First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2017/ 0127

Heard at Alexandra House, The Parsonage, Manchester
On 2 November2017

Before
CHRIS RYAN
JUDGE
JEAN NELSON
PAUL TAYLOR
TRIBUNAL MEMBERS

Between

GRANT WORKMAN

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

THE HOME OFFICE

Second Respondent

DECISION AND REASONS

Attendances:

For the Appellant: The Appellant represented himself
For the Second Respondent: Andrew Deakin of Counsel
The First Respondent did not attend and was not represented at the hearing.

Subject matter: **Freedom of Information Act 2000**

Absolute exemptions
Personal data s.40

Qualified exemptions
Prejudice to effective conduct of public affairs s.36(2)(c)

Cases: Farrand v Information Commissioner and London Fire and Emergency Planning Authority [2014] UKUT 0310 (AAC)

Information Commissioner v (1) CF and (2) Nursing and Midwifery Council [2015] UKUT 449 (AAC).

DH v Information Commissioner and Bolton Council [2016] UKUT 0139

Corporate Officer of the House of Commons v The Information Commissioner, Brooke and others [2008] EWHC 1084.

Goldsmith International Business School v the Information Commissioner and The Home Office [2014] UKUT 563 (AAC)

South Lanarkshire Council v The Scottish Information Commissioner [2013] IKSC 55

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed and Decision Notice FS50653417 upheld, albeit for reasons that differ from those of the Information Commissioner.

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2017/0127**

GENERAL REGULATORY CHAMBER

REASONS FOR DECISION

Introduction and Summary

1. The Home Office operates a register of approximately 35 forensic pathologists (each a "HORFP") from which the police or any coroner's office may select an individual to perform a post mortem examination in a case of unexplained death. Lawyers conducting the defence of an accused person may also obtain information about at least some of the HORFPs with a view to appointing them to assist the defence case. Not all panel members consent to their names being disclosed for this purpose.

2. We have decided that the Home Office was entitled to refuse a request for information about the workload of one particular HORFP in reliance on the exemptions provided by sections 36 and 40 of the Freedom of Information Act 2000.

The Appellant's request for information and the Home Office's response to it.

3. As the Appeal reaches us, the only issue is whether the Home Office was entitled to refuse the Appellant's information request, dated 9 May 2016, for the number of times during the previous ten years one of those HORFPs (referred to throughout this decision as "Dr. A") had been instructed by the police to perform an autopsy ("the Request"). (Other related information was asked for but the Home Office denied that it held it and the Appellant raised no challenge to the denial.)

4. The Request was treated as having been made under FOIA section 1, which 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.

5. The Home Office replied, on 25 May 2016 that it held the requested information, (although only back to 2009), but that the information was exempt information under FOIA section 36(2)(c). The relevant parts of section 36 read as follows:

> ***"Prejudice to effective conduct of public affairs.***
>
> *(1) This section applies to—*
>
> > *(a) information which is held by a government department or by the Welsh Assembly Government and is not exempt information by virtue of section 35, and*
> >
> > *(b)information which is held by any other public authority.*
>
> *(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)would, or would be likely to, prejudice—*

(i)the maintenance of the convention of the collective responsibility of Ministers of the Crown, or

(ii)the work of the Executive Committee of the Northern Ireland Assembly, or

(iii)the work of the Cabinet of the Welsh Assembly Government.

(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.

(3) …

(4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

6. There is no dispute between the parties that the Appellant's request was for statistical information, so that sub-section (4) applied to it.

7. The relevant part of Section 36 is categorised in FOIA section 2(3) as a qualified exemption. If such an 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"*

8. The Appellant asked the Home Office to carry out an internal review of its decision. The result, communicated to him under cover of a letter dated 8 August 2016 was that the original refusal was upheld and the Home Office indicated that it intended to rely, in addition, on the exemption provided for by FOIA section 40(2).

9. 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.

