



NCN: [2024] UKFTT 1113 (GRC)

Case Reference: EA/2023/0417

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

**Heard on: 19 August 2024
Deliberations on: 16 October 2024
Further Deliberations on: 2 December 2024
Decision given on: 12 December 2024**

Before

**TRIBUNAL JUDGE HEALD
MEMBER SIVERS
MEMBER YATES**

Between

JONATHAN ERSKINE

and

**(1) THE INFORMATION COMMISSIONER
(2) NHS ENGLAND**

Appellant

Respondents

The Appeal was decided without a hearing as agreed by the parties and allowed by the Tribunal by rule 32(1) Tribunal Procedure (First -Tier Tribunal) (General Regulatory Chamber) Rules 2009

Decision: The Appeal is Allowed in part and Dismissed in part

Substituted Decision Notice:

(1) NHS England shall, within 35 days of being sent this Decision, disclose the following previously withheld information in the Report requested by the Appellant namely paragraphs 2.15-2.16, 3.13 -3.15, 3.23, 3.24 (save for the name in 3.24), 3.26, 3.61-3.63, 4.1-4.5, the relevant part of 4.13 and 4.14.

(2) NHS England shall, within 35 days of being sent this Decision, disclose a copy of the Closed Schedule to the Appellant and 1st Respondent.

REASONS

1. This Decision relates to an Appeal brought by the Appellant pursuant to section 57 Freedom of Information Act 2000. It is in respect of a Decision Notice issued by the 1st Respondent on 31 August 2023 and concerns a request for information made by the Appellant to the 2nd Respondent on 10 November 2022.
2. What follows is a summary of the submissions, evidence and our view of the law. It does not seek to provide every step of our reasoning. The absence of a reference by us to any specific submission or evidence does not mean it has not been considered. In this Decision the following definitions are adopted:-

| | |
|---|---------------------|
| Freedom of Information Act 2000 | FOIA |
| Data Protection Act 2018 | DPA |
| General Data Protection Regulation | GDPR |
| The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 | 2009 Rules |
| Jonathan Erskine | the Appellant |
| the Appellant's grounds of appeal | GoA |
| The Information Commissioner | the IC |
| NHS England | NHSE |
| Decision Notice dated 31 August 2023 ref IC-242743-F8R7 | the DN |
| an open bundle provided to the Tribunal | the Bundle |
| a Report commissioned by NHSE regarding " <i>...whether North Tees and Hartlepool NHS Foundation Trust (the Trust) had breached its licence conditions in relation to: (i) the proposed appointment of a joint Chief Executive with South Tees Hospitals NHS Foundation Trust (STH) and the Trust's engagement on the issues in that respect; and (ii) the actions and behaviours of members of the Trust's Board in relation to the work to move to a single joint Chief Executive with STH.</i> " | the Report |
| NHSE's Regulatory Assessment dated 5 September 2022 | the Assessment |
| Qualified Person and Qualified Person's Opinion | QP and QPO |
| Open Table showing the redactions claimed by reference to paragraphs in the Report and the outcome of this Appeal | the Open Table |
| A confidential note provided to the 2nd Respondent | the Closed Schedule |

NHSE and the background

3. As explained in their Response (72- 73) NHSE is a statutory body which acts as a commissioner of health services in England. In 2022 NHSE commissioned the Report. They said on 11 April 2023 to the Appellant that (4):-

"NHS England commissioned this investigation to ultimately ascertain whether North Tees & Hartlepool NHS Foundation Trust were compliant with the conditions of its provider licence. There was a high degree of cooperation and openness from all parties involved in the investigation and we consider this is crucial to be able to conduct an effective investigation."

4. NHSE said in it's Response that (73):-

"13...The Investigation concluded that there was evidence to suspect a breach of the Trust's provider licence. NHS England subsequently considered the Report's findings and determined that, given the voluntary efforts being made at the time by all stakeholders, it would not take formal regulatory action at the time, but would keep the matter under review."

14. The Report was completed in May 2022, but was not made public. Instead, NHS England sent the Trust, for publishing, a regulatory assessment based on the Report's conclusions (the Regulatory Assessment), which was released on 5 September 2022, along with a covering letter."

5. A redacted version of the Report was disclosed by NHSE and the redactions are in effect the subject of this Appeal.
6. By way of background the Appellant in the GoA concluded by saying:- (57)

45. The published, redacted version of the report of the Investigation certainly contains some findings that criticise the leadership and governance of the Trust and the NHSE Regional Director. However, these unredacted findings are limited in scope and it is difficult to read across to the Assessment produced by NHSE. Originally, only the Assessment was put in the public domain, at a public Extraordinary board meeting of the Trust, and as a stand-alone document which does not cite evidence directly, it is difficult for the public to make any sense of what actually took place during the period under investigation."

46. By providing a heavily redacted version the report of the Investigation, some five months after my original FOIA request, I believe that NHSE has muddied the water even more."

47. In his decision notice, the Commissioner considered only a narrow interpretation of the public interest test, focused on the regulatory function of NHSE and its ability to engage in candid conversations during an investigation."

48. My view is that the public interest is served by a broader and more profound consideration: trust in public authorities to be open and transparent about the outcomes of investigations, especially where those outcomes result major changes to the management and governance of the organisation that is subject to the investigation."

49. As I stated in my request for an internal review, "It is ... entirely in the public interest that the full facts, as contained in the Governance Investigation Report, should be known, for

the sake of clarity and fairness, but also as a basis for improved governance. The NHS is sadly no stranger to examples of institutions which have failed in their responsibilities, and which have escaped regulation or censure until a crisis has happened – precisely because they hid their failings for fear of reputational damage. The application of this FOI exemption, in this case, amounts to the very opposite of the transparency which should be in place.”

