



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0057
Information Commissioner's Ref: FS50186715

Heard at Procession House, London, EC4
On 26 January 2009

Decision Promulgated
25 February 2009

BEFORE

CHAIRMAN

ANNABEL PILLING

and

LAY MEMBERS

MICHAEL HAKE

IVAN WILSON

Between

WENDY STEPHEN

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

THE LEGAL SERVICES COMMISSION

Additional Party

Subject matter:

FOIA Absolute exemption – Prohibitions on disclosure s.44

Representation:

For the Appellant: Wendy Stephen
For the Respondent: Clare Nicholson
For the Additional Party: Sarah Love

Decision

The Tribunal upholds the decision of the Information Commissioner contained in the Decision Notice dated 7 July 2008, that disclosure of the requested information is prohibited by section 38 of the Legal Aid Act 1988 and that, therefore, it is exempt from disclosure under section 44 of the Freedom of Information Act 2000 and dismisses the Appeal.

The Tribunal finds that the Information Commissioner was wrong to regard Dr Wakefield as the relevant party whose consent would be required for the purposes of section 38(3) of the Legal Aid Act 1988. However, the Tribunal is satisfied that no consent for disclosure existed at the relevant time and that, therefore, the exception to the prohibition on disclosure does not apply.

Reasons for Decision

Introduction

1. This is an Appeal by Wendy Stephen against a Decision Notice issued by the Information Commissioner dated 7 July 2008. The Decision Notice relates to a request for information made to the Legal Services Commission (the 'LSC') under the Freedom of Information Act 2000 ('FOIA'). The LSC had withheld the information on the basis that it was exempt from disclosure, relying on the exemption in section 44 of FOIA, that is, that disclosure was prohibited by virtue of section 38 of the Legal Aid Act 1988 ('LAA'). The Information Commissioner (the 'Commissioner') concluded that the LSC applied FOIA correctly in refusing the request for information by virtue of the exemption in section 44 of FOIA.

Background

2. The report that is the subject of this Appeal (the 'Report') was produced in the context of the multi-party litigation concerning the effects of the measles, mumps and rubella ('MMR') vaccine ('the MMR litigation').
3. Between 1992 and, at the latest, 2006 the relevant public authority (formerly the Legal Aid Board and subsequently the LSC) had provided funding for this litigation. At its peak, the MMR litigation involved thousands of claimants. The Legal Aid Multi-Party Action Arrangements 1992 (as amended) (the 'Arrangements') required the Legal Aid Board to take certain steps as soon as it had identified an actual or potential multi-party action.¹ By 1994, the Legal Aid Board had granted more than ten certificates authorising funding of claims relating to the damage allegedly caused to children by the MMR vaccine and, in compliance with the Arrangements, invited the

¹ Defined as "any action or actions in which ten or more assisted persons have causes of action which involve common issues of fact or law arising out of the same cause or event".

solicitors' firms with certificates for those cases to tender for a contract to work on the multi-party action.

4. A contract was subsequently granted to two solicitors' firms and they divided the generic work between them, which included commissioning appropriate legal and scientific research.
5. The Appellant's daughter was a child litigant in the MMR litigation and the Appellant wishes to raise an action on her behalf in the European Court of Human Rights (the 'ECHR') in relation to the decision to include her daughter's claim in the multi-party action.

The request for information

6. By e-mail dated 13 September 2007 the Appellant requested under FOIA that the LSC provide her with "a copy of the Report submitted to the Legal Services Commission in 1999, as described by Dr Andrew Wakefield in this statement in the Lancet in 2004." She provided the relevant article from The Lancet, the medical journal.
7. Searches that were subsequently carried out by the LSC indicate that the LSC has in its possession only one document that was apparently produced by Dr Wakefield and given to the Board in 1999, by one of the then generic firms.
8. The LSC replied on 25 September 2007, stating that a similar request had been made some time ago and refused by the LSC, that decision to refuse being upheld by the Commissioner. The information was not disclosed on the basis that the LSC was prohibited from disclosing such information under section 20 of the Access to Justice Act 1999 (or section 38 LAA for cases granted legal aid under that Act) and, as such, the information was exempt under section 44(1)(a) of FOIA. The LSC maintained that the same position would apply to the Appellant's request.

