



IN THE FIRST-TIER TRIBUNAL **Case No. EA/2016/0249**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50627244

Dated: 4 October 2016

Appellant: Iain Foster

Respondent: Information Commissioner

Public Authority: The General Medical Council

Heard at: The Residential Property Tribunal, Alfred Place, London

Date of hearing: 1 March 2017

Date of decision: 30 May 2017

Before

Angus Hamilton

Judge

and

Darryl Stephenson

and

Nigel Watson

Subject matter: s 40(5)(b)(i) Freedom of Information Act 2000 (FOIA)

Cases considered:

Rodriguez-Noza v Information Commissioner & Nursing and Midwifery Council and Information Commissioner v Colleen Foster & Nursing and Midwifery Council [2015] UKUT 0449 (AAC)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 4 October 2016 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1 This decision must commence with an apology to all the parties involved for the substantial delay in its provision. This was a consequence of the Tribunal Judge being placed on long-term sick leave almost immediately after the hearing on 1 March. For the same reason the decision is being kept relatively brief.

2 Section 1 (1) of FOIA provides that:

Any person making a request for information to a public authority is entitled:

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

3 However, in relation to personal information, section 40(5)(b)(i) of FOIA says that a public authority is not obliged to confirm or deny that it holds information if by confirming or denying that it is held, the authority would breach one of the data protection principles. The criterion for engaging this exemption is not whether disclosing the information would contravene the data protection principles but whether the simple action of confirming or denying that it is held would do so.

4 The data protection principles are contained within the Data Protection Act 1998 ('DPA') and include the following:

Personal data shall be processed fairly and lawfully and, in

particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

Schedule 2 Paragraph 6(1) sets out the following condition, which is one of a number provided for in the DPA:

The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

Request by the Appellant

- 5 The Information Commissioner in his Response of 23 November 2016 has correctly set out the background to this appeal and the Tribunal has adopted that description – particularly bearing in mind that that description is not disputed by any party.
- 6 On 21 December 2015 the appellant contacted the General Medical Council ('GMC') in the following terms:

My original complaint against [a named doctor and henceforth referred to as 'Dr A'] was in regard of the falsification of data placed on my medical record. My second complaint emanates from the subsequent admission by 'Dr A' that he would be prepared to make diagnosis in the absence of data. These are clearly two different issues. You have failed to address either properly despite your stated claims to the contrary. I'm sure it will come as little surprise

to discover that this matter is already in the hands of other authorities...

To assist ongoing investigation and in accordance with the Freedom of information Act 2000 I request the names of all the anonymous people referred to in correspondence as 'Case Examiner', 'Assistant Registrar', or person having 'considered' or 'investigated' this matter.

- 7 On 12 February 2016, the GMC responded to the Appellant to advise that it was unable to comply with his request in reliance on sections 40(5)(a) and 40(5)(b)(i) FOIA. On 30th of March 2016 the GMC provided the Appellant with its internal review in which it upheld its earlier reliance on section 40(5)(b)(i) FOIA on the basis that it is not obliged to confirm or deny the existence of complaints which have been closed without referral to a MPT [Medical Practitioners Tribunal] or are not associated with restrictions on the doctor's registration. The GMC's complaints procedure is to make an initial decision as to whether an investigation should be conducted. Once this investigation is complete then two case examiners (one medical and one non-medical) will consider the complaint. They can conclude the case, issue a warning, agree undertakings with the doctor or refer the case to a MPT for a hearing. MPT hearings are usually held in public and the details of the complaint and the outcome of the hearing are made publicly available.
- 8 On 28 April 2016 the Appellant complained to the Commissioner.
- 9 The Decision Notice of 4 October 2016 considered, first of all, whether this was a case relating to 'personal information' and concluded:

The Commissioner is satisfied that the information that would be revealed if the GMC confirmed or denied that it holds the requested information is the personal data of a third person.

- 10 The decision notice then went on to consider whether ‘confirming or denying’ whether the information is held would contravene one of the data protection principles and stated:

The Commissioner has considered whether the GMC is correct when it argues that confirming whether or not it held the requested information at the time of the request would breach the first data protection principle: that personal data shall be processed ‘fairly and lawfully’. When assessing whether disclosure would be unfair and so constitute a breach of the first data protection principle, the Commissioner takes into account factors such as whether the information relates to the individual's public or private life, what their reasonable expectations might be and whether or not the individual has consented to the disclosure of their personal information.