Role of the Tribunal

7. The Tribunal's role in an appeal by section 57 FOIA is as set out in section 58 which provides that:-

(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.*

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

8. In *NHS England -v- Information Commissioner and Dean [2019] UKUT 145 (ACC)* the UT said:-

"The First-tier Tribunal 'exercises a full merits appellate jurisdiction and so stands in the shoes of the IC and decides which (if any) exemptions apply..."

9. We also had regard to *Peter Wilson -v- The Information Commissioner [2022] UKFTT 0149* in which it was held:-

"30...the Tribunal's statutory role is to consider whether there is an error of law or inappropriate exercise of discretion in the Decision Notice. The Tribunal may not allow an appeal simply because it disagrees with the Information Commissioner's Decision. It is also not the Tribunal's role to conduct a procedural review of the Information Commissioner's decision making process or to correct the drafting of the Decision Notice."

Request, response, complaint and the DN

10. On 10 November 2022 (1), after the publication of the Assessment, the Appellant made a request for information to NHSE. as follows:-

"Under the Freedom of Information Act 2000, please provide me with a copy of the report on the findings of an investigation carried out by [name] of [company name], which was commissioned by NHS England and NHS Improvement in early February 2022.

The investigation was in relation to the governance and leadership of North Tees and Hartlepool NHS Foundation Trust, and the Trust's compliance with its licence. The report on the findings of the investigation was considered by NHS England's System Oversight Committee (SOC) on 12 April 2022.

For the avoidance of doubt, I am not asking for the report titled 'NHS England Regulatory Assessment – North Tees and Hartlepool Hospitals NHS Foundation Trust', dated 05 September 2022."

11. On 11 April 2023 NHSE provided some information saying (1):-

"Please find attached a redacted copy of the Governance Investigation Report into North Tees & Hartlepool NHS Foundation Trust (herein referred to as "the Trust") finalised in March 2022.

Some of the information contained within the report is being withheld under sections 31, 36, 40 and 41 of the FOI Act as explained in detail below."

12. The Appellant asked for an internal review (23) but NHSE did not provide one and complained to the IC who in the DN (29) said:-

"9. The complainant contacted the Commissioner on 5 July 2023 to complain about the way their request for information had been handled.

10. The complainant disagrees with the application of sections 31, 36 and 41 of FOIA.

13. The IC noted the absence of an internal review but said (28):-

"8. Whilst the complainant requested an internal review on 5 May 2023, complaining about the application of sections 31, 36 and 41 (but not section 40), NHS England did not provide one. The Commissioner has used his discretion to accept the complaint without an internal review"

14. The DN concluded (27):-

1. The complainant has requested, from NHS England, a copy of a report on the findings of an investigation relating to the governance and leadership of an NHS Trust, and compliance with its licence.

2. NHS England disclosed a redacted copy, citing four exemptions to withhold parts of the report. The complainant has challenged the application of sections 31 (law enforcement), 36 (prejudice to effective conduct of public affairs) and 41 (information provided in confidence) of FOIA.

3. The Commissioner's decision is that section 31 is engaged and that the balance of the public interest favours maintaining the exemption. He also finds that NHS England breached section 17(1) of FOIA because it failed to issue its refusal notice within 20 working days.

Appeal (37)

15. On 27 September 2023 the Appellant appealed the outcome of the DN. The outcome sought (46) was:-

"I would like the First-tier Tribunal (Information Rights) to overturn the decision of the Information Commissioner's Office, as set out in decision notice IC-242743-F8R7. "

16. His Notice of Appeal (37) is supported by GoA (from 40- 46 and 50- 57). Thereafter the IC and NHSE provided responses and the Appellant then replied (91- 103).
17. The Appeal was considered on the papers on 19 August 2024. It was adjourned with Directions dealing, for example, with the need for a copy of the Appellant's complaint, the provision of further information regarding section 40(2) FOIA, the provision of a gist of the closed material to the Tribunal and the Appellant and the provision of submissions on sections 41 and 36 FOIA. The Tribunal met for further deliberations on 16 October 2024 and on 2 December 2024.

Evidence and matters considered

18. We considered:-
 - (a) the parties' cases set out in the GoA, Responses and Reply
 - (b) the Bundle including the Report (8-22) in its redacted form and open documents not in the Bundle such as the Assessment
 - (c) a closed bundle including the unredacted Report
 - (d) a gist of the closed material provided to the Tribunal and the Appellant
 - (e) the submissions
 - (f) information provided in response to Directions
19. As regards the gist and closed material the Tribunal continued to consider its obligations as set out in *Browning -v- Information Commissioner [2014] EWCA civ 1050* and *Barrett v The Information Commissioner & Financial Ombudsman Service [2024] UKUT 107 (AAC) (20 April 2024)*.

Scope

20. When replying to the request for information (1-7) NHSE referred to the exemptions at sections 31(1)(g), 36(2)(b)(ii), 36(2)(c), 40(2) and 41(1) FOIA.
21. Although the use by NHSE of section 40(2) FOIA was not included as an issue by the Appellant in the Appeal (e.g. see 29, 40 and 75) we concluded that the scope of the Appeal would involve the use of section 40(2) because due to the redactions themselves, he could not have known what it was that NHSE was redacting by use of this exemption.
22. The Appellant raised as an issue NHSE's later addition of section 31 to apply to all redactions (see 76). In our view the expansion of the use of section 31 by NHSE was not an issue in the Appeal because this change was known by the time of the DN.
23. The IC decided to consider the use of section 31 first and only go on to consider the use of sections 36 and/or 41 if he found that section 31 did not apply. As the IC

concluded in the DN (27) that section 31 was engaged and the PIBT favoured the maintenance of the exemption the other possible exemptions were not fully addressed. The IC in its response to the Appeal (59) went on to say:-

"7. The provision of the report in redacted form was in reliance on several of the FOIA exemptions, although only Section 31 is relevant to this Appeal."

