



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

Appeal Reference: EA/2020/0077P

**Determined, by consent, on written evidence and submissions
Considered on the papers on 15 January 2021.**

Before

Judge Stephen Cragg Q.C.

Tribunal Members

Mr Andrew Whetnall

and

Mr Dan Palmer-Dunk

Between

James Robinson

and

Appellant

The Information Commissioner

Respondent

DECISION AND REASONS

DECISION

1. The appeal is dismissed.

MODE OF HEARING

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.
3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 378.

BACKGROUND AND DECISION-MAKING PROCESS

4. On 10 April 2019 the Appellant wrote to the NHS Nene Clinical Commissioning Group (the CCG) and requested information in the following terms (with identifying names of the nursing home redacted):-

"All correspondence including emails and telephone records, briefing notes, assessments, between Daniel Kane (Chief Executive Officer General Practice Alliance) and any other party employed by or outside of the CCG regarding [Redacted] Nursing Home. [Redacted] Nursing Home, [Redacted]

All correspondence including emails and telephone records, briefing notes, assessments, between Daniel Kane (Chief Executive Officer General Practice Alliance) and any other party employed by or outside of the CCG regarding [Redacted] Nursing Home. [Redacted] Nursing Home, [Redacted].

All communication between Daniel Kane and other NHS bodies (including NHS England) and Local Authority bodies and their employees relating to [Redacted] Nursing Home registering with a GP Practice to secure generic GP cover for residents discharged to [Redacted] Nursing Home including (but not limited to) correspondence with Daniel Kane GPA."

5. The CCG responded to the above request on 12 June 2019. It confirmed that it holds some information falling within the scope of the request but that it is exempt information under section 36(2)(c) FOIA, with the public interest favouring maintaining the exemption. The Appellant complained to the Commissioner who investigated the complaint and produced a decision notice dated 20 January 2020.

6. It is appropriate at this stage to set out the relevant parts of section 36 of FOIA. Section 36 reads materially in this case: -

36. – Prejudice to effective conduct of public affairs.

- (1) This section applies to –
 - (a) ...
 - (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) ...
 - (b) ...
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

- (3) ...
- (4) ...
- (5) In subsections (2) and (3) “qualified person” –
 - ...
 - (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means –
 -
 - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.

7. The decision notice explains the effect of s36(2)(c) FOIA in this case, and notes that s36 FOIA differs from all other prejudice exemptions in FOIA, as the judgement about prejudice must be made by the legally authorised, qualified person (QP) for that public authority. The QP’s opinion must also be a “reasonable” opinion, and the Commissioner, and now this Tribunal, may decide that the s36 FOIA exemption has not been properly applied if it is

found that the opinion given is not reasonable. The Commissioner also points out that s36 FOIA is a qualified exemption and subject to the public interest test pursuant to s2(2)(b) FOIA.

8. In this case the Qualified Person was Toby Sanders, Joint Chief Executive of the CCG. He considered a qualified person's form which explained in detail the law and effect of s36(2)(c) FOIA and then stated that: -

The CCG is in the process of commissioning an independent review into the alleged allegations the applicant has made. The Applicant continues to send long, confusing, complex and repetitive correspondence in relation to the specific issues they have raised. This has already hampered the FOI Internal Review process as the applicant does not engage with the advice given nor wait for the outcome of the review before submitting further correspondence. It also has the effect of diverting resources which would otherwise not be required and removes the safe space investigations need in order to fully establish the facts. Given the applicant's behaviour on engagement it is felt that the independent investigation would be hampered, delayed, or otherwise not as effective if the CCG provided the applicant with further information to scrutinise before the findings of the investigation are released.

The public interest does not outweigh the prejudice specified above due to the effective use of public funds, the investigation requiring a safe space and the outcome of the report will be made available to the applicant.

