



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2014/0230

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS 50536054
Dated: 27 August 2014**

Appellant: C

1st Respondent: INFORMATION COMMISSIONER

2nd Respondent: NURSING AND MIDWIFERY COUNCIL

Heard at: FIELD HOUSE, LONDON

Date of hearing: 10 FEBRUARY 2015

Date of decision: 11 MARCH 2015

Before

ROBIN CALLENDER SMITH
Judge

and

NARENDRA MAKANJI and NIGEL WATSON
Tribunal Members

Attendances:

For the Appellant: C

For the 1st Respondent: Written submissions from Ms C Nicholson, Solicitor for the Information Commissioner

For the 2nd Respondent: Mr T Pitt-Payne QC instructed by FieldFisher on behalf the the Nursing and Midwifery Council

Subject matter: FOIA

Absolute exemptions

- Personal data s.40 (5)

Cases:

Webber v Information Commissioner and Nottingham NHS Trust [2013] UKUT 0648 (AAC), *Butters v Information Commissioner* (EA/2008/0088), *Foster v Information Commissioner* (EA/2013/0176), *Kozan v Information Commissioner* (EA/2013/0006), *Rodriguez-Noza v Information Commissioner* (EA/2013/0163), *A v Information Commissioner and General Medical Council* (EA/2013/0014), *Cubells v Information Commissioner and General Medical Council* (EA/2013/0038), *Cubells v Information Commissioner and General Medical Council* (EA/2014/0066) and *MC v Information Commissioner and Chief Constable of Greater Manchester Police* [2014] UKUT 0481 (AAC).

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 27 August 2014 and dismisses the appeal.

REASONS FOR DECISION

Background

1. The Appellant was concerned about the fitness to practise of two named nurses who had been involved in the care of his partner.
2. The Nursing and Midwifery Council (NMC) considered the issues he raised and told him that no case to answer had been found against the nurses.
3. On being informed of that he asked the NMC, on 12 January 2014, for

....all the information which made up the process. Specifically you make reference to evidence which I am not clear I have seen including that of the other witnesses.

4. On 20 February 2014 the NMC responded. It refused to confirm or deny (NCND) whether it held the requested information under s.40 (5) (b) FOIA on

the basis that to confirm the information was held would, in itself, disclose personal data in breach of the Data Protection Act (DPA) 1998.

5. The Appellant believed that there was a strong public interest in disclosing the information because of child safety and protection issues and complained to the Information Commissioner.
6. The Information Commissioner concluded that s.40 (5) applied and that the NMC did not have to confirm or deny whether the requested information was held.
7. The identity of the Appellant, his family, the nurses involved, the hospital and its location are not disclosed in this decision following the agreement of all the parties at the oral appeal hearing.
8. The Appellant explained to the Tribunal in detail the background and history that had led to his FOIA complaint. None of that is covered in this decision because such details could lead to “jigsaw identification” and destroy the purpose of anonymisation.

Preliminary Issues at the Oral Hearing

9. The Appellant sought an adjournment at the oral hearing on the basis that the bundle of documents prepared for the Tribunal’s and the parties did not reflect all the information he believed should have been included and also that there had been late service of a witness statement in relation to the NMC’s presentation of its case.
10. The Chamber President, Upper Tribunal Judge Peter Lane, had reviewed matters ahead of the oral hearing – particularly in relation to representations made by the Appellant on these topics – in a Case Management Note dated 29 January 2015.
11. He had noted that it would be for the Tribunal at the hearing to keep in mind the requirements of procedural fairness.

12. Having heard all the parties present at the oral appeal on the application for the adjournment the Tribunal retired and considered the matter for 45 minutes.
13. It declined to grant the adjournment on the basis that it was fair, just and proportionate to continue with the hearing.
14. This was because the matter was finally balanced but the focus of the appeal was narrow and limited. The Appellant was appearing as a litigant in person but he was also professionally qualified and the Tribunal was satisfied that it would be able to ensure that he could participate fully in the proceedings.
15. The Tribunal, in refusing the adjournment, was also conscious of avoiding delay so far as was compatible with proper consideration of the issues given that the NMC was represented by leading counsel whose availability for an adjourned hearing might well add further time before any final adjudication.

The Law

16. Section 40 FOIA states:

Personal information.