24. However other exemptions were referred to by NHSE for example in their Response to the Appeal from pages 86-90 of the Bundle and we noted that the Appellant said (56):-

"40. The Commissioner has said in his decision notice that during his investigation, NHSE's "...position changed slightly ... It extended its application of section 31 to all of the redactions that the complainant is disputing in this complaint.". He does not explain why this change was made, and gives no indication whether he agreed with NHSE's reasoning or not.

42. Because of the Commissioner's findings in relation to s31, which eventually covered all of the redacted material, he did not address in his decision notice the arguments presented by NHSE and me in respect of s36 and s41 exemptions. This is a pity, as it presumably means that, should the First-tier Tribunal...overturn the Commissioner's decision... the redactions that cite s36 and s41 would have to be considered afresh; adding further delay to what has already been a lengthy process.

43. For the record, my arguments against the application of s36 and s41 are presented on pages 2, 3 and 4 of my request to NHSE to conduct an internal review."

FOIA

25. FOIA provides that any person making a request for information to a public authority is entitled to be informed in writing if that information is held section 1(1) (a) FOIA) and if that is the case to be provided with that information (section 1 (1) (b) FOIA). These entitlements are subject to a number of exemptions which can be absolute or subject to the PIBT in section 2(2)(b) FOIA namely that in:-

"...all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information"

Section 31(1)(g) FOIA

26. This exemption is subject to the PIBT and provides that:-

*"(1)Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice...
(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),"*

27. Section 31(2)(c) FOIA provides:-

"(2)The purposes referred to in subsection (1)(g) to (i) are... (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise"

Section 36(2) FOIA

28. Sections 36(2)(b)(ii) and 36(2)(c) FOIA (243) provide that:-

*"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 –
(b)would, or would be likely to, inhibit –*

...

*(ii)the free and frank exchange of views for the purposes of deliberation. or
(c)would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."*

29. The route to a decision in relation to section 36(2) is to ask:-

(a) who was the QP?

(b) what was the QPO?

(c) was the QPO reasonable?

(d) if it was a reasonable opinion then in all the circumstances of the case does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

30. As regards reasonableness of the QPO we had regard to decisions such as *Guardian Newspapers Ltd & Brooke v IC & BBC (EA/2006/0011)* (Judgment of 8 January 2007) and the UT in *Information Commissioner v Malnick & ACOBA [2018] UKUT 72 (AAC)* which at para 31-33 said:-

"...Section 36 (for present purposes – see section 2(3)(e)) confers a qualified exemption and so a decision whether information is exempt under that section involves two stages: 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.

"The QP is not called on to consider the public interest for and against disclosure. Regardless of the strength of the public interest in disclosure, the QP is concerned only with the occurrence or likely occurrence of prejudice. The threshold question under section 36(2) does not require the Commissioner or the F-tT 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)."

31. Only if the threshold is passed does the question of the PIBT arise.

The PIBT

32. The exemptions at sections 31 and 36 are subject to the PIBT. When considering this we had regard to authorities such as *Christopher Martin Hogan and Oxford City Council v the Information Commissioner EA/2005/0026&0030*) and *All Party Group on Extraordinary Rendition v IC [2013] UKUT 560*.

33. The time for determining the PIBT is the date the public authority provides its decision on the relevant request (*Montague v ICO and Department for Business and Trade [2022] UKUT 104*).

Section 41 FOIA

34. Section 41(1) provides that information is exempt if:-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

35. Although the PIBT does not apply to this exemption it is a defence to a claim of breach of confidence to assert that disclosure was in the public interest.

36. We had regard for example to the decisions in *Coco -v- A N Clark (Engineers) Limited [1968]* and *Derry City Council -v- the Information Commissioner (EA/2006/0014)*. We considered the issues based on these steps:-

(a) was the information obtained by the NHSE from a third party, for the purposes of section 41(1)(a) and, if so

(b) would its disclosure constitute an actionable breach of confidence, ie:

(i) did the information have the necessary quality of confidence to justify the imposition of a contractual or equitable obligation of confidence?; if so:-

(ii) was the information communicated in circumstances that created such an obligation?; and, if so

(iii) would disclosure be a breach of that obligation?;

(c) would NHSE have had a defence to a claim for breach of confidence based on the public interest in disclosure of the information?

37. As regards this balance and the burden on the Appellant we had regard the decision in *Evans v Information Commissioner [2012] UKUT 313 (AAC)* (at 38):-

“As mentioned earlier, section 41 is an absolute exemption. It is common ground that where section 41 arises there will nevertheless be a public interest balance. That balance does not arise under section 2. Instead, it arises because breach of confidence (which for these purposes includes a breach of privacy) will not be actionable if the defendant shows that the breach was justified in the public interest. There is a distinction here from qualified exemptions, for the burden lies on Mr Evans to show that the necessary breach is in the public interest.”

38. We also took note of the IC's guidance which states:-

“80 The test now, therefore, is whether there is a public interest in disclosure which overrides the competing public interest in maintaining the duty of confidence.

81 This test doesn't function in the same way as the public interest test for qualified exemptions, where the public interest operates in favour of disclosure unless outweighed by the public interest in maintaining the exemption. Rather, the reverse is the case. The test assumes that the public interest in maintaining confidentiality will prevail unless the public interest in disclosure outweighs the public interest in maintaining the confidence.”

