



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

Appeal Reference: EA/2017/0197

Decided without a hearing

Before

JUDGE DAVID THOMAS

TRIBUNAL MEMBERS MIKE JONES AND HENRY FITZHUGH

Between

ROBERT HALPIN

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

NB Numbers in [square brackets] refer to the open bundle

1. The Tribunal's decision, by a majority, is that Devon Partnership NHS Trust (the Trust) should disclose the information requested by the Appellant. It should do so within the later of 28 days from the date of this decision and the determination of any application by the Information Commissioner (the Commissioner) for permission to appeal (and the determination of any subsequent appeal).

The decision of the majority

Introduction

2. This is an appeal by Mr Robert Halpin against the rejection by the Commissioner on 22 August 2017 of his complaint that the Trust had wrongly refused to disclose certain information to him under section 1(1)(b) Freedom of Information Act 2000 (FOIA).
3. The parties opted for paper determination of the appeal. The Tribunal was satisfied that it could properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended) (the Rules).¹

The request

4. On 1 December 2016, Mr Halpin made the request [29]. He wanted to know (i) the dates on which two named employees, one a senior social worker and the other the lead social worker for the Clyst team, undertook training for assessments under section 9 Care Act 2014 (the Care Act); (ii) the training they had received for implementation of the Care Act; and (iii) any qualifications so achieved. Clyst is an area of Devon around the River Clyst.
5. At the same time, Mr Halpin made another request, for the process of a 'needs assessment to care plan'. The Tribunal is not concerned with that request.

The initial response and review

6. On 13 December 2016, the Trust responded [31]. It refused the request on the basis that the information sought was exempt from disclosure under section 40(2) FOIA (third party personal data). Section 40(2) is an absolute exemption in the circumstances of this request: if it is engaged, there is no public interest test to apply.
7. In his review request [33], Mr Halpin suggested that it was well within the reasonable expectations of NHS clinicians paid by the taxpayer that their training and qualifications might be disclosed, especially given that it was policy to allow patients to choose their clinicians based on training and qualifications. The information was not, he argued, sensitive information within the Data Protection Act 1998 (DPA). Clinicians voluntarily gave up their right to anonymity in the public interest.
8. The Trust delivered its review decision on 16 February 2017 [38]. It reiterated that section 40(2) applied: the requested information was 'personal data' within section

¹ SI 2009 No 1976

1 DPA and disclosure would breach the first and sixth data protection principles. The Trust assured Mr Halpin that the two employees were suitably trained and qualified for their roles within the Trust.

Proceedings before the Commissioner

9. Mr Halpin lodged his complaint with the Commissioner on 2 March 2017 [45].
10. The Trust explained its position to the Commissioner in an email dated 15 June 2017. There is a redacted version at [54]. The full version is in the closed bundle. The Trust said that there was no specific mandatory training for staff in relation to the Care Act although it could be a requirement of the local authority (Devon County Council) for training to be made available. Specific training was provided by the council before the Act came into force. Appropriate ongoing training would be provided informally within clinical teams as necessary. The Trust said it regarded the disputed information as personal data but not sensitive personal data. It acknowledged that the data related to the individuals concerned in their professional roles but considered that the level of detail about training would be overly intrusive. Neither individual was a senior manager or held a position warranting greater accountability, for example a public-facing role representing the Trust. It would not be within the reasonable expectation of staff at this level for detail about training to be disclosed. However, it had not asked the employees whether they objected to disclosure.
11. The Trust added that it had had situations where FOIA requests had been used to target members of staff by individuals dissatisfied with the care received. Each case was considered on its merits but the Trust 'would normally expect to refuse this level of detail sought particularly when viewed in the context of numerous complaints, requests for information from an individual'. The Trust did not say whether numerous complaints and requests for information had been made by Mr Halpin but did say that '[i]n relation to this particular request we consider there is a high likelihood such information would be used to put unreasonable pressure on individual members of staff'.
12. The Trust had considered condition 6 in schedule 2 to the DPA (see below) but did not think there was sufficient justification for disclosure when balanced against the legitimate interests of the data subjects.

