



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

**Case No: EA/2011/0223**

**ON APPEAL FROM:**

**The Information Commissioner's  
Decision Notice: FS50372823**

**Dated: 8 September 2011**

**Heard at: Coventry Magistrates Court**

**Date of hearing: 2 May 2012**

**Date of decision: 28 May 2012**

**BETWEEN:-**

**MR A**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

**and**

**THE HEALTH PROFESSIONS COUNCIL**

**Second Respondent**

**BEFORE**

**TRIBUNAL JUDGE  
Melanie Carter**

**and**

**LAY MEMBERS  
Suzanne Cosgrove**

**Malcolm Clarke**

**Attendances:**

For the First Appellant: In person

For the Respondent: Michael Lee

For the Second Respondent: Ben Hooper

Subject matter:

Duty to confirm or deny s.1(1)(a)

Personal data s.40

Cases:

Common Services Agency v Scottish Information Commission [2008] 1 WLR 1550

Dennis Heath v Information Commissioner EA/2009/0020

All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner [2011] UKUT 153 (AAC)

**Decision**

The Tribunal found that the Decision Notice was in accordance with law and the appeal was rejected.

**Reasons for Decision**

**Introduction**

1. On 1 October 2010 Mr A wrote to the Health Professions Council (“HPC”) with a request for information under the Freedom of Information Act 2000 (“FOIA”). This appeal arises from the HPC’s response to that request. Mr A had written to HPC to request information in relation to a named registrant (“the registrant”). HPC is the regulatory body for a range of health professionals, including the registrant’s profession. It maintains a professional register and investigates complaints against and determines the fitness to practise of those registrants. Mr A had written to the HPC to request “the response [the registrant] gave to the Investigating Committee panel.” The particular registrant had acted as an expert witness in Mr A’s family court proceedings regarding access to and custody of his children. Given the sensitivity of the matters under consideration and further to an order made under rule 14(1)(b) of the Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009 on 1 May 2012, this decision is written in such a way that the Appellant, his wife and children cannot be identified.

2. Mr A had been dissatisfied with HPC's response to his request for information and complained to the Information Commissioner ("IC"). The IC found that HPC did not need to take any further steps in compliance with the request, albeit it came to this conclusion by a different route to the HPC. The IC decided, by his Decision Notice dated 8 September 2011 (FS50372823) that HPC was not obliged to confirm or deny whether it held the information requested by Mr A in accordance with section 40(5)(b)(i) FOIA. The IC found that to confirm or deny whether or not the HPC held the information requested would in and of itself disclose whether there a complaint as to the registrant's fitness to practise had been made. Such disclosure, the IC found, would be in breach of the First Data Protection Principle.

### **The appeal to the Tribunal**

3. Mr A has appealed the decision of the IC to this Tribunal. His essential arguments were that

- a. the information he has requested is either his or his children's personal data and should therefore be disclosed;
- b. section 32 of the Data Protection Act 1998 ("DPA") operates such that HPC was obliged to comply with his request;
- c. the information sought ought not to be viewed as personal data as it concerns the registrant's professional role as an expert witness and evidence he gave in open court;
- d. there is significant public interest in expert witnesses in family court proceedings being called to account and Mr A should be allowed to ensure that HPC has carried out its functions in that regard properly.

4. The Tribunal wished to emphasise at the outset that disclosure pursuant to a FOIA request is disclosure to the general public. It is not disclosure solely to Mr A. Hence, the IC had to write his Decision Notice, and in turn this Tribunal has had to

write this public decision omitting certain facts which are already known to Mr A. These facts cannot be released more widely as to do so runs the risk of a breach of the DPA. The Tribunal noted that given this and the complexity of the law involved, the Decision Notice and indeed this decision may be hard for the Appellant to follow. It was to be hoped however that given the oral hearing of this appeal and the helpful contributions of the counsel for both Respondents, Mr A will be able to appreciate the import behind our findings.