9. The Appellant requested an internal review of the decision to withhold the information.
10. The LSC responded by letter dated 30 November 2007 upholding the original decision to withhold the report on the basis of section 44 of FOIA. The LSC indicated that the information requested was indeed held by the LSC and that it had been provided in connection with proposed public funding for MMR litigation in 1999. It was confirmed that the LAA applied in this instance and that section 38 LAA prohibits disclosure of information provided to the LSC in connection with an individual or individuals seeking or receiving services funded by the LSC. Although there is an exemption to this provision if the individuals concerned agree to the release of the information, it was explained that in relation to the previous request for the information, authority to release the information was not given.

The complaint to the Information Commissioner

11. The Appellant complained to the Commissioner by letter dated 10 December 2007. She submitted that the report was essential to the preparation of the case on behalf of her daughter in the ECHR.
12. The Commissioner initially responded by letter dated 21 February 2008, drawing the Appellant's attention to a Decision Notice² issued in respect of the LSC's previous refusal to disclose the Report. The Appellant was invited to withdraw her complaint to the Commissioner; if not, the Commissioner would issue a Decision Notice in relation to her complaint but that Decision Notice would not differ from that already issued and therefore would not find in her favour.
13. The Appellant indicated that she did not wish to withdraw her complaint. She reiterated her purpose in asking for a copy of the report and stressed the importance of being able to show to the ECHR that

² Reference FS50072941.

the Commissioner had denied *her* request and the reasons for doing so. She invited the Commissioner to issue a Decision Notice.

14. In fact, rather than simply issue a Decision Notice, the Commissioner then investigated the substantive complaint and concluded that the disputed information was exempt from disclosure under section 44(1)(a) FOIA as there was a statutory prohibition on disclosure of the disputed information; that prohibition being contained in section 38 of the Legal Aid Act 1988 and that, therefore, the LSC had dealt with the request in accordance with FOIA. A Decision Notice was issued on 7 July 2008.

15. The Commissioner found that the information was provided to the LSC by or on behalf of the individuals seeking or receiving services funded by the LSC and that, therefore, section 38 LAA applied. He considered whether one of the “gateways” to disclosure provided in section 38 LAA applied in this case. With regard to the “gateway” that was provided by section 38(3) LAA, disclosure would be permitted if the person who provided the information to the LSC provided consent. The Commissioner explained that as the LSC had confirmed that Dr Wakefield had not given his consent, there were no grounds for the information to be disclosed under this particular “gateway”. The Commissioner also considered the remaining “gateways” and concluded that none would allow for disclosure in this case.

The Appeal to the Tribunal

16. By letter dated 9 July 2008 the Appellant appealed against the Commissioner’s decision, initially with one ground of appeal, that the wrong party had been identified and approached for consent to be given to disclose the report. She has amended her grounds of appeal on a number of occasions.

17. The Commissioner served a Reply in which it was accepted that the Commissioner’s position regarding the issue of consent may not have

been entirely clear to the Appellant from the Decision Notice, but stressing that at the time of the request for information no consent for disclosure existed and therefore the statutory prohibition in section 38(1) LAA applied and section 44(1)(a) of FOIA was engaged.

18. The Tribunal joined the LSC as an Additional Party.

19. The LSC served a Reply pursuant to a Direction from the Tribunal. In its Reply, the LSC maintained that disclosure of the Report was prohibited by section 38 LAA such that the exemption provided for in section 44 FOIA applied, but disagreed with the reasoning of the Commissioner in the Decision Notice and his Reply. The LSC agreed with the Appellant that Dr Wakefield was not the appropriate person from whom consent would be required in this case but submitted that the outcome was the same as there was no consent to the disclosure by the legal aid applicants.

20. As a result of this, Ms Stephen, with the leave of the Tribunal, amended her grounds of appeal and the LSC served Amended Replies.

21. As there had been amendments to the grounds of appeal, the Tribunal held a further Directions hearing at which the issues for the Tribunal were agreed.

22. The Appeal has been determined without an oral hearing on the basis of written submissions and an agreed bundle of documents.

23. It was not felt necessary that the Tribunal be provided with a copy of the Report that is the subject of this Appeal and we have been able to decide the relevant issues without it.

