



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2016/0116**

**Heard at Belfast RCJ  
On 29 September 2016**

**Before  
JUDGE  
CHRIS RYAN**

**TRIBUNAL MEMBERS  
SUZANNE COSGRAVE  
MARION SAUNDERS**

**Between**

**THOMAS BENNETT**

Appellant

**and**

**INFORMATION COMMISSIONER**

First Respondent

**and**

**REGULATION AND QUALITY IMPROVEMENT AUTHORITY**

Second Respondent

**DECISION AND REASONS**

**Attendances:**

The Appellant appeared in person.

No other party appeared although observers attended on behalf of each Respondent.

GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is allowed in part and the Decision Notice dated 29 March 2016 is substituted by the following notice:

**Public Authority:** Regulation and Quality Improvement Authority

**Complainant:** Thomas Bennett

The Decision Notice dated 29 March 2016 remains in force with respect to the information to which section 14 of the Freedom of Information Act 2000 (FOIA) has been applied.

In relation to the information to which FOIA section 36 was applied the Decision Notice is replaced by a direction that the Public Authority disclose the requested information within 35 days.

In relation to the information to which FOIA section 40(2) was applied, the Public Authority must (i) disclose those parts of the withheld information identified in the Reasons for Decision below by the date and on the terms set out therein, and (ii) by the same date report on the outcome of the further search we have directed and either disclose the additional information, or notify the Appellant of any exemption it intends to rely on.

In relation to the information to which section 42 was applied the Public Authority must disclose, within 35 days, the information identified in the Reasons for Decision as being not covered by the section.

## REASONS FOR DECISION

### Summary

1. We have decided that, although the Decision Notice from which this appeal emanates correctly identified part of the Appellant's information request as vexatious, for the purposes of section 14 of the Freedom of Information Act 2000 ("FOIA"), it was not in accordance with the law in the following respects:
  - a. FOIA section 36 was not engaged in respect of the information for which it was claimed as an exemption;
  - b. Even if section 36 was engaged the public interest in maintaining the exemption did not outweigh the public interest in disclosure;
  - c. FOIA section 42 was not engaged in respect of two out of the four documents for which it was claimed as an exemption;
  - d. The public interest in maintaining the section 42 exemption in respect of the remaining two documents outweighed the public interest in disclosure; and
  - e. FOIA section 40(2) was not engaged in respect of some of the information for which it was claimed as an exemption.

### Background Information

2. The Regulation and Quality Improvement Authority ("RQIA") is the Northern Ireland Regulator of Health and Social Care.
3. The Appellant has been concerned for some time over the management and operation of the Cherry Tree House care home in Carrickfergus, Northern Ireland ("the Care Home"). In 2014, following an independent review, the RQIA published a report about it entitled "Independent Review of the Actions Taken in Relation to Concerns Raised about the Care Delivered at Cherry Tree House, Carrickfergus" ("the Report").
4. The Report was not included among our papers but we were referred to its location on the RQIA website. The investigation which lay behind the report had been instigated in response to concerns expressed by a particular "whistle-blower". It covered the operations at the Care Home between 1 January 2005 and 31 March 2013. The Chief Medical Officer, in commissioning the investigation, noted that concerns in respect of the Care Home had arisen since 2005 and that regulatory enforcement action had been instigated, but that it was not clear whether all concerns and allegations had been investigated and all appropriate actions taken.
5. The Report focused, not on the detail of the care provided at the Care Home, but on the supervision of that care and the steps taken to deal with any shortcomings. It criticised RQIA's inspection methodology and practices, including the limited use that it had made of the enforcement powers available to it and concluded that:

*"[the Care Home] was failing to comply consistently with the minimum care standards. There was evidence that the same issues of concern about care...were highlighted on a regular basis and where improvements were made they were often not sustained."*

6. The Appellant was not satisfied about the rigour of the investigation on which the Report was based and made his views known to RQIA's management in correspondence and during at least one meeting.
7. On 21 November 2014 the RQIA wrote to the Appellant to inform him that, as he had by then written to it on 33 occasions concerning the Report, it did not intend to engage in further rounds of correspondence with him. It argued that the Appellant's correspondence was repetitive and had consumed a disproportionate amount of its time and resources.