## **The Law**

5. The Tribunal's powers insofar as relevant to this appeal are to be found in section 58 of FOIA. Thus the Tribunal may uphold an appeal:

*“(1) If.....under section 57 the Tribunal considers-*

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

6. The Tribunal is concerned with grounds upon which it might be said that the Decision Notice was not in accordance with law. The Tribunal does not take the IC's decision again, rather its task is to consider the Decision Notice and to consider whether it can be impugned on legal grounds. As Mr A was well aware, it was not the role of the Tribunal to consider whether the Judge in the family court proceedings had inappropriately relied upon the registrant's expert testimony or indeed whether he was fit to practise. The Tribunal's sole focus was the Decision Notice issued by the IC and whether he had been right to find that the HPC ought not to have confirmed or denied whether it held the information requested.
7. A person who has made a request for information under section 1(1) FOIA is, subject to other provisions of the Act: (a) entitled to be informed in writing whether the public authority holds the information requested (section 1(1)(a)) and (b) if it does, to have that information communicated to him or her (section 1(1)(b)). Compliance with section 1(1)(a) FOIA is referred to as “the duty to confirm or deny”

(section 1(6) FOIA). A public authority may be excluded from the duty to confirm or deny under provisions contained in Part II FOIA.

8. The IC concluded that HPC was excluded from the duty to confirm or deny whether it held the requested information under section 40(5)(b)(i). Section 40 FOIA, an absolute exemption, provides in the relevant parts:

*“(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.*

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

- (a) it constitutes personal data which do not fall within subsection (1), 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 the 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*

*.....*

*“(5) The duty to confirm or deny –*

*(b) does not arise in relation to other information if or to the extent that*

*... –*

*(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles .”*

*(7) In this section—*

*...*

*‘data subject’ has the same meaning as in section 1(1) of [the Data*

*Protection Act 1998];*

*'personal data' has the same meaning as in section 1(1) of that Act."*

9. Thus, where to confirm or deny whether an authority holds particular information would in itself be a breach of a Data Protection Principle, that authority is released from its obligations under section 1(1) of FOIA. It is moreover prohibited from making this disclosure if it is to uphold the data protection rights of the data subject. In this case, the IC's concern has been that if the HPC confirmed or denied whether it held the information requested this would automatically indicate whether or not there had been a fitness to practise complaint made against the registrant.

10. For the disclosure to be in compliance with the First Data Protection Principle, the Tribunal would need to consider, in addition to fairness, whether one of the conditions in Schedule 2 to the DPA is satisfied. Mr A had not identified any of the conditions in Schedule 2 that might potentially be relevant were disclosure to be made. The only possible condition, in the IC's and the Tribunal's view was that to be found in paragraph 6 of Schedule 2, whereby processing is lawful if it is:

*"necessary for the purposes of legitimate interests pursued 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."*

11. The first part of condition 6 can only be satisfied where there is a legitimate *public* interest in disclosure, as this is disclosure to the public at large. The disclosure must moreover be 'necessary' for the purposes identified. The second part of condition 6 is an exception: even where the disclosure is necessary, one must still go on to consider whether the processing is unwarranted in the particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject, in this case the registrant.

12. The Tribunal noted Lord Hope's observations in *Common Services Agency v Scottish Information Commission* [2008] 1 WLR 1550 at [7], "*there is no presumption in favour of the release of personal data under [the FOI regime]... the guiding principle [of the Data Protection Act] is the protection of the fundamental*

*rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data”.*

### **Mr A's submissions**

13. Mr A's submissions in support of the grounds of appeal were put both in writing and helpfully by his sister, at the oral hearing. These were essentially that:

- a. there was an extremely strong public interest in the HPC confirming or denying whether it had the information requested and then disclosing any such information;
- b. the public interest arose from child protection matters in that the registrant's expert testimony in the family court proceedings related, it was said, to child abuse and thus there was a compelling case for disclosure;
- c. it had been impossible to rule out child abuse in Mr A's particular family court proceedings and the fact that the registrant had, in his expert testimony, effectively done so, strengthened the public interest;
- d. confirming/denying and then disclosing would serve the public interest in ensuring proper accountability for HPC in that Mr A had not been able to understand HPC's actions in relation to this matter;
- e. Mr A had not expected information relating to family court proceedings involving children to be essentially kept secret
- f. that any information with regard to those proceedings should not be viewed as the registrant's personal data (given it arose from his acting in a professional role).