- 11 The Commissioner noted and approved the GMC's policy of only publicly disclosing the existence of a complaint against the doctor if they had any warnings or restrictions placed on their registration or if the complaint progressed to a Medical Practitioners Tribunal (‘MPT’). Neither of these steps had occurred in this case and thus the Commissioner concluded that the doctor in question would have a reasonable expectation that the existence of a complaint against him would not be disclosed and that such a disclosure might well cause him/her distress. Furthermore, there was no consent to such a disclosure from the doctor. Thus, in this case, to confirm or deny whether the sought information was held, would confirm or deny the existence of a complaint, would be unfair to the doctor in question and would therefore be in breach of the first data protection principle. The Commissioner concluded that the GMC had therefore correctly applied s.40(5)(b)(i) FOIA to the request.

- 12 The DN then went on to consider the balancing test set out in Schedule 2 Paragraph 6(1) **[paragraph 4 above]** and concluded:

The Commissioner considers that there is a legitimate public interest in openness and transparency. However she has also

considered the nature of the requested information, the fact that if held the doctor concerned would not expect their personal data to be disclosed and that if held disclosure could cause damage and distress to the doctor concerned. The Commissioner acknowledges that the requested information is of interest to the complainant but does not consider that it is of sufficient wider public interest such that it would outweigh the doctor's legitimate interests.

The Appeal to the Tribunal

- 13 On 18 October 2016, the Appellant submitted an appeal to the Tribunal (IRT). It is not unfair to say that the Notice of Appeal does not immediately disclose a ground of appeal within FOIA. Rather it asserts that the request for information is 'reasonable' and that it is a 'natural and entirely normal courtesy' for the GMC to disclose the names that The Appellant has sought as the Appellant is 'entitled' to know the identities of the personnel considering his complaint. As such the Grounds of Appeal do not challenge the GMC's 'neither confirm nor deny' ('NCND') stance but rather leap ahead to insist on the disclosure of the sought information.
- 14 In fairness to the Appellant the Tribunal found it necessary to interpret his Grounds of Appeal as asserting, first, that there would be no unfairness to Dr. A in confirming or denying the existence of a complaint and secondly that, looking at Schedule 2 Paragraph 6(1) DPA, the Appellant's legitimate interests outweighed the rights and freedoms or legitimate interests of the doctor in question.

The Questions for the Tribunal

- 15 There was no dispute between the parties on the preliminary issue namely: *that the information that would be revealed if the GMC confirmed or denied that it holds the requested information is the personal data of a third person [i.e. Dr A].* Consequently, the Tribunal concluded that the

question for them to consider was whether confirming or denying the existence of complaint involving Dr A would contravene the data protection principles. It would be helpful to make clear at this point that the only parts of the data protection principles that any party asked the Tribunal to consider were those specified at paragraph 4 above namely:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

Schedule 2 Paragraph 6(1) sets out the following condition:

The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

The Tribunal were not invited to consider and did not find it necessary to consider any other aspect of the data protection principles including any other condition specified in Schedule 2 DPA.

Evidence, Submissions and Conclusion

- 16 The hearing of this matter took place on 1 March. The Appellant and counsel for the GMC attended the hearing. The Commissioner did not attend and was not represented. Both the GMC and the Commissioner had very helpfully provided the Tribunal with detailed written representations prior to the hearing. The Appellant chose not to do so but

made oral representations to the Tribunal along with counsel for the GMC.

17 Again, it is fair to say that Mr Foster had some difficulty in grasping that that issue that the Tribunal was considering was whether the GMC's 'NCND' stance was correct and in accordance with the provisions of FOIA. Despite assistance from the Tribunal Mr Foster continued to view the hearing as possibly leading to an 'order' that the GMC disclose the names he had sought in his original request. The Tribunal had some sympathy with Mr Foster's approach since, from his point of view, it must have seemed slightly farcical that the GMC were declining to confirm or deny information that he already knew – namely that there had been a complaint involving Dr A - since he himself was the complainant. Mr Foster also had some difficulty, despite assistance from the Tribunal, in grasping the concept that disclosure (including disclosure by way of confirming or denying whether personal information was held) under FOIA was disclosure 'to the world at large' at not just to him and that there were consequences that flowed from this principle. However, the upshot was that, as with the Grounds of Appeal, the Tribunal had to interpret rather than apply Mr Foster's submissions in the matter.

18 The Tribunal considered all the submissions from the parties carefully. Unsurprisingly the submissions (both oral and written) from the Commissioner and the GMC were very similar. Bearing in mind the comments at paragraph 1 above the Tribunal has reproduced here the essential part of the Commissioner's submissions on the questions for the Tribunal:

In the first instance, the Commissioner generally considers whether it would be fair for the relevant public authority to confirm or deny if it holds the requested personal data. In deciding this point, the Commissioner will consider the reasonable expectations of the relevant data subjects; the consequences of any confirmation or denial to those data subjects and whether there is any legitimate interest which may justify the confirmation or denial

notwithstanding the first two concerns.

