First-tier Tribunal
(General Regulatory Chamber)
Information Rights [alter as appropriate]

Appeal Reference: EA/2018/0023

Heard at Fleetbank House, London
On 6 September 2018

Before

JUDGE DAVID THOMAS

TRIBUNAL MEMBERS MIKE JONES AND NIGEL WATSON

Between

JOSEPH BALDWIN

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

NURSING AND MIDWIFERY COUNCIL

Second Respondent

Summary of the Tribunal's decision

The appeal is allowed: the Nursing and Midwifery Council (the NMC) was not entitled to refuse to confirm or deny, under section 40(5)(b)(i) Freedom of Information Act 2000 (FOIA), that it holds the requested information. However, section 40(2) applies to all the information. The NMC is not required to take any further steps.

Representation

Mr Baldwin: in person

Information Commissioner: Ms Elizabeth Kelsey

NMC: Mr Robin Hopkins

DECISION AND REASONS

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

1. This is the appeal by Mr Joseph Baldwin against the rejection by the Information Commissioner (the Commissioner) on 6 February 2018 of his complaint that the NMC had wrongly refused to disclose certain information he had requested under section 1(1)(b) FOIA.

2. Mr Baldwin opted for an oral hearing and represented himself. The Commissioner was represented by Ms Elizabeth Kelsey and the NMC by Mr Robin Hopkins. The Tribunal is grateful to all for their assistance. Following the hearing, it issued case management directions, which partly explains the delay in issuing the decision.

The NMC

3. Under Article 3(2) of The Nursing and Midwifery Order 2001 (the 2001 Order), [1] 'The principal functions of the [NMC] shall be to establish from time to time standards of education, training, conduct and performance for nurses and midwives and to ensure the maintenance of those standards'; and, under Article 3(4), 'The main objective of the [NMC] in exercising its functions shall be to safeguard the health and well-being of persons using or needing the services of registrants'. It is therefore the professional body for nurses, the nursing equivalent of the General Medical Council for doctors.

4. By 'registrants', the 2001 Order means nurses and midwives registered with the NMC.

Factual background

5. The background concerns the circumstances around the death of Mr Baldwin's father, Mr Thomas Baldwin, in June 2010 at the age of 88. Mr Baldwin Snr had recently gone into care, initially in a nursing home in Kent (the Kent home) and then in a nursing home in Surrey (the Surrey home) (but funded by Kent). He previously lived with his son in a jointly-owned house. It is not necessary to go

[1] 2002 No 253 https://www.legislation.gov.uk/uksi/2002/253/contents/made

into the circumstances in which Mr Baldwin Snr went into care. Suffice to say that it was not with the consent of Mr Baldwin Jnr. There is a sad history of family rifts.

6. Mr Baldwin Jnr is unhappy about the care which his father received, in particular at the Surrey home. The concerns relate to the circumstances around his father being taken to hospital on 30 May 2010 (four days after he went to the Surrey home) but, more particularly, to the events of 26 and 27 June 2010. He says that, on the afternoon of 26 June, on several occasions he implored a particular nurse (Nurse C) to call an ambulance because his father was unwell with increased coughing, swollen ankles and abdomen and in a high state of confusion. He had earlier trapped his foot in his wheelchair. An ambulance was not called. He was documented as being chesty and coughing at 10pm, eased by a nebuliser. He was observed twice in the early hours of 27 June when no concerns were identified but was found not to be breathing and unresponsive at 5am. Even then, it was over an hour before an ambulance was called. Mr Baldwin was pronounced dead at the scene.

7. Mr Baldwin Jnr subsequently pursued complaints against the home and Surrey County Council.

8. In 2015, he instructed a consultant cardiologist, Dr Ron Simon, at the Heart Hospital in London. Mr Simon had never met Mr Baldwin Snr and prepared his report dated 5 March 2015 **[115]** from the documents provided by Mr Baldwin Jnr. Dr Simon recorded that Mr Baldwin had a history of dementia, Paget disease, Parkinsonism, poor mobility, hypertension and asthma (with a suggestion of chronic obstructive pulmonary disease). He could not see much evidence for heart failure on the hospital admission on 30 May 2010. Mr Baldwin's ankles were subsequently swollen (later improved but not resolved). Dr Simon concluded:

> '*… I would say that it is quite possible that had a diagnosis of [left ventricular] dysfunction have been made earlier then the addition of beta a-blockers and an ACE inhibitor may have prolonged Mr Baldwin's life and an echocardiogram should have been requested where there was evidence that he was retaining fluid and this seems to have started to occur around the 14th June which is only about two weeks prior to this death and therefore it is also quite likely that there would not have been time to up-titrate these medications to achieve their maximum benefit.*
> *I do not think the atrial fibrillation rate was sufficiently high to have contributed to his left ventricular failure. I would say that the ambulance should have been called sooner. I would also say that the pleural effusions are consistent with a diagnosis of heart failure*'.

9. In his letter to the NMC of 5 July 2017 **[114]** (disclosed to Mr Baldwin by the NMC), Dr Simon said:

> *'... it appears there was a mis-judgement about how unwell Mr Baldwin was the afternoon and evening before he died and that his condition was misdiagnosed as*

asthma rather than heart failure (cardiac asthma) … I would also say that the observations overnight suggesting that there was no concern clearly underestimated the severity of the situation. His son's request on the afternoon of 26th June that an ambulance be called to have him reassessed and taken to the hospital should have been [heeded]. This would have been his best chance of surviving the night. His longer-term prognosis would have remained guarded'.

10. In short, Dr Simon's view, based on the information he was given, was that the Surrey home staff made a misjudgement in failing to call an ambulance on the afternoon of 26 June 2010. Had they done so, Mr Baldwin Snr's life might have been prolonged. However, given his age and the multiplicity and seriousness of some of his conditions, prolongation might not have been for long.

11. Mr Baldwin was, of course, entitled to such reasonable care as would have maximised the duration of his life and made his twilight period as comfortable as possible. However, it is important to make the point that, even if misjudgements were made, even if those misjudgements can properly be characterised as negligence in the legal sense and even if they caused or contributed to Mr Baldwin Snr dying prematurely or suffering more than he need have done, that does not of itself mean that any nurse was guilty of professional misconduct. Negligence does not necessarily equate to misconduct. It is professional misconduct and (general) lack of competence with which the NMC is concerned, each relevant to whether a nurse or midwife is fit to practise.

12. Mr Baldwin Jnr made complaints against nine nurses to the NMC in the early summer of 2016. Some were based at the Kent home and some at the Surrey home, including Nurse C. Each of the complaints was dismissed. Mr Baldwin now says **[43]** that he is concerned only with events at the Surrey home.

The NMC's complaint procedure

13. Article 22 of the 2001 Order empowers the NMC to investigate allegations that a registrant's fitness to practise (FtP) is impaired.

14. There are three main stages to investigation of a complaint. First, a screening team ('screeners') considers whether the 2001 Order confers the power to deal with it if it proves well-founded: Article 24(3)(a). This sounds like a narrow jurisdiction - limited to issues such as whether the person against whom a complaint is made is a registrant and whether the complaint falls within the scope of Article 22(1) – but Mr Hopkins explained that it is broader than that and extends to considering whether there is a case to answer. If the screeners decide that there is no case to answer, the complaint is closed.