24. Although we may not refer to every document in this Decision, we have considered all the material placed before us. We note that the

Appellant requested that material connected with subsequent disciplinary and libel proceedings involving Dr Wakefield be included within the bundle. While we have read all the material, we consider that these do not provide much assistance with the narrow issues that we have to decide.

The Powers of the Tribunal

25. The Tribunal's powers in relation to appeals are set out in section 58 of FOIA, as follows:

- (1) If on an appeal under section 57 the Tribunal considers-*
- (a) that the notice against which the appeal is brought is not in accordance with the law, or*
 - (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
- the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

26. The starting point for the Tribunal is the Decision Notice of the Commissioner, but the Tribunal also receives evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether the applicable

statutory framework has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

27. The question of whether the LSC was entitled to refuse to disclose the information on the basis of the exemption in section 44 of FOIA is a question of law based upon the analysis of the facts. This is not a case where the Commissioner was required to exercise his discretion; section 2(3)(g) of FOIA makes it clear that section 44 of FOIA is an absolute exemption.

28. If the Tribunal were to determine that disclosure of the disputed information is prohibited by an enactment, the exemption provided by section 44 FOIA is engaged.

The questions for the Tribunal

29. With the agreement of the parties, the issues in this Appeal are said to be as follows:

- i) Does the information fall within section 38(1) Legal Aid Act 1988?
- ii) Does section 38(2) Legal Aid Act 1988 apply?
- iii) If not, is there a relevant “gateway” for disclosure?
- iv) Under Section 38(3):
 - a) Whose consent is needed?
 - b) Was that consent sought?
 - c) Was that consent given?
 - d) Should consent be sought from more than one firm of solicitors?

- e) Is there an obligation on the LSC to make repeated enquiries for consent?

Evidence

30. We were provided with one witness statement, from Jacqueline Elliott, who is employed as the Information Compliance Manager by the LSC. She explained how the Legal Aid Board dealt with the funding of multi-party actions at the time of the MMR litigation and outlined the course of that litigation. It is not necessary for us to rehearse that history in any detail. She also detailed the approach taken by the LSC with regard to the application of section 38 LAA and section 20 AJA.
31. She clarified that the LSC does not hold case papers in relation to a particular matter that it has funded which are held by the solicitor acting for the client. What papers the LSC does hold represent miscellaneous papers that have been sent to the LSC.
32. Her evidence dealt with the award of the generic contract in 1994 to Dawbarns Solicitors ('Dawbarns') and Freeth Cartwright Hunt Dickens Solicitors ('Freeth Cartwright') and the work they undertook subsequently. It appears that these two firms agreed to split the generic work between them. Around April 1998, Hodge, Jones and Allen Solicitors replaced Dawbarns on the multi-party action contract and around August 1999 Alexander Harris Solicitors ('Alexander Harris') replaced Hodge, Jones and Allen. These changes were due to the movement of an individual solicitor who moved firms and, in effect, took the MMR litigation clients for whom he acted with him. When the generic contract was terminated in early 2004, Irwin Mitchell Solicitors ('Irwin Mitchell') acted for some of the MMR claimants known as the "continuers".³

³ These were a group of claimants who had different symptoms to those experienced by the eight lead claimants in the original litigation and claimed that those different symptoms were connected to the MMR vaccine, and who tried to continue with the group action after the eight lead claimants had funding withdrawn around October 2004. Funding was eventually withdrawn from the continuers as well in 2006.

33. The MMR litigation involved thousands of individual claimants, who, being children, were represented mostly by their parents or guardians.

34. The Legal Aid Board authorised funding to Dr Wakefield to prepare a report in respect of ten assisted children. Extensive searches by the LSC have established that the only report in 1999 that the LSC has is an undated document sent by a solicitor to the LSC in 1999, described as a “final interim report” (the disputed information, the ‘Report’).

Legal submissions and analysis

35. A public authority need not comply with the duty to disclose under section 1 FOIA where any of the absolute exemptions provided for by FOIA apply. Section 44 FOIA is an absolute exemption. This means that the information is not disclosable and the public interest balancing test does not have to be applied.

36. Section 44 of FOIA provides as follows:

(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

(a) is prohibited by or under any enactment,

(b) is incompatible with any Community obligation, or

(c) would constitute or be punishable as a contempt of court.

(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).

Does the information fall within section 38(1) LAA?