#### The Request for Information and RQIA's response

8. Some 8 months later, on 21 July 2015, the Appellant wrote again to the RQIA complaining that, over a year after the Report had been published, his concerns had still not been addressed to his satisfaction. He expressed particular concern that:
  - a. the Care Home continued under the ownership of a particular individual ("the Owner");
  - b. the Report had been based on a "desktop review", rather than an investigation; and
  - c. there remained unanswered questions over the way in which the Independent Review Team had conducted itself.
9. In light of those criticisms the Appellant requested a meeting and asked that, in preparation for it, he be provided with certain information. The requested information fell into the following three parts:
  - i. **First Part.** *"All records surrounding RQIA's consideration and possible cancellation of the registration of [the Owner] and the decision not to cancel [the Owner's] registration, to include legal advice received by RQIA in respect of this.  
In anticipation that RQIA will claim legal privilege exemption I would make the following points:  
(a) any such legal advice was obtained at the public expense and for the sole benefit of the public, so really the public is ultimately the client and the privilege therefore belongs to the public.  
(b) It is in the public interest that such advice be made public."*
  - ii. **Second Part.** *All records surrounding the appointment of [a former manager of the Care Home] ("the Manager") as an RQIA inspector, to include the short-listing process, the interview process, how many were short-listed, the make-up of the interview panel, why [the Manager] was chosen over other applicants, was [the Manager's] behaviour while manager at [the Care Home] available to the interview panel. There is considerable concern among [the Care Home] families that [the Manager] was appointed as an RQIA inspector given her behaviour while manager at [the Care Home] and the question has been raised if the application/appointment process was and is sufficiently robust. This is a matter which requires examination."*
  - iii. **Third Part.** *"We had previously asked RQIA for information about [the Report] and that information has not been forthcoming. Should RQIA continue to refuse to release this information to us we will seek to make such application or applications as may be necessary to obtain same. We will also put into the public domain the fact that RQIA has refused to release that information to us."*

*The information we had previously sought, and which RQIA has failed to supply, included the following:*

*(a) all records maintained by [individual name redacted], project manager.*

*(b) all records of all meetings between the Independent Review Team (including its staff) in and around April and May 2014 with officials from DHSSPS [the Department of Health Services and Public Safety] and various Trusts when the Independent Report was shared with these organisations and copies were given to them.*

*What was the legal authority which enabled the Independent Review Team to share/disclose the Independent Report with/to these organisations prior to publication and prior to the Report being furnished to the Minister for Health. Such action may well have been unlawful.*

*(c) the water-marked copies of [the Report] referred to in the minute of the meeting dated 24-3-14 between Glenn Houston and the Independent Review Team.*

*(d) the 'list...with the other organisations feedback' referred to in [individual name redacted]'s email to [the project manager referred to in (a) above] dated 30-4-14".*

10. The RQIA treated the Appellant's letter as a request for information under FOIA section 1. That provision imposes on the public authorities to which it applies an obligation to disclose requested information unless certain conditions apply, or the information falls within one of a number of exemptions set out in FOIA. Each of those exemptions is categorised as either an absolute exemption or a qualified exemption. If an absolute exemption is found to be engaged, then the information covered by it may not be disclosed. However, if a qualified exemption is found to be engaged then disclosure may still be required unless, pursuant to FOIA section 2(2)(b):

*"in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information"*

11. The RQIA refused disclosure, relying on the following exemptions:

- a. As to the First Part, the information was exempt from disclosure because it fell within the scope of FOIA section 36 (prejudice to the effective conduct of public affairs). To the extent that the information requested was legal advice it was also said to be exempt from disclosure under FOIA section 42 (legal professional privilege). The RQIA asserted that the public interest in maintaining each of those exemptions outweighed the public interest in disclosure.
- b. The information requested in the Second Part, relating to the appointment of the Manager as an RQIA inspector, was claimed to be exempt from disclosure under FOIA section 40 (third party personal data).
- c. The Third Part was refused because it was said to fall within the scope of FOIA section 14 (vexatious request), for the reasons which had been given in correspondence in the letter of 21 November 2014, referred to in paragraph 7above.

12. The RQIA maintained its stance on each part of the information request following an internal review, conducted at the Appellant's request. However, the RQIA did not mention FOIA section 36 in reporting to the Appellant the outcome of the internal review. It appears not to have given any consideration to it at that stage.

The statutory language of the exemptions relied on

13. The relevant part of FOIA section 36 is subsection (2), which reads:

*“(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—*

*(a)...*

*(b) would, or would be likely to, inhibit—*

*(i) the free and frank provision of advice, or*

*(ii) the free and frank exchange of views for the purposes of deliberation, or*

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

14. The relevant part of FOIA section 42 reads:

*“(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”*

15. Sections 36 and 42 both create qualified exemptions.

16. FOIA section 40(2) provides that information is exempt information if it constitutes personal data of a third party the disclosure of which would contravene any of the data protection principles. It is an absolute exemption.

17. Personal data is itself defined in section 1 of the Data Protection Act 1998 (“DPA”) which 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”*

18. The data protection principles are set out in Part 1 of Schedule 1 to the DPA. The only one having application to the facts of this Appeal is the first data protection principle. It reads:

*“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 ...”*

Schedule 2 then sets out a number of conditions, but only one is relevant to the facts of this case. It is found in paragraph 6(1) and reads:

*“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.”*

The term “processing” has a wide meaning (DPA section 1(1)) and includes disclosure.

19. A broad concept of protecting individuals from unfair or unjustified disclosure (in the event that their personal data has been publicly requested) is a thread that runs through the data protection principles, including the determination of what is “necessary” for the purpose of identifying a legitimate interest. In order to qualify as being “necessary” there must be a pressing social need for it - *Corporate Officer of the House of Commons v Information Commissioner and others* [2008] EWHC 1084 (Admin).

20. In determining whether or not disclosure of the names would be contrary to the data protection principles we have adopted the following approach:

- i. would disclosure at the time of the information request have been necessary for a relevant legitimate purpose; without resulting in
- ii. an unwarranted interference with the rights and freedoms or legitimate interests of the Manager or any other individuals likely to be affected.