15. If, however, they decide that there is a case to answer, the complaint is referred to a case examiner. The case examiner again considers whether there is a case to answer (see Rules 6B, 6C and 7 of The Nursing and Midwifery Council (Fitness to

Practise) Rules 2004 (the Rules)). [2] There appears therefore to be some overlap between the first two stages.

16. If the case examiner decides there is no case to answer, the Registrar may review the decision under Rule 7A of the Rules, either where there is reason to believe that the decision was materially flawed or material new information has come to light and, in either case, that a review would be in the public interest.

17. If the case examiner or the Registrar believes there is a case to answer, a complaint (of the sort Mr Baldwin has made) is referred to the Conduct and Competence Committee, which may convene a hearing (Rule 10 of the Rules).

18. Under Article 25 of the 2001 Order, the NMC has the power to require third parties to provide it with information. It exercised that power in relation to at least two of the complaints made by Mr Baldwin.

19. The NMC's policy is generally not to disclose the fact of a complaint to the public where it is dismissed at the screening or case examiner stages. However, paragraph 32 of the NMC's *Fitness to Practise Information Handling Guidance* (the FtP guidance) [3] in force when the decisions on Mr Baldwin's complaints were made says that the NMC sometimes receives a request for material gathered during an investigation by a case examiner from registrants, complainants (referrers) and third party organisations (the police, the Disclosure and Barring Service, the Care & Quality Commission and other healthcare regulators) whom it has made aware of the complaint. Paragraph 33 says that, in considering whether to confirm or deny the existence of the information and whether to provide it, various factors are taken into account including 'the connection between the person making the request, the events in question and their involvement in the fitness to practise proceedings' (paragraph 33.3), 'possible intended uses of the information' (paragraph 33.4) and 'whether there are other more proportionate methods or avenues available to the person seeking the information to gain access to it' (paragraph 33.6). Mr Hopkins suggested that the phrase 'confirm or deny' was in context not limited to the FOIA sense.

The chronology of Mr Baldwin's engagement with the NMC

20. Only correspondence relating to the Nurse C complaint is in the open bundle. This is the essential chronology of Mr Baldwin's engagement with the NMC:

- **17 May 2016**: he submits a complaint against Nurse C

[2] 2004 No 176 https://www.nmc.org.uk/globalassets/sitedocuments/ftp_information/old-archived-guidance/nmc-fitness-to-practise-rules-consolidated-text-effective-from-2016.01.19.pdf The Rules have been superseded for hearings commencing on or after 28 July 2017

[3] Effective 26 September 2016. It has now been superseded with effect form 15 December 2017

- **23 May 2016 [127]**: an FtP screening administrator acknowledges receipt of the complaint, explaining that all new cases go through an initial assessment process, and seeks Mr Baldwin's consent to approach Nurse C (whose full first name she gave)

- **Some point subsequent to 23 May 2016**: the Nurse C complaint passes the screening stage and is referred to a case examiner

- **October 2016 to January 2017**: the NMC closes the complaints against the other eight nurses at the screening stage and informs Mr Baldwin (see paragraph 11 of the NMC's skeleton argument)

- **4 November 2016**: Mr Baldwin makes his FOIA request

- **12 January 2017**: a FtP case investigation officer (presumably, another term for a case examiner) puts various questions to Mr Baldwin about the factual background relating to the Nurse C complaint. She also explains that it may be necessary to seek statements from Mr Baldwin's sisters

- **On or before 19 January 2017**: the case investigation officer has a telephone conversation with Mr Baldwin

- **19 January 2017 [134]**: she sends him a draft witness statement, purportedly reflecting their discussion. She reminds Mr Baldwin, in bold typeface, that the statement is confidential and must not be disclosed to anyone, including other witnesses

- **21 and 23 January 2017**: Mr Baldwin asks for amendments to be made to the statement **[141]** and **[143]**

- **3 February 2017**: the case investigation officer sends him the amended statement **[142]** and **[144]**

- **31 May 2017**: the NMC sends the case examiner's decision relating to the Nurse C complaint to Mr Baldwin. The decision is that Nurse C has no case to answer **[106]**

- **2 June 2017**: Mr Baldwin exercises his Rule 7A right to challenge the decision

- **Some point after 5 July 2017**: the head of case examiners refers the complaint to the Registrar under Rule 7A, in light of Dr Simon's letter of 5 July 2017 (which was not available when the initial decision was made) and the questions the NMC had put to him on 13 March 2017 **[112]** (see the NMC's letter to Mr Baldwin of 3 October 2017 **[104]**)

- **3 October 2017**: the Assistant Registrar decides that there are no grounds to review and explains why.

21. There a couple of points to note from this chronology. First, it was nearly six years after his father's death that Mr Baldwin made complaints to the NMC. He had been pursuing other avenues and told the Tribunal that he did not know of the NMC's existence until shortly before his complaints. Nevertheless, for obvious reasons the passage of time made investigation more difficult – for example, some of the medical records were no longer available. Second, the NMC had confirmed to Mr Baldwin prior to the FOIA request that it was investigating Nurse C and did not seek to impose any confidentiality on that information.

Previous FOIA requests and complaints

22. Mr Baldwin has made a number of previous FOIA requests (of different public authorities) relating to this father's care. Some have reached the Tribunal. None of this complaints to the Commissioner or subsequent appeals has been successful.

23. He has also made a complaint to the Local Government Ombudsman, again it appears unsuccessfully although he did obtain some information from Surrey County Council at the behest of the Ombudsman. He also involved the Care Quality Commission and provoked safeguarding reviews, with some success in terms of changes at the Surrey home.

The request, the initial response and the review

24. On 4 November 2016, Mr Baldwin made the request **[51]**. He asked a long list of questions. In its response of 5 December 2016 **[53]**, the NMC identified four as falling within the scope of FOIA:

i. All information exchanged between the NMC and the two care homes

ii. Responses by the two homes to the NMC's questions

iii. The questions put to the homes by the NMC

iv. All information processed by the NMC's legal department

25. Mr Baldwin also asked: '… Even though I supplied you with the nursing notes from [the Kent] care home, did you ever obtain the care/nursing notes from [the Surrey] home?'. This could be construed as a request for the Surrey home notes if held by the NMC. However, it appears that the NMC does not hold those notes and cannot therefore supply them to Mr Baldwin.

26. The NMC dealt with two of the other questions, relating to documents which Mr Baldwin had sent the NMC and information supplied to its safeguarding team, as

subject access requests under the Data Protection Act 1998 (DPA 1998) **[97]**. The final tranche of questions were about the law and for explanations.

27. Mr Baldwin's letter names two of the nurses about whom he had made complaints (not Nurse C). It does not name the other nurses but of course the NMC knew who they were. In particular, it knew that Mr Baldwin had made a complaint about Nurse C with regard to her failure to call an ambulance on 26 June 2010.

28. There is some confusion about the NMC's response because it changed the order of Mr Baldwin's final two FOIA questions. In relation to questions (i), (iii) and (iv), it said that the information was exempt under section 40(2) FOIA (third party personal data). Disclosure would, it said, contravene the first data protection principle set out in schedule 1 to the DPA 1998 (DPP1) and none of the conditions in schedule 2 (see below) was satisfied. It explained that FOIA was applicant- and motive-blind and disclosure was deemed to be to the whole world. This meant that, once disclosure had been made to one requester, any other requester for the same information would be entitled to it. The NMC had no control over how information would be used once disclosed.