39. Additionally in our view if a person with a potential cause of action is unidentifiable or can be made to be unidentifiable for example by appropriate redactions then there may be no actionable breach of confidence.

Section 40(2) FOIA

40. Recital 1 to the GDPR provides that:-

“The protection of natural persons in relation to the processing of personal data is a fundamental righteveryone has the right to the protection of personal data concerning him or her.”

41. In *Common Services Agency (Appellants) v Scottish Information Commissioner (Respondent) (Scotland) [2008] UKHL 47* Lord Hope held:-

"In my opinion there is no presumption in favour of the release of personal data under the general obligation that FOISA lays down. The references which that Act makes to provisions of DPA 1998 must be understood in the light of the legislative purpose of that Act, which was to implement Council Directive 95/46/EC. The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data: see recital 2 of the preamble to, and article 1(1) of, the Directive. Recital 34 and article 8(1) recognise that some categories of data require particularly careful treatment. Section 2 DPA 1998, which defines the expression "sensitive personal data", must be understood in the light of this background."

42. Personal data is defined in section 2 DPA as *“any information relating to an identified or identifiable living individual...”* and section 40(2) FOIA provides that:-

“Any information to which a request for information relates is also exempt information if (a) it constitutes personal data which not fall within subsection (1), and (b) the first, second or third condition below is satisfied.”

43. Section 40(3A)(a) FOIA is the first of these three conditions by which personal data is exempt if *"disclosure of this information to a member of the public otherwise than under this Act (a) would contravene any of the data protection principles..."*
44. The data protection principles are those set out in section 34(1) DPA. They include Article 5(1) GDPR which provides that personal data shall be processed *"lawfully, fairly and in a transparent manner as regards the data subject"*.
45. Article 6(1)(f) provides that the processing of personal data shall only be lawful if it is necessary to further a legitimate interest and it will not be lawful to process it where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data. Even if processing is lawful it must be carried out in a fair and transparent manner as regards the data subject.

Tribunal's review and conclusions on Section 40(2) FOIA

46. The parties had not dealt in any detail with this exemption because it was not part of the Appellant's Appeal. It was applied on the cover, in 1.1, for a word at 1.8, for paragraphs 3.22 to 3.26 and 3.31 to 3.51. Having reviewed the Report in the Closed Bundle, we accepted that these paragraphs contained some personal data and that the Appellant was pursuing a legitimate interest. We considered whether disclosure of this data was necessary for that purpose and if in our view the rights of the data subject(s) should override the interests being pursued.
47. As regards the redactions for section 40(2) on the cover sheet, in para 1.1 and 1.8 we were satisfied that disclosure of this personal data was not necessary and in any event the data subject's rights would override the interest being pursued.
48. Apart from the redaction on the 2nd line of para 3.24, for which we agree the use of section 40(2) is appropriate, we did not agree with its use for the redactions of paras. 3.22 to 3.26 as set out in the Closed Schedule.
49. Finally in our view paragraphs 3.31 to 3.51 also contain some section 40(2) material (for example clearly in 3.34) but not to the extent claimed by NHSE. We did not go on to consider this further on a paragraph by paragraph basis because, as appears below, we concluded that section 36 applied to these paragraphs and that the PIBT was in favour of maintenance of that exemption.

Review of Section 31(1)(g) FOIA

50. On 11 April 2023 when responding to the request with a redacted version of the Report NHSE said (1-2):-

"NHS England considers that the withheld information is exempt from disclosure under section 31(1)(g) of the FOI Act which provides that information is exempt information if its

disclosure would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in section 31(2).

NHS England considers that section 31(2)(c) is engaged and that disclosure of the information in question would be likely to prejudice the exercise of our functions for the purpose of ascertaining whether circumstances exist which would justify regulatory action in pursuance of an enactment.

The conditions of the NHS provider licence enable NHS England to regulate the economy, efficiency and effectiveness of NHS foundation trusts under Chapter 3 of Part 3 of the Health and Social Care Act 2012 ("the 2012 Act").

NHS England relies on the full and frank information from trusts in order to carry out its functions effectively. NHS England relies on having a safe space in which providers are freely able to share information in the knowledge that the information, or any analysis derived directly from it, will not be disclosed more widely. To disclose that information more widely is likely to have a detrimental impact on the quality and content of exchanges between NHS England and the bodies it collectively regulates and its ability to make effective and fully informed regulatory decisions."

51. In the DN the IC, noting the use of the lower level of "likely to cause" said (29 -30):-

18. NHS England has explained to the Commissioner: "Chapter 3 of Part 3 of the Health and Social Care Act 2012 [HSCA]..grants NHS England a range of functions for the purposes of regulating, amongst other providers of healthcare services, foundation trusts via the provider licence regime ...

19. NHS England also told the complainant:

"The conditions of the NHS provider licence enable NHS England to regulate the economy, efficiency and effectiveness of NHS foundation trusts under Chapter 3 of Part 3 of [HSCA]"

52. In the DN the IC said (30-32):-

"20. The Commissioner's guidance specifically gives "the administration of a licensing regime (including the revoking of licences where necessary)" as one example of regulatory action...

21. The Commissioner is therefore satisfied that NHS England has functions for the purpose stated at section 31(2)(c) of FOIA. Regarding the investigation that NHS England commissioned, NHS England is clearly the public authority with power to make a formal decision to take some action."

"32 where an investigation has concluded relatively recently, the likelihood of disclosure affecting the public authority's ability to gather information from the organisations it regulates remains relatively high."

