



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0091
Information Commissioner's Ref: FS50082764

Heard at Bedford Square, London
On 18 and 19 June 2008

Decision Promulgated
21 July 2008

BEFORE

CHAIRMAN
Mr H Forrest
and
LAY MEMBERS

MR IVAN WILSON
MR JOHN RANDALL

Between

Mrs B Francis

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

South Essex Partnership Foundation NHS Trust

Additional Party

Representation:

For the Appellant: Mrs Francis, in person
For the Respondent: Mr J Boddy, barrister
For the Additional Party: Mr T Pitt-Payne, barrister

Decision

The Tribunal allows the appeal in part and substitutes the following decision notice in place of the decision notice dated 8 August 2007.

SUBSTITUTED DECISION NOTICE

Dated 21 July 2008

Public Authority: South Essex Partnership NHS Foundation Trust

Address : The Lodge, Runwell Chase, Runwell, Wickford, Essex, SS15 6NX

Name of Complainant: Mrs Barbara Francis

The Substituted Decision

For the reasons set out in the Tribunal's determination, the substituted decision is that

1. Information, included in Mrs Francis' request, was held by the Trust, and therefore within the scope of the Freedom of Information Act; but it had not been found, and further steps would not be ordered as the Trust had already exceeded the time required of them under section 12 of the Act.
2. The Trust were entitled to claim that information held by Beachcroft Wansborough was covered by legal professional privilege; and the balance of the public interest was in favour of maintaining the exemption for that information.
3. Information held by Bevan Ashford was held on behalf of the Trust, and should be released to Mrs Francis.
4. Information held by Eversheds was not held by or on behalf of the Trust, and therefore fell outside the scope of the Freedom of Information Act.
5. That part of the appeal relating to the first point of Mrs Francis' request for information on 25 March 2005, is adjourned for further consideration by the parties and the Tribunal. Directions for that further consideration are issued separately.

Action Required

The information contained in the Bevan Ashford file before the Tribunal (save for the Miscellaneous document at tab 10), should be released to Mrs Francis.

Dated this 21st day of July 2008

Signed

Deputy Chairman, Information Tribunal

Reasons for Decision

Introduction

1. This appeal concerns a request for information made by Mrs Francis to the South Essex Partnership NHS Foundation Trust (the Trust; previously referred to as the South Essex Partnership NHS Trust). The request arises out of the circumstances in which Mrs Francis' son, Jason Francis, died in August 1998.
2. For some years before his death, Jason Francis had been receiving medical care from, amongst others, the Southend Community Care Services NHS Trust (the Southend Trust). Jason Francis had received treatment from a psychiatrist, Dr Killala, employed by the Southend Trust. Shortly before his death Jason had been admitted to the Accident and Emergency Department of Southend Hospital, which was managed by Southend Hospital NHS Trust, a different Trust. In the evening, against medical advice, he discharged himself. Later that evening he died, after falling from a fourth floor window.
3. The circumstances of his death were investigated at an Inquest, which returned an open verdict. The care he had received from the Southend Hospital NHS Trust was investigated by the Health Services Ombudsman. Internal investigations were also made, on different occasions, by the Southend and other Trusts. The police made inquiries for the Inquest, and have made further enquiries more recently. The General Medical Council commenced disciplinary proceedings against Dr Killala, over various matters of concern. These were later closed, on account of Dr Killala's ill health, and he was suspended from practise on ill health grounds. Mrs Francis has herself made many enquiries of the various bodies involved seeking information. Various firms of solicitors have been engaged from time to time on behalf of the different parties, including Mrs Francis.
4. As a result of these enquiries, formal and informal, Mrs Francis has amassed a considerable amount of information, surrounding the circumstances of her son's death, and his previous care. A real difficulty for anyone now attempting to consider a request for information, such as the Information Commissioner or the Tribunal itself, is created by the multiple overlapping enquiries, and the ways in which reports and records have been referred to for their different purposes, not always identically. Moreover the organisational structures, and names, of the NHS bodies involved have changed over the years. In April 2000 the Southend Community Care Services NHS Trust merged with Thameside Community Healthcare NHS Trust to become the South Essex Mental Health and Community Care Trust. That Trust (the Trust involved in these proceedings) became the South Essex Partnership Trust, and then changed its name again to the South Essex Partnership Foundation Trust.