29. It argued that the nurses in question had a reasonable expectation that it would not publish information about the complaints given that they had been cleared of any misconduct. The NMC's overriding mission was to protect the public and ensure that it was aware which nurses and midwives currently undermined confidence in safety. NMC policy was not to publish information about previous misdemeanours of nurses and midwives investigated by the NMC where they were now deemed fit to practise and posed no threat to the public.

30. The NMC relied on section 41 (information provided in confidence) in relation to all four questions. It said that it relied on section 42 (legal professional privilege) in relation to Mr Baldwin's second question but presumably meant his fourth. It maintained its position on review **[57]**.

Proceedings before the Commissioner

31. Mr Baldwin made a complaint to the Commissioner on 19 January 2017 **[60]**.

32. With its letter of 16 June 2017 to the Commissioner **[69]**, the NMC enclosed the withheld information, indicating which exemptions applied to which information (it later sent an amended version). In answer to the Commissioner's questions, it said that the personal data caught by section 40(2) related to registrants, witnesses, patients and (presumably other) nursing staff. Given that the decision in each case was that there was no case to answer, the nurses had not been asked whether they consented to the disclosure of their personal data.

33. The NMC nevertheless accepted that requests for information by complainants (such as Mr Baldwin) might assist them in considering their position following a decision by a case examiner, particularly whether to ask the Register to exercise the power to review a decision that a nurse or midwife has no case to answer. That could be a strong factor pointing to the need for disclosure. This appears to be a reference to the FtP guidance referred to above.

The Commissioner's decision

34. The Commissioner gave her decision on 6 February 2018 **[1]**. She thought the case was not only about whether section 40(2) applied but also section 40(5)(b)(i), which entitles a public authority not to confirm or deny whether it holds requested information if by doing so it would reveal personal data and breach a data protection principle. In the present case, confirming that the requested information was held would indicate that the nurses in question had been involved in disciplinary proceedings.

35. The Commissioner decided that DPP1 would be breached by giving confirmation or denial. Processing – i.e. giving this information – would be unfair and none of the conditions in schedule 2 to the DPA would be met. In particular, although there might be situations in which it could be argued that confirmation or denial to a requester who knew or suspected the public authority held the information would not breach the data protection principles, here the nurses would have a reasonable expectation that information – that there had been contact between their employers and the NMC - would not be released to the world at large with the potential consequent damage to their reputation. In other words, the Commissioner drew on the 'disclosure to the whole world' principle. Section 40(5)(b)(i) applied to all Mr Baldwin's requests within the scope of FOIA.

36. The Commissioner did note, in paragraph 32, that 'by applying section 40(2) to the request, the NMC appeared to confirm that it holds related information'. However, it should have applied section 40(5)(b)(i), such that section 40(2) was irrelevant. She had therefore not considered it.

The Grounds of Appeal

37. In his Appeal **[16]**, Mr Baldwin noted that by relying on section 40(2) the NMC had confirmed that it held the information he had requested. He also alleged that, by pointing the NMC to section 40(5)(b)(i), the Commissioner was giving it advice: he felt he was battling not one but two public bodies.

38. His focus was on Nurse C (whom he named). His right outweighed hers, he suggested.

The hearing

39. None of the parties had made a witness statement and formal evidence was therefore not taken. However, Mr Baldwin explained that Kent County Council had disclosed a large volume of documents, without redaction, relating to the Kent home and had even included documents contrary to the wishes of individuals. He could not understand why the NMC was being so parsimonious. He had passed the Kent documents to the NMC.

40. He also explained that he wanted the requested information simply to pass it to his solicitor to consider whether to bring a negligence action against one or more nurses and care homes (he confirmed that in post-hearing submissions). He had no wish to publish the information. When given the opportunity by the Tribunal to say whether he was unhappy with the way the NMC had conducted its investigations, he demurred. It appears, therefore, that he does not wish to have the information in order to pursue the complaints within the NMC processes. On the information seen by the Tribunal about the Nurse C complaint, it does indeed appear that the NMC looked into matters thoroughly and competently.

41. Mr Hopkins accepted on behalf of the NMC that Mr Baldwin wanted the information in order to pursue a negligence action. He also explained that Mr Baldwin had made a request outside FOIA for the information. That was presently under consideration.

Discussion

A. Section 40(5)(b)(i) FOIA

42. In all that follows, the Tribunal will for convenience focus on the Nurse C complaint. However, its analysis applies equally to the other complaints.

FOIA

43. Section 1(1) FOIA provides:

> '*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*'.

44. Subsection (2) says that subsection (1) is subject to various provisions, including section 2, which is the gateway to the various exemptions set out in Part II. Some of the exemptions are subject to the public interest test set out in section 2(2)(b). Those in section 40(2) and section 40(5)(b) are for the most part (and for present purposes) absolute exemptions.

45. A requester does not have first to ask whether information is held: they may simply ask for it to be disclosed. However, for obvious reasons a public authority does not have to disclose information it does not hold. [4] Equally, the authority may refuse to confirm or deny that it holds the information (even if the requester has not asked that question), if one of the exemptions in Part II would thereby be engaged and, where relevant, the public interest in not saying whether the requested information is held outweighs that in giving that confirmation.

46. Section 40 has recently been amended to reflect the coming into force of the Data Protection Act 2018 (DPA 2018). At the time in question, subsection (2) provided:

> '*Any information to which a request for information relates is also exempt information if –*
>
> *(a) it constitutes personal data which do not fall within subsection (1) [the personal data of the requester], and*
>
> *(b) the first or second condition below is satisfied*'

47. Only the first condition is relevant. Subsection (3) read:

> '*The first condition is –*
>
> *(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene –*
>
> *(i) any of the data protection principles …*
>
> *…*'

48. Section 40(5)(b)(i) said:

> '*The duty to confirm or deny –*
>
> *…*
>
> *(b) does not arise in relation to other information if or to the extent that either –*
>
> *(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 …*
>
> *…*'

49. Section 40(7) provided:

[4] There is a partial definition of 'holds' in section 3(2) FOIA

'*In this section –*

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act'.

50. Section 1(1) of the DPA defined 'personal data' as:

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

(a) from those data, or

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

51. It will be seen that, in relation to both section 40(2) and section 40(5)(b)(i), information revealing 'personal data' would only be exempt from disclosure if any of the data protection principles would thereby be breached. Merely disclosing personal data does not suffice. The principles were, at the time in question, set out in schedule 1 to the DPA 1998. The only principle of relevance is the first (DPP1):

'*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
…'

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

i. **Condition 1**: the data subject has given his consent to the processing. However, the nurses have not given their consent (or, it should be said, withheld it – the NMC has not canvassed their opinion)

ii. **Condition 6**: '(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject; …'.

Condition 6(1) could apply and the Tribunal will consider it presently.