### **Consideration**

14. Starting with his last submission first, Mr A's argument, formulated in terms of the relevant law in this case, seemed to be that to confirm or deny whether the requested information was held would not lead to a disclosure of 'personal data' to which the exemption in section 40(5)(b)(i) could apply.
15. The Tribunal considered that data arising from the registrant's professional life, insofar as it was data which related to and identified him, was without doubt personal data within the meaning of section 1 DPA. The registrant had rights to privacy under the DPA in relation to his personal data whether it concerned his private or professional life. This was a well established principle of law.
16. Mr A submitted, in the alternative, that certain of the information sought was his or his children's personal data and ought therefore to be disclosed. The Tribunal understood that subject access requests under the DPA had been made by Mr A and that there had been some disclosure in response. As this was a matter for the DPA and the IC under his DPA enforcement powers, it was strictly beyond the jurisdiction of this Tribunal. In any event, the Tribunal was reviewing the IC's decision that HPC should not confirm or deny whether information was held under FOIA, such that the only relevant personal data was whether or not a complaint about the registrant had been made to HPC. This piece of personal data was unquestionably that of the registrant, not Mr A's or his children's.
17. Whilst section 35 (2) of the DPA might have had some relevance in that, if applicable, there was arguably no breach of the First Data Protection Principle, the Tribunal did not consider that disclosure under FOIA, further to Mr A's request, could be said to be "necessary" for "exercising or defending legal rights". Mr A argued that it was necessary for him to have the information he had requested in order to challenge the expert witness testimony of the registrant and thereby the decisions in the family court proceedings. It could not however, in the Tribunal's view, be properly said that disclosure of the information sought was "necessary" to achieve this. The Tribunal could not see why these rights could not have been pursued through the ordinary rights of appeal in the family court proceedings (with further judicial scrutiny of the expert's opinion) or possibly judicial review. Section 35 did not, in the Tribunal's view, apply to this case.



18. The Tribunal had properly to ask itself, further to section 40(5), whether confirming or denying whether HPC held the information requested would contravene any of the Data Protection Principles. The First Data Protection Principle provided that personal data only be processed in a fair and lawful way. The initial issue for the Tribunal in determining whether confirming or denying would be fair, was the registrant's expectation in this regard. A second consideration would be whether any such expectation was reasonable. In other words, did the registrant have a reasonable expectation that, prior to a case to answer being determined one way or the other, the public would not be informed whether or not a complaint against him had been made?
  
19. The Tribunal was told by Ms Johnson that HPC did not make public the fact of a complaint unless and until the Investigating Committee had found there to be a case to answer and it was referred onwards for a hearing. Registrants were routinely told that this would be the case and HPC's practice of only publishing the names of registrants and the allegations made against them after that stage, supported this expectation. Registrants moreover often sought reassurance as to such confidentiality.
  
20. The Tribunal considered that in these circumstances, the registrant was indeed likely to have had an expectation that whether or not a complaint had been made against him would not be disclosed at the early stages of the fitness to practise process. The Tribunal was of the view that this was an entirely reasonable expectation, given that malicious or trivial allegations which amounted to nothing, if made public could still have a damaging effect on a career (on the basis of the possible public perception of 'no smoke without fire').
  
21. On the question of the reasonableness of this expectation, the Tribunal considered the "Handling Complaints: Sharing the registrant's response with the complainant. CHRE 2009" and the 2010-11 Performance Review Report by The Council for Healthcare Regulatory Excellence ("CHRE"), a body which regulates healthcare professional regulators, on their handling of fitness to practise matters. The existence of these reports had come to light as a result of the Tribunal's questioning of Ms Johnson. This 2010-11 Performance Review Report urged the

HPC to reconsider CHRE's recommendation from its 2009 report "Handling Complaints" that "there should be a presumption that the registrant's response will be shared in full with the complainant."<sup>1</sup> The same report highlighted that many of the other healthcare regulators had a more open transparent approach in this regard. The Tribunal was most concerned that HPC had not provided these reports to the Tribunal or made reference to them in the witness statement of Ms Johnson. Both were highly relevant documents, given that, in particular the "Handling Complaints" report directly contradicted what appeared at the time of the hearing, to be a critical aspect of Ms Johnson's evidence. HPC ought to have provided this in advance of the hearing, particularly since the Appellant was a litigant in person.