37. Prior to 1999, responsibility for legal aid lay with the Legal Aid Board. The Access to Justice Act 1999 (the 'AJA') established the LSC and governs its work; its primary function is the regulation of funding for legal services in England and Wales.

38. Section 106 of AJA provides for the repeal of certain provisions, including sections 34 to 43 of LAA. Therefore section 38 of LAA has been repealed and it would appear that this statutory prohibition is no longer in force.

39. However, Article 5(1)(c) of the Access to Justice Act 1999 (Commencement Order No.3, Transitional Provisions and Savings) Order 2000 sets out the circumstances where the provisions commenced by the Order shall not take effect. The result of this is that the repeal of section 38 LAA, as provided for in section 106 AJA, does not take effect in cases where legal aid has been granted under the provisions of the LAA and the application is signed before 1 April 2000 and received by the Legal Aid Board before 2 May 2000.

40. It is clear, therefore, in this case, that section 38 LAA still applies.

41. Section 38 of the Legal Aid Act 1988 provides as follows:

38 Restriction of disclosure of information

(1) Subject to the following provisions of this section, no information furnished for the purposes of this Act to the Board or any court or other person or body of persons upon whom functions are imposed or conferred by regulations and so furnished in connection with the case of a person seeking or receiving advice, assistance or representation shall be disclosed otherwise than-

(a) for the purpose of enabling or assisting the Lord Chancellor to perform his functions under or in relation to this Act,

(b) for the purpose of enabling the Board to discharge its functions under this Act,

(c) for the purpose of facilitating the proper performance by any court, tribunal or other person or body of persons of functions under this Act,

(d) with a view to the institution of, or otherwise for the purposes of, any criminal proceedings for an offence under this Act,

(e) in connection with any other proceedings under this Act, or

(f) for the purpose of facilitating the proper performance by any tribunal of disciplinary functions as regards barristers or solicitors.

(2) This section does not apply to information in the form of a summary or collection of information so framed as not to enable information relating to any particular person to be ascertained from it.

(3) Subsection (1) above shall not prevent the disclosure of information for any purpose with the consent of the person in connection with whose case it was furnished and, where he did not furnish it himself, with that of the person or body of persons who did.

(4) A person who, in contravention of this section, discloses any information furnished to the Board or any court or other person or body of persons for the purposes of this Act shall be liable on summary conviction to a fine not exceeding level 4 on the standard scale.

(5) Proceedings for offences under this section shall not be brought without the written consent of the Attorney General

(6) For the avoidance of doubt it is hereby declared that information furnished to counsel or a solicitor as such by or on behalf of a person seeking or receiving advice, assistance or representation under this Act is not information furnished to the Board or a person upon whom

functions are imposed or conferred as mentioned in subsection (1) above.

42. The general prohibition on the disclosure of information provided by section 38(1) is subject to three sets of exemptions:

- a) Certain permitted purposes - section 38(1)(a)-(f) LAA;
- b) Summarisation/anonymisation - section 38(2) LAA;
- c) Consent - section 38(3) LAA.

43. FOIA itself cannot provide lawful authority for disclosure because the wording of section 44 FOIA specifically refers to authority “otherwise than under this Act”.

44. We note that prior to the FOIA coming into force, the Department for Constitutional Affairs (now the Ministry of Justice) conducted a review of statutory bars to disclosure of information. The intention of the review was to consider which, if any, of the prohibitions could be removed or relaxed using an order under section 75 of FOIA. The review identified 210 statutory provisions which prohibited disclosure of information under section 1 of FOIA. (Another 116 statutory provisions had already been repealed or amended during the course of the review.) This review listed several criteria, any one of which, in the Government’s view, could justify retention of a statutory bar to disclosure, one of which is where it is an offence to release the information.

45. In relation to the prohibition created by section 20 AJA which is broadly similar to that in section 38 LAA⁴, the Government introduced a “sunset

⁴ Section 20 AJA applies to cases where legal aid was granted by the LSC after the provisions of the AJA came into effect, as opposed to by the Legal Aid Board under the provisions of the LAA, where the application was signed before 1 April 2000 and received by the Legal Aid Board before 2 May 2000.

clause”⁵ of 100 years so that the prohibition no longer applies to information over 100 years old. Section 38 LAA is described as having been “wholly repealed” and no corresponding clause has been expressly provided for. We consider that this was an oversight by those conducting the Review and that an identical provision would have been made in respect of section 38 LAA for those cases to which that regime still applied.