The request for information

5. In correspondence with the Trust and other bodies, Mrs Francis requested, and was supplied with, information relating to her son's death. However, the Trust did not send her everything she requested. Some records could not be found: in particular, medical records for her son from Queensway, which recorded the care

he had received from mental health services, could not be located; other material was deliberately withheld as the Trust claimed it was legally privileged from disclosure. The Trust told her that they believed they had sent her everything they could find that they could properly disclose.

6. Mrs Francis was dissatisfied with extent of the information the Trust had disclosed. Following the introduction of the Freedom of Information Act (FOIA) in January 2005, she sent a request for information under FOIA to the Trust, dated 26 March 2005. It requested 7 categories of information:
 1. All documents previously withheld under legally privileged.
 2. My Son's complaints files regarding the events which took place in 1995, and any others previously withheld.
 3. The Queensway Mental Health department files.
 4. Any statements made by any member or former member of staff in relation to my Son or my Son's treatment.
 5. All notes, minutes or reports of meetings or investigations regarding my Son.
 6. I understand that on 29 November 2000, 11 boxes were found at Runwell Hospital with Dr Killala's personal effects, these boxes contained numerous patient's records and photographs, I would like copies of all records or photographs regarding or in connection with my Son.
 7. Any information whatsoever which has previously been withheld.
7. This was the first FOIA request the Trust had received, and was dealt with by Mrs Leonard, the Director of Information at the Trust, and her staff. The Trust replied to the request disclosing some further information, and stating that most of the information had already been disclosed; some could not be found; some was withheld as legally privileged.

The complaint to the Information Commissioner

8. Mrs Francis remained dissatisfied and on 8 July 2005 complained to the Information Commissioner (the IC). As part of his investigation, the IC enquired of documents held by various firms of solicitors on behalf of the Trust. The Trust obtained copies of documents from the various solicitors; they released some further information, but refused disclosure of other documents on the grounds of legal privilege and that the documents were owned by the solicitors involved, rather than the Trust; these therefore fell outside the scope of a FOIA request altogether, as requests can only apply to information held by the Trust, or on its behalf.
9. On 8 August 2007, the IC issued his Decision Notice. This held that the Trust had initially breached the requirements of the Act by not issuing an adequate refusal notice. This aspect of the Notice has not been appealed to us. The IC accepted the Trust's argument in relation to information provided by Bevan Ashford, solicitors to the Trust, that the information was not held on behalf of the Trust and

therefore fell outside the scope of a request under FOIA to the Trust. The IC accepted that legal professional privilege applied to the other withheld information; and that therefore the material was exempt under section 42 FOIA, subject to the public interest test. The IC considered the test and decided that the balance of public interest came down in favour of maintaining the exemption. The IC ordered no steps to be taken.

10. The IC was critical of the Trust in a number of ways, referring to: "Poor records management and the fact that some information was missing and that the present Trust was unable to locate it, exacerbated the complainant's mistrust and suspicion that information was being deliberately withheld." However, the IC balanced this by accepting that the Trust "have demonstrated a desire to be open and transparent", for example, by releasing some information previously withheld as legally privileged.

The appeal to the Tribunal

11. Mrs Francis appealed to the Tribunal on 29 August 2007. At a directions hearing on 23 November 2007, the issues in the appeal were identified as follows:

The Decision Notice, of 8 August 2007, dealt with the outstanding information, which broadly, falls into three categories:

- A. Information withheld as subject to legal professional privilege (section 42 FOIA)
- B. Information that, at the time of the request, the NHS Trust did not hold, and which was not held by another person on behalf of the Trust ("the Bevan Ashford papers")
- C. Information that cannot now be found.

The issue in the appeal is whether the conclusions reached by the Information Commissioner in the Decision Notice in relation to those three categories of information are correct in law.