10. 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"*

11. 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 two are relevant to the facts of this case, namely:

"1. The data subject has given his consent …."

and

"6(1). The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

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

The Information Commissioner investigation and Decision Notice

12. The Appellant asked the Information Commissioner to investigate the refusal of his information request and, having done so, the Information Commissioner published, on 1 June 2017, the decision notice from which this appeal arises. She decided that disclosure of the requested information would breach the first data protection principle and that it was therefore exempt from disclosure under FOIA section 40(2). Having reached that decision she decided that it was not necessary for her to decide whether or not it would have also been exempt under FOIA section 36.

13. The Information Commissioner decided, first, that the withheld information did constitute A's personal data. That part of her decision has not been challenged by the Appellant. She then considered whether disclosure would be "fair" so that it would be permissible under the first data protection principle. Having determined that it would, she then went on to decide that disclosure would nevertheless not be permissible because it would not satisfy the condition set out in paragraph 6(1) of Schedule 2 quoted above.

14. In respect of the issue of "fairness" the Information Commissioner reminded herself that disclosure would put the information into the public domain and concluded from this that there must be a public interest in disclosure – the private interests of the individual making the information request were not relevant, save to the extent that they reflected a wider public interest. She set against that the potential prejudices to the rights, freedoms and legitimate interests of A, including A's right to privacy. The outcome of that balancing exercise was that disclosure would not be unfair. An individual performing the role of a HORFP should have some degree of expectation that information about their professional life may be disclosed and:

"the legitimate interests of the public are sufficient to justify any negative impact to the rights, freedoms and interests of the individual concerned."

15. Turning to the Schedule 2 conditions the Information Commissioner noted that Dr A had not given consent (a finding that, again, is not disputed). As to paragraph 6(1) her approach was to apply a three-part test. This involved asking, first, if there was a legitimate interest in disclosing the information, secondly was disclosure necessary for that legitimate interest (or could it be served in some other, less intrusive, means) and, thirdly, would disclosure cause unwarranted interference or harm to A's rights,

freedoms and legitimate interests. The Information Commissioner recorded that she had considered the first and third parts of the test when considering fairness, leaving only the second question to be determined. As to that, she interpreted the word "necessary" as requiring a pressing social need for any interference with privacy rights and that the interference must be proportionate (following *House of Commons v ICO & Leapman, Brooke, Thomas* (EA / 2007 / 0060).

16. The Information Commissioner's conclusion on this issue was that there was a legitimate public interest in transparency and openness in relation to the workload of a HORFP, specifically in indicating that individual pathologists were neither conducting too few autopsies to remain competent nor too many, leading to competence being endangered by overwork. However, she observed that there was a separate mechanism for monitoring workload, namely the Pathology Delivery Board ("PDB"), which monitors the number of cases conducted. She concluded that this less intrusive monitoring mechanism meant that disclosure of the withheld information was not therefore "necessary".

The Appeal to this Tribunal

17. The Appellant lodged an appeal to this Tribunal on 21 June 2017.

18. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, she ought to have exercised her discretion differently. We may, in the process, review any finding of fact on which the notice in question was based. Frequently, as in this case, we find ourselves making our decision on the basis of evidence that is more extensive than that submitted to the Information Commissioner.

19. The Appellant's Grounds of Appeal were quite short, consisting of just three paragraphs. The first paragraph identified Dr A as a HORFP with a duty of care to the general public when working on cases for the police. It continued:

> *"Working for the police has lead [A] to become indoctrinated to their needs rather than the public interest in the truth [*leading A's work to] *become unjustified and untruthful and it can be shown that [*A*] has become 'a police officer in a white coat' rather than the independent expert [*A*] should be…. [*A*]'s duty is to the court not [A]'s employer and it is to be dispassionate fair and equal at all times."*

The second paragraph relied on A's withholding consent to disclosure as evidence of there being something to hide. The third paragraph then reiterated the Appellant's view that:

> *"[*A*] is a dangerous individual to the public and theirs [*sic*] interests."*

20. Those Grounds of Appeal were interpreted by the Information Commissioner in her written Response as an allegation that there was a pressing social need to disclose the withheld information in order to protect the public from A. She argued that the Tribunal should not involve itself in the competence or quality of an individual HORFP. It was for the PDB to protect the public in those respects, which it was able to do with less intrusion into the privacy of individual HORFPs than an order to disclose the withheld information.