And if our conclusion on those points would lead to a direction that the information should be disclosed we would consider:

- iii. whether disclosure would nevertheless have been unfair or unlawful for any other reason.

21. In respect to the issue of fair and lawful processing we have to bear in mind guidance provided in paragraph 1(1) of Part II of Schedule 1 to the DPA, which provides:

*“In determining for the purposes of the [first data protection principle] whether personal data are processed fairly, regard is to be had to the method by which they are obtained, including 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.”*

22. The relevant part of FOIA section 14 reads:

*“(1)Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.”*

#### The Information Commissioner’s investigation and Decision Notice

23. On 14 September 2015 the Appellant complained to the Information Commissioner about the manner in which his request for information had been handled.

24. During the course of the Information Commissioner’s subsequent investigation, the RQIA returned to its earlier reliance on FOIA section 36. It argued (in a letter to the Information Commissioner dated 23 November 2015) that, in respect of those parts of the First Part that were not exempted by virtue of section 42, it should not be required to disclose:

*"preliminary, and thus incomplete, dialogue and/or records regarding the regulation and registration of registered individuals" because "Disclosure of information which reflects early and incomplete consideration of courses of action will limit the ability to have relevant and appropriate internal consultation".*

The RQIA went on, in the same letter, to reiterate its reliance on section 40 in respect of the Second Part and to provide further information in support of its claim that section 14 applied to the Third Part.

25. The Information Commissioner considered the claim to exemption under FOIA section 36(2)(b)(ii) in the context of all the withheld information relating to the continued registration of the Owner. He found that the "qualified person" for the purpose of section 36 was Glenn Houston, who at the time was the Chief Executive of the RQIA. He had direct involvement in the handling of the information request from the outset and had, in fact, been the signatory of the letter of 21 November 2014 referred to above. The Information Commissioner was satisfied that the position Mr Houston held meant that he would have been familiar with the contents of the records falling within the request for information, even though no detail had been provided as to particular information made available to him. He also found that the opinion, although given verbally and not recorded, was to the effect that the withheld information under the First Part recorded *"preliminary and thus incomplete dialogue...and would not necessarily provide an accurate reflection of the RQIA's final position"* and that the ability of RQIA's staff to freely and frankly exchange views on matters such as a care home owner's registration in the future would be curtailed by the knowledge that the record of such exchanges might be disclosed.
26. The Information Commissioner concluded that the opinion, as so reported to him, was reasonable, even though the process for obtaining it had been flawed.
27. Having reached the conclusion that the exemption was engaged, the Information Commissioner decided not to consider whether the First Part might also have been exempt under any other limb of section 36, but went on to consider the public interest balance under FOIA section 2(2)(b). In that regard he gave due weight to the qualified person's reasonable opinion that disclosure would have a chilling effect on the exchange of views both within RQIA and between the organisation and other organisations and service providers. Against that he balanced the acknowledged public interest in greater transparency for the benefit of current and future users of care home facilities, as well as their families. He concluded that, although once the Report had been completed and published, the public interest in maintaining the exemption was less than it would otherwise have been, it was sufficient to outweigh the public interest in disclosure, bearing in mind the possible chilling effect on investigations conducted by the RQIA.
28. Some of the information falling within the scope of the First Part was found also to be covered by FOIA section 42, as it constituted communications which had, as their dominant purpose, the seeking and providing of legal advice. The Information Commissioner found the exemption to be engaged in respect of this information and the public interest in preserving the principle of client confidentiality to outweigh the public interest in the disclosure of information, even though disclosure would help the public understand the RQIA's decision-making processes.



29. As regards the Second Part, the Information Commissioner concluded that, as the withheld information related to an individual's interview and employment procedures, it should be treated as personal data. He concluded that, in light of the individual's reasonable expectations of privacy, an order for disclosure would constitute unwarranted interference with that individual's data protection rights. Balanced against those rights, the legitimate interest in full disclosure of the selection process of a public servant was not so great, (in the absence of credible grounds for concern over the particular appointment in question), to outweigh the detriment which might be caused to the data subject, if disclosure were ordered.
30. Finally, the Information Commissioner assessed the level of disruption, irritation or distress caused to the RQIA by all the information requests submitted by the Appellant over a two-year period leading up to the submission of the Third Part. He set that against the importance of the issues arising from the findings recorded in the Report, but concluded that the point had been reached where the actions taken by the Appellant, and the associated burden imposed on the RQIA, was disproportionate to the objective that the Appellant was attempting to achieve. The information requests in the Third Part were therefore vexatious and the RQIA had been entitled to reject them on that basis.