(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 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

- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
 - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
- (4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).
- (5) *The duty to confirm or deny—*
- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
 - (b) *does not arise in relation to other information if or to the extent that either—*
 - (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 or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or*
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

17. It is section 40 (5) (b) (i) – italicised immediately above – on which the NMC relies.

Oral Evidence

18. The Tribunal heard oral evidence – on which he was cross-examined – from Mr John Lucarroti, the Head of Fitness to Practice Policy and Legislation at the NMC. He adopted his written witness statement dated 23 January 2015.

19. He provided a brief background on the NMC, his role within the NMC, the NMC's fitness to practice policies and procedures and commented on what

he believed would be the adverse impact on the NMC and its registrants of this appeal succeeding.

20. In relation to the latter he maintained, in cross-examination, that the appeal raised the key issue which was importance both to the NMC and to other professional disciplinary bodies more generally. The NMC – and other regulators – had a duty to treat its registrants fairly by conducting the initial stages of investigations in private and maintaining that privacy when assessing requests for information by those such as the Appellant.
21. The NMC received numerous requests for information about its fitness to practice investigations from other third parties including journalists.
22. There had been 4860 fitness to practice cases that were closed or concluded between 2013/2014. 1503 cases had been closed on initial screening, 1404 cases had been closed by the Investigating Committee and 1805 cases concluded in the Conduct and Competence committee or the Health Committee. 92 cases had been concluded through voluntary removal and 12 cases of fraudulent or incorrect entry on a register were concluded.
23. In his experience a sizeable number of complaints which reached the Investigating Committee had no evidential basis and were potentially defamatory in nature. If they had been made public at an early stage they would have had the potential to cause significant reputational harm to the registrants.
24. So as to support the authority and credibility of its investigation process, the NMC required the capacity to reject requests for information where an investigation was ongoing or if it had been closed at an early stage.
25. Any removal of that option would undermine the integrity and efficacy of the NMC's investigation procedures. That could prove damaging for all parties including registrants, complainants and the public.

The Appellant's Position

26. In C's Grounds of Appeal and the submissions – the main points of which are summarised below – he maintains in essence that the Information Commissioner and the NMC have taken an absolutist position because he knows the information he is seeking because it has already been disclosed to him, by other processes, privately.
27. On that basis it would be possible for him to upload the details of the nurses concerned in the case to any website he might create and, in doing so, he would simply be providing factual information about a matter of public importance.
28. Simply because he held the information in a “private” capacity should not prevent the NMC disclosing it to him in the context of this FOIA request.
29. He believed there was a legitimate interest for a member of the public (like him) who had made a complaint to the NMC to understand the process through which and the information on which it had adjudicated in respect of the complaint. The processing of the personal data in question was necessary for the purposes of that legitimate interest being pursued by him (as a third party).
30. The information could be obtained by an application for pre-action disclosure in the High Court. In that context he maintained that there was a legitimate interest of a member of the public being encouraged to avoid the High Court legal process with all its complexity and expense by allowing simple disclosure of the information requested under FOIA.
31. He did not believe that the NMC could rely on the Data Protection Act because that simply created a circular argument. Neither the Information Commissioner nor the NMC had identified any other right or freedom which justified their respective positions.

32. There had been no consideration of the provisions of Schedule 1 of the Data Protection Act relating to “fairness” and no analysis of the elements which went to make up the assertion that disclosure would not be “fair”. There seemed to be no balancing of what would be fair as between the interests of disclosure and any interests in non-disclosure. The concept of “fairness” had only been applied to the apparent interests of the registrants (the nurses involved in this case).
33. There needed to be a balance between his interests in having the information made public and the likely consequences to the data subjects of any interference with their legitimate interests. Such interference had to be sufficiently substantial to make disclosure “unwarranted” and, in the context of him knowing privately the information which he did, it was not unwarranted.
34. He had taken High Court action which had succeeded, notwithstanding the Information Commissioner’s assertions that there appeared to be nothing wrong with the decision-making process.
35. Following his High Court action the matters were returned to a differently constituted NMC Investigating Committee. That committee had found there was a case to answer in relation to one allegation against one of the nurses but found no case to answer against the other or on any other allegation.
36. When he then asked for information identical to the request under appeal the NMC had asked the nurse in question/ data subject and provided the information requested.
37. The nurse in question had not taken the position that there was a legitimate interest in non-disclosure and it was clear (to the Appellant) that it was the interests of the NMC rather than those of the data subject which were being addressed in the refusal to confirm or deny his request in this appeal.