21. After the Home Office was made a party to the Appeal (by Case Management Directions issued by the Tribunal Registrar on 4 August 2017) the Information Commissioner adopted a lower profile in the Appeal and opted not to attend the hearing, which took place in Manchester on 29 October 2017.

22. The Home Office did attend that hearing, its Counsel arguing the case for refusing to disclose the withheld information, which had previously been set out in its written Response filed with the Tribunal on 14 September 2017. The Home Office also filed a witness statement signed by Dean Jones, the manager of its Forensic Pathology Unit, which supports the PDB in its role in supervising the Forensic Pathology service in England and Wales. Mr Dean's evidence, as expanded in places when answering questions during the hearing, was to the following effect:

    a. A HORFP provides a service to police and coroners. In particular, they advise police in respect of the medical cause of death, the retrieval of forensic and medical evidence from a deceased's body and they offer expert evidence in cases of suspicious death.
    b. HORFPs will generally be self-employed individuals who, as a consequence of having become registered by the Home Office, make themselves available for engagement by the police on a case by case basis. The "Protocol for Membership of the Home Office Register of Forensic Pathologists" ("the Protocol") has been agreed by all HORFPs and governs the conditions of each engagement. No set fee applies for each case undertaken but Mr Dean explained during questioning at the hearing that it tended to be in the region of £2,600 per case with a much lower fee for coroner work.
    c. Entry to the registered list is beneficial to a HORFP, not just because of the potential fee income, but also because it may represent a gateway to giving expert evidence in criminal trials. Defence lawyers will frequently also seek to hire a HORFP from the register because registration by the Home Office is a sign of quality and enables the defence team to field an expert witness having equivalent professional standing to the expert engaged by the prosecution.
    d. Those on the register have a choice as to whether they wish their details to be disclosed to defence lawyers. Any HORFP who does not wish to take on defence work may refuse to allow the relevant details to be disclosed. Dr A has opted not to take on defence appointments by lodging such a notification with the Home Office.
    e. Workload statistics do not include any information about the amount of defence work undertaken by a HORFP.
    f. It would not be possible to assemble the same workload data from another source, other than by the impractical process of reviewing every invoice submitted by each HORFP to each police force in the country.
    g. The minimum standards to be maintained in conducting a forensic post mortem are set out in a Code of Conduct and Performance Standard established by the Home Office and other official bodies.
    h. Since 2009 the Home Office has gathered information about the number of cases taken on each year by each HORFP. This reflected a recognition that undertaking too many or too few cases could have been a contributing factor to previous cases where the work did not comply with the Code of Conduct referred to. Guidance provided at the time suggested that undertaking more than approximately 95 cases per rolling year or less than approximately 20 would justify further enquiry about that individual's workload and how it might be adjusted but would not, of itself, attract disciplinary action. The statistics might also be reviewed, if it was found that a HORFP had not maintained the required standard in a particular case or particular cases, to see if workload might have been a contributory factor.

i. The statistics were also used to monitor police performance. Variances from one police area to another in the ratio of autopsies performed against homicides identified had been used as an indication of varying standards among police forces and had led to a re-drafting of National Police Practice Advice in this area.
j. A change to the Protocol was negotiated with the HORFPs at the time the workload statistics were first assembled. This reflected a commitment to the HORFPs by the Home Office that data concerning each HORFP's work would be held in confidence.
k. All final reports produced by a HORFP are subjected to review by another HORFP and Mr Dean's organisation check that the procedure is being followed by means of quarterly returns made by each HORFP.
l. An additional layer of quality control is provided by the Forensic Science Regulator, which conducts an annual audit of each HORFP's work. The outcome remains confidential only if no evidence of sub-standard work emerges.