53. The IC was satisfied from its investigation that disclosure would cause real and significant non trivial prejudice namely *"harm to the voluntary supply of information to NHS England, and ultimately harm to NHS England's investigations and regulatory decisions"* (31). The DN (32) says

"Therefore, disclosure would be likely to have an impact on the voluntary supply of information to NHS England, both generally and in terms of the ongoing investigative process that existed in relation to the Trust."

54. The Appellant considers the exemption is not engaged. In his request for a review (23) he says for example that he disagreed with the proposition that:-

"... open and voluntary provision of information by trusts is necessary if NHS England is to regulate trusts effectively, and that disclosing the redacted information could lead to future investigations being hampered by reticence and/or provision of only minimal information."

55. We also noted his submissions in paragraphs 24 to 33 of his GoA and his conclusion in his Reply (103) that:-

"The s.31 exemption has been applied too strictly and the Commissioner has not taken appropriate notice of the inconsistencies between the Assessment and the Investigation"

PIBT – section 31

Arguments in favour of disclosure

56. The parties' submissions included these in favour of disclosure:-

(a) the public interest in accountability and transparency as to how NHSE carries out its role and in relation to the services provided by Trusts to support the maintenance of public trust and confidence (33) and because (103)

"The governance processes that lead to the decisions behind these changes are frequently opaque, which adds to the sense that the concerns of some stakeholders in local communities are not being democratically addressed."

(b) to enable there to be a better an understanding of how the Report's conclusions and recommendations were reached (23) and what the issues were that lead to the Report being commissioned (84)

(c) because *"It may (or may not) inconvenience NHS England, in the future exercise of their regulatory function, to publish some of the section 31 redactions, but the public interest test in this instance is not about the relative ease or difficulty of conducting a future investigation."* (23)

(d) because *"the information concerns the governance of a public authority, and an investigation and formal report involving public money"* (33)

(e) because there is a suspicion (held at least by the Appellant) that the redactions have been made to avoid embarrassment in some quarters and so disclosure is in the public interest to ensure they are held to account (33)

(f) to ensure any inconsistencies (apparent to the Appellant) between the Report and the Assessment are clarified (33)

(g) to be able to understand why problems arise and how they can be resolved (103)

(h) (103) because of the need for there to be transparency about a growing trend of NHS organisations:-

"...amalgamating their senior leadership positions, such that multiple hospital trusts (for example) are led by a single CEO and boards share a single Chair....many of these changes are contentious and subject to challenge by trust governors, staff and the general public."

(i) *"... the public interest test in this instance is not about the relative ease or difficulty of conducting a future investigation"* (23)

57. The Appellant says in his GoA (45- 46):-

"My view is that the public interest is served by a broader and more profound consideration: trust in public authorities to be open and transparent about the outcomes of investigations, especially where those outcomes result major changes to the management and governance of the organisation that is subject to the investigation."

and

"It is ... entirely in the public interest that the full facts, as contained in the Governance Investigation Report, should be known, for the sake of clarity and fairness, but also as a basis for improved governance. The NHS is sadly no stranger to examples of institutions which have failed in their responsibilities, and which have escaped regulation or censure until a crisis has happened – precisely because they hid their failings for fear of reputational damage. The application of this FOI exemption, in this case, amounts to the very opposite of the transparency which should be in place."

58. He concluded at paragraph 39 of the GoA (56):-

"In a nutshell, my view is that the Commissioner has taken at face value NHSE's special pleading about the effect of disclosure on its future regulatory effectiveness, and has not considered sufficiently the public interest involved in a regulator demonstrating transparency in its use of evidence and decision making."

Arguments in favour of maintenance of the exemption

59. These included:-

(a) because the appropriate desire for accountability and transparency is met by disclosure of the redacted version of the Report (2)

(b) *"the strong public interest in NHS England being able to oversee and regulate trusts effectively, and the need to ensure that trusts are able to share confidential or otherwise sensitive information with NHS England without concern that such information will enter the public domain"* (2)

(c) to support the statutory role of NHSE by maintaining an open "strong and balanced" relationship with Trusts and to protect the trust and confidence of those who engage with NHSE.

(d) to prevent there being an *"adverse impact upon the quality of information that trusts provide us since they would be likely to provide us with the minimal information required to respond to our information request. This would also reduce the efficiency and quality of our regulatory decision making process."*

(e) to preserve NHSE's ability *"to perform its statutory functions as robustly and effectively as possible..."*

(f) because of the strong public interest in protecting the ability of NHSE to enforce the law (34)

(g) to protect the voluntary cooperation between regulators and those being regulated and that *"there is a public interest in not deterring the voluntary supply of information, even where the public authority has the power to compel a party to supply information."*(34)

(h) because (85) *"the withheld information would add little value to what has already been disclosed in the Regulatory Assessment and redacted version of the Report."*

60. In its Response NHSE also said (83-84):-

"In considering the circumstances which led NHS England to commission the Investigation, the challenges being faced at the Trust and potential inter personal difficulties, disclosure of the withheld information had the potential to make a fragile situation worse. Evidently the Report reveals some significant challenges in the way in which the appointment of a joint CEO was being progressed, and although NHS England acknowledges the public interest in generally understanding what the issues were and what was being done to resolve them, disclosure of some of the specific details in the Report would have been likely to lead to a deterioration in the situation at a time when NHS England and the Trust were trying to resolve it"

Tribunal's conclusions on section 31(1)(g)

61. At para 23 (76) of its Response NHSE said:-

"During the Commissioner's investigation of the Appellant's complaint, NHS England extended its application of s. 31 FOIA to all of the withheld information."

62. NHSE might have decided to consider seeking to withhold the whole report on the basis of section 31 however this exemption was only used for certain parts and we reviewed the Appeal on that basis.

