First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2017/0009

Heard at Birmingham
On 17th. May, 2017

Before

Judge

David Farrer Q.C.

Tribunal Members

Michael Hake

and

Suzanne Cosgrave

Between

Caroline Young

Appellant

and

The Information Commissioner ("The ICO")

First Respondent

and

An NHS Foundation Trust

("The Trust"}

Second Respondent

Ms. Young appeared in person assisted by a McKenzie Friend

The ICO did not appear but made written submissions.

Christopher Knight appeared for the Trust.

The Decision of the Tribunal

The Tribunal finds

(i) that the Trust did not and does not hold information within the scope of the request other than the disputed information presented at pp. 170 – 172 of the agreed bundle of documents.

(ii) that disclosure of that disputed information would breach the First Data Protection Principle ("the FDPP"}, hence that the exemption provided by FOIA s.40(2) applies.

The Decision Notice ("the DN") was therefore in accordance with the law. The Tribunal does not require the Trust to take any action in response to the Request.

1. Having regard to the Tribunal's finding, the names of the hospital and the Trust, the department and the individuals involved, except for Ms. Young, are anonymized in this Decision.

2. Ms. Young was for several years employed in a hospital run by the Trust. She had a troubled working relationship with a doctor (Ph.D), who managed the department ("Dr. A"). She contends that Dr. A's bullying and "inappropriate behaviour" caused her to suffer reactive depression in 2013 and that the Trust failed to protect her from such treatment.

3. On 8th. December, 2015 she wrote to the Trust, in accordance with the Practice Direction on Pre – action Conduct, indicating a claim for damages for loss of employment, injury to mental health and distress and requesting pre – action discovery of a range of documents including

   The record of complaints made by staff about Dr.(A's) behaviour kept by the (–) Technical Manager ("E")".

   Although the entire letter was framed in accordance with the procedure for pre – action disclosure (see C.P.R. 31.6), hence as a precursor to private litigation, it was further designated thereafter as a request for information under s.1 of FOIA (see §5).

4. As to disclosure for the purposes of that litigation, the Court made an order on 26th. September, 2016 requiring the Trust to disclose the above documents (and others). Ms. Young duly received copies of such records of complaints as the Trust acknowledged that it held. She held them subject to the restrictions imposed by CPR 31.22. She was not entitled to use them in furtherance of any wider objective than her claim against the Trust.

5. As to the letter viewed as the request which led to this appeal, the Trust responded on 14th. April, 2016, which, as it later acknowledged, was well outside the 20 day time limit imposed by s.10(1). It stated that it had not located any information within the scope of the request. Its HR department confirmed that there had been no formal complaints by staff relating to Dr. A. Ms. Young questioned this response, pointing out that E, who had by then retired, was still employed by the Trust at the date of the request and asserted that the Trust was profiting from its own breach of s.10(1), since it was aware all along that E would remove her personal records on retirement.

6. On 3rd. May, 2016, the Trust responded again, stating that it had identified information within the scope of the request but that it contained personal data and that s.40(2) of FOIA rendered it exempt from disclosure. When Ms. Young claimed that some of the recorded complaints were made by her and sought to make a subject access request in respect of them, the Trust replied that there was no clear indication as to the identity of the complainants.

7. It maintained its refusal following an internal review.

8. Ms. Young complained to the ICO.

9. The ICO had already found a breach of s.10(1) in an earlier DN. Ms. Young argued that that breach was a deliberate ploy to ensure that E had retired and removed the record of complaints before commencing its search.

10. The ICO found that, on a balance of probabilities, the Trust did not hold responsive information beyond what it had disclosed in compliance with the court order. She concluded that the search for information had been reasonable and proportionate.

11. She characterized E's records as a private document, rather than official data and accepted that the named individuals would not have expected that their personal data, as disclosed by the record of complaints, would be made public. Disclosure would be unfair. Moreover, it was not necessary for any legitimate private or public interest, or, if it was, it was unwarranted, given the resulting prejudice to the data subjects' legitimate interests. For both those reasons, disclosure would breach the FDPP so that s.40(2) was correctly invoked.

12. Ms. Young appealed.

13. The evidence adduced by the Trust at the hearing was the witness statement of Rebecca Richardson, a solicitor in the firm retained by the Trust for the management of employment and public liability claims. She set out the history of the handling of the claim for damages, the parallel FOIA procedure and how the letter of 8th. December, 2015 came to be treated as a FOIA request. She produced related correspondence and emails relevant to the switch from a denial that the disputed information existed to a refusal to disclose in reliance on s.40(2). It appears that inquiries by Ms. Richardson, resulting from Ms. Young's reference to E's records in correspondence in April, 2016, had prompted a senior employee of the Trust to contact the head of the department in which Ms. Young had worked. He was aware of a file created by E and held on a shared drive within the department, in which the disputed information was located. It was examined and the s.40(2) response followed. Ms. Richardson strongly refuted the claim that there had been a deliberate delay in the FOIA response until E had retired and her file had departed with her.