#### The Appeal to this Tribunal

31. On 25 April 2016 the Appellant lodged with this Tribunal an appeal against the Decision Notice. The grounds of his appeal were supplemented by a letter to the Tribunal dated 6 May 2016 (the Notice of Appeal did little more than to record his disagreement with the Decision Notice). The letter complained that the Information Commissioner had communicated with the RQIA during the investigation without informing the Appellant of the arguments and information it had submitted. It also criticised the investigation which underlay the Report, (on the ground that it left the RQIA investigating its own conduct), as well as the RQIA's perceived reluctance to implement recommendations in the Report or to disclose relevant records on a matter of such public interest.
32. Faced with such, relatively uninformative, Grounds of Appeal the Information Commissioner's written Response to the Appeal simply joined issue with the Appellant's assertion that the Information Commissioner had failed to give proper weight to the public interest factors in favour of disclosure.
33. The RQIA was joined to the Appeal as Second Respondent, under a Case Management Note issued by the Tribunal Registrar on 31 May 2016. On 8 July 2016 the RQIA submitted an informal, undated document by way of Response, which commented on each passage of the Appellant's 6 May 2016 letter. In essence it relied upon the submissions and information which it had sent to the Information Commissioner on 23 November 2015, during his investigation, annexing a copy of the letter to the Response. The letter made a number of points, the most relevant of which were as follows:
  - a. The RQIA regularly published on its website reports on all the inspections it made of regulated service providers, including information about enforcement actions;

- b. Release of the background materials sought by the Appellant under the First Part would set a precedent, which would discourage appropriate exchanges of view between the RQIA and its legal advisers;
- c. Preliminary views expressed between those considering the continued registration of care home owners would not necessarily provide an accurate reflection of the RQIA's final position on the issue and would hamper internal consultation;
- d. With regard to the Second Part the letter read:  
*"Information relating to the appointment of a member of staff, their previous employment, is clearly exempt from disclosure by virtue of section 40 of the FOIA. Release of such information, in the absence (or, in this instance, refusal) of consent from the data subject would be a clear, and actionable, breach of the Data Protection Act (1998)"*
- e. The Third Part was dealt with by a detailed review of each item of information, an account of earlier information requests in relation to each and a summary of the efforts made by the RQIA to answer the Appellant's questions and respond to his criticisms. This was accompanied by submissions on:
  - i. the burden placed on the RQIA by the Appellant's many information requests
  - ii. the persistence with which the Appellant pursued his requests (and on occasions resurrected earlier ones); and
  - iii. the frequency of information requests and the extent to which they tended to overlap with one another.

34. The Appeal was determined, at the Appellant's request, at a hearing. The Appellant represented himself. Neither the Information Commissioner nor the RQIA was formally represented, although both arranged for members of staff to attend in the capacity of observer. In the event one of the RQIA's representative, Mr Johnston from its Directorate of Legal Services did volunteer some information on some aspects of the case.

35. We were provided with an open bundle of materials, which included the parties' written submissions and copy correspondence passing between the parties prior to, and during the course of, the Information Commissioner's investigation. The RQIA also prepared an un-paginated and un-indexed bundle ("Closed Bundle A") containing copies of:

- a. Documents which had been withheld in full; and
- b. Unredacted copies of documents that had previously been disclosed in redacted form.

Due to the fact that Closed Bundle A was provided only in electronic form, and a late discovered problem with opening the electronic copy provided, it was not available to the Tribunal panel until the day of the hearing. As a consequence, the panel reconvened at a later date in order to review both those materials and the additional information referred to below. This contributed to, but was not the sole reason for, the delay in reaching a final determination, for which we apologise.

36. We were also provided on the day with a bundle of documents ("Closed Bundle B"), which was said to represent the information falling within the scope of the First Part and all that was said to be available at that point in relation to Second Part.

37. In the following paragraphs we deal, in turn, with each part of the information request. We set out the arguments and evidence presented (both during, and since, the hearing), together with the conclusions we have reached.

First Part – information on the decision to maintain the Owner’s registration.

*Exemption under FOIA section 42*

38. As mentioned above, Closed Bundle B contains a copy of the documents falling within the scope of the First Part. We deal below with each document without disclosing the withheld information itself (although further information is set out in the Confidential Annexes to this decision):
- a. Tab 1: Manuscript notes dated 20 January 2015 and headed “Legal Advice”.
    - i. It is clear, from both the heading of the document and the matters it records as having been discussed, that the document attracts legal advice privilege.
    - ii. We have set out in the Confidential Annex A to this decision additional reasons for concluding that the section 42 exemption is engaged.
  - b. Tab 2: A document headed “Cherry Tree House – Review of Regulatory History – Version 7, 20 January 2015” (“the Draft Review”).
    - i. It was explained to us by Mr Johnston that this document was created as part of a “look back” exercise, in which the RQIA considered the follow up action required in response to the content of the Report.
    - ii. For the reasons set out in Confidential Annex B, we are satisfied that no part of this document is entitled to legal professional privilege and accordingly the section 42 exemption does not apply to it.
  - c. Tab 3: A table of “Actions”, with a date set against each (“the Action List”), which according to a note at the start of the document formed part of the “look back” exercise. For the reasons given in Confidential Annex A we consider that, provided a minor redaction is made (also identified in the Confidential Annex), this document does not fall within the section 42 exemption.
  - d. Tab 4 is a memorandum of advice, which clearly consists entirely of legal advice provided to the RQIA and falls within the scope of the section 42 exemption.