The Commissioner's decision

13. The Commissioner upheld the Trust's decision not to disclose the requested information under section 40(2) FOIA. The information constituted the personal data of the individuals concerned. The first data protection principle was the most relevant. This requires personal data to be disclosed only in fair and lawful circumstances. In the Commissioner's judgement, the individuals would not have had a reasonable expectation of disclosure of this level of information given their

(relative lack of) seniority. Although the Trust had not provided any evidence of staff being targeted after the release of information under FOIA, the Commissioner accepted that the nature of the requested information could lead to employees being put under unreasonable pressure and caused distress.

14. She accepted that there were legitimate interests in information about the expenditure of public money and the performance of public bodies being available. Similarly, although Mr Halpin had not said why he wanted the information, there was a legitimate interest in ensuring that employees were sufficiently trained and qualified. However, her default position was in favour of protecting the privacy of the individual and there was no sufficiently compelling public interest in the disclosure of the information. It might be of interest to Mr Halpin but there was no sufficient wider public interest to warrant overriding the rights and expectations of the individuals concerned.

Proceedings before the Tribunal

15. In his **Grounds of Appeal**, Mr Halpin reiterated that clinicians performing a public function would reasonably expect that information about their 'skill base' would be made public when requested and this was in the public interest. Information showing that a practitioner was fully competent and trained could only enhance the therapeutic relationship. There was no likelihood of a patient applying unreasonable pressure. If the practitioner was not qualified or competent, this would of course put pressure on him or her and the organisation to deliver better care. That sort of pressure was not unreasonable and it was in both the public interest and the patient's interest to ensure that the patient had confidence in the service.
16. In her **Response**, drafted by Counsel, the Commissioner said that it was not the case, as Mr Halpin contended, that the request concerned the carrying out of a statutory provision: he had not asked for information about assessments under the Care Act. In any event, the Trust had said that professional registrations could be verified via professional bodies.
17. Given that the Commissioner had held that the employees concerned were neither sufficiently senior or public-facing to have a reasonable expectation of the information being disclosed, it reasonably followed that she could conclude that the employees would also be likely to experience distress as a result of such disclosure. The level of information sought was unduly intrusive.
18. Mr Halpin challenged a ruling by the Registrar that the redacted passages in the Trust's email of 15 June 2017 should be withheld from him under rule 14(6) of the Rules.² He argued that this was contrary to Article 6 of the European Convention

² 'The Tribunal may give a direction that certain documents or information must or may be disclosed to the Tribunal on the basis that the Tribunal will not disclose such documents or information to other persons, or specified other persons'.

on Human Rights (the Convention) and deprived him of a fair hearing. The Chamber President rejected the challenge on 19 December 2017 and later refused him permission to appeal against her decision on the basis that there were no arguable grounds. In addition, the application for permission to appeal was premature because, if the substantive decision went against him, he could include the non-availability of the closed material as a ground for permission to appeal the substantive decision (to the Upper Tribunal). The Registrar later refused Mr Halpin's application for a stay of the appeal pending an application to the Upper Tribunal for permission to appeal against the 19 December 2017 decision.

19. On 6 April 2018, the Tribunal issued further directions. It directed Mr Halpin to explain:

'(i) particularly in light of the assurance given by the Trust in its email to the ICO on 15 June 2017 [54] that all staff have been appropriately trained, why he still wants the information; (ii) in particular, why he has asked for information about these two social workers; (iii) to what use (if any) he would put it; and (iv) what is his basis (with specific reference to the Act and any guidance issued under it) for saying that there is a public policy that patients should be able to choose their clinicians based on their experience and qualifications and whether this extends to social workers'.

The Tribunal explained that, although a FOIA requester did not generally have to explain why he wanted information, the reason could be relevant for some exemptions and might be relevant in the present case

20. In his discursive response on 11 April 2018, Mr Halpin expressed resentment that he was being asked to explain why he wanted the information. He did not address all the directions. However, he did make a number of substantive points. For example, he said that the outcome of section 9 of the Care Act was an essential needs statement which gave a mandatory right to provision of social care. He was a mental health patient (he did not specify his condition) and a vulnerable adult without access to appropriate services under the Care Act. He was at severe risk (*inter alia*) of losing his accommodation and of his psychiatric condition deteriorating to such a degree that he had to be compulsorily detained. In any appeal against a Care Act assessment, the 'capacity & skill set' of the assessing officers was highly relevant.