14. She proceeded to set out the Trust's case on s.40(2), identifying the unfairness said to be consequent on disclosure. None of the parties who seemed to have complained nor the object of such complaints would have expected such records to be disclosed. They did not even relate to a formal complaint or grievance procedure.

15. Ms. Young combined evidence and argument in the presentation of her case. Most of the evidential element was reflected in the documents produced and there was no reason to doubt the sequence of events which she described, subject to the obvious issue as to causation of her health problems, as to which the Tribunal is neither qualified nor required to make a finding.

16. So far as material to this appeal, Ms. Young's case was, in essence, –

    (i) It was more likely than not that the Trust held, or would have held, further records kept by E of complaints about the conduct of Dr.A, if it had not deliberately delayed its search until after E's retirement.

    (ii) The public interest in transparency in all matters relating to the NHS overrode the need to protect personal data in a case such as this. It was essential that bullying and the Trust's failure to identify and tackle bullying were exposed. As the Francis Review "Freedom to speak up" made clear, NHS staff must feel free to speak out where malpractice is concerned.

    (iii) If, contrary to her case, the identification of individuals named in the disputed information was unwarranted, the solution was the redaction of names, not the withholding of the records.

17. Both respondents submitted that there was no evidence to justify a finding that the Trust had held further information, undisclosed following the court order. Mr. Knight, for the Trust, argued that Ms. Young's arguments concerning a gap in the dates of the documents in the disputed information and E's evidence to the internal investigation (see below at §27) did not imply the existence of further information. The question was what responsive information the Trust held when it searched, not what it should have held.

18. As to s.40(2), disclosure would not be fair, given the private nature of the records, the lack of any opportunity for Dr.A or the Trust to answer allegations that they contained and the expectation of all concerned that internal complaints would be kept confidential. Furthermore, disclosure

was not necessary for any legitimate interest of Ms. Young, since her private interest had been satisfied and there was no further public interest in publication of these particular documents.

The reasons for our decision

19. The right to information conferred by FOIA s.1 is a right to information held by the public authority when it receives the request, subject to routine amendments and deletions made regardless of the receipt of the request (s.1(4)). There is no duty to retrieve information which it has relinquished or to obtain information from a third party.

20. Like all findings under FOIA, the Tribunal decides any issue as to whether an authority holds information on a balance of probabilities – see *Bromley and others v The ICO and the Environment Agency EA/2006/0072.*

21. E was not under any duty to record complaints or similar information passed to her by colleagues in her department. She did so of her own volition in password – protected files in a folder entitled "(Dr.A) issues".[1] The particular drive on which she created a file or folder of such information is immaterial. There is no evidence of any official sanction for the practice nor any formal notice to her employer that she was so acting. So long as she was employed by the Trust these records were, we find, held by her, not the Trust, just like the contact numbers on the mobile phone that she probably had with her every day at work.

[1] Clearly, she knew the password. Ms. Richardson's evidence (§20), based on what the departmental head told her, was that he knew of the files and discussed them with E. She did not hand them to him on retirement. He retrieved the disputed information from a shared drive on which she had a folder. How and when he obtained the password(s), we do not know.

22. When she retired and left such records on a drive on a computer system belonging to the Trust, she impliedly handed over such records to the Trust, since she had no further access to or use for them. She had told the departmental head of their existence.

23. If, on retirement, she copied such records, or some of them, to her private laptop and took them home, deleting them from the Trust computer, they evidently remained in her possession and were never held by the Trust.

24. It follows from the reasoning in the preceding three paragraphs that any search performed before E's retirement would have excluded all her records since all would have been held by E, not the Trust. As it was, on her departure she transferred the disputed information to the Trust, which therefore held it in April, 2016. So a plan to cheat Ms. Young of disclosure of E's records by delaying the search until after E had retired would have been seriously misconceived.

25. In fact, we find no evidence that she removed any records from the Trust computer system. She had no obvious motive for doing so and if she had done so, it seems likely that she would have said so when questioned about these matters by the internal investigators, especially if some of the records related to Ms. Young.

26. The Trust was ordered by the Court to disclose all material within the scope of this request, albeit for a different purpose. The Tribunal can see no sensible motive for it to flout that order by suppressing such material. If that were its intention, it is hard to see why it reopened its search in April, 2016 and disclosed the documents which Ms. Young has received.

27. The gap in the records referred to by Ms. Young appears consistent with E's evidence in January, 2016 that her early concerns as to Dr. A resolved

themselves with the passage of time. The record which follows the gap, is of a meeting initiated by Dr. A., not a complainant.

28. The Tribunal is satisfied that the Trust held no further relevant information and that the delay in responding to the s.1 request was not part of a plan to ensure that E removed the records from the Trust before it undertook its search. The latter finding is, strictly, irrelevant to our decision on this issue but we make it since this serious allegation featured prominently in submissions.