Conclusion and remedy

38. The question facing the Tribunal in this appeal is straightforward. Would giving the information to a member of the public - in terms of confirming or denying that the information existed - breach this "NCND" provision of FOIA and amount to the processing of personal data in the context of the data protection principles?
39. The Tribunal is satisfied that, to confirm or deny to a member of the public whether it held the requested information, the NMC would inevitably be disclosing publicly that a complaint had been made regarding the fitness to practice of (in this case) two named registrants. That inevitably involves the NMC processing the personal data of those registrants.
40. The NMC would be disclosing something about the contents of the information that it held regarding those individuals. It would be making public an important and significant fact about them.
41. The Appellant maintains that - because he knows the information he was seeking in the information request via another route - the statutory restrictions in relation to NCND, disclosure and data processing create bizarre practical situation which is not properly reflected in the legislation and which should, in effect and in the public interest, be corrected in this appeal.
42. The Tribunal is not persuaded by this argument. Disclosure under FOIA means disclosure to the world in general and involves putting the requested information into the public domain. Even confirming or denying its existence does just the same thing.
43. The fact that the Appellant knows the information is not a "lever" that dis-applies those statutory provisions so that he can "bootstrap" himself into the position he seeks. To say that disclosure under FOIA should be made to him would be to say that disclosure should be made to anyone else making a similar request. That cannot be right.

44. If the NMC disclosed to a member of the public – by putting the information into the public domain – the fact that a complaint had been made about two registrants it would clearly breach the first data protection principles. It would be unfair in respect of them and would not satisfy any of the conditions in Schedule 2 of the Data Protection Act 1998.
45. In terms of fairness – and this was covered in detail in Mr Lucarotti’s evidence which we accept as both cogent and credible – when a complaint is made to the NMC about a registrant’s fitness to practice than the actual existence of the complaint and its details are not routinely made public. It is only where the NMC’s Investigation Committee decides that there is a case to answer that the existence and details of the complaint are made public.
46. The sequence of the process is that, if it clears the hurdle of the Investigating Committee, it is referred to the Conduct and Competence Committee (which sits in public) or the Health Committee. The Health Committee sits in private because it deals with information about the registrants’ health. That said, notices of both such hearings and decisions are published and the notices and decisions contained the names of the registrants and the detail of the charges together with a detailed decision (with any health information redacted).
47. The Tribunal accepts that the NMC has not made public – at the date of the information request – the fact that complaints had been made against these two individuals. For the NMC to do this would amount to a public and official confirmation that a complaint has been made against them. It would be unfair to them and would contravene their reasonable and legitimate expectations about how their personal information was handled by the NMC.
48. As Mr Lucarotti explained, in his experience
- a sizeable number of complaints which reach the Investigating Committee had no evidential basis and were potentially defamatory in nature. If they had been made public at an early stage they would have had the potential to cause significant reputational harm to the registrants.

49. Dealing with Schedule 2 of the Data Protection Act, the Tribunal agrees that the only relevant condition in that Schedule is Paragraph 6. That applies when 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.

50. The Tribunal finds that such disclosure would not be “necessary” for the purposes of any legitimate public interest. Public scrutiny of the NMC’s functions in this area does create a legitimate interest but that does not require that the existence of complaints which have not yet been referred further to be made public.

51. As the NMC points out, any legitimate interest can be met by way of the Judicial Review process – as it was in the present case – and that allowed an individual with a sufficient interest successfully to challenge the NMC’s decisions regarding the handling of fitness to practice complaints.

52. For similar reasons, such disclosure would be “unwarranted” because of the prejudice to the rights, freedoms and legitimate interests of the two registrants (who are also the data subjects and to whom the request relates).

53. The Tribunal was referred to – and has considered the effect of – all the existing case law. It finds, against that background, in the present case at the time of the request there was nothing in the public domain to indicate whether or not the requested information existed or was held by the NMC.

54. Specifically, the NMC itself had not publicly disclosed whether the relevant information existed or was held, no other personal body had disclosed such information, the Appellant’s complaint to the Ombudsman about the two registrants had been made before his complaint to the NMC and had not resulted in that complaint being made public, the Appellant’s application for Judicial Review was dealt with without a hearing and did not result in the

existence of his complaint about the two registrants being made public and the information disclosed to him in those proceedings was not put into the public domain.

55. For all these reasons the Tribunal is satisfied that the NMC correctly relied on the provisions of section 40 (5) FOIA and that this appeal must fail.

56. Our decision is unanimous.

57. There is no order as to costs.

Robin Callender Smith
Judge
11 March 2015