21. Mr Halpin continued that the NHS Constitution said that patients '[had] the right to be treated with a professional standard of care, by appropriately qualified and experienced staff, in a properly approved or registered organisation that meets the required levels of safety and quality'.³ He questioned what the Trust meant by staff being 'appropriately trained': did this mean trained in the Care Act, the NHS constitution, health and safety, social work or as a consultant psychiatrist? He also questioned whether (particular) social workers would have the experience to deal

³<https://www.gov.uk/government/publications/the-nhs-constitution-for-england/the-nhs-constitution-for-england>

with 'the level of mental functioning to ensure necessary engagement with the client'?

22. Mr Halpin asked for legal aid if the Tribunal required assistance on the law. In fact, the Tribunal has no power to grant legal aid.

The legal framework

The Care Act and regulations made under it

23. Mr Halpin has asked for information about the training of two social workers under the Care Act and specifically section 9.

24. The long title of the Act reads:

'An Act to make provision to reform the law relating to care and support for adults and the law relating to support for carers; to make provision about safeguarding adults from abuse or neglect; to make provision about care standards; to establish and make provision about Health Education England; to establish and make provision about the Health Research Authority; to make provision about integrating care and support with health services; and for connected purposes'.

25. Section 1(1) places a general duty on local authorities to promote an individual's well-being when exercising a function under Part 1. 'Well-being' is said by subsection (2) to include (b) physical and mental health and emotional well-being; (d) control by the individual over day-to-day life (including over care and support, or support, provided to the individual and the way in which it is provided); and (h) suitability of living accommodation. Under subsection (3), in exercising a function under Part 1 a local authority must have regard to (*inter alia*) '(a) the importance of beginning with the assumption that the individual is best-placed to judge the individual's well-being'; (b) 'the individual's views, wishes, feelings and beliefs'; and '(e) the importance of the individual participating as fully as possible in decisions relating to the exercise of the function concerned and being provided with the information and support necessary to enable the individual to participate'. 'Local authority' is defined by subsection (4) to mean county or district councils, London boroughs or the Common Council of the City of London.

26. Under section 3(1), a local authority 'must exercise its functions [under part 1] with a view to ensuring the integration of care and support provision with health provision and health-related provision where it considers that this would – (a) promote the well-being of adults in its area with needs for care and support and the well-being of carers in its area ...'.

27. Under section 4(1) and (2), local authorities have to provide information and advice about care and support for adults and support for carers, in particular how to access available care and support.

28. Section 5(1) provides that a local authority must promote the efficient and effective operation of a market in services for meeting care and support needs with a view to (*inter alia*) ensuring that any person in its area wishing to access services in the market '(c) has sufficient information to make an informed decision about how to meet the needs in question'
29. Section 6 imposes a duty on local authorities and their 'relevant partners' to cooperate with regard to the provision of services relating to adults with needs for care and support and to carers. Each NHS body (including trusts) in a local authority's area is a relevant partner.
30. Section 8 gives examples of how a local authority may meet needs: (a) accommodation in a care home (as defined by section 3 of the Care Standards Act 2000) or in premises of some other type; (b) care and support at home or in the community; (c) counselling and other types of social work; (d) goods and facilities; and (e) information, advice and advocacy.
31. Sections 9 to 13 come under the heading *Assessing needs*. Section 9 is sub-headed *Assessment of an adult's needs for care and support*. Subsection (1) requires local authorities, where it appears to them that an adult may have needs for care and support, to assess whether he or she does have such needs and what they are. This is called a 'needs assessment'. Regard must be had to the impact on well-being within section 1(2), the outcome the adult wishes to achieve in day-to-day life and whether, and to what extent, the provision of care and support could contribute to the achievement of those outcomes. The authority must involve (*inter alios*) the person concerned in the needs assessment.
32. Section 12(1) is a regulation-making power. Regulations may, in particular, specify circumstances in which the local authority must refer the adult concerned for an assessment of eligibility for 'NHS continuing healthcare' (to be construed in accordance with standing rules under section 6E of the National Health Service Act 2006) (paragraph (g)). Subsection (2)(a) provides that regulations may provide the person carrying out a needs assessment with information about the adult to whom the assessment relates.
33. Pausing there, the Secretary of State for Health has made The Care and Support (Assessment) Regulations 2014 ⁴ (the assessment regulations) under section 12. Under regulation 3(1)(b), a local authority carrying out a needs assessment must ensure that the individual concerned is able to participate in the process as effectively as possible. Under paragraph (4), it must give information about the assessment process to the individual. Regulation 5(1) is important in the present context:

