IN THE FIRST-TIER TRIBUNAL **Case No. EA/2012/0120**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50408527
Dated: 15 May 2012

Appellant: **Dr Waney Squier**

Respondent: **Information Commissioner**

Second Respondent: **The Commissioner of Police for the Metropolis**

Considered on the Papers

Date of decision: **13 November 2012**

Before
John Angel
(Judge)
and
Michael Hake
Michael Jones

Subject Matter: Personal data s.40(2) FOIA.

Cases: *Durant v FSA* [2003] EWCA Civ 1746; [2011] 1 Info LR 1
Commons Services Agency v Scottish Information Commissioner [2011] 1 Info LR 184 (*CSA)*
The Corporate Officer of the House of Commons v IC & Brooke & Others [2008] EWHC 1084 (admin)

Decision

The Tribunal upholds the Information Commissioner's decision notice dated 15 May 2012 and dismisses the appeal.

Reasons for Decision

Background

1. In 2009 the Commissioner of Police for the Metropolis usually known as the Metropolitan Police Service ("MPS") held two multi disciplinary meetings ("the meetings") at New Scotland Yard to discuss issues surrounding medical evidence in prosecutions involving alleged 'shaken baby syndrome' which is a collective term for non- accidental head injury ("NAHI") suffered by a baby or young child having been shaken. Police officers, lawyers and medical experts voluntarily attended the meetings.

2. MPS investigates and (where appropriate) prosecutes NAHI cases. All cases before the courts will fall to be determined on the evidence before them. NAHI, however, is a difficult and controversial subject which has led to intense debate among the medical community. As we understand it there is a "mainstream" and an "alternative" or "minority" clinical opinion on NAHI. Such is the divergence of clinical opinion on the issue that a specialist conference chaired by Professor Furness was held in December 2009. Dr. Squier has outlined her concerns on this issue to us and that she is prepared to consider and advance an "alternative" opinion on NAHI.

3. On 13 September 2010 two MPS police officers addressed the Eleventh International Conference on Shaken Baby Syndrome/Abusive Head Trauma, in a session entitled "A National Co-ordinated Approach to Cases of Non-Accidental Head Injury in the UK" (*US conference*). Reference was made to the meetings. Heather Kirkwood, a US attorney who attended the conference, characterised their presentation as a description of efforts to prevent Dr Squier and another doctor from testifying in NAHI cases on behalf of the defence. The MPS does not accept this characterisation as accurate.

4. Dr Squier made a subject access request under the Data Protection Act 1998 ("DPA") for disclosure of any personal data recorded in the minutes and other papers relating to the meetings. Information was disclosed but she is not happy that it contained all her personal data.

The Request

5. Dr Squier made a request dated 14 March 2011 for "all personal information about me held by MPS" and "names of all those involved in … a meeting took place in early 2008 as described in statement to BBC, broadcast in File on Four Feb 15th 2011."

6. These were two different types of requests. The former was a data subject access request which we do not have jurisdiction to consider. The second request was made under the Freedom of Information Act

2012 ("FOIA") for which we do have jurisdiction. However as we discuss later they are related.

7. MPS issued a refusal notice on 7 April 2011 which described Dr Squier as seeking access to

> "Names of all participants in the meeting (Early 2008) described by DI Welsh in appended document:
> Multi-disciplinary meeting at New Scotland Yard, London. Police, Crown Prosecution Service, lead and junior counsel, lead medical experts in pathology, paediatrics, ophthalmology, head of sections. Decided to discuss situation, identify main problems and some solutions."

8. MPS claimed the s.14(1) FOIA exception was invoked and refused the request on the basis it was vexatious.

9. Dr Squier applied for an internal review of the decision on 26 April 2011. On 28 July 2011 MPS wrote to Dr Squier upholding its decision but now claiming the s.40(2) (personal information) exemption was engaged. The s.14 exclusion had been withdrawn. MPS explained there were two meetings in 2009 and had considered the request as applying to both.

Complaint to the Commissioner

10. Dr Squier complained to the Information Commissioner. By a decision notice dated 15 May 2012 ("DN") the Commissioner found that MPS had correctly applied the s.40(2) exemption to withhold the information.

11. The Commissioner considered that "the arguments are strong on both sides" but was satisfied that the risk of harassment to those who attended the meetings would increase if their names were disclosed and that would contravene the first data protection principle.