63. As set out in the Open Table and the Closed Schedule we concluded that of the disputed material only paragraphs 3.16- 3.18 engaged section 31(1)(g). As regards the PIBT we concluded that there had been an appropriate consideration of the

competing PIBT arguments and that the arguments in favour of maintenance of the exemption outweighed those in support of disclosure. In summary this was because on balance as regards these paragraphs we gave more weight to the public interest in the benefit of openness between NHSE and those it regulates than openness and transparency more generally and as regards the Report as this had been satisfied in part by the publication of the Assessment.

64. Had we not taken this view we would have gone on to consider whether these 3 paragraphs also contained personal data (see para 3.16 and 3.17) and confidential information (see 3.18).

Review of Sections 36(2)(b)(ii) and 36(2)(c)

65. We had regard to the information provided in the Bundle (see in particular pages 242-248) and the parties' submissions on section 36.
66. The QPO was set out in box 12 of the form and was that if disclosure was to take place then the prejudice/inhibitions would take place. While the form used did not at that point specify which section(s) it was clear from the form (box 8) that the QP had in mind sections 36(2)(b)(ii) and 36(2)(c). Also while at this point the QP did not specify whether the harm would or would be likely it is clear from box 9 (244) that the QPO was referring to harm that "would be likely etc.."
67. We noted from the form used that the QPO was sought on 7 March 2023 and was "originally considered" on 11 April 2023. Arguments as to why the prejudice/inhibition would be likely to occur were listed together with counter arguments. We noted that on 7 March 2023 (246) information was provided to assist with the QPO including "*all relevant documents.*"
68. We considered whether the timing of the QPO, being signed off in March 2024 about a year after NHSE gave its response and after the Appeal was started, rendered the QPO unreasonable by reference to *Malnick*. Our conclusion was that, as stated in NHSE's response on 11 April 2023 (3) and evidenced by the emails of that date (234) the QPO had been sought in March 2023 and a conclusion reached by the QP on or about the 11 April 2023 and it was only that the signature was not added until March 2024 as is disclosed on the form itself (245).
69. As regards the reasonableness of the QPO the Appellant's focus was the PIBT but he did say when seeking a review (24) for example:-

"NHS England argues here that disclosure of some material redacted under section 36 would somehow lead to less effective conduct of public affairs, because such disclosure would cause public authorities to be more cautious in their disclosures in future, and to be less open and transparent. This argument seems to me to be flawed from the outset."

PIBT- section 36

70. The PIBT arguments relating section 31 apply to a substantial degree to the consideration of the PIBT for section 36 as the Appellant says at para 11 of his submission of 7 September 2024. What follows are only those that are specifically identified with section 36.

Arguments in favour of disclosure

(a) openness and transparency in relation to decisions made by public bodies (4) and openness and transparency in particular as regards decisions involving the NHS

(b) to be able to demonstrate that concerns are taken seriously with appropriate action is being taken (244)

(c) (244) to enable the public to see that "*authorities are working together in a joined up way to take any necessary action to improve concerns regarding NHS Trusts.*"

(d) because in the view of the Appellant (see 23 and his submission of 7 September 2024)

"it is prejudicial to the effective conduct of public affairs not to provide the redacted information. The Governance Investigation Report was commissioned by a public authority, using public funds, to investigate another public authority. Widespread redactions in a report that was used as the basis for a very public 'Regulatory Assessment' by NHS England, published in September 2022, only gives the impression of a lack of transparency and accountability; in that it is no longer clear how the Regulatory Assessment reached its conclusions. This, in itself, serves to undermine confidence in the effective conduct of public affairs."

(e) because in the view of the Appellant (see para 13 of his submission of 7 September 2024) open and strong relationships between regulators and those being regulated:-

"...are enhanced, not undermined, by open publication of reports and investigations by regulators. This is how organisations learn to govern themselves better (it also helps regulators to regulate better) and it builds public confidence that, if there are challenges and problems with the management of public sector organisations, they will be acknowledged and acted upon. "

and

"Multiple and frequent redactions only lead to suspicions that certain facts are being withheld for reasons potentially linked to embarrassment or internal convenience. This in itself is a corrosive factor that can prejudice the effective conduct of public affairs"

Arguments in favour of maintenance of the exemption

71. Arguments for the exemption to be maintained included:-

(a) "*...the strong public interest in NHS England being able to work together effectively with other healthcare organisations. "*(4)

(b) that the public interest is better served "*where public authorities are able to have good quality decision making, which will translate into higher quality services for patients.*" (4)

(c) (88) "*the public interest in maintaining a strong relationship with those it regulates, ensuring those it regulates have a safe space to openly converse with NHS England and ensuring that NHS England's regulatory functions are not jeopardised, outweigh the public interest in disclosure*"

(d) to avoid the prejudice referred to in the QPO (243) such as

(i) the likely prejudice to the "*ongoing discussions and the effective relationship between NHS England and the Trust in question* "

(ii) any undermining of the ability for there to be an honest and open exchange of information between NHSE and those it regulates

(ii) to avoid more cautious disclosures and the reduction of the provision of information that could hinder decision making

(iv) the likely prejudice to live ongoing discussions

(v) the risk that disclosure could lead to

"Less informed decision making [which] would in turn lead to a lower quality health service for the public and patients in the region of this Trust.

Tribunal's conclusion on section 36(2)

72. We were satisfied that Amanda Pritchard as chief executive of NHSE and whose signature appears on page 245 was the QP for the purposes of section 36(5)(o) FOIA. In our view having reviewed the evidence and based on the authority of *Malnick* the QPO was reasonable. From our review of the Bundle and the parties' cases including the submissions provided it was clear to us that there had been an appropriate consideration of the competing PIBT arguments.