'A local authority must ensure that any person ... carrying out an assessment –

⁴ SI 2014 No 2827

(a) has the skills, knowledge and competence to carry out the assessment in question;
and
(b) is appropriately trained' (emphasis added)

34. Under regulation 7(1), a local authority must refer an individual to the NHS Commissioning Board or a clinical commissioning group where it appears to it that he or she may be eligible for NHS continuing healthcare.
35. Returning to the Care Act, under section 13(1) a local authority must determine whether a person's need for care and support constitutes 'eligible needs' (as prescribed by regulations).
36. Pausing again there, The Care and Support (Eligibility Criteria) Regulations 2015⁵ set out when a person's needs meet the eligibility criteria. In short, as a result of a physical or mental impairment or illness, he or she must be unable to achieve two or more of the outcomes specified in regulation 2(2), including managing toilet needs, maintaining a habitable home environment and developing and maintaining family or other personal relationships.
37. Under section 18 of the Care Act, the authority must meet eligible needs, subject to certain conditions (including financial ones). Under section 22(1), a local authority may not meet needs under sections 18 to 20 by providing or arranging for the provision of a service or facility that is required to be provided under the National Health Service Act 2006 unless (a) doing so would be merely incidental or ancillary to doing something else to meet needs under those sections, and (b) the service or facility in question would be of a nature that the local authority could be expected to provide.
38. Section 26(1) requires local authorities to determine a personal budget for qualifying adults, setting out the cost of providing the services in question and the respective contributions of the authority and the client. Under section 27(1), an authority must keep a care and support plan under review and consider revising it if requested by the client.
39. It will be seen that the section 9 needs assessment is therefore a key part of the process.
40. It is not clear from the papers why Mr Halpin is the responsibility of the Trust with regard to care and support rather than the local authority. It may be that he is receiving NHS continuing care. Local authorities and NHS trusts have a duty to cooperate under the Care Act: see section 6. In any event the Trust does not dispute that it has relevant duties under that Act to Mr Halpin or that its social workers need to know how it operates.

⁵ SI 2015 No 313

41. Similarly, it is not clear what professional relationship the two employees have to Mr Halpin, although it may be surmised that he has asked for information about the training they have had because they are, or may become, his social workers (directly or in a managerial capacity) and/or responsible for his needs assessment.

Section 40(2) and (3) DPA: the personal information exemption

42. Section 40(2) and (3) FOIA deals with third party personal data:

'(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 [relevant here] 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'.

43. Section 1(1) of the DPA defines 'personal data' as:

'data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual'

44. Schedule 1 sets out the data protection principles. Paragraph 1 of part 1 contains the first principle (the principal one of relevance here):

'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

(b) ...'

45. The conditions in schedule 2 which could in principle be relevant are:

- Condition 1: the data subject has given his consent to the processing. However, the two employees have not given their consent (or, it should be said, withheld it – the Trust has not canvassed their opinion)
- Condition 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; ...'.

So, it is only condition 6 which is relevant. The third party here is Mr Halpin. The Tribunal's task is to determine whether disclosing the requested information would (i) be fair; (ii) be lawful; (iii) be necessary to promote Mr Halpin's legitimate interests; but (iv) without prejudicing in an unwarranted way the rights and freedoms or the legitimate interests of the two employees. (In fact, the proviso to the condition is so broad that the concept of fairness is unlikely to add much). In crude shorthand: does Mr Halpin's interest (if legitimate) in having the information outweigh the interests of the employees in maintaining their privacy, or vice-versa? The information is not 'sensitive personal data' within section 2 and so the Tribunal does not have to also apply the conditions in schedule 3.

The correct approach to the first data protection principle in the context of section 40(2) FOIA

46. The approach taken to the first data protection principle by caselaw in the context of section 40(2) FOIA may be summarised as follows:

Discussion

Introductory remarks

47. The majority has concluded that the requested information should be disclosed. The judgement has not been an easy one.

48. Whether personal data is processed (which, in the context of a FOIA request, means disclosed) fairly requires an assessment of the nature of the data, the identity of the requester and the possible implications for the data subject (here, the two

employees). There is no doubt that the requested information constitutes the personal data of the two employees. The fact that it relates to their work does not detract from that. However, as the Tribunal said in *House of Commons v Information Commissioner and Norman Baker*,⁶ the work context is relevant:

'When assessing the fair processing requirements under the DPA ... the consideration given to the interests of data subjects, who are public officials where data are processed for a public function, is no longer first or paramount. Their interests are still important, but where data subjects carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their personal lives ...'