53. The DPA represented the transposition into UK law of Directive 95/46/EC (the directive), now replaced by the General Data Protection Regulation. [5] Article 7(f) of the directive was expressed in similar terms to condition 6(1). [6]

54. In *Common Services Agency v Scottish Information Commissioner*, [7] Lord Rodger of Earlsferry said: [8]

> '*Where the legislature has thus worked out the way that the requirements of data protection and freedom of information are to be reconciled, the role of the courts is just to apply the compromise to be found in the legislation. The [Freedom of Information (Scotland) Act 2002] gives people, other than the data subject, a right to information in certain circumstances and subject to certain exemptions. Discretion does not enter into it. There is, however, no reason why courts should favour the right to freedom of information over the rights of data subjects*'.

55. By parity of reasoning, there is no reason for the rights of data subjects to be favoured over those of freedom of information requesters. The 'compromise' – here, the balancing exercise required by condition 6(1) – simply has to be applied. Indeed, recital 72 of the directive recognises that there are two competing interests, not one which overrides the other:

> '*Whereas this Directive allows the principle of public access to official documents to be taken into account when implementing the principles set out in this Directive*'.

Was the Commissioner wrong to substitute section 40(5)(b)(i) for section 40(2) since the NMC had, in effect, already said that it held the requested information?

56. As the Commissioner recognises in her decision, by relying from the outset on the exemptions in section 40(2), 41 and 42, the NMC had in effect confirmed that it held the information. [9] Exemptions are only relevant if a public authority holds information. It might be said that the Commissioner was seeking to close the stable door long after the horse had bolted.

57. The answer lies in the Commissioner's jurisdiction. Under section 50(1) FOIA, her task is to consider whether a public authority has dealt with a request in accordance with the requirements of Part 1 of FOIA (including by its application

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[5] Regulation (EU) No 2016/679

[6] 'Member States shall provide that personal data may be processed only if:

…

f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1 (1)'.

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

[8] Para 68

[9] In paragraph 25 of her skeleton argument, Ms Kelsey says: 'The Commissioner recognises that, by relying on s.40(2) FOIA in response to the request, the NMC implicitly confirmed it holds the requested information …'.

of exemptions under Part II: see sections 1(2) and 2). It follows that she is looking back at the actions of the public authority. She was therefore, in principle, entitled to hold that the NMC should have relied on section 40(5)(b)(i) rather than section 40(2), even though the fact that the NMC relied on the latter provision made later reliance on the former ineffective.

The principles that FOIA requests are applicant and motive blind and that disclosure is to the world at large

58. There was considerable discussion at the hearing and in subsequent submissions about three related principles: (i) FOIA requests are applicant-blind; (ii) they are motive-blind; and (iii) FOIA disclosure is to the world at large. In particular, Mr Hopkins submitted that the third principle is universal and Ms Kelsey that it is near-universal. As the Tribunal will explain, whether that is right is not determinative of the appeal. However, out of deference to the parties' submissions and because it has implications for other cases, the Tribunal will consider it.

59. Part of the rationale for the principle that FOIA requests are applicant-blind is that requesters have to be treated in an even-handed manner. Requests are normally motive-blind because requesters do not have to say why they want the requested information. Both principles relate, at least in part, to the third principle: that disclosure is to the world at large. The principles have two consequences, it is said. First, a requester is free to do whatever he wishes with disclosed information: a public authority cannot, for example, impose a duty confidentiality. Second, once a public authority has disclosed information to a particular requester, it must disclose the same information to any subsequent requester.

60. Of course, disclosure to a requester is not literally disclosure to the whole world. Many requesters wish to have information simply for their own purposes and do not share it with anyone. Some public authorities, under a section 19 publication scheme, routinely publish on their websites (and therefore to the whole world) information they disclose under section 1(1)(b). Indeed, Mr Hopkins told the Tribunal that the NMC has traditionally done that, albeit that it now has a backlog (with the result that it had not reached Mr Baldwin's request). But that is a public authority's choice; many simply disclose information to the requester. When it is said that disclosure under section 1(1)(b) is to the whole world what is meant is that the requester is *free* to publish the information if he wishes. Baroness Hale recognised that disclosure is not necessarily in practice to the whole world when she said in *South Lanarkshire Council v Scottish Information Commissioner* (*South Lanarkshire*) [10] that '… these paragraphs [schedule 2 to the DPA] apply to all kinds of processing, not just to disclosure under the [Freedom of Information (Scotland) Act 2010, materially identical to FOIA], which in practice may mean disclosure to the whole wide world' (emphasis added).

[10] [2013] UKSC 55, [2013] 1 WLR 2421 para [8] http://www.bailii.org/uk/cases/UKSC/2013/55.html

61. Before considering how these principles impact on the application of section 40(5)(b)(i) to this case, it is important to recall the factual scenario. Mr Baldwin made a complaint against Nurse C in May 2016. The NMC immediately acknowledged receipt and indicated it would go through an initial assessment process. It gave the (reasonably unusual) first name for the nurse. The decision by the case examiner was not made until May 2017 but the important point is that Mr Baldwin already knew, when he made his FOIA request in November 2016 and the NMC gave its initial response in December 2016, that the NMC was investigating his complaint against Nurse C and therefore held information within the scope of his request. Importantly, the NMC did not seek to impress any confidentiality on the fact that it was investigating the complaint, as it later did in relation to his witness statement. Whether any such impressing would have had legal effect is not for the Tribunal to decide. It might not have done because, even without the NMC acknowledgment letter, Mr Baldwin knew that he had made a complaint against Nurse C and that the NMC would investigate in line with the 2001 Order (at least if Nurse C was a registrant). But in any event the NMC did not seek to impose confidentiality.

62. In these circumstances, a finding that the NMC should have refused to confirm or deny whether it held information within the scope of the request would be counter-intuitive: Mr Baldwin knew that it did. Not surprisingly, he is bewildered that the case has taken the diversion which it has. FOIA is a statute of constitutional importance. It is designed to enable citizens to hold public bodies to account and to participate in democratic decisions. The right to information is not absolute: there are other important interests to be protected and the legislation seeks to strike a balance between those interests and the right to know. But FOIA is intended to be accessible to citizens, who should be able to use it without facing unnecessary legalism or therefore needing recourse to lawyers. Indeed, in *Rodriguez-Noza v Information Commissioner and the Nursing and Midwifery Council; Information Commissioner v Foster and Nursing and Midwifery Council* (*Foster*), [11] Upper Tribunal Judge Jacobs decried the legalism which he thought had crept into the (First-tier) Tribunal's decision-making.

63. Every lawyer knows, and some litigants learn, that the law, on the one hand, and norms of justice and common sense, on the other, are not necessarily bedfellows. But neither do they occupy separate bedrooms with the doors bolted. The greater the gap between what lawyers say the law is and what the public think it should be, the more respect for the rule of law is imperilled, and the closer judges should therefore examine the legal proposition in question. In the present context, the Tribunal should only conclude that a public authority may refuse to confirm or deny that it holds information which a requester knows that it holds if driven to do so either by the canons of statutory construction (bearing in mind that one of those canons is that Parliament cannot have intended a result which is absurd or capricious) or by binding caselaw.

