DOH would expect to see some evidence that there was cause for concern before taking action. The DOH would have already been satisfied by its own scrutiny and therefore there would be a need for another piece of information to change that view. The Tribunal considers that to have to wait until publication of aggregated statistics (once a cell count of 10 is reached) and to then ask for all 10 (or more) cases to be investigated when it may be that none of them was post 24 weeks, would be disproportionate and would risk an unnecessary waste of considerable public resource and cost .

Enabling public scrutiny of the way abortion law is applied.

77. With reference to Section 1(1)(d) of the Abortion Act, “substantial” has no legal definition and there is debate amongst practitioners as to what constitutes “serious”. Therefore there is room for considerable uncertainty in the way in which the law has been, and should be, applied. The Tribunal accepted the evidence of Professor Stuart Campbell (formerly Professor and Head of the Departments of Obstetrics and Gynaecology at both Kings College and St George’s Hospital Medical Schools) who noted that it was no longer always possible to establish what abnormality underlay a

termination or the gestation. There were also a significant number of terminations where no ICD-10 group was identified⁹. In his opinion:

- it was important that the data was available for scrutiny so that society would know how the current legislation was being interpreted and applied.
- a termination for abnormalities which are not serious is illegal.
- Termination for a cleft palate alone over 24 weeks is extremely dubious.

Ensuring accountability in relation to practitioners

78. Professor Campbell was firm in his assessment that the value of the data was not just research – it was a measure of efficiency and provided useful checks and balances to what was otherwise a self regulatory system with no proper external scrutiny. In his experience Doctors could be pressurized or have a cavalier attitude and might terminate when a foetus did not appear grossly abnormal. It was important to know if this was happening. He knew of no case where the DOH had actually checked the basis or reasons for a termination. Investigations might arise if one of the treating team made a complaint, but this was never instigated by the DOH. Angela Duncan of the DOH gave evidence that “there have been cases referred to the Police” following information raised on HSA4 forms, but that “this is not a common occurrence”. No detail of the individual cases was given and there was no evidence before the Tribunal as to whether any of the referrals that there have been, related to the basis and reason for a ground E post 24 week termination. In the experience of Professor Campbell junior Doctors who saw statistics appearing within 1 or 2 years were more obsessive about accurate recording of data, for example they were more likely to ask for detailed investigation of what was delivered, by pathology. It served as a reminder that they were accountable and prevented carelessness from creeping in.

79. Whilst there was evidence from Mr X and Professor Campbell that post 24 week ground E terminations are dealt with by specialist teams often in foetal medicine units, who take their responsibilities seriously, Professor Campbell was clear that this did not mean that those Doctors would not make mistakes or lose their sense of proportion.

⁹ See Confidential schedule 2

80. Jane Fisher, Director of Antenatal Results and Choices (ARC) gave evidence that since the Jepson case she had heard of hospitals convening ethics panels to decide whether a post 24 week termination was warranted, whereas before this had been left to the judgment of the 2 certifying Doctors. Whilst the thrust of her evidence was that this added delay to the process and was distressing to the patient, the Tribunal considers this to be an example where the realization that the published statistics can trigger a Police investigation has led to greater accountability.

Providing external checks and balances to the DOH scrutiny.

81. The DOH has a duty to ensure that the Act is carried out properly. Whilst Andrea Duncan confirmed that cases had been referred to the Police (this was not “a common occurrence” in the context that by 2003 there were over 180,000 such forms every year). All scrutiny is internal to the medical profession and the full burden of law enforcement falls upon the DOH. The DOH witnesses were satisfied that the system “worked well”. However, from the evidence, the Tribunal was concerned that there did not seem to be a mechanism for rigorous scrutiny of the forms to ensure compliance with the Act. The scrutiny described amounted to self regulation with no audit, spot checks, outside opinions or quality control of the basis for the terminations:

- In a non-emergency case 2 Doctors in good faith had to give the same opinion before the termination can take place.
- The Tribunal heard that each form is checked for compliance with the Act (this involves automated and manual checks including data quality checks and verifying and cross referencing the data). Any missing or inaccurately completed data fields cause the form to be sent back.
- If a patient appeared to be under 14 or over 50 their date of birth was checked.
- If the gestation was post 24 weeks a DOH Doctor checks the return and only when he or she was satisfied were the statistics generated.