*Public Interest Balance under section 42*

38. As section 42 creates a qualified exemption it is necessary, next, to consider whether the public interest in maintaining the exemption in respect of the information contained in the documents at tabs 1 and 4 and in the relevant part of the document at tab 3, outweighs the public interest in disclosure.
39. Our starting point has been to acknowledge that significant weight should be given to the public interest in preserving the freedom of public authorities to receive legal advice in confidence and to preserve the confidence of any instructions or information passed to a lawyer in order to obtain such advice. This has been commented on in several cases – see *DBERR v O’Brien and Information Commissioner* [2009] EWHC 164 (QB) at paragraph 48. We consider that added weight arises from the circumstances of this case, in which a regulator sought legal advice on the exercise of potentially draconian enforcement rights against a commercial organisation. Against that we have set the serious concerns we have recorded in

Confidential Annex B about the RQIA's response to the Report and the actions it took in light of its findings. The detail appears in the Confidential Annex as part of our analysis of the application of the section 36 exemption to the parts of the withheld information that do not fall within the scope of section 42. However, those concerns also have an impact (albeit reduced) on the information currently under consideration. Our detailed review of the documents at tabs 1 and 4 has demonstrated to us that their disclosure would not contribute in any significant way to any public debate regarding the performance by the RQIA of its duties. We find no reason to criticise the RQIA for the manner in which it took legal advice. Our criticism goes to the manner in which, in light of all the materials available to it, the RQIA approached the task of deciding what action it should take.

40. We conclude, therefore, that the public interest in disclosing the particular information to which the section 42 exemption applies does not reach the threshold of being at least equal to the public interest in maintaining the exemption. It is therefore outweighed by that public interest and the information to which we have applied the exemption should not be disclosed.

*Exemption under FOIA section 36*

41. We turn now to consider the Draft Review at tab 2 and the main part of the Action List at tab 3, to which the section 42 exemption does not apply. The basis for arguing that the Draft Review falls within the exemption, as expressed by the RQIA in its submissions to the Tribunal, was that the premature disclosure of preliminary views would have a chilling effect on the decision-making process.
42. As we have recorded above, the Information Commissioner decided that, although the process by which Mr Houston formed his opinion that disclosure of these materials would undermine the free and frank exchange of views within the RQIA was flawed, the opinion was nevertheless a reasonable one to have formed in the circumstances.
43. We have set out in Confidential Annex B to this decision various findings of fact which we have made as to the manner in which the RQIA responded to the Report, based on our inspection of the withheld information and the RQIA's response to a request for clarification, which the Tribunal sent, after the hearing, on a closed basis. As a result of those findings we have concluded:
  - a. the RQIA has not established to our satisfaction that any opinion was provided by a qualified person, for the purpose of section 36; and, even if wrong on that issue
  - b. the circumstances we have described demonstrate that the opinion could not have been a reasonable one whether it applied to FOIA section 36(2)(b) or (c).

Accordingly, the section 36 exemption is not engaged and the information in the Second Part should be disclosed.

44. If we were to be found on appeal to have been wrong on the engagement of Section 36 we would say that the public interest in maintaining the exemption does not outweigh the public interest in disclosure. We reach that conclusion, as explained in Confidential Annex B, on the basis of both the contents of the documents, the process

by which they appear to have come into existence and the evidence they provide about the RQIA's conduct of its "look back" response to the findings of the Report.

#### Second Part – information relating to the appointment of the Manager

45. The letter of 31 July 2015, which rejected this part of the information request, did so in these terms:

*"The information you have requested in respect of the appointment of an RQIA Inspector is confidential personal information and in my qualified opinion is exempted under Section 40 of the Freedom of Information Act (Personal Information)"*

46. The Information Commissioner subsequently decided that the section 40 exemption was engaged. The Decision Notice first recorded the factual basis for that conclusion in these terms (paragraph 38):

*"The information ... relates to an individual's employment by the RQIA, specifically details of the interview and shortlisting process surrounding this. The Commissioner is satisfied that information relating to an individual's interview and employment procedures is personal data in accordance with section 1 of the DPA"*

Later in the Decision Notice consideration was given to whether disclosure might impart to the public information that was relevant to "controversies or credible allegations" (paragraph 46) so as to justify what would otherwise be an unwarranted interference into the Manager's privacy. The conclusion was then recorded (paragraph 48) in these terms:

*"Having taken into account all the circumstances of the case, and having considered the reasonable expectations of the data subject, the potential consequences of disclosure, and any public interest factors, the Commissioner has concluded that there is no legitimate public interest in disclosure which would outweigh any detriment which might be caused to the data subject as a result of disclosure of the requested information."*

47. The Tribunal asked the RQIA, in advance of the hearing, to provide a closed bundle of the withheld information. It was not made available in time for the hearing because, we were told at the hearing, the organisation to which the RQIA had outsourced its archiving function could not locate the relevant file.