[11] [2015] UKUT 0449 (AAC) at [27] (10 August 2015)
http://www.bailii.org/uk/cases/UKUT/AAC/2015/449.html

64. Here, there is nothing in FOIA itself which compels the conclusion. The three principles are not set out in the legislation. They are the creature of judicial interpretation. Principles are developed to make legislation workable and fair, in light of the policy which underpins it. They have to be flexible. Principles which are forced into a straitjacket are likely to lead to injustice. It makes perfect sense that one should normally apply FOIA exemptions on the basis that disclosure to the requester is deemed to be disclosure to the whole world. For example, assume that information would be benign in the hands of a requester but would represent a risk to safety if he published it (as he is free to do). The law in that instance has to take account of the latter scenario. But assume instead that, at the time of the initial response to requestor x, disclosure would not represent a risk to safety even if he published it (which he chooses not to do); but that, by the time requester y made a request for the same information, there was a safety risk, perhaps because of a new terrorist threat. According to the principle that requester y must be treated in the same way as requester x (the applicant-blind principle), disclosure would have to follow, despite the new safety risk. That would clearly be absurd. The scenario illustrates why principles have to be applied flexibly.

65. It would therefore be surprising if caselaw demanded inflexibility. Mr Hopkins nevertheless says that it does: disclosure is *always*, he says, deemed to be to the whole world. Ms Kelsey's analysis of the caselaw is driven to allow for a single exception. They each point to *dicta* in a number of cases – Court of Appeal, High Court and Upper Tribunal as well as the Tribunal [12] – which refer to the principle without qualification and they conclude that the principle is therefore universal (or nearly universal). It should be said, however, that in none of those cases did the relevant judicial body say in terms that the principle was universal (or near-universal).

66. The starting-point in the Tribunal's analysis is a passage in the decision of Judge Jacobs in *Foster*. The cases involved complaints by Ms Rodriguez-Noza and Mrs Foster against nurses. Mrs Rodriguez-Noza is herself a nurse: her complaint was how she had been treated by colleagues. Mrs Foster complained about the care which her son had received. In each case, the NMC gave a 'neither confirm nor deny' (NCND) response under section 40(5)(b)(i) FOIA. Judge Jacobs found that that was the appropriate response in the two cases, in essence because each of the complainants had an alternative means of accessing the substantive information requested, such that they did not satisfy condition 6(1) of schedule 2 to the DPA.

67. In paragraph 30, he said:

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[12] *Webber v IC and Nottinghamshire Healthcare NHS Trust* (GIA/4090/2012 at [37]; *Office of Government Commerce v IC* [2008] 737 at [72]; *South Lanarkshire* at [8]; *Cabinet Office v IC and Aitchison* [2013] UKUT 0526 (AAC) at [58]; *BBC v Sugar* [2012] UKSC 4, [2012] 1 WLR 439 at [78]; *Willow v IC and Ministry of Justice* [2017] EWCA Civ 1876 at [36] and [52]; and *S v IC and General Register Office* EA/2006/0030 at [80]

'*Before leaving the analysis, I want to comment on two aspects of the arguments from Mr Hopkins [who in that case appeared for the Commissioner] and Mr Pitt-Payne. They both deployed general statements that are often made in FOIA cases. First, I was told that FOIA is applicant and motive blind. Second, I was told that disclosure under FOIA was disclosure to the whole world. There is much truth in both propositions, but they are not universally true. That makes it dangerous to rely on them as universally applicable principles that provide a sound basis on which to interpret FOIA. I merely wish to draw attention to this danger for future cases. I will not dwell on it beyond pointing out, by way of illustration, that it is impossible to apply paragraph 6(1) without having regard to the identity of the applicant, the interest pursued by the request, and the extent to which information is already potentially available to the public*'.

68. Mr Hopkins and Ms Kelsey say that the passage is *obiter* (not a necessary part of the judge's reasoning) and therefore not binding on the Tribunal. That may be so. However, since the case was about the very provisions at issue in the present case – section 40(5)(b)(i) and DPP1 via condition 6(1) of schedule 2 to the DPA – it is, at the least, of considerable persuasiveness.

69. In her post-hearing submissions, Ms Kelsey drew the Tribunal's attention to the three-judge Upper Tribunal decision in *PricewaterhouseCoopers LLP v Information Commissioner and HMRC* (*PricewaterhouseCoopers*). [13] The case involved the relationship between section 44(1) FOIA (statutory prohibitions on disclosure) and sections 18 and 23 Commissioners for Revenue & Customs Act 2005 (CRCA). The Upper Tribunal said this:

'*101 It does not follow, however, that it must always be assumed that every disclosure in response to a FOIA request must automatically be treated as a disclosure to the world at large. That will be the most usual result in cases turning on the interplay between, on the one hand, the obligation to disclose, and, on the other, the recognition that some categories of information may not be suitable for disclosure. But section 44 of FOIA creates a different test. It is not based on those broad freedom of information principles but provides, in effect, that they do not arise where another statute overrides them by imposing a prohibition on disclosure. In those circumstances, the outcome of an information request falls to be determined solely on the interpretation of the relevant provisions of that other statute. Care must be taken not to imply into them freedom of information criteria that were not or may not have been under consideration at the time when the legislation was enacted (see Secretary of State for the Home Office v BUAV [2008] EWHC 892 (QB))* ' (emphasis added).

70. As with so many *dicta* about the 'whole world' and related principles, this passage was *obiter*: the issue of consent which the Upper Tribunal was here considering did not arise in light of its decision on the construction of section 23 CRCA. However, as comments by a three-judge panel they are particularly persuasive.

[13] [2011] UKUT 372 (AAC) (Judges Williams, Wikeley and Ryan) (13 September 2011) http://www.bailii.org/uk/cases/UKUT/AAC/2011/372.html

The judges said that the 'whole world' principle is not inviolable. Ms Kelsey seeks to conclude that the principle was only displaced because of the interaction of FOIA (via section 44) and other legislation. But the Upper Tribunal did not say that. Its comment was general: '[it] does not follow, however, that it must always be assumed that every disclosure in response to a FOIA request must automatically be treated as a disclosure to the world at large'. It focused on section 44 FOIA because that was the exemption in issue. Once universality is breached, application of a principle has to be context-dependent. In any event, section 40(5)(b)(i), like section 44, involves the interaction of FOIA and other legislation (the DPA 1998).

71. At the hearing, Mr Hopkins accepted that the applicant-blind principle was not universal. In *Foster*, Judge Jacobs rejected his argument (for the Commissioner) that condition 6(1) had to be applied as if the requested data would be disclosed to a notional member of the public rather than to the requester. In other words, the identity of the requester could be important. Since the applicant-blind principle is not universal it would be surprising if the whole world principle, to which it is closely related, was. *PricewaterhouseCoopers* and *Foster* show that it is not.

Causation

72. Ultimately, the universality or otherwise of the principle is not determinative of the present appeal. The crucial factor is that it would not be confirmation by the NMC in response to the FOIA request that it holds the requested information which enables that fact to be broadcast but rather its *earlier* confirmation to Mr Baldwin that it held the information: he was at that earlier point free to tell the world that the NMC was investigating his complaint against Nurse C and would have remained free even had he not made a FOIA request. In *Foster*, Judge Jacobs quoted from the decision of Upper Tribunal Judge Turnbull in *MC v Information Commissioner and Chief Constable of Greater Manchester Police*: [14]

> '*In my judgment it is a nonsense to say that the public interest demands that a public authority give a 'neither confirm nor deny' response when the fact that the information exists is already in the public domain*'.