22. Whilst the report was directly relevant to the case as argued by the HPC, in the end it did not impact on the limited issue which formed the basis of this IC's Decision Notice and in turn this Tribunal's decision. Thus, the critical issue which eventually decided this matter was the disclosure of whether or not a complaint had been made, rather than disclosure of the actual responses sought. As it happened, the CHRE Handling Complaints report did make a distinction between disclosure of responses to complainants and disclosure to the public, under the FOIA regime. In its report CHRE stated "We consider it appropriate that the registrant's response is not disclosed under the Freedom of Information Act as it would involve releasing personal information to the general public"<sup>2</sup>. (although their recommendation was clear that a registrant's response should, subject to the withholding of sensitive material, be made available to the complainant<sup>3</sup> by way of voluntary disclosure).

23. The Tribunal concluded that the registrant's expectation that HPC would not disclose whether a complaint had been made, was a reasonable one. Disclosure would be unfair and therefore a breach of the First Data Protection Principle. The Tribunal could have stopped there as that led inexorably to it being the case that HPC was not obliged under section 40(5) to confirm or deny whether it held the information requested.

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<sup>1</sup> Para 5.5 Handling complaints CHRE December 2009

<sup>2</sup> Para 5.4 Handling Complaints CHRE December 2009

<sup>3</sup> Para 5.2 Handling Complaints" CHRE December 2009

24. For completeness however and given the extensive submissions from the HPC and the IC, it went on to consider whether a condition in Schedule 2 of DPA could be satisfied were HPC to confirm or deny. Only Schedule 2 was in question here as whether or not a complaint had been made was not sensitive personal data within the meaning of section 2 DPA. Thus, this issue brought into play paragraph 6 of Schedule 2 and the balancing test of legitimate public interests in disclosure as against any prejudice that might be suffered by the registrant. An initial issue was whether the reference to disclosure to “a member of the public” in section 40(5)(b)(i) should be construed as a reference, essentially, to Mr A, the requester of the information, not disclosure to all members of the public.

25. Counsel for HPC pointed out that subsection (1) of section 40 made reference to “the applicant”. He submitted that had Parliament intended subsection (5) when referring to “a member of the public” to mean the applicant or requester, then the provision would have expressly referred to “the applicant” as it had done earlier on in the section. Moreover to introduce the specific position of the requester in this way would be to undermine the overwhelming thrust of FOIA which was that requests were to be treated as ‘motive blind’ and that, when considering the implications of disclosure, disclosure to the public at large is the test, not just disclosure to the person who has made the request. The Tribunal found both these arguments to be highly persuasive and concluded that the appropriate test was to ask whether HPC confirming or denying that it held the information requested to any member of the public, ie: the public in general, would breach the Data Protection Principles. In this regard the Tribunal did consider the Upper Tribunal case of All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner [2011] UKUT 153 (AAC) case and what appeared, on the face of it to be a contrary view. Its views on this matter, contained in paragraphs 112 to 115, were however obiter and particular to the facts of that case. This Tribunal was not therefore bound to follow the Upper Tribunal’s reasoning in this regard.

26. The first question in relation to paragraph 6, Schedule 2, therefore was whether the public had a legitimate interest in HPC confirming or denying that it held the information requested. In other words, did the public have a legitimate interest in

knowing whether a complaint had been made to the HPC against the registrant? The Tribunal noted that Mr A had advanced a significant number of arguments which related to his own personal interest in the disclosure of the particular information. These however were not strictly relevant.