73. We agreed with most of the arguments presented however bearing in mind the roles carried out by the parties concerned we did not accept that disclosure following a FOIA request would undermine the ability of NHSE and those it regulates to have an "honest" exchange of information.

74. Our approach was to review each redaction where section 36 was relied upon and consider whether in our view the balance of the PIBT was in favour of disclosure or maintenance of the exemption.

75. Our conclusion as set out in the Open Table was that from the disputed material the PIBT favoured maintenance of this exemption at paragraphs 3.16 to 3.18 and 3.31 to 3.51 of the Report. This was because on balance the public interest in avoiding the issues raised in the QPO (including ensuring there was not a reduction in the ability for NHSE to achieve fully informed decision making) outweighed the public interest

for openness and transparency as that was in part at least satisfied by the publication of the Assessment.

Review of Section 41 FOIA

76. NHSE (88) says that it:-

"...exempted some information under s. 41(1) FOIA, on the basis that some of the withheld information was provided to NHS England in confidence and disclosure of that information would constitute a breach of that confidence."

77. To support this position we expected, but did not see, evidence, for example, of what interviewees and other participants had in fact been told and whether it was explained that the information being provided would be treated in confidence. However the impression from the evidence is that confidentiality was assumed by NHSE or implied and implicit but not expressly explained, required or agreed for the Report. For example:-

(a) *"The information was obtained through interviews which were conducted in confidence" (89)*

(b) *"The withheld information was obtained through interviews, which were conducted by an investigator who was commissioned under specific terms, including that the Investigation was to be conducted in strict confidence (80)"*

(c) *"Those individuals who were interviewed as part of the Investigation did so under the expectation that their confidentiality would be maintained (80)"*

(d) *"It is also clear to NHS England that those who were interviewed did so with an expectation of confidentiality by virtue of the fact that they provided candid and frank information and views"*

(e) *"It was understood by all parties (i.e. the investigator, trust staff and NHS England) that such information was sensitive and submitted in confidence with the sole purpose of fact finding for the investigation. For this reason, we believe that section 41 of the FOI Act applies to parts of the requested information. (5)"*

78. We did however also note and accept that in the Report the writer says (10):-

(a) *There was a high degree of cooperation and openness from all parties involved (emphasis added)*

(b) *The Report does not seek to attribute comments to any individual unless critical to understanding the issues and findings*

79. We also noted (80) that it was said by NHSE that:-

"It is standard practice for NHS England to ensure that any information provided to it in confidence as part of its regulatory functions will be kept confidential. NHS England's Enforcement Guidance specifically sets out that any confidential information obtained as part

of its regulatory functions will be handled "with great care" and only shared more widely "to the extent strictly necessary for the intended purpose" (para. 91, NHS England's Enforcement Guidance)"

80. Para 91 in full says (282)

"Significant harm may be caused to the legitimate commercial interests of an ICB or provider, or to NHS England's ability to carry out its functions, if confidential information relating to the ICB or licensee or confidential regulatory information is disclosed. For these reasons, NHS England handles confidential and sensitive information with great care, ensuring that it is only used for appropriate purposes and that it is shared within NHS England or more widely only to the extent strictly necessary for the intended purpose."

81. We also noted in para 92 (282) a reference to the Health and Social Care Act 2012 which provides at section 109(2) (and paragraph 10 of schedule 11)

" But NHS England must not include information which it is satisfied is –

(a) commercial information the disclosure of which would, or might, significantly harm the legitimate business interests of the person to whom it relates;

(b) information relating to the private affairs of an individual the disclosure of which would, or might, significantly harm that person's interests."

82. The Appellant (see 24) agreed that the information was obtained as set out in section 41(1)(a) FOIA and that the information possessed the relevant quality of confidence and that:-

" I agree that Trust staff would have had an expectation of confidence in relation to the detail of the interviews that were conducted and any documentary evidence they presented."

83. However he also said (24/25):-

"However, they understood very well that the evidence they provided was to be used in the investigation, and I do not accept that they would have reasonably expected the overall findings of the investigation – suitably anonymised, if necessary – to be kept confidential."

and he referred to the Assessment as published *"which uses much of the text of the Governance Investigation "*

84. He added:- (26)

"NHS England considers that disclosure of the information I have requested could lead to confiders bringing an action for breach of confidence against NHS England and that it could succeed. I question whether this is, in fact, the case.

First, confiders had a reasonable expectation that the detail of the evidence they supplied, in the form of interview transcripts, personal notes, emails and other forms of communication,

would be held in confidence. So it should be, and I have not asked for publication of this kind of information.

Second, it would also be a reasonable expectation that a report of the findings would be anonymised such that personal views or elements of evidence could not be attributed to any particular person or group, except where absolutely necessary. I would be surprised if this condition was not applied by the report's author(s).

Third, where information had to be attributed to a particular individual or group, it would be standard practice to explain this to the person or people in question, and to obtain their agreement to public disclosure. If this did not happen, I consider this to be a failing on the part of NHS England and/or the author(s) of the Governance Investigation Report."

Tribunal's conclusion on section 41

85. While the Appellant did not disagree with parts of NHSE's case on this exemption he was not able to see the Report in full and so we reviewed it in the Closed Bundle noting the submissions to see if in our view the material redacted engaged this exemption. For each relevant redaction (notwithstanding the Appellant's acceptance of some of these propositions) we considered whether:-

(a) the information had been obtained by NHSE from a third party and, if so

(b) if its disclosure would constitute an actionable breach of confidence, ie:

(i) did the information have the necessary quality of confidence to justify the imposition of a contractual or equitable obligation of confidence?; if so:-

(ii) was the information communicated in circumstances that created such an obligation?; and, if so

(iii) would disclosure be a breach of that obligation?;

(c) and then, where needed, whether NHSE would have a defence to a claim for breach of confidence based on the public interest in disclosure of the information?