*Further, the Upper Tribunal has considered the issue of legitimate interests in the matters of *Rodriquez-Noza v Information Commissioner & Nursing and Midwifery Council* and *Information Commissioner v Colleen Foster & Nursing and Midwifery Council* [2015] UKUT 0449 (AAC) (“Rodriquez-Nosa & Foster”). This is relevant here even though the Upper Tribunal considered the issue by reference to Schedule 2, condition 6(1) rather than fairness given the overlap between the two provisions.*

Schedule 2, condition 6(1) provides:

“...The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject...”

*In *Rodriquez-Nosa & Foster*, the Upper Tribunal appears to have concluded that legitimate interests, for the purposes of Schedule 2, condition 6(1), incorporate both legitimate private and public interests and whether the relevant processing was necessary to meet any such legitimate interests. The Upper Tribunal went onto consider the fact that any processing, i.e. the confirmation or denial, would be made effectively to the world at large under the Act but found that this was a factor to take into account when looking at the other stages of the test under Schedule 2, condition 6(1), namely, identifying the rights; freedoms and/or legitimate interests of the data subject(s) and then whether the processing would be unwarranted.*

*The *Rodriquez-Nosa & Foster* judgment is also relevant to this appeal as those appeals concerned whether a regulator, there the*

Nursing and Midwifery Council (“NMC”)), was able to rely on section 40(5)(b)(i) to refuse to confirm or deny whether it held information which would result in a formal confirmation that a complaint had been made about certain nurses. In short, the Upper Tribunal concluded that both Appellants were able to pursue their legitimate interests via routes other than under the Act and which would not affect the privacy rights of the data subjects. As such, the Upper Tribunal found that the NMC was able to rely on section 40(5)(b)(i) to neither confirm nor deny whether it held the requested information.

- 19 The Tribunal considered that there was considerable merit in the GMC’s approach in this case – namely to only confirm or deny that a complaint had been made against a particular doctor if that complaint had been referred to a MPT or if the complaint had resulted in warnings or restrictions being placed on the doctor’s registration – that is if the complaint was deemed to have some merit even if it had not been upheld by a MPT. The Tribunal considered that this struck an appropriate balance between complaints with some merit – where their existence should be disclosed - and complaints which were likely to be without merit or indeed even malicious and where disclosure of their existence would cause unjustified distress to the doctor in question which was not warranted. The Tribunal concluded that to confirm or deny the existence of the latter type of complaint would be unfair to the doctor in question and thus in breach of the data protection principles.
- 20 Arguably, this conclusion ought to have been determinative of the appeal since the DPA provides: *Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met.* The implication of this sentence is that to establish the legitimate processing of personal data a data controller must show that the processing was fair **and** in accordance with schedule 2 DPA. But, for the processing of personal data to be illegitimate it is only necessary to show that the personal data has been

processed unfairly and not that it has **also** been processed in breach of one or more of the Schedule 2 conditions.

- 21 However out of an abundance of fairness to the Appellant the Tribunal did consider Schedule 2, condition 6(1) DPA and whether it might justify 'confirming or denying':

...The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject...

- 22 The Tribunal did not consider that 'confirming or denying' was necessary for the purposes of Mr Foster's legitimate interests as he was already aware of the outcome of the preliminary disciplinary investigation involving Dr A and if he wished to challenge that he could do so by, for example, mounting a judicial review. Furthermore, disclosing that there had been a preliminary disciplinary investigation involving Dr A would be prejudicial to his rights and legitimate interests bearing in mind that the complaint made against him did not have sufficient merit to go before a MPT and did not result in any restrictions on his registration. The Tribunal considered the fact that 'confirming or denying' would be to the world at large and consequently considered whether this might be necessary for the 'world at large's' legitimate interests but the Tribunal considered that the world at large did not have a legitimate interest in knowing of the existence of a complaint that had been dismissed at the first hurdle.

- 23 The Tribunal formed the view that the Appellant's unhappiness with the GMC's decision-making clearly stemmed from his belief that the GMC had not investigated his complaint properly. However, his appeal to the IRT was not the appropriate way to check that. The Appellant clearly wanted the Tribunal to play a role in considering the merits of his

complaint and then in sanctioning further challenges to the GMC's rejection of his complaint. Whilst the Tribunal had sympathy for Mr Foster being a litigant in person he did not assist his case before the IRT. Beyond his grounds of appeal (which say nothing at all about the 'NCND' argument) he provided no written submissions to the Tribunal and no contributions to the formal bundle. His arguments were not coherently presented but were lengthy and incoherent and frequently strayed from the central issues in the case. The Appellant persisted in addressing the Tribunal on the basis that the Tribunal would be potentially directing the disclosure of the names he was after. As already mentioned the Tribunal found it necessary to interpret the Appellant's representations in order to give them any meaning within the terms of FOIA.

24 The Tribunal's decision to dismiss this appeal was unanimous

Signed:

Angus Hamilton DJ(MC)

Tribunal Judge

Date: 30 May 2017