



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

Appeal Reference: EA/2017/0140

Determined, by consent, on written evidence and submissions

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Ms Melanie Howard
and
Mr Stephen Shaw

Between

William Stevenson

Appellant

And

The Information Commissioner ("The ICO")

Respondent

DECISION AND REASONS

BACKGROUND

1. As the appellant says in his final submissions 'this is a small case in the course of a very large and long running matter'.

2. As a result of a FOIA request the appellant, on 17 November 2016, was provided by NHS Improvement with a copy of a briefing pack prepared by Monitor for the 'Board to Board' meeting on 8 September 2010 which led to what the appellant describes as the 'disastrous' authorisation of the University Hospital of Morecambe Bay (UHMB) NHS Trust as a Foundation Trust. The appellant says that the 'UHMB disaster resulted in an additional cost to the country' of hundreds of millions of pounds. We make that reference to indicate the importance placed by the appellant on the report and the identities of those who compiled it.
3. As the appellant recognises, the only information withheld from the pack, initially, contained the names of four individuals referred to on the covering page of the report who, it is clear from the report, constituted the "Assessment team". Following further contact from the appellant it was accepted by NHS Improvement (NHSI, which has taken over responsibility for FOIA matters from Monitor and the NHS Trust Development Authority) on 21 December 2016 that the first named person of the assessment team and her role were in the public domain and this name and her role, Senior Assessment Manager (SAM,) were then also disclosed. It should be noted that the names of the two Monitor Non-Executives appearing on the front page of the report have also been disclosed.
4. However, it was maintained by NHSI that the other three individuals listed as part of the assessment team were neither senior officers of Monitor nor were they participants in any of the open interviews in the Morecombe Bay investigation and therefore NHSI relied on section 40(2) of the FOIA to withhold the names.
5. The Commissioner upheld this reliance on section 40(2).

LEGAL FRAMEWORK AND APPLICATION

6. Section 40 FOIA reads, materially, as follows:-

40.— Personal information.

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

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

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.

(3) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

7. The names redacted on the report clearly amount to personal data under s1(1) of the Data Protection Act 1989 (DPA 1989), and it does not appear that the appellant contests otherwise.

8. Consideration has to be given under s40(3)(a)(i) and (ii) as to whether that personal data can be disclosed without contravention of data protection principles.
9. Materially, for the purposes of s40(3)(a)(i), the first data protection principle requires that personal data is processed (which includes disclosure) fairly. Section 10 of the DPA 1989 (as referred to in s40(3)(a)(ii)) refers to damage or distress caused by disclosure.
10. In relation to interpreting the first principle, the disclosure must also not breach the material conditions in Sch 2 to the DPA 1989 'relevant for purposes of the first principle'. Processing is permitted if the data subject has consented to it (Sch 2, first condition), but if not then for the purposes of the sixth condition in Sch 2 it must be established that the disclosure is necessary in order to meet the legitimate interests of the appellant.
11. Further for the purposes of the sixth condition, there is an exception to disclosure even where disclosure has been established as for the purposes of the appellant's legitimate interests. Thus, the exception covers a situation where the processing (disclosure) is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

DISCUSSION AND DECISION

12. Distilling the requirements of s40 FOIA, in deciding whether disclosure is fair, the Commissioner has noted the following: (a) the fact that disclosure to an individual under FOIA operates as disclosure to the world at large; (b) there is no presumption in favour of the release of personal data; (c) the reasonable expectation of the data subject in

relation to disclosure will be considered along with any consequences of disclosure; (d) whether there is a legitimate interest in disclosure notwithstanding the two considerations in (c).

13. The appellant's case is that the authorisation of UHMB was made by Monitor on the basis of the information in the report and briefing pack (the substance of which has now been disclosed) and that those involved in compiling the information presented to the Monitor Board, should now bear some responsibility for that information by being named.
14. We understand why the appellant says he has a legitimate interest in the disclosure of the names of the other three individuals who contributed to the briefing pack, and we will assume that there is a legitimate interest in knowing who compiled the report. However, the strength of the 'legitimate interests' argument is greatly diluted by the fact that the information itself has been disclosed which allows the appellant to make any criticisms of the content that he wishes to make. The appellant also has the names of the Monitor Board executives and the Senior Assessment Manager with overall responsibility for the content.
15. In addition, having the names of the other three individuals would not, in our view, assist the appellant in identifying for which particular parts of the pack each one is responsible.
16. The appellant also argues that the individuals who contributed to the report were sufficiently senior for them to have a reasonable expectation that their names would be disclosed. However, the appellant already knows that those whose names have not been disclosed are less senior than the (named) Senior Assessment Manager, who in turn was less senior than the Executive Manager, and that the staff involved were two assessment managers and a legal adviser.

17. As the Commissioner notes, the briefing pack is marked 'highly confidential' and less senior staff would, in our view, have a reasonable expectation that their names would not be disclosed on such a document, even if the document itself were disclosed.

18. In these circumstances it cannot, in our view, be said that disclosure is 'necessary' to meet the appellant's legitimate interests.

19. Therefore we find:-

- (a) The three names (which constitute the information sought) are personal data.
- (b) There is a legitimate interest in knowing who compiled the report/pack.
- (c) But disclosure is not necessary for the purposes of those legitimate interests, because the disclosure is unwarranted by reason of prejudice to the rights of the data subjects.
- (d) Processing the information by way of disclosure would not meet the requirement of fairness.

CONCLUSION

20. For the reasons set out above we are satisfied that that NHSI were entitled to rely on s40(2) FOIA to withhold the information and the appeal is refused.

21. This decision is unanimous.

Signed Stephen Cragg QC

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 26 January 2018.

(Case considered by Panel on 19 December 2017).

Promulgated: 31 January 2018.