86. As regards this aspect we also had regard to the decision in *Evans* noting that "*the burden lies on [the Appellant] to show that the necessary breach is in the public interest.*"

87. Our conclusions as regards this use of this exemption are set out in the Open Table and Closed Schedule.

88. While NHSE had not relied upon s41 FOIA as an exemption relating to paragraph 4.6 of the Report in our our view s41 is also engaged for this paragraph because:-

(a) it is information received from identifiable people

(b) the information in our view does have the necessary quality of confidence to justify the imposition of an obligation of confidence because it stems from a process which we consider to be confidential

(c) the information is likely to have been communicated in circumstances that created such an obligation

(d) in our view disclosure would be a breach of that obligation for which NHSE would not have a public interest defence.

Decision

89. In summary our Decision and the basis of the substituted decision notice is that NHSE:-

(a) remains entitled to maintain the redactions on the cover sheet and at paragraphs 1.1, 1.8, 2.17, 3.16-3.18, 3.22 a name in 3.24, 3.25, 3.31- 3.51 and 4.6.

(b) is required to disclose the previously withheld information in the Report at paragraphs 2.15-2.16, 3.13 -3.15, 3.23, 3.24 (save for the name in 3.24), 3.26, 3.61-3.63, 4.1- 4.5, part of 4.13 and 4.14.

90. The Open Table lists the outcome of our Decision by reference to the redactions claimed and the paragraphs of the Report. Further information is provided (initially to NHSE only) in the Closed Schedule.

91. Accordingly our Decision is that the DN was partly in accordance with the law and partly not and thus the Appeal is allowed in part and in part dismissed.

Signed: **Tribunal Judge Heald**

Date: **12 December 2024**

OPEN TABLE

| Para | exemption claimed and outcome |
|-------------|---|
| cover page | s40(2): is applicable to the name s31(1): is not engaged |
| 1.1 | s40(2): is applicable to the name at the start of the sentence s31(1): is not engaged |
| 1.8 | s40(2): is applicable to the redacted word s31(1): is not engaged |
| 2.15-2.16 | s36(2): while the QPO was reasonable on balance the public interest in maintaining the exemption did not outweigh the public interest in disclosure s31(1): is not engaged |
| 2.17 | s41(1):- is engaged for which NHSE would not have a defence if a claim for breach of confidence was made s36(2): while the QPO was reasonable on balance the public interest in maintaining the exemption did not outweigh the public interest in disclosure s31(1): is not engaged |
| 3.13-3.15 | s36(2): while the QPO was reasonable on balance the public interest in maintaining the exemption did not outweigh the public interest in disclosure s31(1): is not engaged |
| 3.16-3.18 | s36(2): the QPO is reasonable and on balance the public interest in maintaining the exemption did outweigh the public interest in disclosure s31(1): is engaged and on balance the public interest in maintaining the exemption did outweigh the public interest in disclosure |
| 3.22 | s41(1): is engaged for which NHSE would not have a defence if a claim for breach of confidence was made s36(2): while the QPO was reasonable on balance the public interest in maintaining the exemption did not outweigh the public interest in disclosure s31(1): is not engaged |
| 3.23 | s36(2): while the QPO was reasonable on balance the public interest in maintaining the exemption did not outweigh the public interest in disclosure s31(1): is not engaged s41(1) is not engaged |
| 3.24 | s 40(2) applies to the name in para 3.24 only s36(2) while the QPO was reasonable on balance the public interest in maintaining the exemption did not outweigh the public interest in disclosure |

| | |
|--------------|--|
| | <p>s31(1): is not engaged s41(1) is not engaged</p> |
| 3.25 | <p>s41(1) is engaged and NHSE would not have a defence if a claim for breach of confidence was made. s36(2): while the QPO was reasonable on balance the public interest in maintaining the exemption did not outweigh the public interest in disclosure. s31(1): is not engaged</p> |
| 3.26 | <p>s36(2) while the QPO was reasonable on balance the public interest in maintaining the exemption did not outweigh the public interest in disclosure s31(1): is not engaged s41(1): is not engaged</p> |
| 3.31-3.51 | <p>s36(2): the QPO is reasonable and on balance the public interest in maintaining the exemption did outweigh the public interest in disclosure s40(2): these paragraphs have some section 40 material but not to the extent claimed s31(1): is not engaged.</p> |
| 3.61-3.63 | <p>s36(2): while the QPO was reasonable on balance the public interest in maintaining the exemption did not outweigh the public interest in disclosure s31(1): is not engaged</p> |
| 4.1- 4.5 | <p>s36(2): while the QPO was reasonable on balance the public interest in maintaining the exemption did not outweigh the public interest in disclosure s31(1): is not engaged</p> |
| 4.6 | <p>s41(1): is engaged and NHSE would not have a defence if a claim for breach of confidence was made s36(2): while the QPO was reasonable on balance the public interest in maintaining the exemption did not outweigh the public interest in disclosure s31(1): is not engaged</p> |
| part of 4.13 | <p>s36(2): while the QPO was reasonable on balance the public interest in maintaining the exemption did not outweigh the public interest in favour of publication s41(1) is not engaged s31(1): is not engaged</p> |
| 4.14 | <p>s36(2): while the QPO was reasonable on balance the public interest in maintaining the exemption did not outweigh the public interest in disclosure. s41(1): is not engaged s31(1): is not engaged</p> |