9. There was a further email, dated 12 June 2019, accompanying the form which stated that:-

We need Toby, as the detailed "Qualified Person" of the CCGs to approve the issuing of the FOI response to the named person. This relates to an ongoing case that has generated a number of requests and responses. The CCG has committed to undertake an investigation into the matter and this will be led by [name redacted]. On the recommendation of the NEL CSU Freedom of Information team, the CCG are looking to issue the attached that sets out we will not be releasing the information as it could have an impact upon the investigation.

10. Later on, 12 June 2029, Mr Sanders emailed to say, 'Further to our conversation on this today...I can confirm that in this instance I am supportive of the approach proposed'.

11. The Tribunal has not been provided with the information withheld, and the Commissioner has also not seen it. The Commissioner noted:-

19. ...In this case, the CCG has explained that the correspondence in question has been archived for a long time and it would take its IT some time to retrieve it. It has made the point that the content of the correspondence may be fairly innocuous but that section 36 concerns prejudice to the effective conduct of public affairs. For reasons that will be discussed in this notice the CCG considers that releasing the requested information would be likely to frustrate its investigation but not because of the content of the correspondence, as such. The CCG has confirmed that the correspondence will be as described in the complainant's request i.e. it will involve particular individuals and nursing homes. In the circumstances, the Commissioner has not found it necessary to view the withheld information on this occasion.

12. The Commissioner decided that the QP's opinion was reasonable. The Commissioner set out the test to be met:-

23...is it an opinion that a reasonable person could hold? This only requires that it is a reasonable opinion, and not necessarily the most reasonable opinion. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, she must find that the exemption is engaged.

13. The Commissioner reviewed the information provided to the QP (as set out above) and concluded that:-

30. The Commissioner is satisfied that the QP had sufficient appropriate information about the request to enable him to form an opinion on the matter of whether section 36(2)(c) was engaged. ...As a result she must find that the QP's opinion - that releasing the correspondence in question, at the time of the request, would be likely to prejudice the effective conduct of public affairs (by hampering the CCG's ongoing service complaint

investigation) - is one a reasonable person might hold and that, therefore, the correspondence engages the exemption under section 36(2)(c) of the FOIA.

14. The Commissioner went on to consider the public interest arguments. She noted that the Appellant appeared to argue that the fact that the investigation was ongoing is all the more reason to release the information he has requested, in order to demonstrate transparency, and that he was not confident that the CCG will manage the investigation fairly. The CCG acknowledged the general principle of openness and transparency in the commissioning of healthcare services, and the Appellant's private interest in the information in question.
15. The Commissioner noted again the arguments put forward by the CCG about the disruption caused by the Appellant's frequent correspondence while an investigation was ongoing and concluded that:-

35. The Commissioner is satisfied that there was greater public interest in this case in the CCG being able to carry out its independent investigation methodically and efficiently. She considers that, at the time of the request, the CCG would have been less likely to be able to achieve this if it released the requested information. This is because there was a strong likelihood that this would have generated further questions and correspondence from the complainant, which would have diverted CCG staff and hampered the investigation in question.

36. The requested information has little wider public interest and such public interest as there is in the CCG's handling of the service complaint that is behind the complainant's request will be satisfied by the knowledge that the CCG was carrying out an independent investigation into the complaint. The CCG intends to provide the complainant with a copy of its associated report.

THE APPEAL AND RESPONSE

16. The Appellant has filed an appeal dated 24 February 2020. The Notice of Appeal does not appear to contain identifiable grounds for appealing the decision notice, and the documents referred to appear to detail a series of criticisms of the CCG and its handling of the Appellant's complaint to the CCG. The email of 18 February 2020 is referred to and the following provides a flavour of the Appellant's concerns:-

I wish to appeal the decision of the 'ICO' for the following reasons of evidenced obstruction to the service by this Nene CCG officer concerned that is clearly against protocol and requires accountability as of endangering service users and fully compromising a care service against that of the Regulator CQC decision to support the facility.