Appeal to the First-tier Tribunal

12. Dr Squier appealed to the First-tier Tribunal. MPS was joined as a party. MPS claimed for the first time that the following further exemptions were engaged, namely s.38(1)(b) (health and safety) and s.31(1)(a) (prevention and detection of crime) and s.31(1)(a) (apprehension or prosecution of offenders) and that the public interest balance favoured maintaining the exemptions.

13. The case was heard on the papers before the Tribunal. In other words there was no oral hearing by consent of the parties. Some of these papers were closed which meant they have not been seen by Dr Squier. This is because they comprise the disputed information and evidence related to such information, that if disclosed to Dr Squier during the course of these proceedings would defeat the exercise of considering the case under FOIA.

Questions for the Tribunal

14. Put simply we have to decide whether s.40(2) is engaged. If it is, then as an absolute exemption, we need go no further. If it is not engaged or only engaged for some of the requested information then we need to consider whether the recently claimed s.38(1)(b) and/or s.31(a) or (b) exemptions are engaged and if so where the public interest balance lies.

15. Despite the very recent claiming of the new exemptions we have no discretion as to whether we need to consider them – see *Home Office v IC* [2011] 1 Info LR 1533.

The legal framework

16. The absolute exemption at s. 40(2) of FOIA provides, insofar as is relevant here:

> *(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 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, or...*

17. The definition of "personal data" is found at s. 1(1) of the DPA. This provides:

> *"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,*
> *and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.*

18. The courts have considered the definition of personal data in *Durant v FSA* [2003] EWCA Civ 1746; [2011] 1 Info LR 1 and applied two notions that might be of assistance. However these are not determinative. The

Court of Appeal found that "In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity".

19. There is no presumption in favour of the disclosure of personal data. Rather, the guiding principle of the DPA 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: *Commons Services Agency v Scottish Information Commissioner* [2011] 1 Info LR 184 (*CSA)* at §7.

20. The data protection principles are set out at Part I of Schedule 1 to the DPA. The first data protection principle is that:

> *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...*

21. There are two relevant conditions. The first is condition 1 which provides as follows:

> *The data subject has given his consent to the processing.*

22. The second is condition 6(1) which provides as follows:

> *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.*

23. The test to be applied in relation to condition 6(1) has been considered by the High Court in *The Corporate Officer of the House of Commons v IC & Brooke & Others* [2008] EWHC 1084 (admin) where the court found that

> It follows that the general right of access to information is not unqualified. Where a request is made for personal data (within the meaning of section 40(2) of FOIA) that does not relate to the applicant himself it may be exempt from disclosure where disclosure would contravene one of the data principles set out in the DPA. The issue in a nutshell is the potential conflict between the entitlement to information created by FOIA and the rights to privacy encapsulated in the DPA.

24. Following from this judgment and the decision of the Information Tribunal it upheld we consider that for the purposes of condition 6(1) two questions may usefully be addressed:

(A) whether the legitimate aims pursued by the applicant can be achieved by means that interfere less with the privacy of those who attended the meetings (and, so far as affected, their families),

(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 attendees.

25. 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.

26. The Commissioner puts it even simpler in the DN and says we have to consider

a. whether disclosure of the requested information would be within the data subject's reasonable expectations;
b. what, if any, consequences would flow from disclosure of the requested information; and
c. whether there are any legitimate public interests in disclosure of the requested information.

27. S.38(1)(b) FOIA provides that:

(1) Information is exempt information if its disclosure under this Act would, or would be likely to –
(a) endanger the physical or mental health of any individual, or
(b) endanger the safety of any individual.

28. S.31(1) FOIA provides that:

(1) Information which is not exempt information by virtue of section 30 is exempt information if is disclosure under the Act would, or would be likely to, prejudice –
(a) the prevention or detection of crime,
(b) the apprehension or prosecution of offenders…

29. Both these exemptions are subject to the following public interest test under s.2(2)(b)

In all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing information.

Evidence and facts

30. The *US conference* was held in Atlanta Georgia USA. Heather Kirkwood, a US attorney, attended the session given by the two UK police officers at the conference and concluded that the "national

coordinated approach …was essentially a description of the joint efforts of New Scotland Yard, prosecution counsel, and prosecution medical experts to prevent Dr Squier and [another named medical expert] from testifying for the defence on their findings in specific cases as well as on their published and peer-reviewed research."