23. Mr Dean also explained his concerns if the confidentiality commitment embedded in the Protocol were to be breached. He anticipated that most of those on the register would refuse to submit workload data in the future. This would prevent caseloads being monitored and differing standards in the work of both HORFPs and in police force policies for using forensic post mortems to identify homicides. He thought that any attempt to force HORFPs to provide the information as a condition of them remaining on the Home Office register was likely to lead to a number of those removing themselves from that Register. The consequence of that happening would be that at least a portion of police autopsies would be left to unmonitored pathologists.

24. Mr Dean confirmed that Dr A had been approached and had stated that she would not submit workload statistics in the future if the withheld information were to be disclosed.

25. A copy of the Protocol was made available to us. Two provisions are relevant.

Section 8 provides that:

> *"All Group Practices provide statistics to the Board on a quarterly basis for management information purposes, to enable the Board to monitor changes or trends in the provision of forensic pathology services. You agree to provide the necessary information to your group practice in respect of your post mortem examination reports and critical conclusions checks of colleagues' reports for the purposes stated."*

Section 15 of the Protocol provides that:

> *"You accept that as part of the Board's obligation to protect the public interest and maintain the integrity of the Register it may need to disclose information relating to concerns about your medical practice, your professional conduct or competence and allegations of a criminal nature to the following bodies as relevant:*

Crown Prosecution Service

General Medical Council

Chief Officer of Police

Coroners including the Chief Coroner

Human Tissue Authority (if the matter relates specifically to human tissue incidents)

Forensic Science Regulator

Home Office or any relevant Government Department

Legal Services Commission

Royal College of Pathologists

Criminal Cases Review Commission and other similar relevant bodies involved in the administration of criminal justice

and you consent to such disclosure and waive any copyright you may have in any document or report to allow such disclosure".

26. We should add that the workload statistics for Dr A were also made available to us, obviously on a closed basis. We are, however, able to state in this open decision that at all times in the period from 2009 A's workload fell within the parameters of maximum and minimum number of cases established by the Home Office.

The arguments put to us in respect of FOIA section 40(2)

27. The Appellant presented an attractively straightforward argument. HORFPs were paid very substantial fees which encouraged them to accept work only for the prosecution side. This loss of independence lead to a risk to the public. The work of a HORFP was, in any event, public in nature and he or she should therefore be accountable for it to the public. The Appeal was intended to ensure that happened. Disclosure was desirable even if it showed that there was nothing untoward about Dr A's workload.

28. The Home Office's argument addressed, first, the question of fairness. Its counsel stressed that HORFPs were not employees but private individuals who had agreed to the disclosure of workload statistics on the terms recorded in the Protocol. They had accepted the need for disclosure (to a limited number of organisations and not the world at large), but only on the conditions recorded in section 15. This did not include the disclosure at large of information that could be used to work out who the HORFP had worked for and an estimate to be made of his or her income. The Information Commissioner had therefore been right to conclude (Decision Notice paragraph 44) that:

> *"… disclosure contrary to the expectation of confidentiality … could lead to an intrusion into the private life of the individual concerned and the consequences of any disclosure could cause damage and distress to the party concerned."*

29. Weighed against those considerations, it was argued, was the value of the information. The Home Office argued that it was difficult to see any benefit from its disclosure because without a great deal more information to put the workload statistics into context they were largely meaningless. There was a general public interest in transparency and openness but this did not outweigh A's reasonable expectation of confidence.

30. On that basis the Home Office invited us to reject the Information Commissioner's conclusion that disclosure would not be unfair to A.

31. Turning to the application of paragraph 6(1) of Schedule 2 to the DPA, the Home Office questioned, first, what pressing public need would be served by disclosure. It would not help the public to assess the quality of work of either or forensic pathologists generally. There were far more appropriate processes already in place, particularly in the quality control monitoring conducted by the PDB, which were far less intrusive for the individual.