...

The excuse given by 'FOI' as Section 36 (2) that would prejudice to effective conduct of public affairs whilst existing evidence exists to the manipulation of such information ...

...

For the CCG to say the information has been archived for some time is a very weak response as information relating to the second officer was easily enabled albeit heavily redacted and in the most with equal non-disclosure that equally upheld the decision in the main by the 'ICO'. Such information would be held on memory of the 'Officers' computer and would be readily available by implementing a simple search within today's technology.

The response from the investigating officer to justify a section 36 was factually inaccurate and myself made to look as though I was to hamper the investigation that in reality was clearly a closed shop protecting its own officers in question. I would also consider a conflict of interest occurring by Toby Sanders being the qualified person to implement such a Section 36 himself being Joint Chief Executive for both Corby and NHS Nene Clinical Commissioning Groups.

I consider neither good practice took place by the CCG on reopening service extending to this lack of information requested that makes such a decision being upheld as little more than lip service and the complaint appearing to be discounted whilst my attempting to right a clear wrong. In the immediate time I have written a fully factual and evidenced report to the Parliamentary and Health Service Ombudsman that I appreciate looks at concerns outside a system that this very CCG are looking to hide under by such a bureaucracy whilst with themselves having totally ignoring such 'systems' in place on our attempting to facilitate a safe service upon reopening that was steered by a clear opposite agenda of the

CCG Officer in question that would appear to be outside this argument with the ' by the nature of this appeal.ICO' in question.

17. Another document entitled Document 1A appears to deal entirely with the Appellant's underlying complaint to the CCG.

18. In an attempt to focus the appeal, the Registrar asked the Appellant, on 1 July 2020, to provide a reply and that:-

7. His reply should clearly state:

7.1 Does he say that the Qualified Person's Opinion was wrong – i.e. that Mr Sanders' opinion was not reasonable?

7.2 If that is his argument, why does he say it was not a reasonable opinion?

7.3 Why he says that, even if the Qualified Person's Opinion was right, the public interest (i.e. the interest of people not directly connected to the issues within the CCG) meant that the information should in any event have been provided under the Freedom of Information Act 2000, that is publicly.

19. The Appellant provided a response. He says that he does say that Mr Sanders' opinion was not reasonable. However, his response appears then to refer back to the investigation of his underlying complaint, concluding:-

Hence my moving on to the FOI in seeking what had actually happened to 'facilitate' residents losing their home and ourselves a business of 20 years standing we had done everything within our power to enable together with the Regulator CQC.

20. The Appellant also appears to cast doubt on the appropriateness of Mr Sanders being the QP in this case, stating:-

This I consider is a major conflict of interests that I suspect is a set protocol to enable such automatic decisions to be made within a simplification of dismissing a complainant down the line with a legitimate complaint only to be lost in what appears to be a thorough and in depth investigation that

it clearly was not by the very complexity used in a deliberate manner that I am then accused of in scrutiny.

21. In relation to the public interest query posed by the Registrar, the Appellant again appears to refer to his underlying complaint and its importance and his view that the CCG has failed to deal with it properly. He concludes that:-

My request being for transparency and compliance the NHS Nene CCG (as they were known of the time) would quite correctly expect of others under their regulatory scrutiny that in the main would appear unregulated to enable such dangerous and gung-ho actions.

22. In her response the Commissioner submits that the Tribunal should uphold the decision notice.

DISCUSSION

23. *Information Commissioner v Malnick and ACOBA* [2018] UKUT 72 (AAC) sets out the approach for the Tribunal to take in cases involving s36 FOIA and a QP's opinion. The Upper Tribunal at paragraphs 28 and 29 said:-

28. The starting point must be that the proper approach to deciding whether the QP's opinion is reasonable is informed by the nature of the exercise to be performed by the QP and the structure of section 36.