73. In that case, the requester, Mr Cubells, had asked the Greater Manchester Police (GMP) for the instructions given to a doctor commissioned by the police to investigate the death of his mother. The GMP refused to confirm or deny whether it held the information, citing the NCND provisions in section 40(5) and two qualified exemptions. It accepted that Mr Cubells knew that it held the instructions but it relied on the applicant-blind principle. The (First-tier) Tribunal upheld the reliance on NCND. Judge Turnbull overturned that decision because the Tribunal had not had regard to the fact that, by the time of the request, that the

[14] [2014] UKUT 481 (AAC) (22 October 2014) para 22

GMP held the instructions was in the public domain via a decision of the High Court in related judicial review proceedings brought by Mr Cubells. [15]

74. It would have been equally nonsensical, in the Tribunal's judgment, for the NMC to give an NCND response in relation to Mr Baldwin's request for information about its investigation into his complaint about Nurse C on the grounds that the fact of an investigation prejudices her privacy rights, when it had already told Mr Baldwin that it was investigating the complaint and had not purported to place any restriction on his use of the information. In other words, there is no causative link between confirmation under FOIA that the NMC holds the requested information and Mr Baldwin's being able to tell the world that it does: that link had already been established by its earlier letter.

75. It follows that confirming pursuant to the FOIA request that it held information about Nurse C was not the cause of any breach of her privacy rights, even if notionally that confirmation is treated as being to the whole world.

Does confirmation under FOIA represent greater authority?

76. Ms Kelsey nevertheless suggested that disclosure under FOIA gave greater authority to the information than disclosure through other means. But that cannot be right in the present case: the NMC had already written to Mr Baldwin on its headed notepaper confirming that it was investigating his complaint against Nurse C and without imposing any restriction on his use of that information. Had he been so minded, Mr Baldwin was free to publish that letter, with all the authority it represented, on the internet.

DPP1

77. The conclusion that a NCND response was not appropriate in this case is reinforced by consideration of condition 6(1) of schedule 2 to the DPA. It will be recalled that section 40(5)(b)(i) only applies if giving confirmation or denial would breach at least one of the data protection principles: the revelation of personal data is not enough. It is common ground that the only principle which might be breached is DPP1. It follows that, to resist a NCND response, Mr Baldwin may show that 'processing' (i.e. disclosing) the fact that the NMC was investigating Nurse C would be (a) fair; (b) lawful; and (c) meet one of the schedule 2 conditions. It is also common ground that the only condition potentially in play is condition 6(1).

78. The principal authority on condition 6(1) is *South Lanarkshire*. Baroness Hale, who gave the leading judgment, said [16] it was obvious that condition 6 requires three

[15] The Court of Appeal eventually upheld the decision of Mr Justice Simon not to quash the decision of the Independent Police Complaints Commissioner dismissing Mr Cubell's appeal against the Professional Standards Board in relation to the police investigation into his mother's death: *R (Cubells) v IPCC* [2012] EWCA Civ 1292

questions to be answered (and it was not obvious why further exegesis was required):

i. Is the data controller [here, the NMC] or the third party or parties to whom the data is disclosed [here, Mr Baldwin] pursuing a legitimate interest or interests?

ii. Is the processing involved necessary for the purposes of those interests? [17]

iii. Is the processing unwarranted by reason of prejudice to the rights and freedoms of legitimate interests of the data subject?

79. Baroness Hale recognised that, in the context of freedom of information requests, the condition required a balance to be struck between the rights of the data subject and the requester. [18] In *Foster*, Judge Jacobs foreswore the language of balance but, with respect, the question he posed – whether the interests of Mrs Rodriguez-Noza and Mrs Foster were sufficient to override the interests of the data subjects – involves striking a balance.

80. For the purposes of section 40(5)(b)(i) FOIA, the personal data which is being processed under DPP1 is limited to that which would be revealed by confirmation or denial: whether the NMC has investigated a particular nurse. It does not extend to all the information which has been requested and to which section 40(2) might apply. In other words, there has to be correlation between section 40(5)(b)(i) and DPP1 just as there has to be between section 40(2) and DPP1. The correlation is not the same. For example, application of DPP1 in the context of section 40(2) would extend to the privacy rights of any witnesses identified by the substantive information requested; witnesses would not be identified merely by confirmation that an investigation is underway. [19] In her post-hearing submissions, Ms Kelsey, in considering the condition 6(1) necessity test (see below), discusses whether Mr Baldwin has alternative means of obtaining the *substantive* information he has requested. That is not relevant to section 40(5)(b)(i).

81. What conclusion does analysis of DPP1 in the present context lead to? The Tribunal will first consider condition 6(1). Applying Baroness Hale's three-stage test, the first question when applying the condition in the context of section 40(5)(b)(i) FOIA is: 'Does Mr Baldwin have a legitimate interest in knowing whether the NMC holds information about an investigation into his complaint about Nurse C?'. But of course he already knew that it did so before making his FOIA request. The question whether someone has a legitimate interest in being told information he already knows must (to the extent that it has any meaning) be answered in the affirmative. The NMC and the Commissioner counter that it is

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[16] Paragraphs [18] and [19]

[17] 'Necessary' means 'reasonably necessary': *Goldsmiths International Business Scholl v IC & HO* [2014] UKUT 563

[18] See the final sentence of paragraph 9

not disclosure to Mr Baldwin which matters but rather disclosure to the whole world, which giving confirmation or denial under FOIA would represent. But, as already noted, it is not giving confirmation or denial pursuant to the FOIA request which is the proximate factor in facilitating global dissemination here but rather the NMC's prior confirmation to Mr Baldwin, without imposing any restriction, that it was investigating Nurse C.

82. The second condition 6(1) question is whether disclosure is necessary to pursue Mr Baldwin's legitimate interest in knowing the fact that Nurse C is being investigated. The Supreme Court in *South Lanarkshire* said that whether disclosure is necessary really involves asking whether, applying EU law proportionality principles, [20] there is another method reasonably open to the requester to obtain the relevant information which is less intrusive of the rights of the data subject (here, Nurse C). But since Mr Baldwin already knew that Nurse C was being investigated, the question of an alternative remedy does not arise. Similarly, there is no meaningful balance to be struck between his interests and those of Nurse C (the final condition 6(1) issue). Once again, it is not giving confirmation under FOIA that an investigation is being conducted which adversely affects her privacy but rather the NMC's prior confirmation that it was investigating.

83. For these reasons, Mr Baldwin satisfies condition 6(1). For similar reasons, 'disclosing' information he already knows must be fair. There is no dispute that, disregarding section 40(5)(b)(i) and DPP1, disclosure is lawful.

84. DPP1 is therefore not breached. There is no suggestion that giving confirmation or denial would breach any of the other data protection principles.

85. It follows that section 40(5)(b)(i) is not engaged in the circumstances of the present case.

Protecting the anonymity of the nurses

86. The Tribunal's conclusion is reinforced by the fact that it has proved perfectly possible to give confirmation or denial in the present case without revealing the identity of the nurses under investigation.

87. In her post-hearing submissions, Ms Kelsey disputes that: even a simple 'yes' response would disclose the information, if published alongside Mr Baldwin's request. But there is no nothing in FOIA which obliges public authorities to set out a request when giving a response. It is true that Mr Baldwin could publish his request with the response but he could already publish his complaint with the NMC's confirmation that it was investigating it.

