



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

Appeal Reference: EA/2018/0037

**Decided without a hearing
On 16 July 2018**

Before

**JUDGE SOPHIE BUCKLEY
DAVID WILKINSON
GARETH JONES**

Between

SASHI SHASHIKANTH

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

1. The appeal is dismissed.

REASONS

Procedure

2. The parties and the tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of the Tribunal Procedure (First-Tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The tribunal considered an open bundle of documents including the grounds of appeal, reply and the appellant's response/further information.

Background

3. On 17 March 2017 the appellant made the following request for information from Hillingdon Clinical Commissioning Group ('the public authority'):

This is regarding the vote that was conducted this year to take on level 3 (delegated) commissioning responsibility.

Voting sites - 1. Northwood 2. Boundary House, Uxbridge

1. Names of practices that voted 'yes' i.e. in support of level 3 commissioning
 2. Names of practices that voted 'no' i.e. against level 3 commissioning
 3. Name of the practice that spoiled the ballot paper.
4. The public authority provided the numbers of practices that had voted in the ways specified in the request, but refused to provide the names, relying on s 41(1) of the Freedom of Information Act 2000 (FOIA).
 5. The Appellant requested an internal review and the public authority upheld its original position. The Appellant complained to the Information Commissioner ('the Commissioner') who issued Decision Notice FS50691865 finding that the requested information was exempt from disclosure under section 41 of the Freedom of Information Act 2000 (FOIA) because it was obtained by the public authority from another person and disclosure would constitute an actionable breach of confidence.

Factual background

6. On 22 February 2017 the public authority held a vote amongst GP practices on whether the public authority should take on level 3 delegated commissioning. Votes were made in private and the vote was overseen by 'Hillingdon Healthwatch' a separate albeit related organisation.
7. 35 practices voted and 11 practices abstained. The results were that 26 practices voted 'yes', 8 voted 'no' and there was one spoiled ballot paper. To be quorate 75% of practices were required to vote, and in order to proceed over 50% of the votes had to be 'yes'. The public authority therefore commenced full delegated commissioning.

Grounds of appeal

8. The Appellant's grounds of appeal argue that:

- a. Healthwatch were not a totally independent body. There were no external truly independent observers. The ballot papers were not signed or verified.
- b. The voting was not a secret vote.
- c. Without the spoiled ballot paper the turnout would have been below 75%.
- d. How do we know that a spoiled ballot paper was not created?
- e. Disclosing the names would show if the spoiled ballot paper and the other votes were genuine.
- f. The process should be open and transparent because of the importance of delegated commissioning to the public.
- g. The doctor-patient relationship would not be affected.
- h. If there was no malpractice, the public authority has nothing to fear from disclosure.

The relevant law

9. Section 41(1) FOIA provides:
Information is exempt information if –
 - (a) It was obtained by the public authority from any other person ... and,
 - (b) The disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
10. A number of factors are relevant in deciding whether there is an actionable breach of confidence (*Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47):
 - a. Does the information have the necessary quality of confidence?
 - b. Was it imparted in circumstances importing an obligation of confidence?
 - c. Would disclosure be an unauthorised use of the information to the detriment of the confider?
11. Although s 41 is an absolute exemption, there is a public interest defence to claims of breach of confidence, and therefore the tribunal must consider the public interest in disclosure in order to determine if there is an actionable breach of confidence.

Discussion and conclusions

12. We find that the information has the necessary quality of confidence, and that it was imparted in circumstances importing an obligation of confidence. There is nothing in the documents before the tribunal that suggests that it was mandatory for the vote to be held by secret ballot. However it is clear that the public authority took the decision to hold a confidential vote. The ballot papers were put in closed boxes and counted and opened by officials from the public authority in front of one of two observers from Hillingdon Healthwatch.
13. Hillingdon Healthwatch is not a fully independent organisation and has some links to the public authority. For example, one of the two observers, Graham

Hawkes, is on the governing body of the public authority in his capacity as representative of Healthwatch Hillingdon. However the tribunal concludes that this link does not affect the fact that the vote was intended and was seen to be a confidential vote. Nor is the confidential nature of the vote affected by the fact that the votes had the practice's names on them and were opened and counted in the presence of an observer by officials from the public authority. It was necessary for the practice to be identified because practices with higher patient population were given more block votes. The tribunal accepts that the public authority did not adopt as stringent a procedure as might have been expected in, for example, a general election, but we find that this does not affect the fact that the vote was intended to be and seen to be confidential. The procedure adopted by the public authority meant that practices would have had a reasonable expectation that the way they voted would be kept confidential.

14. The tribunal finds that disclosure would be detrimental, because it would undermine the expectation of confidentiality and the practices' expectation that the way they voted on other issues in the future would remain confidential. This might undermine the trust in the public authority. It could lead to pressure on practices to vote in a particular way and/or the practices being approached for comments about the way they had voted.
15. The tribunal accepts that without the spoilt ballot paper the turnout would have been below 75%. The tribunal accepts that Hillingdon Healthwatch was not totally independent. However this does not provide sufficient basis to support anything other than speculation on the part of the Appellant that a spoilt ballot paper might have been created. There is a general public interest in openness and transparency in relation to decision making on an issue of such importance to the public, and therefore a public interest in how the vote is operated, but we find that the public interest in disclosure is not of sufficient strength to outweigh the public interest in maintaining the obligation of confidence.
16. We therefore dismiss the appeal on the grounds that the public authority was entitled to withhold the information under s 41 FOIA.

Signed
Sophie Buckley

Judge of the First-tier Tribunal
Date: 24 July 2018
Promulgation date: 2 August 2018