Evidence

12. We heard evidence from Mrs Leonard, the Director of Information at the Trust, where (with its various predecessors) she has worked for 32 years. Her main responsibility had been for patient and medical records, but in 2005, she became responsible for FOIA requests as well. We were referred to a bundle of some 256 pages of documents; in addition the Trust produced some papers from Eversheds solicitors, in closed session; and Mrs Francis produced 4 documents, dated 10.2.2000, 5.9.2001, 4.3.2002, and 23.5.2005 which showed receipt by the Trust of various documents, now missing, but which had been received or held by the Trust at various times. We did not hear evidence formally from Mrs Francis, but we read her various witness statements, and submissions to the tribunal. The tribunal heard the majority of evidence and submissions in open hearing, but where we considered the information which was the subject of the request in detail, and by reference to its content, we moved to closed session, without Mrs Francis or members of the public present, and received evidence and submissions on a closed basis.

Submissions and analysis

Information which cannot be found.

13. We considered first the category of information which the Trust say cannot now be found. One difficulty we faced, like others who investigated, was knowing what information fell into this category. The difficulty comes from the open way in which the request is framed. Only part of it was expressly defined, for example: "3. The Queensway Mental Health department files". Even that cannot be taken literally, but has been sensibly and correctly taken to refer, in context, only to information and files relating to Jason Francis. Other parts of the request are defined by reference to previous correspondence: "1. All documents previously withheld under legally privileged". Much of the other information requested is not clearly defined; for example, "5. All notes, minutes or reports of meetings or investigations regarding my Son". This is a very open category: does it refer to investigations within the Trust, or extend to external investigations such as the Coroner's inquest? The last category, "7. Any information whatsoever which has previously been withheld." is even more open ended, and potentially infinite. We bear in mind that this was the first FOIA request the Trust had dealt with, but with hindsight it would have been better if the Trust had exercised its power under section 1(3) FOIA to request clarification of the request before dealing with it.
14. Some specific information was clearly identified as falling within the category which the Trust cannot now find: the Queensway records, for example. Other information, such as files relating to the inquest, emerged during the documents search conducted by Mrs Leonard, prompted in part by the IC's enquiries. This unearthed for example, the Bevan Ashford file of papers prepared for the inquest. It appeared from a letter from Bevan Ashford, solicitors (now Bevan Brittan) of 21 June 2001, to Ms V Baker, the Trust's legal and Insurance advisor, that Bevan Ashford sent the trust a copy of a transcript of the notes of evidence at the inquest. Mrs Francis produced this letter. She had been sent it as part of an earlier request for records to one of the investigatory bodies. Mrs Leonard had been unaware of the letter, and could not find the inquest transcript, or indeed any other documents relating to the inquest, despite the Trust being formally legally represented at it.
15. There were other similar specific examples of documents which could not now be found. For example, in February 2000, the Department of Health requested an urgent report from the Trust as part of their investigation into a complaint Mrs Francis had made to them. In order to respond, the Chief Executive of the Trust sent a number of urgent emails and memos requesting various documents to be sent to solicitors, Eversheds; he wished to obtain their advice before responding to the Department. Copies of these emails and memos had been sent to Mrs Francis previously, from various sources. Mrs Leonard was unaware of their existence and could trace no documents held by the Trust relating to any report that was sent to the Secretary of State, or the documents that were sent to Eversheds.
16. Some specific items referred to by Mrs Francis before us as withheld can be dealt with fairly easily. In correspondence with her, the Trust had referred to "a report from the Coroner". Mrs Francis responds by saying that she has never seen such

a report, and that this, too, is information withheld from her. At the hearing, it was explained that the "report" referred to is simply the verdict from the Coroner's Inquest. There is no separate report to disclose. Similarly, Mrs Francis refers to earlier correspondence which establishes that medical files relating to her son were found in the 11 boxes of Dr Killala's personal effects. Yet the search conducted later by Mrs Leonard's colleague yielded nothing related to Mr Francis. This, too, is taken by Mrs Francis as another instance of information being concealed or withheld from her. We take a different view: it seems to us that the results of the search are entirely consistent with patient files having earlier been found in the boxes. It seems very unlikely that having found such material in the boxes, the files would have been replaced there, rather than being put back in their proper place with other medical records. It follows that by the time the more recent search was conducted, nothing was left relating to Mr Francis. We accept Mrs Leonard's evidence on the point.