[20] Relevant because of the source of the DPA is the directive

88. The fact that it is perfectly possible to give confirmation or denial without revealing anyone's identity is indeed demonstrated by the Commissioner's decision. She says, in terms, that the NMC has confirmed that it holds the requested information – by relying on section 40(2) and other exemptions – but no reader of her decision would have the slightest inkling of the identity of the nurses.

Naulls

89. The Tribunal is conscious that its decision on section 40(5)(b)(i) may appear to be at odds with that of a differently-constituted Tribunal on 8 October 2018 in *Naulls v Information Commissioner and The Nursing and Midwifery Council*. [21] The request was for the name of the senior lawyer involved in Mr Naulls' complaint about a nurse. The case followed the same pattern as the present one: the NMC refused the request relying on section 40(2) but the Commissioner said that it should have relied on section 40(5)(b)(i) instead (with which the NMC then agreed). Although the request was for the identity of the lawyer, the primary concern of both the NMC and the Commissioner seems to have been to protect the identity of the nurse about whom complaint had been made.

90. The Tribunal held that the Commissioner was right. It considered that the whole world principle was universal and that Judge Jacobs' comment in paragraph 30 of *Foster* suggesting that it was not was out of kilter not only with other caselaw but with his own observation in paragraph 23 that FOIA disclosure was free of any duty of confidence. It is not clear whether *PricewaterhouseCoopers* was cited to the Tribunal; at any rate, it did not refer to it.

91. The Tribunal also decided that condition 6(1) was not met: privacy rights overrode Mr Naulls' legitimate interests.

92. It is, of course, preferable that decisions of the Tribunal should be consistent. However, ultimately each Tribunal has to come to its own conclusion based on the evidence and its assessment of the law. The facts in *Naulls* may not have been materially identical (for example, it is not clear whether the NMC had already told Mr Naulls that it was investigating a complaint against the nurse).

Did the Commissioner improperly give advice to the NMC?

93. Mr Baldwin complains that, by deciding that section 40(5)(b)(i) applies rather than section 40(2), the Commissioner was giving the NMC advice. This has no impact on the outcome of the appeal but the Tribunal considers it for completeness.

94. The complaint is misconceived. It is perfectly proper for the Commissioner to say that a public authority should have relied on exemption x instead of, or in addition to, exemption y (sections 40(2) and 40(5)(b)(i) are exemptions in their

[21] EA/2018/0022

own right). By making such a finding the Commissioner is not giving advice to the public authority but simply applying the law as she sees it to the facts. Equally, the Commissioner may identify factors favouring the requester even though he or she has not raised them.

Conclusion on section 40(5)(b)(i)

95. For these reasons, the appeal is allowed. Section 40(5)(b)(i) does not apply. [22]

96. Because the NMC has already, in effect, confirmed that it holds information revealing personal data, there is no need for it to take any further steps as a result of this decision. There is therefore equally no need for the Tribunal to consider paragraphs 51 and 52 of schedule 20 to DPA 2018. [23]

B. Section 40(2)

Introduction

97. In *Information Commissioner and Malnick v Advisory Committee on Business Appointments*, [24] a three-judge Upper Tribunal held that, where the (First-tier) Tribunal decided that the Commissioner was wrong to uphold the decision of public authority on the basis of the exemptions she considered, the Tribunal would then have to consider other exemptions which were in play (rather than remit them to the Commissioner). It is not enough for Mr Baldwin to win on section 40(5)(b)(i) to get the information he wants; he must also show that section

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[22] In *Foster*, Judge Jacobs ultimately decided the two appeals on the basis that the requesters should have used alternative avenues to obtain the substantive information

[23] '51 Paragraphs 52 to 55 make provision about the Freedom of Information Act 2000 ("the 2000 Act").

52(1) This paragraph applies where a request for information was made to a public authority under the 2000 Act before the relevant time.

(2) To the extent that the request is dealt with after the relevant time, the amendments of sections 2 and 40 of the 2000 Act in Schedule 19 to this Act have effect for the purposes of determining whether the authority deals with the request in accordance with Part 1 of the 2000 Act.

(3) To the extent that the request was dealt with before the relevant time—

(a) the amendments of sections 2 and 40 of the 2000 Act in Schedule 19 to this Act do not have effect for the purposes of determining whether the authority dealt with the request in accordance with Part 1 of the 2000 Act, but

(b) the powers of the Commissioner and the Tribunal, on an application or appeal under the 2000 Act, do not include power to require the authority to take steps which it would not be required to take in order to comply with Part 1 of the 2000 Act as amended by Schedule 19 to this Act.

(4) In this paragraph—

"public authority" has the same meaning as in the 2000 Act;

"the relevant time" means the time when the amendments of sections 2 and 40 of the 2000 Act in Schedule 19 to this Act come into force'

[24] [2018] UKUT 72 (AAC) at para 109

40(2) does not apply (and, if it does not, sections 41 and 42 as well). It follows that the Tribunal must consider that provision.

98. In directions issued prior to the hearing, the Tribunal indicated that it would wish to hear submissions on section 40(2). Ms Kelsey and Mr Hopkins objected on the basis that they might wish to appeal against an adverse ruling on section 40(5)(b)(i), irrespective of the position on section 40(2). In the event, some of the discussion was at least as relevant to section 40(2) as to section 40(5)(b)(i). As already indicated, part of Ms Kelsey's post-hearing submission concerned the former. Mr Baldwin made three lengthy post-hearing submissions, all directed to section 40(2).

99. The Tribunal is satisfied that the parties have had ample opportunity of making their case on section 40(2). It would not be a proportionate use of resources to convene another hearing. Since the NMC has in effect already confirmed that it holds the requested information and the Tribunal's conclusion is that it is entitled to rely on section 40(2), it is not prejudiced by the Tribunal publishing its decision on that provision now. Whether the NMC or the Commissioner is entitled to appeal the section 40(5)(b)(i) decision is a separate issue, to which consideration will be given if either applies for permission.

Whether section 40(2) applies

100. The requested information would reveal the identity of living individuals, not simply the nurses about whom complaint is made but perhaps representatives of their employers and witnesses too. Some of that information, at least, will be new to Mr Baldwin.

101. The real issue is whether DPPI, and in particular condition 6(1) of schedule 2 to the DPA, applies to the requested information. In the circumstances of this case, there is considerable overlap between the stages of Baroness Hale's tripartite test - whether Mr Baldwin has a legitimate interest in acquiring the information, if so whether the information is (reasonably) necessary for him to pursue that interest and, if so, whether the rights, freedom and interests of the data subjects take precedence over his interest. The first stage involves asking why he wants the information and the second whether there is a reasonable alternative way in which he could obtain it which is less intrusive of privacy rights (in other words, outside FOIA).

102. As already noted, Mr Baldwin has been clear, both at the hearing and in his post-hearing submissions, that he wants the information for one purpose only: so that he can discuss with his solicitor whether to bring a negligence action, in particular (it seems) against Nurse C and the Surrey home. He does not want the information to pursue the NMC complaints (including, therefore, by making a complaint to the Professionals Standards Authority, which oversees the NMC, or

by judicial review), or to publicise in some way his dissatisfaction with the way his father was treated.