49. In short, in the context of public sector employees, there is a spectrum of personal data. At one end is information which is highly sensitive, at the other information which may not be very personal at all. For obvious reasons, it is easier for a requester to rely on condition 6 with the latter than with the former.

Error of approach by the Commissioner

50. There is an error of approach at the heart of the Commissioner's decision. In paragraph 22, she said that her default position with section 40(2) was to favour the privacy of the data subject and, as a result, there had to be a more compelling interest in disclosure which would make it fair.

51. In fact, there is no default position with the first data protection principle. As discussed, where there is no sensitive personal data (as here), a public authority has to consider (i) whether processing (i.e., in the FOIA context, disclosing) would be fair; (ii) whether it would be lawful; and (iii) where it would be both fair and lawful, whether one of the six conditions in schedule 2 is met. The relevant condition in Mr Halpin's case is condition 6, such that the Trust and the Commissioner needed to consider whether disclosure was necessary for the purposes of a legitimate interest pursued by Mr Halpin, but even then, it should not take place if unwarranted 'by reason of prejudice to the rights and freedoms or legitimate interests'. There is no default position either way.

52. In *Common Services Agency v Scottish Information Commissioner* (a House of Lords case),⁷ Lord Rodger of Earlsferry said:⁸

'Where the legislature has thus worked out the way that the requirements of data protection and freedom of information are to be reconciled, the role of the courts is just to apply the compromise to be found in the legislation. The [Freedom of Information (Scotland) Act 2002] gives people, other than the data subject, a right to information in certain circumstances and subject to certain exemptions. Discretion does not enter into

⁶ 16 January 2007

⁷ [2008] UKHL 47 <http://www.bailii.org/uk/cases/UKHL/2008/47.html>

⁸ Para 68

it. There is, however, no reason why courts should favour the right to freedom of information over the rights of data subjects.

53. By parity of reasoning, there is no reason for the rights of data subjects to be favoured over those of freedom of information requesters. The ‘compromise’ – here, the balancing exercise required by condition 6 – simply has to be applied.

The correct approach to condition 6

54. The leading authority on condition 6 is the Supreme Court decision in *South Lanarkshire Council v Scottish Information Commissioner (South Lanarkshire)*.⁹ The Court recognised that, in the context of FOI requests, the condition did indeed require a balance between the rights of the data subject and the requester.¹⁰

55. The need for a balance to struck is captured by the word ‘unwarranted’ in condition 6(1).

Does Mr Halpin have a legitimate interest in the information such that disclosure is ‘necessary’?

56. A preliminary question is whether a purely private interest can constitute a legitimate interest. In paragraph 26 of her decision notice, the Commissioner said that, while the requested information might be of interest to Mr Halpin, she was not convinced that it was of sufficient wider public interest to warrant overriding the rights and expectations of privacy of the two employees. That implies that the Commissioner believes that a private interest cannot be a legitimate interest.

57. In fact, this reflects her guidance *Requests for personal data about public authority employees* (the guidance).¹¹ The guidance makes the point that a FOIA disclosure is to the world at large and information released under FOIA is free from any duty of confidence. As a result, a public authority would in effect be making an unrestricted disclosure of employees’ personal data to the general public on the strength of an individual requester’s private interests. This could, it suggests, represent an unwarranted level of interference with data subjects’ rights and freedoms, particularly their right to the protection of their personal data under Article 8 of the Charter of Fundamental Rights of the European Union. As a result, it was unlikely that a disclosure under FOIA based on purely private interests would comply with the proviso to condition 6.

58. This is the wrong approach. The guidance is, in part, conflating the question whether a requester has a legitimate interest in third party personal data with the separate question whether disclosure would prejudice the rights and freedoms of

⁹ [2013] UKSC 55, [2013] 1 WLR 2421 <http://www.bailii.org/uk/cases/UKSC/2013/55.html>

¹⁰ See the final sentence of paragraph 9

¹¹ Version 1.2 (2 May 2013) https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

the data subject. The fact that disclosure is nominally to the whole world has no bearing on whether a private interest will suffice as legitimate. That can only be relevant to the balancing exercise and the question of fairness. In any event, the whole world principle is not inviolable and a measure of common sense needs to be applied to it. The world would only find out the requested information if either the Trust or Mr Halpin publicises it. The Trust controls what it publicises. There would be no obvious motive for Mr Halpin to publicise the information.

