



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FS50810127**

Appeal Reference: EA/2019/0368

**Considered on the papers at Wigan and Leigh Magistrates Court
On 31 January 2020**

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

JEAN NELSON & PAUL TAYLOR

Between

MARK TER-BERG

Appellant

and

INFORMATION COMMISSIONER

First Respondent

NHS ENGLAND

Second Respondent

DECISION AND REASONS

1. The Appellant (Mr Ter-Berg), who is a dentist, raised concerns about another dentist with NHS England (who have responsibility for helping ensure proper performance by NHS dentists) and also with the General Dental Council (the body responsible for the registration and regulation of dentists). He was concerned that NHS England (NHS-E) had not taken adequate action to protect the public interest (in particular patient safety) and he wrote to NHS-E on 11 November 2018:-

"You will be aware from the records that I made a protected disclosure to NHSE about the poor practice of [redacted] who works at [redacted].

This resulted in an investigation process which started with a visit by [redacted] dental practice advisor. I was advised that following this visit the matter was referred to Performance Advisory Groups (PAGs) and Performers Lists Decision Panels (PLDPs).

Please identify to me the names and GDC numbers of the GDC registrants who were members of the PAG and PLDPs who were involved in making decisions about [redacted] between September 2017 and August 2018. I also ask you to identify any other Dental Practice Advisors who have been involved in [redacted's] supervision over the last 3 years"

2. NHS England refused the request relying on s40(2) FOIA, the protection of personal data from disclosure. Mr Ter-Berg sought a review arguing:

"the information I am seeking is not personal information as it relates to individuals' professional, civic roles performing a regulatory function on behalf of the state, in a role where there is a public interest in transparency"

3. NHS England maintained that position on review.

"Section 40 was appropriately engaged as NHS England has responsibility for protecting the personal information of its employees... We consider that to release names and job titles of individuals, non-senior members of staff is contrary to the expectations of staff as this could potentially identify them and would affect their privacy and therefore is exempt from disclosure under section 40(2) of the FOI Act."

4. Mr Ter-Berg complained to the Respondent (the Commissioner) who investigated. During the course of the investigation Mr Ter-Berg disclosed to the Commissioner a letter he had received from the GDC in January 2019 after he had raised this and other issues with them. This stated:-

"I can reassure you that the NHSE and the GDC have an information sharing agreement, which would enable NHSE to share directly with the GDC details of any registrants, including their committee members and dental advisers, regarding whom they have fitness to practice concerns. I trust that this is satisfactory reassurance that there is a scrutiny and escalation route in these instances where NHSE has concerns that a committee member or dental adviser may have acted in bad faith or outside their delegated authority"

5. On 30 September 2019 the Commissioner issued her decision notice upholding the position taken by NHS England. During the course of her investigation she accepted the explanation that dentists are not supervised by its Dental Practice Advisers (DPA) and that therefore no information was held with respect to "Supervisors" She noted that a DPA had visited after Mr Ter-Berg's

initial complaint as part of the investigation but that was distinct from day to day supervision. With respect to the balance of the request NHS-E had acknowledged that the information related to the panel members' professional and public roles and that disclosure would foster accountability and transparency. She found that there was a legitimate interest in disclosing the names of the dentist members of these bodies, but that they had a reasonable expectation that their personal information would not be disclosed. This expectation arises from the fact that the panel members were also working dentists whose involvement in reviews and suspensions for NHS-E was not publicly known since NHS-E did not publish their names in respect to the work they carried out. It was also understood that their proceedings were confidential and that information relating to them would only be known to those directly involved. She noted the arrangements between NHS-E and that GDC provided a mechanism for NHS-E to share any concerns about such individuals; also that there was no suggestion that NHS-E had done so. She concluded:-

"Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful."

Background

6. In his notice of appeal of 7 October 2019 (incorrectly dated 7 September) Mr Ter-Berg set out the background to the request. He had become aware of issues with respect to the safety of the performance of a dentist. He raised them with NHS-E in September 2017, NHS-E visited in October, he wrote again in December. In April/May 2018 having seen further matters which gave him concern he contacted the GDC about the dentist and others. He also raised concerns with the GDC about (unidentified) dentist members of the PAG and PLDP of NHS-E. In July 2018 the dentist was placed under conditions by NHS-E and GDC. NHS-E provided the Commissioner with a press report showing that after a hearing before the Interim Orders Committee of the GDC, conditions were imposed requiring regular supervision of and reporting on practice; further training on a range of clinical issues and regular clinical audit on a range of aspects of practice. The following month Mr Ter-Berg was dismissed by the practice which employed the two dentists and he has made a claim against the practice.
7. He argued that the safety of patients was the primary concern and that dentists who police the profession should be held to account if they do not prioritise patient safety. He submitted that NHS-E had been aware of poor performance by the dentist years before his first complaint and that the lack of effective action NHS-E from September 2017 to July 2018 caused further avoidable harm to patients. The dentist members of the NHS-E bodies had an obligation to

refer their concerns to the GDC if they thought that patients needed to be protected from a dentist. There was therefore a case that the dentists on the PAG and PLDP had breached GDC guidance and should be answerable for it. He argued that the NHS-E bodies had failed to protect the public.