17. In giving her evidence, Mrs Leonard was clearly embarrassed and frustrated at her inability to locate the missing documents. In part, she blamed poor record keeping by the Southend Trust, before the merger in April 2000. The merger itself inevitably caused difficulties in tracking records down. In some cases, for example, the Queensway files, there was a clear paper trail, which simply stopped: the files were recorded as delivered back from solicitors (where they had been for the inquest), but the Trust had not recorded where they had then been stored. Mrs Leonard had focussed her efforts on information stored under the names of Mrs Francis and Jason Francis. She had not specifically searched files held under Dr Killala's name, or the GMC proceedings relating to him.
18. The Trust is not obliged, of course, to make an exhaustive search. Under section 12 FOIA and the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, the Trust is not obliged to comply with a FOIA request if it estimates the cost of compliance would exceed 18 hours work. The Trust did not, as it might have, estimate the likely cost of compliance with Mrs Francis' request, and only raised the section 12 limit before the IC. It argues that we should not now order any further steps to be taken, by way of further searches, since the Trust has now clearly exceeded the limit, on Mrs Leonard's clear and unchallenged evidence.
19. We accept that Mrs Leonard and her colleagues have searched in good faith for the information requested, understandably focussing on finding information stored under the names of Mrs Francis and her son. We are surprised that this search did not throw up any pointers to relevant information held in other files, for example, files for Dr Killala or the Secretary of State. This suggests an inadequate level of cross-referencing in the Trust's filing system. However, we accept that, given the section 12 limit, we should not now order the Trust to search further.
20. The Trust argues, on the strength of Mrs Leonard's diligent enquiries, that we should draw the inference that the Trust does not now hold the information, if it ever did; and since the Trust can only be required under FOIA to disclose information which it holds, we should find the request for information which cannot be found, to fall outside the Act. We decline to draw that inference. Mrs Leonard did not suggest that any of the missing documents had been destroyed, only that

they had not been found. There was clear evidence that the Trust has in the past held such documents as the Queensway records, the Inquest Transcript, and the report into Mrs Francis' complaint sent by the Chief Executive to the Secretary of State for Health. We find it unlikely that the records have been either destroyed or removed from the Trust altogether. Given the sensitivity of some of the records, apparent from the Chief Executive's personal involvement in obtaining information back in early 2000, it seems to us very unlikely that the Trust has not kept a record somewhere. More likely, on a balance of probability, is that the records are still held by the Trust, but cannot now be located in the time required by the Act to be spent searching for them.

Ownership of papers held by solicitors

21. Section 3 (2)(b) of the Act provides that information is held by a public authority if it is held by another person on behalf of the authority. In this case, sets of papers, of potential relevance to the application, were held by firms of solicitors, who had been instructed to represent the Trust. In respect of each of these the Tribunal had to consider whether the papers were owned by the Trust, as client, or whether they were owned by the firm of solicitors. If the former, the papers were held on behalf of the Trust and would be disclosable unless an exemption applied. If the latter, the papers were held by a private entity outwith the scope of the Act, and would not be disclosable.
22. The Tribunal was directed to a number of authorities on the ownership of solicitors' files. The Trust sought to place reliance on the statement of principle in *Solicitors' Negligence and Liability*, Flenley & Leech (Tottel 2008): at paragraph 14.02, pages 706-707. This provides that the client is the owner of all documents that were created or received by the solicitor whilst acting as the client's agent. Such documents will include all transactional documents (and drafts thereof), correspondence passing between the solicitor and third parties and attendance notes of conversations between the solicitor and third parties whilst acting as the client's solicitor and agent. The solicitor's working papers belong to the solicitor. Such papers include correspondence to and from the client, attendance notes of discussions with the client and drafts of letters and notes of other research. The statement of principle arises from *Leicestershire County Council v Faraday* [1941] 2 KB 205; and *Re Wheatcroft* [1877] 6 Ch D 97.
23. Mrs Francis directed us to *The Guide to the Professional Conduct of Solicitors 1999* (the version of the *Guide* that was in force at the time of her application) and to Annex 12A on page 253. This document, published by the Law Society, advises solicitors that client files are likely to contain a mixture of documents belonging to the client and to the solicitor. The guidance reflects the principle set out in Flenley & Leech, and sets out some helpful examples of the application of the principle.
24. The Law Society guidance assisted the Tribunal in one particular respect. The leading cases on which the principle is based date from 1941 and 1877, and thus pre-date the general availability of the photocopier. The Law Society guidance provides that copies made for the client's benefit, of letters received by the solicitor, belong to the client; whereas copies of the same letters, made for the

benefit or protection of the solicitor, where the cost of copying is not regarded as an item chargeable against the client, belong to the solicitor.