48. That response demonstrated, to our surprise, that the RQIA had not apparently searched for any potentially relevant materials before rejecting the information request in the terms that it did. And, equally surprising, the Information Commissioner had not asked to see the withheld information before making the decision recorded above. We quite fail to see how that decision could have been reached without having considered whether those who selected the Manager for the role of inspector were aware of a previous connection with the Care Home and, if aware, whether the information formed any part of their deliberations. The Appellant had, of course, made very clear his feelings that previous involvement with an organisation which had subsequently been heavily criticised (in the Report) should have been rigorously investigated during the selection process. A very specific public interest factor had therefore been brought to the Information

Commissioner's attention and the Decision Notice contains an error in recording that a balance had been struck between that factor and the impact on the individual, when the reality was that the materials which would have shown how the relevant part of the Manager's employment history had been dealt with had not been seen, or even called for.

49. Immediately after the hearing the Tribunal asked the RQIA to continue the search for *"the material covered by the second part of the information request"* and ultimately received a set of copy documents identified by the RQIA as *"relevant recruitment records"*. As they constitute the disputed information we have treated them as closed material which has not been made available to the Appellant, in order to avoid pre-judging the issue we have to decide.
50. The papers had not been assembled into a paginated or indexed bundle but consisted of the following:
  - i. A document entitled "desirable criteria";
  - ii. The Manager's completed application form, with attachments;
  - iii. A document entitled "Chairperson's Checklist for Shortlisting (Guidelines)";
  - iv. The shortlisting process documentation, showing the identity of each applicant for the relevant post and recording the extent that each one satisfied the shortlisting criteria;
  - v. A document scheduling the interviews, identifying each individual to be interviewed by name;
  - vi. A completed interview assessment form in respect of the Manager, identifying each member of the panel by name and incorporating their comments and scoring against each criteria;
  - vii. A series of "score sheets" recording each (named) candidate's score against each criteria and in the aggregate;
  - viii. Documentation recording the taking up of references in respect of the Manager;
  - ix. A document containing the detailed job description for the post under consideration;
  - x. A copy of the advertisement to which the individual responded;
  - xi. A document entitled "Personnel Specification" in respect of the position applied for;
  - xii. A copy of the terms and conditions of employment;
  - xiii. Communications about the Manager's pre-employment health assessment, identifying the individual by name;
  - xiv. Correspondence with the Manager regarding the outcome of the application process and her ultimate appointment to the position of Inspector.
51. It will immediately be apparent from those descriptions that several of the documents are generic materials and our own inspection of them satisfied us that they do not contain any information about any individual. They are therefore incapable of forming, or containing, the personal data of any individual. They clearly fall within the scope of the Second Part of the information request and should therefore be disclosed. The material covered by that assessment comprises items i., iii. and ix. – xi. inclusive.

52. It is also clear that the RQIA has limited its search to the file of the Manager's application. Yet the Second Part also seeks generic information, not specific to, or likely to disclose personal data about, any individual. It includes:
- a. "*All records surrounding ...the short-listing process*" – it is not clear to us if any search has been carried out for generic information about how the process was to be conducted, (either generally in accordance with the organisation's HR policies or by reference to this particular recruitment exercise), or for any instruction or guidance that was given in writing to those due to carry out the process. Given the clear terms of the direction which the Tribunal gave in its Case Management Note and the description which the RQIA itself gave to the materials provided, all emanating from one individual's recruitment file, we conclude that the RQIA failed to carry out a wider search either at the time of the original information request or following receipt of the Tribunal's direction.
  - b. "*...the interview process...*" – the same conclusion applies to this category of information as is set out under sub-paragraph a. above. But in this case we have, in addition, already seen (item vi. above) that the interview panel members wrote their comments onto a form that identified the selection criteria. Any retained copy of a blank form clearly falls within the scope of the information request and would not, in our view, disclose the personal data of any individual, either job applicant or selection panel member.
  - c. "*...how many were shortlisted...*" – this is just a number which may very easily be extracted from item v. above.
53. It might be said (although it has not been so argued by the RQIA up to this moment) that even generic materials that relate to the role of Inspector are capable of comprising the personal data of the Manager when released in response to an information request that identified that individual as the focus of the request. Against that it may be argued that the role of an RQIA Inspector is a public office and the advertisement identified as item x. in our list above invited potential applicants to request an "application pack". The effect of that was to put into the public domain generic information about the position which the individual applied for. It is, we suspect, unlikely that this would have included the more specific information contained in a blank interview assessment form (item vi. in our list) but it would certainly have included a reasonably detailed job description.
54. These considerations lead us to direct the RQIA to carry out a search for generic information, covered by the information request and retained elsewhere than in the individual's recruitment file. The RQIA will be conscious, when making that search, of the comments we have made above about the inadequacy of its original, limited search. It should then notify the Appellant and the Tribunal, within 35 days of the date of this decision, whether it holds the requested information. It should at the same time either disclose the information or notify the Appellant and Tribunal of any exemption it wishes to rely on to justify non-disclosure. Further directions will then be given for resolving any dispute that may arise at that stage as to the application of the exemption or exemptions relied on.