82. However, this scrutiny was purely administrative to ensure that the 2 Doctors were consistent and the form properly completed. They were not scrutinized clinically or substantively. None of the witnesses were able to point to a case where the DOH had checked the diagnosis of a certifying Doctor. Ms Duncan gave evidence that it was not the role of the DOH to “second guess” the Doctors.

- Mr X who gave evidence on behalf of the DOH said that completing form HSA4 for ground E did not involve a long reasoned explanation. If ever there needed to be an investigation, the detail would be in the patient's notes, not on the form HSA4.
- Every effort is made to allocate an ICD-10 code prior to publication (i.e. the underlying condition) but where no ICD10 code was allocated at time of publication, unless the DOH had to republish for another reason (such as the aggregated figures) that abnormality would never appear in the statistics.
- There is no guarantee that in any year every case is eventually allocated an ICD-10 Code (usually because around 400 forms per year have more than 1 diagnosis, and sometimes it is not possible to say which of 2 or 3 abnormalities was the principal one).

83. The DOH argue that anything the government does can be subjected to external scrutiny at any time and that the existing system of checks and scrutiny is based on statute and regulations, any alteration to the system is a matter for Parliament. Additionally the DOH do not accept that better scrutiny is warranted. The Tribunal considers that this raises the question of whether the legitimate interest of the public can be met by campaigning for better scrutiny within the DOH rather than disclosure of the disputed information. The Tribunal notes that in the *House of Commons* case the lack of scrutiny and accountability (notwithstanding an annual audit and the publication of total expense sums) was considered to be key. Mr Justice Blake noted that if more accountability were entered into the process then that might affect a future balancing exercise, but it was not considered a reason to withhold disclosure at the present time.

To identify trends

84. Whilst it was Mr Nolan's evidence that it is difficult to discern trends from small numbers Professor Campbell gave evidence that there is significance in an apparent jump from 0-9 cases in one year to e.g. 17 in the next that goes beyond "statistical noise". He accepted that it was not possible to discern trends from 2 years worth of statistics. The DOH provided Professor Campbell with a table of figures compiled from the disclosed statistics comparing the post 24 week ground E figures for the cardiovascular system and the musculoskeletal system from 2002-2008. Professor Campbell agreed that trends could be determined over several years from these types of

figures even though some of them were suppressed, however, he maintained it was unsatisfactory not to have exact figures. Professor Campbell also accepted that with small figures there was scope for random variation. The DOH emphasised that a suppressed figure did not provide “no” information, it indicated that the figure was between 9 and 0. Professor Campbell stated that he considered a clinical value to be between 4 and 9 and that if a figure for the termination of viable foetuses was 0 he would be relieved but if it was 9 he would be concerned as 9 was a big number if a foetus was viable.

85. The Tribunal has not had sight of the actual values of the suppressed figures used in the example for the years 2005, 2006, 2007 and 2008. Whilst there was therefore no evidence before the Tribunal as to whether there had in fact been a jump from 0-17 in the cardiovascular category between 2007 and 2008 the Tribunal agrees with Professor Campbell’s evidence that such a jump would be significant and bear further scrutiny as it might be indicative of a deteriorating situation. Identifying Prenatal diagnosis trends and the extent to which a trend was significant was therefore hampered without this data.

86. Professor Campbell was clear that data is needed upon which to assess clinical needs. The response to remedy a perceived shortfall in patient care can be very swift and informal (including mentioning to the Royal College that a correction is needed). He gave the example that with current medical technology a termination for Downs Syndrome after 24 weeks ought not to arise. The baby would be viable, and it should have been diagnosed earlier. The absence of the data hampers audit.

87. The DOH argued that this aim could be fulfilled through access to the raw data under Regulation 5(e) Abortion Regulations 1991 which permits disclosure of the data as part of a research project. However, the Tribunal notes that an applicant would need to:

- formulate a research proposal,
- obtain funding,
- get the approval of 2 ethics committees

and even then they would probably not be able to refer to the statistics in their published research. This would represent a phenomenal waste of time and resources if the focus of

the enquiry was a specific termination condition and it transpired that in fact there were none and that the screening programme was working well. The Tribunal also considers that it is the data from the statistics that might trigger the formulation of a research proposal in an appropriate case in the first place, and that it is unrealistic to expect that a formal research application must be made under Regulation 5(e) at considerable cost and in an information vacuum.