29. If the Trust had held such further information, it seems inevitable that the personal data issue arising in relation to it would have been determined in the same way as the similar issue in respect of the disputed information, to which we now turn.

30. The disputed information contained –

(i) Dr. A's name
(ii) brief accounts of his alleged conduct
(iii) the names of individuals in the department,
(iv) references to their alleged experiences with Dr.A (corresponding to (ii))
and
(v) brief references to distress and mental disturbance said to have been suffered by some of those individuals.

30 It was not disputed that (i) and (ii) were Dr. A's personal data (see DPA s.1) and (iii), (iv) and (v) were the personal data of those individuals. Category (v) was probably their sensitive personal data (see DPA s.2(e)).

31 FOIA s.40(2) and (3)(a)(i), taken together, provide an absolute exemption from disclosure for third party personal data where disclosure, otherwise than under FOIA, would contravene any of the data protection principles.

32 The relevant data protection principle is FDPP (DPA Schedule 1) which requires that –

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

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

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

33 As is usual in FOIA appeals, the only Schedule 2 condition which needs to be considered is condition 6(1) since none of the preceding conditions could possibly be met. So far as material, it reads –

"The processing is necessary for the purposes of legitimate interests pursued by . . .the third party . . .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".

34 As is apparent from the wording of DPA Schedule 1 §1, the specific requirement of compliance with a Schedule 2 condition is independent of the general requirement of fairness. Judge Jacobs observed in *Farrand v Information Commissioner and London Fire and Emergency Planning Authority [2014] UKUT 0310(AAC)* at §20 that it is open to the Tribunal, in the interests of efficiency, to concentrate immediately on the question whether the relevant condition is met without a prior examination of the comprehensive issue of fairness.

35 Compliance with condition 6(1) involves three questions –

(i) Is Ms. Young pursuing a legitimate interest or interests ?

(ii) Is the processing (disclosure) involved necessary for the purposes of those interests?

(iii) Is the processing unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects ?

- See *Goldsmith International Business School v Information Commissioner and the Home Office [2014] UKUT 0563 (AAC)* at §35

36 The test of necessity must be met before question (iii) arises for decision.

37 Here Ms. Young clearly had a legitimate personal interest in disclosure of the disputed information for the purposes of her claim for damages. That interest was met by the court order of 26th. September, 2016. Disclosure under s.1 of FOIA cannot be necessary for the pursuit of that interest.

38 Ms. Young appears to assert a further independent personal interest in disclosure, namely a concern that the public interest in the disclosure of bullying and of unjustified secrecy in the NHS should be served. Assuming that she has such a legitimate interest, is disclosure of the disputed information necessary for its pursuit?

39 We are satisfied that it is not. The records involved are not of formal proceedings in accordance with a grievance or complaint procedure but independent notes of what several individuals, including Dr. A, told E on various occasions about their treatment by Dr.A or of his concerns about a member of staff. The reliability of the claims is untested. It seems that none of them was presented as a formal grievance or complaint[2] but there is no

[2] In its initial response dated 14th. April, 2016, the Trust stated that no records of complaints within the scope of the request existed in the department or in the Trust H.R.

evidence as to whether this was due to intimidation, a culture which discouraged complaints or, as seems to us most probable, simply because early problems subsided and no complaint was necessary. They all predate the Francis review. They are very limited in scope. There is nothing in them to suggest that staff were deterred, for whatever reason, from expressing concerns as to their treatment.

40 Their disclosure would tell the public nothing about the Trust's attitude to bullying nor would it encourage NHS staff to speak up in the face of bullying, bad practice or other misconduct. It would serve no useful purpose.

41 If Ms. Young has a wider legitimate interest of the kind supposed in §38, this information would do nothing to promote it. The request fails the necessity test.

42 Even if the necessity test had been met, it is highly likely that disclosure would have been unwarranted, having regard to the effect of disclosure, especially on Dr. A who would never have expected such information to be publicized and who had no opportunity to answer these untested assertions. The same goes, if to a less marked degree, for the other named individuals, who might be highly averse to being identified as complainants without any opportunity to explain their position. None had consented to disclosure.

43 Similar considerations would determine any assessment of fairness.

44 If, contrary to our primary finding, the test of necessity had been satisfied, the Tribunal does not accept that problems of prejudice to legitimate interests or unfairness could be solved by redacting the relevant documents. Effective anonymising by redaction (i.e., such redaction as would protect Dr.A's personal data) would reduce the three documents to meaningless shells. It is not a workable option.

45 The Tribunal finds that disclosure would clearly contravene the FDPP so that the Trust was right to rely on s.40(2).

46 For these reasons we dismiss this appeal.

47 Our decision is unanimous.

David Farrer Q.C., Date Promulgated: 07 July 2017

Tribunal Judge,

22nd, June, 2017