27. The Decision Notice had, in its consideration of paragraph 6 of Schedule 2, proceeded on the basis that the public did have a legitimate interest in this regard (as opposed to Mr A's particular interest). That interest was said to be knowing that registrants are fit to practise and thereby HPC is called to account in carrying out this important function. The Tribunal accepted moreover, in accordance with Mr A's submission, that there was a particular heightened public interest in accountability of expert witnesses in child protection matters. It was self-evidently the case that children being amongst the most vulnerable in our society, the public interests attendant on protecting their needs were particularly heightened.

28. The Tribunal was of the view that the IC had, nevertheless, correctly applied the test in paragraph 6 of Schedule 2. The Tribunal considered that whilst there was a legitimate interest in the public being confident of the fitness to practise of registrants in these circumstances, the IC had been correct in concluding that this did not require disclosure of whether or not there had been a complaint against a named registrant. In terms of paragraph 6, the legitimate interest did not make disclosure to the general public "necessary". There were other means by which this confidence could be maintained, firstly through the role of the courts in testing the experts' evidence and secondly, through a regulatory system which publicised its notification that a complaint had been made where a case to answer had been found and then a record of decision if a registrant had been found not to be fit to practise. The Tribunal agreed moreover that the disclosure to the public would not be warranted when set against the potential prejudice to the data subject, in this case the registrant.

29. In conclusion, the Tribunal was of the view that paragraph 6 of Schedule 2 of the DPA would not permit disclosure of whether or not a complaint had been made against the registrant such that confirming or denying whether the requested

information was held in this case would be a breach of the First Data Protection Principle.

30. Finally, the Tribunal was addressed by the IC and HPC, not by Mr A, on whether, by reason of the omission of any reference to subsection (5)(b) of section 40 in section 2(3)(f), a public interest balancing test ought to apply. The Tribunal considered there was some doubt over this question, given the way in which section 2(1) was worded. Given however the wholly unattractive position that would arise if it was concluded that a public interest balancing test ought to apply in circumstances in which a potential breach of a Data Protection Principle had been identified and that this would likely bring the UK into breach of its obligations under the European Directive, the Tribunal adopted a purposive approach. It decided to follow the reasoning in the Tribunal case of *Dennis Heath v Information Commissioner EA/2009/0020*, paragraphs 22 -24 , on the basis that there was sufficient ambiguity in the meaning of “provision” in section 2(1) so as to enable a purposive interpretation, one which, in effect, gave primacy to data protection obligations. Thus, it concluded that once the Tribunal had decided that disclosure would lead to a breach of the First Data Protection Principle, that was the end of it and it ought not to apply a public interest balancing test before deciding that the duty to confirm or deny did not arise.

## **Conclusion**

31. For the above reasons, the Tribunal considered that the Decision Notice had been in accordance with law in concluding that the exemption in section 40(5)(b)(i) applied. HPC had not been required to confirm or deny whether it held the requested information and was not required to take any further steps in compliance with the request.

32. Whilst the Tribunal was greatly sympathetic to Mr A, it was obliged to conclude that his grounds of appeal failed. This was precisely because, whilst disclosure to him as to whether a complaint had been made might seem unobjectionable given his personal knowledge of matters, disclosure under FOIA had to be seen as disclosure to the general public. There would be no restrictions on the information

being more widely disseminated and thus, the Tribunal was obliged to consider what impact this might have on the registrant's rights to privacy.

33. It was regrettably the case that Mr A ought perhaps to have taken different legal action at an earlier stage and that he had clearly not been aware of this possibility. It may have been that had he taken further legal action in the family court proceedings and/or by way of judicial review he would have obtained the information he sought. Disclosure through FOIA or the DPA was not however a substitute or alternative mechanism for this, given the particular constraints of those Acts.

34. It will also have been frustrating to Mr A as, clearly had it been a different healthcare professional regulator responsible for the fitness to practise of the registrant, he might have obtained certain of the information he was seeking. These were however matters beyond the jurisdiction of this Tribunal.

35. Our decision is unanimous.

Melanie Carter  
Tribunal Judge  
Dated: 28 May 2012