25. This distinction is relevant, as it is now common for photocopies to be made of documents. A file may contain a clean (or original) copy, and a photocopy bearing the solicitor's annotations. The former may well belong to the client, the latter may well be a working paper belonging to the solicitor. This distinction is an issue with respect to one of the sets of papers discussed below.
26. Three sets of papers were considered by the Tribunal, from Messrs Eversheds, Beachcroft Wansborough and Bevan Brittan (formerly Bevan Ashford).

THE EVERSLEDS PAPERS

27. The Eversheds papers were produced to the Tribunal, on the day of the hearing, in closed session. They consisted only of a file opening sheet and papers relating to billing. The file contained nothing of substance in relation to any named individual. The nature of the file, and the amount of time billed, suggested strongly that it related to advice given orally.
28. The papers related solely to the internal administrative arrangements of the firm, and were clearly the property of the firm. The Tribunal found they were not papers held on behalf of the Trust.

THE BEACHCROFT WANSBOROUGH PAPERS

29. The Beachcroft Wansborough papers were provided to the Tribunal in a closed bundle. It was clear to the Tribunal that these papers were a copy of a solicitor's file. They included correspondence, attendance notes, manuscript notes and annotated papers. The Tribunal found (see below) that the exemption in s.42 (legal professional privilege) was engaged, and that the public interest in maintaining the exemption outweighed the public interest in disclosure. As such, it was not necessary for the Tribunal to determine whether or not the papers were held, in whole or in part, on behalf of the Trust.

THE BEVAN BRITTAN PAPERS

30. The Bevan Brittan papers were provided to the Tribunal in a closed bundle. The papers appeared to relate to the inquest into the death of Jason Francis, at which the Trust was represented by Bevan Ashford (as it then was). The Trust argued, in its skeleton argument, that the papers were held by Bevan Brittan on its own behalf, not on behalf of the Trust and, should the Tribunal not accept this point in respect of some or all of the papers, that the exemption in s.42 (legal professional privilege) was engaged.
31. In oral submission the Trust accepted the inquest bundle would have been made available to all parties to the inquest (including Mrs Francis, who was represented legally at the inquest). By making the papers available in this way, privilege in them was waived. The Trust did not pursue the privilege point further, in respect of these papers. That concession seems to us sensibly made; it would have been

difficult in any event for the Trust to claim privilege in respect of many of the documents in the bundle since few if any had been produced for the purpose of seeking legal advice, and it is doubtful if their mere assembly into a bundle to be used at an inquest could by itself attract privilege.