29. In particular, it is clear that Parliament has chosen to confer responsibility on the QP for making the primary (albeit initial) judgment as to prejudice. Only those persons listed in section 36(5) may be QPs. They are all people who hold senior roles in their public authorities and so are well placed to make that judgment, which requires knowledge of the workings of the authority, the possible consequences of disclosure and the ways in which prejudice may occur. It follows that, although the opinion of the QP is not conclusive as to prejudice (save, by virtue of section 36(7), in relation to the Houses of Parliament), it is to be afforded a measure of respect. As Lloyd Jones LJ held in *Department for Work and Pensions v Information Commissioner* [2016] EWCA Civ 758 (at paragraph 55):

“It is clearly important that appropriate consideration should be given to the opinion of the qualified person at some point in the process of balancing competing public interests under section 36. No doubt the weight which is given to this consideration will reflect the Tribunal’s own assessment of the matters to which the opinion relates.”

24. The UT then continues to describe the two stages involved in deciding whether information is exempt under s36 FOIA at paragraph 31:-

31.....first, there is the threshold in section 36 of whether there is a reasonable opinion of the QP that any of the listed prejudice or inhibition (“prejudice”) would or would be likely to occur; second, which only arises if the threshold is passed, whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing it.

25. The UT then emphasizes that the ‘QP is not called on to consider the public interest for and against disclosure...the QP is only concerned with the occurrence or likely occurrence of prejudice’ (paragraph 32). Going on, the UT explains:-

32...The threshold question under section 36(2) does not require the Information Commissioner or the FTT to determine whether prejudice will or is likely to occur, that being a matter for the QP. The threshold question is concerned only with whether the opinion of the QP as to prejudice is reasonable. The public interest is only relevant at the second stage, once the threshold has been crossed. That matter is decided by the public authority (and, following a complaint, by the Commissioner and on appeal thereafter by the tribunal).

33. Given the clear structural separation of the two stages, it would be an error for a tribunal to consider matters of public interest at the threshold stage.

26. The UT also decided that when considering whether the QPs opinion was reasonable ‘we conclude that “reasonable” in section 36(2) FOIA means substantively reasonable and not procedurally reasonable’ (paragraph 57).

27. We should deal with the Appellant's complaint that the QP in this case is not unbiased and is not independent. As the UT said the QP is a person who is defined by the FOIA - the CCG has not chosen the QP in this case. As the UT explains QPs are those 'who hold senior roles in their public authorities and so are well placed to make that judgment'. Thus, as defined by the legislation, QPs are never independent of the public body concerned. Mr Sanders is the QP in this case, even though he is the Joint Chief Executive of the CCG.
28. In relation to the reasonableness of the QP's opinion it is our view that it is not unreasonable. We have seen a lot of correspondence from the Appellant in the bundle, in relation to the request and appeal and otherwise. It is true that it is sometimes difficult to follow, sometimes repetitive and overlapping, and copious. It is clear that the Appellant has a grievance against the CCG which he was pursuing at the time of the request, and about which he has very strong feelings.
29. The background to the case as described by the Appellant is that he and his wife opened care home facilities in October 2017. Cover by a registered GP practice was needed but not in place when the service opened. Nor was assurance that such places as were not funded privately would have support from public funds. The Appellant's view is that he was let down and obstructed by officials. His requests for an allocated GP surgery were ignored after an initial assurance was given, and an inspection visit was delayed. There are more particulars in the bundle, and more allegations, including that safeguarding complaints concerning absence of GP cover had, in the Appellant's view, been orchestrated by officers dealing with the case who should have resolved the issues in advance if due process had been followed. This is a very compressed summary. There was more than one FOIA request and a subject access request by and behalf of the Appellant, and he opened a complaint to the Parliamentary and Health Service Ombudsman (we have no information on the outcome).