59. In fact, the Supreme Court in *South Lanarkshire* put the matter beyond doubt. It said¹² that a legitimate interest could be 'purely private interest'.

60. Does Mr Halpin have a legitimate interest in the requested information requested, even though it may be characterised as private? The majority believes that he does. Certain themes run through the Care Act: the objective is personal well-being; that includes as full involvement by the prospective beneficiary in the process as possible; a high premium is placed on personal autonomy; and information should be available to assist those going through the process. The section 9 needs assessment is central to whether an individual's needs are met. Self-evidently, it needs to be carried out properly, in the way envisaged by the Act and along public law principles. If it is not, a vulnerable adult may not have his needs met.

61. Critically, regulation 5(1) of the assessment regulations provides that a local authority must ensure that a person carrying out a needs assessment (a) has the skills, knowledge and competence to carry out the assessment in question; and (b) is appropriately trained'. True, the regulations do not specify what is meant by 'appropriately trained'. But it must mean trained in the Care Act to a sufficient standard to enable those being trained to carry out functions under the Act, including in particular under section 9. Mr Halpin has a legitimate interest in knowing what training social workers who will, he believes, be carrying out his needs assessment, have had.

62. The needs assessment is of central importance to him. He says that his needs are not being met at the moment. He has a mental illness. He fears losing his home and being compulsorily detained in a psychiatric unit. He is therefore anxious that the needs assessment is carried out properly. Whether or not his fears are justified does not detract from his entitlement to a proper assessment and all that may flow from it. It may be said that, whether or not his assessors have had particular formal training in the Care Act, and section 9 in particular, may not have decisive bearing on their ability to carry out assessments. Informal guidance, written or from peers, may be as effective. If he wishes to challenge an adverse assessment, he is likely to need stronger grounds than merely the fact that one or more of the assessors may not have had the formal training he thinks they should have had.

¹² Para 24

63. But nor can it be said that formal training is irrelevant. A social worker who has been formally trained in the Care Act, and section 9 in particular is, all other things being equal, more likely to carry out a needs assessment properly. The issue of training is clearly important to Mr Halpin and it cannot be said that his concerns are irrational. The Trust has sought to assure him that all staff have been 'appropriately trained' to perform their role (that could include informal training within clinical teams). The Tribunal has no reason to doubt the sincerity of the assurance. However, the point about FOIA is that members of the public are, subject to the exemptions, entitled to information held by public authorities so that they can make their own judgements. Those judgements may be good or bad, but they key thing is that they are theirs. FOIA consigns to history the paternalistic approach which formerly characterised the relationship between citizen and government. Mr Halpin wants to reach his own judgement about the appropriateness of the training the two employees have had.
64. For these reasons, the majority considers that Mr Halpin does have a legitimate interest in the requested information.

Is disclosure 'necessary'?

65. The guidance is wrong in a second respect. Referring to the Divisional Court decision in *Corporate Office of the House of Commons v Information Commissioner*,¹³ itself drawing on the caselaw of the European Court of Human Rights under Article 8 of the Convention, the guidance says that whether disclosure is 'necessary' depends on whether there can be said to be a pressing social need for it. On that basis, it would be very difficult for Mr Halpin to pass the necessity test.
66. However, *South Lanarkshire* shows that pressing social need is not the correct test. Drawing instead on EU jurisprudence – more directly relevant because the genesis of the DPA is EU legislation, Directive 95/46/EC – the Supreme Court said the correct test was whether disclosure was reasonably necessary to promote a legitimate interest. That collapsed into the question whether the interest could be advanced in another way, less intrusive of personal privacy. Once it is accepted that Mr Halpin has a legitimate interest in knowing the details about the Care Act training of the two employees, it really follows that disclosure is reasonably necessary to promote that interest, because he has no other way of obtaining the information. He could, in principle, ask the Trust outside FOIA, but he knows what the answer would be and it would be all but impossible for him to challenge the expected refusal by judicial review, even if that were otherwise practicable.