46. Anything that is “information furnished for the purposes of this Act to the Board...in connection with the case of a person seeking or receiving advice, assistance or representation” will, prima facie, fall within the prohibition in section 38(1) LAA. We agree with the submissions of the LSC that this is a very wide prohibition, covering all information supplied in connection with a legally aided client’s case, whether or not that information would otherwise be confidential or privileged and it is self-evident why that must be the position.

47. We consider that the expression “furnished for the purposes of this Act to the Board” is clear and unambiguous and “furnish” in this context would encompass “provide” and “supply”.

48. The parties are in agreement that the Report falls within section 38(1) LAA and we agree that is clearly the case.

49. Thus, unless any of the permitted grounds for disclosure (the “gateways”) exist, the LSC is prohibited from disclosing the Report and to do so would amount to criminal offence. Consequently, section 44 of FOIA would apply and the Report would be exempt from disclosure.

Does section 38(2) Legal Aid Act 1988 apply?

50. Under section 38(2) LAA, the statutory prohibition on disclosure does not apply to “information in the form of a summary or a collection of

⁵ By virtue of the Freedom of Information (Removal and Relaxation of Statutory Prohibitions on Disclosure) Order 2004, SI 2004 3363.

information so framed as not to enable information relating to any particular individual to be ascertained from it”.

51. There is no evidence that, with regard to the disputed information, a summary or collection of information as defined in section 38(2) exists, or has ever existed. There is no obligation on the LSC to create a summary of information so that the prohibition on disclosure does not apply.

52. The Appellant submits that the General Medical Council (the ‘GMC’) obtained a copy of the Report during its investigation into allegations against Dr Wakefield and two other doctors. As the terms of section 35A(5) of the Medical Act 1983 give the GMC power to place others under a duty to summarise, collate, redact or otherwise anonymise information into a form from which one could not identify any individual, the Appellant submits that this “summarising” of the Report must have been done already. We do not accept that inference. The GMC “may” require such action to be taken but it is not mandatory. There is no evidence that any such approach was taken in regard to this Report, or, more importantly, that the LSC ever held a summarised version.

53. The Appellant also submits that redaction of the Report could be implemented as a means of protecting the identity of those named and therefore remove the prohibition on disclosure. The Commissioner submits that no matter how the information was redacted, the author of the Report would be identified and thus allow information “relating to any particular person” to be ascertained.

54. With respect to the Appellant and the Commissioner, we agree with the submissions of the LSC and we consider that the question of redaction is irrelevant. Section 38(2) removes the prohibition on disclosure for information in the form of a summary or collection of information that is *itself* so framed as not to enable information relating to any particular person to be ascertained from it. We consider that this section would apply, for example, to statistical information held by the LSC and we

cannot conceive that an expert's report such as that requested in this case would ever fall within this category of material.

55. For the reasons given, we do not consider that section 38(2) LAA applies to the disputed information.

If not, is there a relevant "gateway" for disclosure?

56. As stated above, the general prohibition on the disclosure of information is subject to three sets of exemptions. We have rejected submissions that section 38(2) applies and do not consider that any of the permitted purposes provided for in section 38(1)(a)-(f) LAA apply in this case.

57. The sole remaining "gateway" for disclosure that could apply is that provided for in section 38(3) LAA. We agree.

58. Section 38(3) provides that section 38(1) shall not prevent the disclosure of information for any purpose with the consent of the person in connection with whose case it was furnished **and**, where he did not furnish it himself, with that of the person or body of persons who did.

59. We have emphasised the word "and" in section 38(3) because it seems to us that this is an important point that has not been considered fully by the parties.

60. The Appellant submits that the relevant party whose consent would be needed is not Dr Wakefield or Freeth Cartwright, one firm of solicitors holding the generic contract in respect of the MMR litigation who declined to give consent to the Report being disclosed in respect of the previous request. The Appellant argues that as she is the mother of one of the children involved in the litigation, her position is very different from that of the individual making the previous request. She submits that the correct relevant person whose consent would be needed is the individual solicitor who "commissioned" Dr Wakefield's

report and who worked for Hodge, Jones and Allen Solicitors at that time.