55. As regards the documents identified in our list as items ii., iv. - viii. inclusive and xii. – xiv., inclusive we are satisfied, having reviewed the documents, that they include the personal data of the Manager and of other individuals such as other applicants and the interview panel members. Had we been minded to direct disclosure we would have required those individuals' names to be redacted, in any event.
56. In the case of the Manager, we have taken into account the Appellant's particular concern, as described above, and have reviewed the extent to which that part of the Manager's employment history was disclosed in the application form and thereafter taken into account during the selection process. We have a concern about one aspect of the process and expand upon that in Confidential Annex A to this decision. However, having taken into consideration the date of the application (2007), the period of review covered by the Report (2005 - 2013) and the matters raised and responded to during the selection process, we have not come across any information which has led us to believe that the public consideration of the issues that causes the Appellant concern would be better informed, to any significant extent, by disclosure of the information in those documents. Nor have we identified any other public interest that might be served by disclosure. Against that, the Manager would have a reasonable expectation that employment records would retain confidentiality, particularly in the case of materials recording matters raised during a job interview. Disclosure would, therefore, constitute an unwarranted interference in individual privacy and would not be justified by any public interest in disclosure of these particular materials.

### Third Part – information said to represent a vexatious information request

57. We derive guidance on the application of section 14 from the Upper Tribunal case of *Information Commissioner v Devon CC and Dransfield* [2012] UKUT 440 (AAC)<sup>1</sup>. We have approached this part of the appeal with the following passage from *Dransfield* firmly in mind:

*"27. The common theme underpinning section 14(1), at least insofar as it applies on the basis of a past course of dealings between the public authority and a particular requester, has been identified by Judge Jacobs as being a lack of proportionality (in his refusal of permission to appeal in Wise v Information Commissioner GIA/1871/2011; see paragraph 17 above). This issue was also identified by the recent FTT in Lee v Information Commissioner and King's College Cambridge at [73] as a relevant consideration. ... I agree with the overall conclusion that the FTT in Lee reached, namely that "vexatious" connotes "manifestly unjustified, inappropriate or improper use of a formal procedure" (at [69])."*

58. Upper Tribunal Judge Wikely went on to identify four questions which he suggested might help those considering whether or not a request was truly vexatious. They were:
- i. How great a burden did the request impose on the public authority and its staff?
  - ii. What was the requester's motive?
  - iii. Did the request have value or a serious purpose?

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<sup>1</sup> Subsequently approved, in substantial part, by the Court of Appeal - [2015] EWCA Civ 454



iv. Was there any evidence of the requester harassing staff members or causing them distress?

However, he also made it clear that those considerations were not intended to be exhaustive and that they should not be treated as a formulaic check-list.

59. Unlike the material falling within the First Part and Second Part, the information falling within the Third Part all relates to the preparation of the Report and not the conduct of the "look back" review which resulted from it. The publication of the Report certainly appears to have caused genuine concern to the Appellant and others, a factor which we should take into account when considering whether the Third Part should have been refused under FOIA section 14.

60. Having made those general points, we review each element of the Third Part (as set out in full in paragraph 9 above) in turn.

*(b) All records maintained by the project manager of the independent review covered by the Report*

61. The Appellant previously requested (by letter dated 22 September 2014) "*all communications between [the project manager] or anyone else within RQIA or with the Review Team.*". Subsequently, on 23 October 2014 he commented that the same individual had written two detailed emails to the Review Team in April 2014 from which he inferred that the writer would also have kept notes. He asked for copies of all such notes and records.

62. The letter from the RQIA of 21 November 2014, in which it was asserted (see paragraph 7 above) that the Appellant's information requests had become vexatious, sought to address a large number of outstanding information requests. It addressed materials authored by the project manager by specific reference to the 23 October 2014 request, stating that:

*"These notes and records are exempted under section 36(2)(c) and section 36(5)(L) of the Freedom of Information Act (2000)."*

The reliance on those exemptions was not challenged by the Appellant. During the hearing he said that he did not pursue the point because he lacked confidence in the freedom of information processes, as operated by the RQIA and the Information Commissioner.

63. We have considered whether any developments occurred between the date of the rejection of the first two requests in November 2014 and the date of the information request we are considering, which would justify the Appellant effectively repeating his information request in July 2015. We have seen none in the papers provided to us and the Appellant did not rely on any such changes that might be said to have justified his persistence.

64. We have concluded that the Appellant's decision, to ignore the statement by the RQIA that it relied on the section 36 exemption and then to repeat what was effectively the same request several months later, represented a disproportionate and manifestly unjustified use of the freedom of information mechanisms. Those mechanisms balance the right to have information disclosed against a public authority's right to rely on exemptions in certain circumstances. To allow those

requesting information to continue to assert their right to information, by submitting repeat requests, without at any time addressing the public authority's counter-assertion of its right to rely upon an exemption previously identified represents a misuse of those mechanisms.

*(b) Records of meetings when a draft of the Report was made available to certain organisations*

65. On 18 June 2014 the Appellant submitted a very wide request for all communications between the RQIA and the review team both before, during and after the investigation. Some information was disclosed to him in response to that request but section 36 was relied on as the basis for refusing to disclose more. In this case a separate record of the qualified person's opinion was prepared, signed by Mr Houston and made available to the Appellant. The opinion made specific reference to the difficulties that were anticipated to arise if drafts of the Report were to be disclosed, revealing early consideration of issues dealt with in the final version. This followed earlier correspondence in which the RQIA had tried to address the Appellant's concern that drafts of the Report had been shared with organisations and individuals likely to be affected by its findings. Although the Appellant criticised this process in correspondence with the RQIA, he informed us during the hearing that he was familiar with the "Maxwellisation" process, (a confidential procedure whereby individuals criticized in an official inquiry are given the opportunity to read relevant sections of a draft report of the inquiry and challenge or object to the critical findings before a final version is published.)