31. She provided Dr Squier with her contemporaneous notes of the session which formed the basis of her conclusion.

32. Dr Squier made a request to the MPS for:

    a. All personal information about her held by MPS, and

    b. Names of all those involved in the meeting(s) described at the *US conference.*

33. The first request was treated as a subject access request with which we are not concerned. The second request is a FOI request which we can consider. However they are related and both most be seen in context.

34. In 2009 MPS hosted two meetings at New Scotland Yard to discuss issues surrounding medical evidence in recent prosecutions involving alleged NAHI. Evidential uncertainties had made prosecutions unusually difficult. Given its role in bringing well-founded prosecutions, the MPS sought the input of police officers, lawyers and medical experts, on this contentious issue, who voluntarily attended the meetings. It would appear that the attendees were invited by MPS and that the meeting was not open to anyone to attend. It would also appear from the evidence that some but not necessarily all of those who attended were guided by or supported the mainstream view of the cause of NAHI, namely "the triad of injuries" which consists of retinal haemorrhages (bleeding into the linings of the eyes), subdural haemorrhages (bleeding beneath the dural membrane) and encephalopathy (damage to the brain affecting function). Dr Squier was not invited to attend.

35. MPS described those who attended as "*Multi-disciplinary …… Police, Crown Prosecution Service, lead and junior counsel, lead medical experts in pathology, paediatrics, ophthalmology, head of sections.*

36. DI Terry Sharpe provided us with a witness statement which explained the intense controversial nature of the subject due to the highly emotional situation whereby a parent or carer is prosecuted for the death or serious injury of a child. He accepted the MPS was guided by the "mainstream" view but he also accepted that there may be divergent expert evidence and alternative opinions. It was a matter for the courts to decide between different expert opinions on the basis of all the evidence and the circumstances of any case before them.

37. In his view prosecution clinical experts have an extremely difficult job of trying to convince juries (given the standard of proof for criminal offences) of the existence of the triad and causation. Conversely, it could

be argued that defence expert clinicians offering an alternative explanation may more easily raise doubt in a juror's mind. He considers this resulted, between 2007 and 2009, in two separate fatal NAHI cases having hung juries and re-trails being ordered which ultimately resulted in unsuccessful prosecutions.

38. DI Terry Sharpe states there have been vociferous and unduly hostile attacks on experts who have supported prosecution cases. In some instances these have amounted to harassment and in others at least giving rise to serious and understandable distress on the part of those criticised for sharing the "mainstream" view. He gave an example of such behaviour.

39. The prosecution failures and hostility towards some experts had acted, in the MPS' view, as a major deterrent on experts supporting prosecution cases. As a result the MPS decided to arrange the meetings to debrief those involved in prosecution cases. The first meeting was held in June 2009 and there was a follow up meeting in October 2009. The meetings were to discuss the issues and try to devise a coordinated strategy to improve the prosecution of NAHI cases.

40. It is clear from the evidence that there are only a few medical experts in this field, whatever their views.

41. DI Terry Sharpe denies that the meetings were part of a campaign to discredit defence witnesses, or to identify and remove such experts from the court.

42. On or about 13 July 2011 (before the internal review) Sarah Strong of the MPS contacted the attendees of the meetings to "ascertain whether you wish the MPS to either withhold or disclose your name (and possibly other). The MPS will not disclose any personal reasons/rationale you provide me with within my response letter." She explained that disclosure would, in effect, be to the "world" at large and that if the attendee should wish his or her name to be withheld they would apply s.40(2) FOIA.

43. In November 2011 Nigel Shankster, a Higher Information Access Manager within the Public Access Office of the MPS' Directorate of Information and previously a serving police officer, again wrote to the attendees. This was after the complaint to the Commissioner and in a response to questions put by the Commissioner as to whether their position had changed since their response to Sarah Strong's email.

44. Of the 19 attendees who responded only 5 provided any sort of consent to their names being disclosed to Dr Squier. One of these said he/she only agreed if all the other names of attendees were also disclosed. The remaining 14 refused.

Are the names of the attendees personal data?

45. Applying the legal principles set out above we find that the names are personal data because they identify the individuals who attended the meetings in 2009. The fact that they attended the meetings in a professional capacity to discuss NAHI prosecutions are matters of biographical significance for those individuals. We therefore agree with the Commissioner that the information requested is personal data.

Should the names be disclosed?

46. The DPA is designed to protect such data. As the House of Lords found in *CSA* there is no presumption in favour of release of personal data under the general obligations that FOIA lays down.