For planning healthcare services including monitoring the rates of foetal abnormalities.

88. From the evidence it was clear that there is an increased risk to the patient undergoing a termination post 20 weeks. The number of foetal abnormalities for a particular condition assist in assessing what pre-natal screening facilities are required. Terminations at late gestations might point to a lack of expertise or a lack of facilities for prenatal screening, or a delay in assembling ethics committees, a shortage of practitioners or a lack of facilities for carrying out that type of termination. Foetal abnormality rates and their possible causes are an important area of research.

89. The Tribunal notes that in 2004 there were 11 post 24 week terminations for Downs Syndrome and in 2006 there were 12. In 2003¹⁰, 2005 and 2007 the figure is suppressed. No aggregate figure is available (presumably to prevent small cell figures being disclosed by subtraction). In considering the utility of the statistics, the Tribunal asks itself the hypothetical question: if in light of the high figure in 2004 steps had been taken to address the causes of the increase in late terminations in this category e.g. improve training and resources so that such cases were detected and terminated before viability was reached; how would those responsible know whether the suppressed figures after 2004 represented 0 (a significant improvement) or 9 (virtually no change in the situation)? This is postulated in the context that Professor Campbell gave evidence that the number of late terminations of viable foetuses for Cardio vascular abnormalities should reflect the effectiveness of our prenatal diagnosis service.

¹⁰ See confidential schedule 2

To inform public debate.

90. The Tribunal is satisfied that it is important that public debate is balanced and factually based¹¹. If there are no abortions in a specific category over a one year period it need not be the subject of political lobbying or a campaign to raise political awareness. The statistics are accessible to the public, easy to use and readily available (on the DOH website), therefore they ensure a greater participation in public debate.

91. The Rt. Hon Anne Widdecombe MP provided evidence that it has been difficult for Parliamentarians to secure reliable and accurate information on abortion statistics in order to debate full abortion needs and ethical issues and to ensure that the law is consistently applied. From the *Hansard* account of the Parliamentary debate upon the Abortion Act in 1990 it was clear that even then there were concerns that abortions were being carried out for trivial reasons. The then Health Secretary said in relation to the proposed amendment to record the handicap in the cases of abortions carried out under ground E:

“It would finally answer one way or the other the continual claim that abortion is carried out for a hare lip or other such condition... if that amendment is defeated the Government intend to introduce regulations to make it necessary for the nature of the handicap to be specified on the notification for a late abortion after 24 weeks”.

The form has been so amended, part of its purpose was clearly to allay fears that abortions were being carried out for “trivial” reasons. That information is now being withheld in circumstances that would appear to defeat the stated intention of Parliament.

92. DOH argue that since only small cells are affected and where possible aggregated totals are given, that the disclosure is sufficient to meet most of the legitimate aims listed above. A suppressed figure provides some information in that it indicates that the cell

¹¹ See confidential schedule 2

has a value of between 0-9 and that in general these figures are so small that they should provide reassurance. The Tribunal notes that, under the aggregated method, disclosure takes place after 3 years and then only if the cell total is 10 or more. If not, the next disclosure opportunity is after 10 years.

93. The DOH destroys form HSA4 after 3 years and does not keep all of the data. In particular the patient and practitioner names are not retained. If a case highlighted in an aggregated 10 year total were the subject of a criminal investigation, the relevant information would have to be obtained from a GP or the place of termination. GP records are kept until 10 years after the death of the patient and maternity records for 25 years after the last live birth as per the Health records Retention Schedule. The Tribunal accepts that when the DOH has undertaken this exercise in the past in relation to requests from patients, the information was found. However, it will be more difficult to reconstruct the information that was held on form HSA4 in an investigation where a long period of time has elapsed and it may be harder to trace those involved and to gather their recall.

94. The 3 and 10 year total figures allows for the possibility of e.g. 27 post 24 week Downs syndrome terminations taking place before disclosure of the aggregated figures (9 per 3 year period, accumulatively). In the context of Professor Campbell's evidence that a single case would be a cause for concern, and since there would have been no opportunity for public debate or political campaigning or to call for extra resources and training to aid swift diagnosis over that lengthy period of time, the Tribunal considers that disclosure of the disputed information is necessary to meet the legitimate aims of the PLA and wider general public.

Would the disclosure have an excessive or disproportionate adverse effect on the legitimate interests of the data subjects?