32. The Trust maintained, nevertheless, that the papers were the property of Bevan Brittan, not of the Trust. In her evidence Mrs Leonard described the papers as "heavily annotated". She said further that she had been told by a solicitor who had dealt with the matter that the file was "heavily annotated" and was the working file used by Bevan Ashford (as it then was) at the inquest. Heavy annotation could have been an indication that the file was a set of working papers and, as such, the property of Bevan Brittan.
33. The Tribunal inspected the bundle with care, and found little annotation. Mr Pitt-Payne, for the Trust, was able to draw to our attention only 14 annotated pages out of a total of well over 300 pages in the bundle.
34. The Tribunal gave careful attention to the annotations. In some cases, side-linings or under-linings could have been added by a solicitor, or equally by an earlier recipient of the sheet in question. Where annotations were in the form of manuscript comment or information, it appeared likely that these had been added by an earlier user or recipient. For example, the name and hospital reference number of the patient was written on a print-out of medical measurements; and a letter addressed to a person by her first name carried a manuscript annotation requesting action, and signed with that same first name. The most heavily annotated page bore manuscript that appeared to be medical in nature, rather than legal.
35. These points were put to Mrs Leonard, who conceded that it would be difficult to sustain a description of the bundle as "heavily annotated".
36. The status of the bundle as working papers belonging to a solicitor depended largely on its annotated nature. The Tribunal concluded, on the balance of probabilities, that the annotation was already on the documents at the time they were passed to the solicitors. As such, it could not be regarded as a set of working papers. Indeed, if the recollection of the solicitor at Bevan Ashford was correct, that the bundle he worked on had been "heavily annotated", he would seem to be referring to a different bundle. It is more likely that the bundle was a clean copy of the papers held originally for the purpose of representing the Trust at the inquest.
37. Accordingly, the Tribunal found that the Bevan Brittan papers were held by the firm on behalf of the Trust. They were thus held by the Trust, within the meaning of s.3(2)(b) of the Act. The Trust having conceded that the exemption in s.42 (legal professional privilege) was not engaged, no other exemption was either claimed or engaged.
38. The information contained within these papers should therefore be disclosed to Mrs Francis. We mention for completion one minor exception. At Tab 10 of the bundle of Bevan Ashford papers produced to us there was a document which

appeared to be a record of investments held on behalf of various individuals. None had any connection at all with the appeal before us; the document had been included by mistake. That document, referred to in the index as Miscellaneous, should therefore be removed before disclosure.

Legal Professional Privilege.

39. The last issue we considered was whether the IC had been correct to consider that legal professional privilege did properly apply to the information for which it was claimed; and if so, whether he was right to find that the balance of public interest favoured maintaining the exemption from disclosure, under section 42 FOIA, for information covered by privilege.
40. Leaving aside, for later consideration, the information referred to in category 1 of the request, the remaining information for which legal professional privilege was claimed was the information in the bundle before us which had been received by the Trust from Beachcroft Wansborough, solicitors, after the IC had prompted the Trust to enquire of the various firms of solicitors it had used at various stages to see whether they held any documents relating to Jason Francis or Mrs Francis' complaints. As we said above, it is clearly a solicitor's working file; it contains the instructions from time to time given to the solicitors, in writing and over the phone; attendance notes and records of meetings; drafts of documents; copies of other documents on which the Trust sought advice in connection with various matters; advice notes and letters to the Trust. The Trust have said they are willing to disclose the first 85 pages of the file to Mrs Francis, and did so during the hearing.
41. A claim for legal professional privilege could be made for the whole file in legal proceedings. Many of the documents were clearly created for the purposes of giving legal advice, or with legal proceedings in contemplation. Those documents which were not, such as the original records and third party documents sent to the solicitors for them to advise on, have been annotated in such a way as to gain the protection of privilege in their current annotated form. In any event, it seems to us unrealistic to attempt to isolate particular documents and find they are not protected when the whole file is clearly a solicitor's working file, created for the purpose of giving legal advice. Even the disclosure of an un-annotated sheet, when the identity of the file from which it came is known, could indicate the nature of the legal advice that was being sought.
42. The exemption from disclosure for information covered by legal professional privilege, under section 42 of FOIA, is a qualified exemption : it only applies, under section 2(2)(b) of FOIA, if "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information." We turned therefore to consider the balance of the public interest. On the side of disclosure, we count the general public interest in improving the transparency and accountability of public bodies. In this particular case, Mrs Francis pointed to the public interest in ensuring that deaths in suspicious circumstances, such as her son's, are fully investigated; and that the public has a real interest in seeing the standards of care exercised by NHS Trusts; and, where there are questions raised about the fitness to practise of

Doctors, in seeing how those questions were dealt with. These are weighty matters.