The proviso to condition 6

67. Once it is accepted that Mr Halpin has a legitimate interest in the information, and that disclosure is (reasonably) necessary to promote that interest, a balance then in

¹³ [2008] EWHC 1084 (Admin) (16 May 2008)

effect needs to be struck between that interest and the rights, freedoms and legitimate interests of the two employees.

68. The majority accepts that the Commissioner was entitled to focus on the reasonable expectations of the two employees and the consequences of disclosure in applying the proviso to condition 6.
69. However, actual expectations may not correspond to reasonable expectations. Although the Trust has not consulted them, it appears to have a policy of refusing this kind of FOIA request and the employees may therefore have an expectation that the information would not be disclosed. But, even if this is right, this does not mean that the expectation is reasonable. Reasonableness of expectation has to be viewed in the context of FOIA. It is now well known that information held by public authorities may have to be disclosed. That may extend to information about employees. The question is whether the two employees would have held a reasonable expectation that requested information might be disclosed or rather that it would be protected.
70. The Tribunal has concluded that the two employees would not have had a reasonable expectation of protection. They are public servants, paid by the taxpayer. On-the-job training, whether mandatory or voluntary, is paid out of public funds. As the Tribunal recognised in *House of Commons*, there is a spectrum of data constituting 'personal data' within section 1 DPA. Although the requested information constitutes personal data, because the two employees can be identified from it (indeed, the request names them), it is not of a nature which goes to the essence of the employees' personalities or private lives. It is not particularly personal. It relates to how well equipped they are to perform their *professional* roles, in the public sector. The Trust has made the point that the professional qualifications of the employees are publicly available from professional bodies. If the public is entitled to that information, it is not obvious why information about training designed to build on professional qualifications and keep employees up-to-date should be withheld. It does not appear to be of much, if any, greater sensitivity.
71. It is regrettable that the Trust has not asked the employees whether they had any objection to disclosure of the information. It may be that they would be entirely relaxed about its being disclosed.
72. The Tribunal accepts that the seniority of employees is a relevant factor with regard to reasonable expectations, even where information relates to public duties. There is a stronger expectation of privacy with junior employees who may be regarded as accountable to their employer and not directly to the public.¹⁴ Neither of the employees holds a particularly senior position in the Trust's hierarchy. But neither can their positions be characterised as junior. One is a senior social worker and the

¹⁴ *Gilbert v Information Commissioner* (21 March 2011)

other a lead social worker. Some cases have considered it relevant not only whether a role is public-facing but also whether the employee represents the authority in a managerial capacity. With respect, the Tribunal does not consider it decisive or even especially relevant whether a public-facing role is as managerial representative of an employer or in some other capacity. Here, the two employees are public-facing and clearly they represent the Trust when performing their roles. Their relative seniority is more relevant than the precise content of their public-facing role.

73. In short, the majority has concluded that the requested information is not overly intrusive and that, whatever their actual expectations, the two employees did not have a reasonable expectation that it would not be disclosed on request.

74. This is not to say that public sector employees, even public-facing employees of relative seniority, can have no reasonable expectation that any personal data would be protected. Annual appraisals or disciplinary records, for example, are unlikely to be disclosable, even though relevant to how well they are performing their public roles. That type of information is much more personal to an employee than whether he or she has been on a particular training course and it would therefore require more powerful 'legitimate interests' within condition 6 to warrant disclosure.

75. The Trust is clearly concerned about the effects of disclosure. As with reasonable expectations, this is relevant to the proviso to condition 6 as well as to the notion of fairness. The Trust says it has had 'situations where Freedom of Information requests have been used to target individual members of staff by individuals dissatisfied with the care received' and '[i]n relation to this particular request we consider there is a high likelihood such information would be used to put unreasonable pressure on individual members of staff'. This represents a strong hint that there is history between the Trust and Mr Halpin going beyond the clinical relationship.

76. If that is right, it would have been better if the Trust had provided at least some particularisation, although it may understandably have been reluctant to exacerbate any difficulties. However, even assuming that the relationship is a problematical one, with a history of FOIA requests and complaints, in the Tribunal's judgment that is insufficient to tip the condition 6 assessment away from disclosure. If there are concerns that someone is using FOIA abusively - that has not been suggested of the present request - section 14(1) (vexatious requests) may be available to the public authority. If someone makes inappropriate complaints, they can no doubt be summarily dismissed. If someone, armed with information, targets individual members of staff for the alleged inadequacy of the care they provide, the merits of the individual case have to determine what happens. The Tribunal, whilst accepting the legitimacy of Mr Halpin's interest in the requested information, has already commented that he would be unwise to place too much weight on whether particular employees have had particular ongoing training: his use of the information should be proportionate and if it is not he may find that his representations are not heeded.