95. The Tribunal assesses the weight of the adverse effects which might flow from disclosure of the disputed information in the paragraphs that follow.

Identification of the patient by the public

96. This would or could be devastating because:

- The patient may be subject to public vilification based on an incomplete knowledge of the circumstances of the case and factors leading to the decision,
- Considerable stigma may remain,
- Patients may wish to keep the matter confidential from their family and friends (the desire for confidentiality may last for life).

97. However, these consequences are all dependent upon a patient being identified. As set out at 52 et seq above, the Tribunal is satisfied that this is very unlikely and that the risk of any of these adverse effects coming into existence is so slight that disclosure is proportionate.

Risk of identification perceived by patients

98. Professor Nathanson gave evidence that the BMA were aware that Doctors already had patients asking if they can use a false name and address. The fear is that people will consider telling untruths or travel abroad for treatment because of the perceived risk of disclosure. A repercussion could be that they may delay in coming forward with post abortion complications. It would be very hard to track whether this is happening.

99. Mr X stressed that patients faced with the decision whether to terminate under ground E should not have to worry whether they would be identified or not, and it would be detrimental to patients' healthcare if factors or fears which were not germane to the decision affected patients' medical treatment.

100. The Tribunal is satisfied from the evidence that patients are not usually focused on the statistics¹². The perceived risk of identification could equally affect a data subject in a cell of 10 whose information is disclosed. To each patient her case is unique and so the Tribunal is not satisfied that there is a material difference in the perceived risk of identification of a data subject in a cell of 1-9 as opposed to a cell of 10 or more. The fact that there has never

¹² See confidential schedule 1

been a patient identified from the statistics also suggests that the fear is unrealistic.

Self identification

101. In this context, self identification in a small cell:

- may motivate that person to try to identify others in that cell (looking for support),
- may tell a patient information about themselves that they did not know before e.g. rareness or uniqueness of the statistic in the population, which may be distressing,
- may lead to a perceived threat of identification (they may feel exposed), and could cause distress and lead them to claim that the statistics are inadequate to protect them or others.

102. However, the above factors equally apply to patients in a cell of 10 who do appear in the published statistics. In the case of a low count cell the patient already knows all the information about herself. What she might discover from publication is something about the rest of the population. She is already likely to know that her situation is rare. In his evidence Mr X said that patients often ask “what do other people do in my situation?”. The Tribunal observes that the statistics may provide these patients with some information and context. In a cell of more than 1 they may take comfort in realizing that they are not the only one. The statistics are annual and it may be that there were occurrences in other years which give some sense that they are not unique.

103. The Commissioner points to the fact that a number of witnesses whose evidence was received by the Tribunal had vast practical experience of women who have had terminations, both as Doctors and as Counsellors. None of the witnesses was able to point to a single case of a woman who had experienced anxiety as a result of this type of self identification.

Evidence of risk and harassment

104. The consequences for Doctors are different. The evidence was that there are genuine stake holder groups and also some organizations with extremist views. In other countries anti-abortion campaigners have inflicted fatal violence against Doctors. Mr

Dessent provided media articles and internet print outs of instances where those perceived to be involved in abortion services became the subject of unpleasant and intimidating campaigns. BPAS and Marie Stopes clinics are regularly subjected to demonstrations. Some organizations run “naming and shaming” campaigns against practitioners including posting their home address on the internet. There was evidence that this information crossed national boundaries and in one instance a nurse whose details had been removed from a British internet site became the subject of American anti-abortion campaigners. The Tribunal accepts that it cannot ignore the risks of this type of behaviour just because it has not yet happened in the UK. However, this must be balanced by the fact that there is no evidence before the Tribunal of any UK anti-abortion group campaigning activity which has led to criminal prosecution or civil proceedings. Additionally the Tribunal takes into consideration that the risk of identification is remote.

105. The Tribunal has heard that the DOH had difficulty obtaining witnesses who were prepared to be named in proceedings before the Tribunal. Indeed Mr X was permitted to give evidence in closed session (but in the presence of all parties) to protect his identity. Professor Nathanson’s evidence was that some Doctors are reluctant to be identified as carrying out abortions. However, the Tribunal takes into account the fact that many Doctors do not shy away from identification as Doctors who carry out ground E terminations (2 provided open evidence under their own name to this Tribunal), and others can be identified from articles in medical journals and media appearances.