103. In this context, it might be questioned whether he has a legitimate interest in obtaining the information from the NMC. The NMC holds it for one purpose – to investigate his complaints – and he wants it for another. However, on balance the Tribunal considers that he does have a legitimate interest in the information. There does not have to be synergy between the reason information is held and why the requester wishes to have it. It is legitimate for Mr Baldwin to want access to information which he has been unable otherwise to access to assess with his solicitor whether there are grounds for a negligence action. In fact, his complaints about professional misconduct and his proposed negligence action are each based on the same facts.

104. Is disclosure (reasonably) necessary to pursue that interest? There are two principal alternative means open to Mr Baldwin. First, he can ask the NMC for the information outside FOIA and has in fact already done so. At first sight, it might seem unlikely that the NMC would accede to his request, given its approach to this appeal. However, with non-FOIA disclosure it could stipulate that Mr Baldwin was only to use the information for the proposed negligence action, and from his evidence it is likely he would accede to that. The privacy of the nurses would then be protected to a significant degree because their names would only be revealed if Mr Baldwin, no doubt heeding the advice of his solicitor, decided to bring an action against one or more of them. It costs him nothing to ask the NMC outside FOIA.

105. The other possible means is to make an application for pre-action disclosure under Part 31.16 of the Civil Procedure Rules. This would be against the nurse(s) and/or Surrey home against whom Mr Baldwin proposes bringing a negligence case. The Tribunal regards this as a reasonable alternative means too. There would be considerable overlap between the information the NMC has obtained through its investigations and the information Mr Baldwin could obtain on a pre-action disclosure application. If the application were successful, it would give him the information which he and his solicitor need to assess whether he has a strong enough case. Mr Baldwin would only be able to use the information for the purposes of the proceedings, until and unless it was referred to in open court. As with the first option, the privacy of the nurses would therefore be protected to a significant degree.

106. It is true that this would not be a free option (unless Mr Baldwin was able to obtain legal aid, which is unlikely, or a conditional free agreement). He would *prima facie* be liable for the other parties' costs if the application was unsuccessful. The reality, however, is that he would face costs risks – indeed, much larger ones – if he simply embarked on negligence proceedings, armed with information obtained from the NMC. It is also true that the judge on a pre-action disclosure application would inevitably in exercising his or her discretion make an

assessment of Mr Baldwin's prospects of success in pursuing the substantive action. If he concluded that the prospects were poor and for that reason declined to order disclosure, Mr Baldwin would not get the information. However, that would simply confirm that he has little to put into the balance for the third stage of the condition 6(1) test (see below).

107. Neither of the alternative routes might in the event prove fruitful. The Tribunal has to assess whether they were reasonable for Mr Baldwin to pursue at the time of the NMC's initial response to the request. The Tribunal considers that in all the circumstances they were, such that he fails the second condition 6(1) test. Ultimately, it does not matter because, in the Tribunal's judgment, he fails the third.

108. The Tribunal considers that the balance between his interest in accessing the information and the nurses' privacy rights comes down firmly on the side of the nurses. None of his complaints has been upheld. Indeed, in each case the NMC concluded that there was no case to answer. However, the fact that a complaint has been made can itself be damaging to reputation. Some members of the public tend to think 'no smoke without fire'. It would not be fair to the nurses to be associated with complaints which have been found to be unmeritorious. It should not, but might, affect employment prospects. The Tribunal accepts that, based on the NMC's normal practice, the nurses would have had a reasonable expectation that they would not be identified publicly until and unless a complaint reached the third stage. Even though the complaints relate to their public rather than private lives, their professional reputation is likely to be core to their being as individuals. There are therefore weighty considerations on their side of the condition 6(1) balancing exercise.

109. In addition, whilst it is not the Tribunal's function to second-guess what might happen in a negligence action, it is entitled, in assessing the value of the information to Mr Baldwin, to identify the formidable hurdles he appears to face. For example, he is not the personal representative (executor or administrator) of his father's estate and so would not be able to bring an action on the estate's behalf. He would therefore have to establish that he was financially dependent on his father and as a consequence had suffered loss resulting from his premature death. It is not clear that he was, in fact, financially dependent (they jointly owned their home). Any loss may well be small, especially given his father's uncertain prognosis. Second, it is now over eight years since the events which Mr Baldwin says caused or precipitated his father's death, or led to his suffering unnecessarily. Although the limitation period can be extended for good cause, the basic rule with a medical negligence action is that it must be brought within three years of the claimant having sufficient knowledge that he has a case. Mr Baldwin has been complaining from the outset about what he regards as the inadequate care his father received. Third, even if he can overcome limitation problems, it is inevitably going to be more difficult to bring a claim now than it would have been shortly after his father's death: the Surrey home appears not to have retained its

records and memories will have faded. Fourth, Mr Baldwin's sisters, who are potential witnesses, have refused to cooperate with him. Finally, even if there was misjudgement (and, of course, Nurse C and the others may well dispute that there was), as explained above that does not necessarily equate to negligence in the legal sense.

110. Because the information is likely to have limited value for him given the reason he wants it, and because the nurses' interest in privacy is weighty, the condition 6(1) balance comes down in their favour.

111. If this analysis is overly pessimistic and a negligence action would have good prospects, that would no doubt go into the mix in a pre-action disclosure application and reinforce that as a reasonable alternative route. In other words, Mr Baldwin fails at either the second or the third stage of the condition 6(1) analysis. This applies to all the information held by the NMC – redacting names would not help.

112. Mr Baldwin has already pursued several complaint routes. The reality, unpalatable though it will be for him, may well be that he has reached the end of the road in his understandable quest to obtain posthumous justice for his father.

Overall conclusion

113. The Tribunal's overall conclusion is that section 40(5)(b)(i) FOIA does not apply but that section 40(2) does, to the whole of the requested information. There is no need to consider the other exemptions on which the NMC has relied. The decision is unanimous.

The directions of 20 July 2018

114. The Tribunal needs, finally, to revisit the directions issued by the Registrar on 20 July 2018.

115. The Registrar made two directions: (i) the names of the nurses about whom Mr Baldwin had made complaint, the names and addresses of their employers and any other information which could identify the nurses should not be disclosed outside the proceedings; and (ii) similarly, information in the open bundle should not be disclosed outside the proceedings. The Registrar said breach of the directions could lead to proceedings for contempt of court (which is punishable with imprisonment). The purpose of the directions was evidently to maintain the status quo pending determination of the section 40(5)(b)(i) issue. That has now been determined.

116. As to (i), Mr Baldwin clearly already knew at least the identity of the nurses prior to his FOIA request. He told the Tribunal that he was in discussion with his solicitor (not instructed in relation to the request) about a possible negligence

action. He may, prior to 20 July 2018, have already told his solicitor the identity of some or all of the nurses. If so, that communication will not be caught by the terms of the direction. The Tribunal will consider any representations which he or the other parties wish to make in relation to direction (i).

117. As to (ii), there may be no reason for the direction to survive determination of the appeal. The Tribunal understands that Mr Baldwin provided much of the contents of the open bundle. The parties should seek to agree which (if any) of the information in the open bundle should remain subject to the direction. The Tribunal will again consider any representations in the event of a dispute.

Signed Judge David Thomas

Judge of the First-tier Tribunal
Date: 3 December 2018