Our conclusions under FOIA section 40(2)

32. In the case of *Farrand v Information Commissioner and London Fire and Emergency Planning Authority* [2014] UKUT 0310 (AAC) the Upper Tribunal considered the order in which the issues emerging from the first data protection principle should be addressed. Judge Jacob said this:

> *"Paragraph 1 of Schedule 1 to the DPA refers to fairness and then provides specifically that one of the conditions in Schedule 2 must be met. Those conditions arise independently of the general issue of fairness.* [Counsel for the Information Commissioner] *told me that the Information Commissioner began with fairness, because that directs attention to the importance of the data subject's interests. I see no problem with that. However, the First-tier Tribunal and the Upper Tribunal may prefer to take a different approach in the interests of efficiency. A tribunal may come to the conclusion that the appeal has to be decided against the appellant on a particular ground and it may be sufficient for the tribunal's reasons to concentrate on that ground rather than take the comprehensive and structured approach that is expected of the Commissioner."*

33. It seems to us that in this case the Information Commissioner's decision to consider fairness first led her to consider, under that heading, some of the factors that paragraph 6(1) specifically identifies as part of the test for determining whether a Schedule 2 condition has been satisfied. This may lead to confusion and a possible risk that the analysis acquires too narrow a focus. Other factors, beyond those identified in paragraph 6(1) but having relevance to the broad concept of fairness, may then be overlooked. For these reasons, we propose to analyse the effect of paragraph 6(1) first. The words "*in particular*" in the first data protection principle support that approach. The general test of lawfulness and fairness then only comes into play, logically, if an examination of the particular test leads to the conclusion that disclosure should be allowed but there are other factors pointing in the opposite direction.

34. Guidance on the proper approach to adopt in relation to paragraph 6(1) is to be found in the Upper Tribunal decision in *Information Commissioner v (1) CF and (2) Nursing and Midwifery Council* [2015] UKUT 449 (AAC). At paragraph 19 of that decision Judge Jacob said:

> *"19. The application of paragraph 6(1) is often referred to as involving a balance. I prefer not to use that language, as it is potentially misleading. Any balance involved is*

different from the balance that has to be applied under, for example, section 2(1)(b) of FOIA. As I said of paragraph 6(1) in Farrand v the Information Commissioner and the London Fire and Emergency Planning Authority [2014] UKUT 310 (AAC):

> *29. … It contains a condition that must be satisfied – that processing is necessary – to which there is an exception – prejudice to the data subject. …*

… Applying paragraph 6(1) may involve up to three stages:

- *The first stage is to consider whether 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 would be disclosed. If not, it is not necessary to proceed to the other stages. That is what I decided in Farrand at [29].*
- *The second stage only arises if the consideration passes the first stage. It is then necessary to identify the rights and freedoms or legitimate interests of the data subject. If there are none, it is not necessary to proceed to the third stage.*
- *The third stage only arises if the consideration passes the first and second stages. It is then necessary to consider whether the processing is unwarranted, or overridden, in any particular case by reason of prejudice to the data subject's rights, freedoms or legitimate interests."*

35. In considering the first stage in that case the Upper Tribunal focused on the private interests of the requester in order to see if a legitimate interest existed. It did however, acknowledge that the difference might be no more than presentational. In *DH v Information Commissioner and Bolton Council* [2016] UKUT 0139 the Upper Tribunal agreed with Judge Jacob' view that it was not public interests that should be taken into account, but the interests of the person seeking the information. However, in that case the requester was an investigative journalist so that the private and public interests were difficult to separate.

36. We would be reluctant to conclude that, if the Appellant had not disclosed a private interest in the disclosure of the withheld information, we should refuse disclosure without further enquiry and without regard to the possibility that there might be a legitimate interest in the public having access to the information. There is, after all, no requirement in the FOIA that a person submitting an information request must disclose a private interest in having the requested information disclosed. However, the approach adopted by the Upper Tribunal on the nature of the legitimate interest is at variance with that adopted by the Court of Appeal in *Corporate Officer of the House of Commons v The Information Commissioner, Brooke and others* [2008] EWHC 1084. That case proceeded on the basis that the First-tier Tribunal had been right to take into account the public interest in the expense claims of Members of Parliament being disclosed and without apparent regard to any private interest that the original requesters had in disclosure.