8. He submitted that Article 6 of ECHR applied to these two bodies since they could stop a dentist working for the NHS and by analogy with the GDC whose panel members were identified. He submitted that the potential distress to panel members should not prevent disclosure. He submitted that a DPA attended the practice, examined records, identified failures and gave guidance; on Mr Ter-Berg's interpretation that was supervision and the DPA was a supervisor.
9. In resisting the appeal the Commissioner maintained the position set out in her decision notice. She confirmed that it was proper to take into account any distress which would be caused to panel members by, for example, dissatisfied individuals seeking to challenge panel members in person or through internet campaigns. She considered that the role of a DPA was distinct from that of a supervisor. She maintained the position that disclosure would be unlawful.
10. In its response NHS-E explained that its role was distinct from that of the GDC – its role, with respect to a dentist, was *fitness for purpose* – i.e. to hold a NHS contract to provide services to the public and so be included on its Performers List; whereas the GDC as a professional regulator was concerned with *fitness to practice*. NHS-E had procedures under the Performers Lists Regulations 2013 to manage concerns about the performance of its contracts by dentists. It has published the *Framework for Managing Performance Concerns in Primary Care* which explains the structures, processes and decision-making for doing so. Within this procedure a PAG could order that an investigation be carried out, a PLDP could conduct hearings into concerns and make decisions, including to suspend or remove a dentist from the List. The two sorts of panels had similar compositions of four members including one lay member, two NHS managers and one dentist. The dentist's role was to provide input into the decision-making drawing upon their professional expertise within the group of four members. There were safeguards to ensure that any concerns about individual panel members were identified and acted upon, however there was potential for them to be targeted and singled-out for their actions. It was a condition of membership of PAG/PLDP that the individual practitioners were not "subject to any investigation, restrictions, conditions or warnings from the professional body". They had a duty to disclose any such matters. They were subject to induction, training and review. These individuals carried out their roles in PAG/PLDP helping NHS-E discharge its statutory duties, alongside their work as dentists.
11. NHS-E in its arrangements for PAG and PLDP struck a balance between openness and transparency to the practitioner under investigation (who would

know the identities of the members of the panel) and confidentiality. There were mechanisms for review and appeal of NHS-E with respect to its decisions in relation to performers lists.

Consideration

12. The starting point for consideration of this appeal is the legal framework provided by s40 FOIA (as amended) which provides:-

"40 Personal information.

...

(2) Any information to which a request for information relates is also exempt information if –

...

(b) the first, second or third condition below is satisfied.

(3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act –

(a) would contravene any of the data protection principles,"

13. The most relevant data protection principle is that contained in Article 5(1)(a) of the GDPR that – personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject. The relevant potentially lawful basis for processing is Article 6(1)(f):-

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data..."

14. In his appeal Mr Ter-Berg has argued that NHS-E has failed in its duty to protect patients by failing to act sufficiently swiftly or at all to intervene to suspend a dentist. He wishes to have disclosed the names of all the dentists involved in the NHS-E's processes which considered the matter. In essence the justification for the disclosure is that they should be held accountable and be subject to disciplinary investigation by the GDC. This is to fundamentally misunderstand their role and responsibility and on the back of this misunderstanding to seek to scapegoat individual dentists. On the information before the tribunal it is clear that they have specific limited roles within a larger organisational response to the complaints that NHS-E received.

15. There is a legitimate interest in understanding the processes of NHS-E, whether they are sufficient to deal with a case such as this, whether they could be swifter to move to protect the public either in this case or generally. However the legitimate interest in knowing the names of the dentists who were involved in the administration of this process is slight. By personalising the issue Mr Ter-Berg has in essence sought to shift responsibility for the performance of NHS-E, which may or may not be deficient in this case, to a

number of individuals with limited roles who have the desirable attribute that, if identified to him, can be reported to the GDC.

16. While NHS-E acknowledged (and the Commissioner has found) that there is a legitimate interest in knowing that a review has been carried out it did not consider that there was an interest in the identity of the individuals if information confirming that the individuals were suitably qualified were disclosed. It seems to the tribunal that the identity of the persons involved is at best secondary to the primary interest. Similar considerations arise with respect to necessity. In resisting the appeal NHS-E noted that (paragraph 30):-

Although NHS England is able to refer a discipline-specific member to the relevant regulatory body, this would be highly unusual. The nature of the discipline specific member (i.e. offering their professional opinion) means that it is hard to see in what circumstances this would warrant a fitness to practice referral."

17. The tribunal agrees. The procedural safeguards around the appointment, training, review and reporting requirements provides sufficient safeguard to the public interest without recourse to disclosure of individual names. In balancing the interests of the data subjects in their right to privacy against the public interest in disclosing the information, the balance is decidedly in favour of non-disclosure.

18. Mr Ter-Berg also argued that the role of the Dental Practice Adviser who visited and examined the work of the dentist was, properly considered, discharging the role of supervisor and accordingly the identity of any individual who had carried out that role should be disclosed. The tribunal does not accept that analysis of the meaning of the word "supervisor". Supervisor would be an appropriate term for an individual employed by the company which employed the dentist who had overall responsibility for the work of the dentist, however the DPA's role was to report back to NHS-E. NHS-E interpreted the request in a reasonable way which accords with the normal meaning of the word. Furthermore, even if Mr Ter-Berg's interpretation is correct, the same issue with respect to the protection of personal data would apply to a DPA as it applies to members of a PAG and a PLDP.

19. The appeal is without merit and is dismissed.

Signed Hughes

Judge of the First-tier Tribunal

Date: 14 February 2020

Promulgation date: 17 February 2020