106. It was argued that fear of identification would reduce the pool of doctors prepared to carry out ground E terminations. As well as impacting upon the Doctors’ professional lives it would also cause delay, distress to the patient and an increase in the number of late terminations. The Tribunal does not consider this a realistic concern. Professor Campbell was clear that ground E terminations are usually carried out at foetal medical units by committed and dedicated specialists and that there is no difficulty in attracting Doctors to these posts.

107. The Tribunal is satisfied that the likelihood of identification from the statistics is so remote that disclosure of the disputed information would not be unwarranted. The

disclosure would be proportionate, the legitimate aims are important and the disclosure of the disputed information directly furthers those legitimate aims.

Sensitive Personal Data

108. Section 2 DPA provides a definition of sensitive personal data :

“In this Act “sensitive personal data” means personal data consisting of information as to— ...

(e) his physical or mental health or condition,

(f) his sexual life,”

It is not in dispute that the data pertaining to the patients is sensitive personal data.

109. The conditions relevant to the processing of sensitive personal data for the purposes of the first data protection principle are found in Schedule 3 DPA:

7 (1) The processing is necessary—

(a) for the administration of justice,

(b) for the exercise of any functions conferred on any person by or under an enactment, or

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department.

110. Mr Dessent told the Tribunal that publication of abortion statistics is now one of the functions of the Department, and the DOH rely upon section 7(1) (b) for the publication of the sensitive personal data in the statistics of cells that number 10 or more. To the extent that the disputed information constitutes sensitive personal data, the factors of necessity considered at para 73 et seq above in relation to Schedule 2 paragraph (6) are material and apply equally for the same reasons.

Statutory Prohibition

111. Section 44 FOIA provides that:

(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—

(a) is prohibited by or under any enactment,

Regulation 5 of the Abortion Regulations 1991 provides that:

“.. any notice given or any information furnished to the chief Medical Officer in pursuance of these Regulations shall not be disclosed”.

112. It is the DOH case that the statistics for cell counts of 9 or lower constitute information furnished to the CMO. They justify their disclosure of cell counts of 10 or greater as not being “information” for the purpose of Regulation 5 because they are satisfied that these cell counts cannot be related back to the information furnished to the CMO, and the risk of identification is very low. No one has suggested that the DOH should not publish statistics at that level. There is no dispute between the parties that where the level of abstraction of statistics is high then there is no contravention of regulation 5 if the statistics are published.

113. The Commissioner contends that the disputed information is not information furnished to the CMO under the Regulations, rather it is statistical information derived from the information furnished to the CMO. The Tribunal notes that from an individual form, the CMO would not know e.g. how many post 24 week terminations were carried out for a particular congenital abnormality, consequently the information disclosed in the statistics is different from the information provided in the raw material given to the CMO.

114. Additionally for the reasons set out above the Tribunal is satisfied that all of the statistical information has a very high level of abstraction (i.e. the data subjects are not identifiable from the statistics) and for the purpose of risk of identification there is no real distinction between the publication of the low cell count numbers and the higher cell count numbers of 10, 11 or above.

Conclusion

115. The Tribunal allows the appeal to the extent that it is satisfied that the disputed information does constitute personal data in the hands of the Department of Health pursuant to section 1(1)(b) of the Data Protection Act and that the Commissioner ought to have considered section 40(3)(a)(i) FOIA namely whether disclosure would contravene any of the data protection principles in order to conclude whether section 1 FOIA had been breached.

116. The Tribunal is satisfied that disclosure would not contravene the Data Protection Principles and would not be in breach of the Abortion Regulations 1991 and therefore the exemptions at section 40 and 44 FOIA do not apply. By failing to disclose the disputed information, the DOH have breached section 1 FOIA.

Other Matters

117. We have considered this case based on the relevant facts and circumstances, and we would not wish this decision to be considered a general bar to withholding statistical information from public disclosure on grounds of protection of personal data. There may be cases where data subjects may be identified or reasonably identifiable from statistics, where different factors and circumstances may determine whether disclosure is unfair or unwarranted. Where statistics can be added to other information held by a public authority to identify an individual, consideration must in each case be given to the Data Protection Principles as required by Section 40(3) FOIA.

118. This decision is unanimous.

Dated this 14th day of October 2009

Signed

Fiona Henderson,
Deputy Chairman