37. The Appellant in this case has emphasized the public interest in disclosure. He has not at any time expressly identified a private interest. However, we conclude that, contrary to the views of the Upper Tribunal but in accordance with those of the Court of Appeal, we are entitled to take public interest into account at the first stage of the enquiry. And we find that the public interest in the competence and independence of HORFPs satisfies the test.

38. The existence of a legitimate interest is not enough, however. It must also be shown that disclosure is "necessary" to serve that interest. In *Goldsmith International Business School v the Information Commissioner and The Home Office* [2014] UKUT 563 (AAC) the Upper Tribunal endorsed the statement that *"a legitimate wish is not a reasonable need*" and "*desirability is not necessity".* But the judge in that case referred to a "*reasonable necessity*" (in order to reflect European jurisprudence on proportionality) and to the test being "*more than desirable but less than indispensable or absolute necessity*". It would

not therefore be satisfied if the identified aim could be achieved in some other way, involving less intrusion. Disclosure had to be the least restrictive means of achieving the legitimate aim in question – see Lady Hale in the Supreme Court decision in *South Lanarkshire Council v The Scottish Information Commissioner* [2013] IKSC 55 at paragraph 27.

39. On this issue, we conclude that the Decision Notice was correct in its conclusion (at paragraphs 71 and 72) that disclosure of the workload statistics of an individual HORFP was not necessary as there was another, less intrusive, means of serving the identified public interest.

40. In case we were found to be wrong on the first stage of the enquiry, we proceed to consider the second stage. As to that, we note that the Decision Notice records the conclusion that Dr A may have had an expectation that the withheld information would not be disclosed (paragraph 38) but that it could not be regarded as a reasonable or legitimate expectation, given the public nature of the service provided. Those conclusions were made in the context of the Information Commissioner's analysis of the fairness of disclosure – an example of the confused mixing of issues to which we have already referred. We think, in any event, that the Information Commissioner was wrong to come to that conclusion. We remind ourselves that the Request was not for anonymised statistics, or for the workload statistics of all HORFPs, but just those of one individual HORFP. We believe that it would be reasonable, in light of the terms of the Protocol, for HORFPS to retain an expectation that that particular information would not be disclosed.

41. Having reached that conclusion, it is necessary for us to proceed to stage 3 and assess whether the intrusion we have found at stage 2 would be unwarranted. This requires us to re-visit the public interest in disclosure and ask ourselves whether it is sufficient to warrant the level of personal intrusion which we have identified. We have already concluded (in paragraph [37] above) that disclosure of this particular information is not necessary for any public interest. There is nothing, therefore, to set in the scales against the level of personal intrusion which we have identified. Disclosure would therefore constitute an unwarranted intrusion.

42. It follows that the particular condition for disclosure set out in Schedule 2 is not satisfied. That is sufficient to dispose of the issue and we conclude that disclosure would breach the data protection principles and that, accordingly, the exemption under section 40(2) applies to the withheld information. The Information Commissioner was therefore entitled to conclude that the Home Office had been entitled to refuse disclosure, even though we have arrived at that conclusion by a different route.

<u>The arguments put to us in respect of FOIA section 36</u>

43. Although the Information Commissioner, having reached a conclusion under FOIA section 40(2) did not go on to consider section 36, we think it is appropriate that we should take that further step, in case our decision under section 40(2) is appealed.

44. The relevant part of section 36, as it applies to statistical data (which the withheld information undoubtedly is) provides that:

> "*Information to which this section applies is exempt information if, … disclosure of the information under this Act—*
>
> *(a)…*

(b)…

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

45. The Home Office argued that disclosure of the withheld information was at least likely to prejudice the effective conduct of public affairs by causing a number of HORFPs, possibly a majority, to refuse to submit relevant data in the future. We accept the evidence of Mr Dean on this likelihood (paragraph [23] above) and the consequences that he feared would flow from it.