30. The ICO's case officer explained that the office was not in a position to consider all of the issues raised in the Appellant's emails. It can take into account only so much as is relevant to the application of s36 FOIA. We agree with that approach.
31. We can see that there is sufficient evidence to establish that disclosure of the requested information at the time of the request would be likely to hamper the internal investigation the CCG was carrying out, and that disclosure would have been likely to encourage further communications from the Appellant on the same topic. As set out above it can be seen that the QP had discussed the matter with members of staff who had knowledge of the context and of the communications being received from the Appellant, and that the QP considered this information when forming his opinion.
32. In our view, it was reasonable for the QP to conclude that the likely disruption to the CCG's internal investigation would amount to prejudice to the effective conduct of public affairs (and therefore engage the s36 FOIA exemption). We agree with the Commissioner that the effective conduct of public affairs can include having the space to conduct internal investigations and fact-finding exercises without external disruption.
33. In this case we are able to say that not only do we think the QP's opinion was reasonable, we also think it was correct and the same conclusion to which the Tribunal would have come. This is important given the approach to be taken in relation to the public interest. As highlighted in *Malnick*, Lloyd Jones LJ held in *Department for Work and Pensions v Information Commissioner* [2016] EWCA Civ 758 (at paragraph 55) that:-

"It is clearly important that appropriate consideration should be given to the opinion of the qualified person at some point in the process of balancing competing public interests under section 36. No doubt the weight which is given to this consideration will reflect the Tribunal's own assessment of the matters to which the opinion relates."

34. Thus, as we agree with the QP, significant weight must be given to his view when considering the public interest. In our view, the public interest in maintaining the exemption in this case outweighs the public interest in disclosure of the requested information.
35. We accept that there is a general public interest in the openness and transparency of public authorities and, in this case, as urged by the Appellant in the commissioning of healthcare services. However, in our view there is limited public interest in the disclosure of the disputed information. The Appellant was evidently dissatisfied with the service provided by the CCG and with the potential outcome of his internal complaint, but there was insufficient evidence to support his case that disclosure of further information while the complaint was being investigated was in the public interest.
36. In contrast we accept that there was significant public interest in allowing the CCG to carry out the ongoing investigation efficiently, without the additional burden of having to deal with further responses from the Appellant once disclosure had been made. We agree with the Commissioner's view, that it is not in the public interest for the resources of the CCG to be unduly focused on additional administration of one particular internal complaint where it is already carrying out an investigation.
37. On that basis we find that the public interest, especially having given weight to the QP's opinion, at was balanced against disclosure, and this appeal is therefore dismissed.
38. Finally, there is a question as to who is now the correct public authority in relation to this appeal. This is because, as the Commissioner describes it, in further submissions:-

The Tribunal accepted the appeal out of time pursuant to directions dated 2 April 2020. These were received by the Commissioner on 9 April 2020. It

was therefore not until that date that the Commissioner was aware there would be an appeal in this case.

On 16 April 2020 (three working days after receiving the 2 April 2020 directions), the ICO contacted Mr Kevin Winter at NEL Commissioning Support Unit (“NEL CSU”) to inform him the DN had been appealed. NEL CSU had handled the initial request on behalf of Nene CCG.

On 20 April 2020, Mr Winter informed the ICO that Nene CCG had been dissolved on 31 March 2020 and Northamptonshire CCG had come into existence on 1 April 2020.

...

While, from the information available to her, the Commissioner considers that there is a strong indication that Northamptonshire CCG has assumed Nene CCG’s liabilities under Part 1 of FOIA, the exact position is not entirely clear.

39. The Commissioner also states that Northamptonshire CCG has been notified of the fact of the appeal.

40. The Tribunal recognises that this may have been an issue to be resolved if the appeal had been allowed. However, neither of the health service bodies have been joined to the appeal and Northamptonshire CCG has not made an application to be joined. The failure of the appeal means that it is not necessary for the Tribunal to determine the issue.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 12 February 2021.

Date Promulgated: 15 February 2021.