43. The trust relied on the “inbuilt weight” in the doctrine of legal professional privilege, relying on a long series of decisions from the Information Tribunal that stress the importance of keeping communication between lawyer and client confidential, starting with Bellamy (EA/2005/23), and conveniently summarised in Pugh (EA/2007/0055). Moreover, in the particular circumstances of this case, Mr Francis’ death had already been properly and fully investigated: there had been a Coroner’s Inquest and a Health Service Ombudsman Report; and two internal enquiries within the NHS. Accepting that there was a weighty public interest in investigating deaths in these circumstances, that had already been done; and the public would therefore gain little from seeing the information passing between solicitors and the Trust.
44. Mrs Francis counters by saying that the investigations into her son’s death were incomplete: in particular, the Health Service Ombudsman only investigated Mr Francis’ care in the Accident and Emergency Department of the Southend Hospital NHS Trust, and did not investigate the care provided by the Southend Community Care Services NHS Trust, the predecessor of the Trust involved in this appeal; while the internal enquiry conducted by that Southend Trust was itself criticised by a further Review Enquiry, which called for a reinvestigation. As for the importance of legal privilege, Mrs Francis argues that its purpose is to promote justice, not to frustrate it by enabling wrongdoing to be covered up.
45. That last point is based on a misconception of the purpose of legal privilege. Its purpose is to enable people, or organisations, to exercise the fundamental right of access to a lawyer for advice. The value of that right would be greatly reduced if the lawyer could subsequently be compelled to reveal what had been discussed. Parties must be able to speak frankly to their lawyers, to discuss possibilities, to consider and be advised on their best course of action. If frankness were curtailed, because of fears of disclosure, access to legal advice would be denied just at the point when it is most needed. That is why confidential access to lawyers is recognised not just by the common law, but as a fundamental human right within Article 6 of the European Convention on Human Rights; and that is why maintaining the legal privilege has a heavy, in built weight when considering the public interest test.
46. The balance in this case is firmly in favour of maintaining the exemption. The Tribunal recognise a weighty public interest in ensuring that deaths are appropriately and properly investigated: but that has happened here through the Coroner’s inquest, even if we discount the other numerous enquiries that have been undertaken. It is instructive to compare this case with the decision of the Tribunal in Mersey Tunnel (EA/2007/0052), where the Tribunal found the balance was in favour of releasing privileged information. There, the advice was one off, though it had effects which were still continuing. Here the advice extends over a period, and is still current: police enquiries, for example, have relatively recently been reopened, and remain open, pending the result of this appeal, amongst other matters. There the issues involved were matters of pure public administration: the tribunal observed that in such circumstances “there is less inbuilt weight attaching to the exemption” (paragraph 50). Here, significant

personal interests are involved – literally, matters of life and death. This is a case “at the opposite end of the spectrum of importance”, much closer to the examples discussed in Mersey Tunnel, of “legal advice in a criminal or child care case”, (paragraph 49). We accept that Mrs Francis has a great personal interest in information relating to the circumstances in which her son died, but that is not the same as the public interest in those circumstances, which has been largely satisfied. We find that the IC was correct in the decision notice on this point.

47. If we had come to a contrary conclusion, we would have to have considered the Trust’s other defences in relation to this material: that the entire file is not theirs to release, but is the property of the solicitors, a point which is clearly arguable in relation to these documents, in contrast to the Bevan Ashford papers; that some of the information falls outside the scope of the request, since Beachcroft’s were consulted about other matters and other patients, as well as Mr Francis; and that disclosure would reveal personal data, which is exempt from disclosure under section 40 FOIA. Given our conclusion on the section 42 exemption, it was not necessary for us to consider these other defences.

Conclusion

48. Our decision therefore is different in some respects to the Decision Notice. In relation to the information which the Trust say cannot now be found, we find, on a balance of probability, that the trust do hold at least some further information, but we order no steps to be taken for further searches, as the Trust has already exceeded the cost limit in section 12 FOIA. We uphold the Decision Notice in relation to information withheld on the grounds of legal privilege for the information in the Beachcroft papers, but not for that in the Bevan Ashford file; and we hold that that file was held on behalf of the Trust and should therefore now be released to Mrs Francis. We find the information held by Eversheds was not held on behalf of the Trust, and therefore no obligation to disclose it arises under FOIA. We adjourn for further consideration by both parties and Tribunal, that part of our decision relating to the information previously withheld as legally privileged, set out in point 1 of the original request. Directions for the further consideration of this point will be given separately.

49. Our decision is unanimous.

Signed

Humphrey Forrest

Deputy Chairman

Date: 21 July 2008