77. In short, on the information available to the Tribunal (and the Commissioner), the majority does not accept that disclosure of the requested information is 'unwarranted by reason of prejudice to the rights and freedoms or legitimate interests' of the two employees. In all this, the majority has borne in mind that the data in question is not particularly personal. In addition, the Commissioner was not justified in assuming distress from disclosure in light of the employee's seniority and role (see paragraph 16(c) of the Response).

Conclusion on condition 6

78. In the majority's judgment, disclosure of the information is fair, for really the same reasons as condition 6 applies. It is lawful (as being made under FOIA following determination by the Tribunal). Mr Halpin has a legitimate interest in the information and disclosure is (reasonably) necessary to promote that interest. The prejudice proviso does not apply. The Tribunal has had regard to the interpretive provisions in paragraphs 1 to 4 of part II of schedule 1 to the DPA,¹⁵ and to the reasons of the minority member.

79. For completeness, the Tribunal also holds that disclosure respects the sixth data protection principle (raised by the Trust in its review but not otherwise discussed): 'Personal data shall be processed in accordance with the rights of data subjects under this Act'. None of the contraventions contemplated by paragraph 8 of part II of schedule 1 applies.¹⁶

The opinion of the minority member

80. The minority member adopts the factual background set out by the majority and its legal analysis. He also agrees that Mr Halpin has a legitimate interest in the requested information and passes the necessity test. Where he differs is with respect to the outcome of the balancing exercise required by condition 6.

¹⁵ In particular, there is no breach of paragraph 1(2) and (3) because, although it appears that the Trust has not obtained the consent of the two employees to disclosure of the requested information, the information was not obtained from them: as organiser or commissioner of training (if relevant), the Trust would already have the information

¹⁶ 'A person is to be regarded as contravening the sixth principle if, but only if—

(a) he contravenes section 7 [right of access to personal data] by failing to supply information in accordance with that section,

(b) he contravenes section 10 [right to prevent processing likely to cause damage or distress] by failing to comply with a notice given under subsection (1) of that section to the extent that the notice is justified or by failing to give a notice under subsection (3) of that section,

(c) he contravenes section 11 [right to prevent processing for purposes of direct marketing] by failing to comply with a notice given under subsection (1) of that section, or

(d) he contravenes section 12 [rights in relation to automated decision-taking] by failing to comply with a notice given under subsection (1) or (2)(b) of that section or by failing to give a notification under subsection (2)(a) of that section or a notice under subsection (3) of that section'

81. In particular, in the judgement of the minority member the two employees have a reasonable expectation of privacy with regard to the information. Although it is not particularly personal in nature, it does relate to two named individuals. Unlike professional registrations, information about what ongoing training individual employees have received is not usually in the public domain. The Trust was entitled to assume that the two employees would not want the information disclosed. The 'disclosure to the whole world' principle on which FOIA is based is the context in which this disclosure has to be assessed: the question is not simply whether the employees would be content for Mr Halpin to have the information but whether the information should be generally available, in a way it would not be for their colleagues (absent requests in relation to their training history).
82. In addition, the Trust is clearly concerned about the effects of disclosure. This reinforces the reasonableness of the two employees' expectation of privacy and underlines the risk to their rights and freedoms more generally from disclosure.
83. The minority member bears in mind, in conducting the balancing exercise, that Mr Halpin's interest, whilst legitimate, is a private one. As the Commissioner noted, there is no wider public interest in the information being generally available. He also bears in mind that the Trust has assured Mr Halpin that staff are appropriately trained, the relevant requirement of regulation 5 of the assessment regulations.
84. For these reasons, the minority member considers that condition 6 does not apply. Nor, for much the same reasons, would disclosure be fair. He would have dismissed the appeal.

Conclusion

85. For the reasons given by the majority, the appeal is allowed.

Signed David Thomas

Judge of the First-tier Tribunal

Date: 24 May 2018

Promulgated: 25 May 2018