47. Under s.40(2) FOIA there is an absolute prohibition on disclosure where one of two conditions apply. The first is where one of the data protection principles would be infringed. The second where s.10 DPA has been used.

48. One attendee served notice under s.10 and therefore we are satisfied that his/her name cannot be disclosed.

49. For the other attendees by common agreement between the parties only the first data protection principle is applicable in this case – see paragraph 19 above. Where a condition under Schedule 2 DPA is satisfied then there may be fair and lawful processing which would mean that persona data could be disclosed to a third party. Two conditions are applicable in this case. Firstly was there consent to disclosure?

50. According to the MPS 19 attendees responded. 14 explicitly refused to allow disclosure of their names. Five attendees gave some form of consent in writing to their names being disclosed. We have considered the email exchanges following the letter and email from Sarah Strong and Nigel Shankster which was provided to us as part of the closed bundle and are not convinced that unequivocal consent was given by any attendee. One of the five was only prepared for his/her name to be disclosed if all other attendees had agreed for their names to be disclosed. Clearly condition 1 has not been met for this attendee. The information we have seen from others appears to express concerns and reservations about the disclosure of their names. In our view this does not amount to the form of consent required under the DPA.

51. Therefore we do not find that condition 1 can be applied in this case.

52. We now turn to condition 6(1) which the parties all seem to agree is applicable and which is referred to in paragraph 20 above.

53. The processing has to be necessary for Dr Squier to pursue her legitimate interests.

54. We note that the Commissioner considers that generally attendees of public authority meetings should have an expectation that they may be named. In this case, it is not clear what were the expectations of attendees before their replies to Sarah Strong and Nigel Shankster's email and letter. However what is clear from reading their responses is that most of them had no such expectation.

55. Dr Squier from other evidence states in her grounds of appeal that:

    a. the meetings were public meetings and therefore MPS should, in effect, disclose their content. MPS disputes that the meetings were public;

    b. the MPS had been saying in public that she and another expert faced Fitness to Practice hearings and that they should no longer be suitable as defence experts;

    c. also they were targeting her expertise in other ways for example by way of peer-reviews;

    d. this is having the affect of stifling public debate and influencing the course of justice.

56. Also she has received independent evidence from a US attorney who attended an international forum that there were discussions by the attendees at the meetings on how to undermine the effectiveness of evidence she might be giving as a defence expert in NAHI court cases.

57. These are serious allegations. We can understand that Dr Squire may consider that the minutes of the meetings may shed some light on these allegations, but their disclosure as such is not what we have to consider in these proceedings. Incidentally we note that a largely redacted version of the minutes of one of the meetings has been disclosed to Dr Squier.

58. What we find on reviewing the minutes (which were provided to us as part of the closed bundle), however, is that there is nothing as such in them which undermines Dr Squier's professional integrity. Also there is no evidence of wrongdoing.

59. If there had been, it may have been necessary to disclose the names of attendees in order to know who had been discussing such matters. However as that does not seem to be the case we are not convinced that it is necessary to disclose names.

60. Even if we were so convinced we need to balance Dr Squier's legitimate interests with those of the attendees at the meetings. We must consider whether the disclosure of their names is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of these data subjects.

61. We have considered evidence given to us by MPS in both open and closed statements that because of the controversial nature of NAHI that

those expounding the “mainstream” view have been subject to vociferous and unduly hostile attacks sometimes bordering on harassment. Although Dr Squier questions whether this is the case we consider that evidence given to us by a police officer is something we should give considerable weight to, particularly where there is no substantive evidence to the contrary. Dr Squier has not provided any. We are additionally convinced the police officer’s evidence is sound from reading the responses we have read from attendees in closed evidence. These clearly show genuine concern expressed by attendees for their safety if their names are disclosed.

62. When balancing these legitimate interests we find that the balance favours withholding their names. As a result we find that there would be a breach of the first data protection principle if the names of attendees at the meetings were disclosed.

63. Therefore we do not need to consider the recently claimed other exemptions as we find s.40(2) is engaged and there is an absolute prohibition from disclosure of the names of those who attended the meetings.

64. Our decision is unanimous.

Observation

65. We have only been dealing with a request for the disclosure of the names of attendees at the meetings. Dr Squier formulated the first part of her request as a data subject access request. If the request had been for disclosure of the minutes of the meetings (with attendee names redacted) and/or other relevant information then this could have been dealt with wholly under FOIA. Dr Squier, in her written submissions, seems to recognise this.

Dated: 13 November 2012

Signed: Judge Angel