61. We note that Hodge, Jones and Allen Solicitors and Irwin Mitchell Solicitors have been notified of the Appeal. It is clear from their responses that neither firm, either explicitly or implicitly, indicates that it consents, on behalf of the legal aid recipients, to the Report being disclosed at this stage.
62. The Commissioner in his Decision Notice stated that Dr Wakefield was the relevant person and that he had not given consent. Before us, the Commissioner appears to maintain that the relevant person is either Dr Wakefield, or the legal aid applicants themselves, although he submits that consent could be given on their behalf through their legal representatives. Where there is more than one relevant person, the Commissioner submits that a refusal of consent by one would render invalid any indications of consent from any other relevant person.
63. The LSC submits that the relevant person(s) is/are the applicant(s) for legal aid themselves, and submits that consent could be given on their behalf through their legal representatives.
64. As we have indicated above, we consider that the word “and” in section 38(3) LAA is significant. We consider that the exemption from the prohibition on disclosure can only apply with consent from **both** the person in connection with whose case it was furnished, that is the legal aid applicant(s), **and**, where he did not furnish it himself, with that of the person or body of persons who did. There are obvious practical difficulties in a multi-party action, but we consider the wording of section 38(3) is clear and without the appropriate consent being given, the exemption cannot apply.
65. In any event, looking at the facts of this case, all the parties agree that at the time of the request there was no consent for disclosure. The Appellant submits that as consent had not been *refused* from what she considers to be the relevant party, the exemption from the prohibition

on disclosure should apply but in our opinion that approach is misconceived. In the absence of consent the exemption from the statutory prohibition on disclosure cannot apply.

66. The parties are in agreement that there is no obligation on the LSC to seek consent for disclosure. We agree that must be the case.

67. A number of matters have been raised for us to consider in relation to section 38(3) LAA:

a) Whose consent is needed?

b) Was that consent sought?

c) Was that consent given?

d) Should consent be sought from more than one firm of solicitors?

e) Is there an obligation on the LSC to make repeated enquires for consent?

68. These matters were said to be issues for the Tribunal to consider when deciding this Appeal. We have already decided that the information falls within section 38(1) LAA, that section 38(2) does not apply and the only possible exemption to the prohibition on disclosure is consent under section 38(3). The Commissioner and the LSC submit that no consent existed at the time of the request and that there was no obligation on the LSC to seek consent. We agree that is the position according to the evidence. We have dealt briefly with the issue of whose consent would be needed because the initial ground of appeal concerned the Commissioner's identification of Dr Wakefield as the relevant party. We are of the opinion that if there was no consent to disclosure, the other matters are irrelevant for the purposes of this appeal. We do not consider it appropriate for this Tribunal to attempt to lay down guidelines as to how the LSC should conduct itself.

Other Matters

69. The LSC has suggested that the Appellant may be able to obtain a copy of the Report directly from one of the firms of solicitors involved in the MMR litigation although it does not go so far as to submit that section 21 of FOIA⁶ would apply. Having regard to the efforts made by the Appellant in contacting solicitors directly, we consider that this is an unrealistic suggestion. It has been suggested also that the individual litigants have been provided already with a CD-ROM containing around 50 reports that had been generated during the MMR litigation, and that this would include a final version of this “interim report”. We are not in a position to comment on that suggestion save to note that the Appellant has not been able to obtain a copy of the Report she is seeking from any source so far.

70. Although the Appellant is the parent of a child litigant involved in the MMR litigation, we are reminded that FOIA is “applicant and motive blind”. Once information is disclosed under FOIA it is in the public domain and no restrictions can be put on its use and dissemination.

Conclusion and remedy

71. We have concluded that the Report is exempt information under section 44 of FOIA, by virtue of the statutory prohibition in section 38 LAA, and therefore the Commissioner was correct to conclude that the LSC was entitled to refuse the Appellant’s request for information. We refuse this Appeal.

72. Although we disagree with the Commissioner that Dr Wakefield was the person whose consent was needed, we agree with his conclusion that there was no consent to disclosure of the Report such that the

⁶ Section 21 of FOIA excludes from the scope of that Act information that is reasonably accessible to the applicant by other means.

“gateway” in section 38(3) LAA would apply exists – either at the time of the request or now.

73. Our decision is unanimous.

Signed:

Deputy Chairman

Date: 25 February 2009