66. The Appellant was justified in having concerns about the management of the Care Home and the performance by the RQIA of its role as regulator. However, it was not proportionate or justified to pursue those concerns by raising a request, in July 2015, which covered information which falls within the scope of a properly reasoned refusal ten months previously, particularly as he had not in the meantime tried to challenge that refusal. The RQIA was entitled to have the grounds of its refusal debated and, if necessary, disputed through the procedures created under the FOIA, rather than have its staff put through the effort of having to repeat the refusal process in the face of a later request that was phrased in slightly different terms, but covered the same material. If not entitled to rely on section 14 in these circumstances public authorities could find themselves pressured by the harassment of repeat requests into disclosing information which the law gives them the legal right to claim exemption.

*(c) Water-marked copies of the Report*

67. The reasons set out above for refusing disclosure of meeting reports coming into existence during the Maxwellisation process apply with equal effect to the copies of the draft of the Report that were made available at, or in preparation for, those meetings.

*(d) Other organisations' feedback on a draft of the Report*

68. The Appellant explained in written submissions filed with the Tribunal that the reason for requiring this part of his information request to be answered was that he perceived that changes had been made to the Report after it has been shown in draft

to public bodies who had been investigated. We have already commented on the Appellant's understanding of the "Maxwellisation" process

69. This part of the information request arose, originally, from a letter which the Appellant sent to the RQIA on 25 July 2014. He raised a number of questions about the sending of drafts to organisations which had been subject to investigation. He included requests for copies of the relevant drafts and of responses received.
70. The requests overlapped with others made both before and after that date. The RQIA, by letter dated 30 July 2014, objected to disclosure of any of the requested information regarding the draft, relying on FOIA section 36 (b)(i) and (ii). The letter also explained that the only purpose of making a draft available to people outside the investigation team was to enable factual errors to be detected. It did not detract from the fact that the review team had taken sole responsibility for the content and conclusions of the Report. The letter concluded by telling the Appellant that if he was dissatisfied with the response he could request that it be subjected to internal review.
71. We have not been able to identify, among the substantial body of correspondence passing between the Appellant and the RQIA around this time, any response from the Appellant to the invitation to seek an internal review. However, on 12 September 2014 the RQIA wrote to him to say that, on further reflection of its first response, it had decided to provide him with a list of all the changes made to the draft of the Report between the penultimate version (dated April 2014) and the final version (dated July 2014). The list took the form of a lengthy table setting out all the text that had been removed and/or added to each paragraph of the draft. It led to a further information request from the Appellant, set out in a letter dated 19 September 2014, seeking information about the versions compared in creating the table, and the significance of certain meeting he understood had taken place during the summer of 2014. The letter also raised a further 4 information requests on points of detail. Additional items of information were sought in follow up letters from the Appellant dated 22 and 24 September 2014. Although each of the letters raised further points of detail, none of them sought to pursue the original refusal, by means of an internal review, or otherwise. Neither did they comment on any of the specific changes to the draft of the Report, as recorded in the table which the RQIA had prepared.
72. The Appellant's approach at this stage, under which he developed further information requests from any information that was made available to him, is evidence of the sort of obsessive, harassing behaviour frequently relied on to support a finding that a subsequent request was vexatious. It cannot be said that the later requests arose from the detailed information set out in the table of changes. That sort of "drilling down" into more detailed information may sometimes be justified in pursuing a legitimate cause, (as in this case). But there was no evidence of it here – the Appellant just switched his attention from the information that had been supplied to another line of enquiry that was related, but not subsidiary, to the original question.
73. On that basis, notwithstanding the serious concerns the Appellant has regarding the Care Home, we would have been sympathetic to the stance adopted in the RQIA's letter of 21 November 2014, in which it informed the Appellant that it would rely on FOIA section 14 to refuse any further information requests. We are satisfied that the

table of changes had provided the information the Appellant needed to identify whether any third parties had caused the content of the draft of the Report to be varied and, if so, the extent of any changes. He had been notified at that stage that section 36 was relied on for the other information he requested. He did not challenge the stance taken at any time but simply re-submitted the relevant part of his request several months later.

74. We have concluded that the manner in which the Appellant pursued this part of his information request rendered it a vexatious request for the purposes of FOIA section 14.

#### Conclusion

75. The RQIA was therefore entitled to rely on FOIA section 14 in refusing the Third Part of the information request. However, with the exception of the material exempted under section 42, as described above, the rest of the requested information should have been disclosed. The appeal in respect of those parts of the Decision Notice therefore succeeds.

76. Our decision is unanimous

Signed

Judge of the First-tier Tribunal

Date: 21 February 2017

Date Promulgated: 21 February 2017