46. The Appellant accused the Home Office of exaggerating these risks. In particular, he suggested that the difficulty of obtaining the same statistical data from other sources was overstated and that the HORFPs would not ultimately press their objections to the stage where their careers in pathology were either curtailed in scope or terminated.

47. We share some of the Appellant's scepticism. It would certainly be surprising if HORFPs as a body would be prepared to undermine criminal investigatory processes by refusing to provide relevant data. However, we have to remind ourselves, again, that the Request was not for anonymised data about the workload of HORFPs generally, but the records on a particular HORFP. We can understand that objections would be made by both that individual (as there have been) and others, who would fear that disclosure of the withheld information would be followed by a request for the equivalent information as to their workload. We also accept the consequences that would be likely to flow from the partial or complete withdrawal of cooperation. We do not think that Mr Dean was exaggerating when, in answer to a question on the point he expressed concern that this would involve significant disruption to the effectiveness of the Home Office's pathology services.

48. We conclude, therefore that the section 36 exemption is engaged.

49. The approach of the Home Office was to suggest that the public interest in disclosure of the withheld information was so slight that it could not come near to equalling the public interest in maintaining the exemption for the purposes of FOIA section 2(2)(b). It drew attention to the particular issue raised in the Grounds of Appeal - the competence of an individual HORFP - and argued that the release of the withheld information would not throw any light on it. It was only if concerns as to competence arose from the individual's performance on one or more specific cases that the workload statistics might be referred to as a possible cause of, or a contributory factor to, the perceived shortcomings.

50. The Appellant argued that the public interest in disclosure lay in the importance of the public being aware of the extent to which a HORFP might obtain extensive work (and therefore income) from the police and might, as a consequence, develop bias in favour of the prosecutor. This would be of particular concern, he said, if the individual did not become involved in defence work, possibly because he or she deliberately avoided it.

51. The Home Office argued, as before, that if any such bias manifested itself during the course of particular prosecution hearings the errors or shortcomings would become apparent from an examination of the individual's work, including the outcome of prosecutions with which he or she had been involved. That would provide evidence which the public would have the strongest legitimate interest to see. Information

about the relevant HORFP's workload, however, did not give rise to any significant public interest in disclosure. On their own, separate from any evidence of a HORFP's failings, the statistics disclosed nothing of public interest.

52. We should add that no evidence was presented to us suggesting that A's performance was regarded as inadequate, either generally or in respect of any identified case or cases. Nor was it clear to us what the result of any bias was said to be. If a HORFP felt an obligation to support a prosecution, even if an autopsy provided insufficient evidence for the purpose, the shortcomings in the HORFPs work would be likely to be exposed by the defence team, leading to damage to the professional reputation of the HORFP and criticism for the prosecuting authority. If, on the other hand, a HORFP's bias led him or her to withhold evidence emerging from autopsies (perhaps in the hope that this would help a police force to close files on cases of suspicious death and thereby reduce its own workload) the process of having a second opinion on each case and of carrying out annual audits would be likely to bring the behaviour to light. The impact of such behaviour on the ratio between autopsies undertaken and homicide cases pursued would also be likely to reveal what was happening. Each one of those monitoring processes would be much more likely to bring poor performance to light than the disclosure of the withheld information which, for the reasons set out above, would not reveal any useful information about the quality of the pathology service provided.

Our conclusions under FOIA section 36

53. In the circumstances described we are satisfied that the public interest in disclosure would not equal, or even come close to equalling, the public interest in maintaining the exemption. We therefore conclude that the Home Office would also have been entitled to refuse to disclose the withheld information in reliance on section 36(2)(c).

54. Our decision is unanimous

Judge of the First-tier Tribunal
Chris Ryan

Date: 21st November 2017