**First-tier Tribunal**
**(General Regulatory Chamber)**
**Information Rights**
**Decision notice FS50805174**
**Dated 11 June 2019**

**Appeal Reference: EA/2019/0241**

**Heard at Field House, Breams Buildings London**
**On 25 November 2019**

**Before**

**JUDGE CHRIS HUGHES**

**TRIBUNAL MEMBERS**

**MIKE JONES & DAVE SIVERS**

**Between**

**LIAM O'HANLON**

Appellant

**and**

**INFORMATION COMMISSIONER**

First Respondent

**Appearances:-**

**Appellant: In person**
**First Respondent: did not appear**

## DECISION AND REASONS

1. Following a visit Mr O'Hanlon and a friend made to a hospital in 2013 Mr O'Hanlon made a complaint. He was dissatisfied with how the complaint was handled and he pursued the matter through the NHS complaints procedure to the Parliamentary and Health Services Ombudsman who failed to resolve all

his concerns. During this process he sought information from the relevant NHS Trust under FOIA and subsequently complained to the Respondent Information Commissioner (IC). Over the years there have been a number of complaints to the IC, as well as appeals to the First-tier Tribunal and an appeal to the Upper Tribunal. Mr O'Hanlon has been critical of the conduct of the IC's officers and legal representatives in the course of these investigations and proceedings.

2. On 25 July 2018 Mr O'Hanlon sought information from the NHS Trust about communications between it and the IC:-

*[2014]*

*"1[0]. Information amounting to the text of correspondence between the ICO and MHT [or vice versa; and including legal or other representatives of either] leading on 19 and then on 27 August 2014 to the signing by MHT's self-described 'acting chief executive' Mary Sexton of 2 ICO Qualified Person Opinion forms; and*
*[1.1] correspondence submitting same to the ICO; and*
*[1.2] any ICO response to MHT (to include any such communication following MHT's response of 27 August 2014 to my FOI Request); and*
*[1.3] any information thereafter submitted in either direction on that matter of fact.*

*2[0]. Information evidencing any internal MHT deliberations or any discussion leading up to contact made by MHT with the ICO concerning the production or submission of those QPO Forms of 19 or 27 August 2014, or of the opinions stated therein; and information evidencing any internal MHT deliberations or any submission seeking*
*[2.1] (a) a statutory finding under section 50 that either of such opinions was reasonable; or*
*[2.2] (b) the pleading by the ICO on 09.07.15 or thereafter by MHT that such opinions of Mary Sexton were reasonable.*

*[2015]*

*3[0]. Information amounting to the text of correspondence between the ICO and MHT [or vice versa; and including legal or other representatives of either] leading on 31 July 2015 to the signing by the MHT chief executive Maria Kane of 2 ICO Qualified Person Opinion forms whose receipt was first pleaded on behalf of the ICO on 29.09.15 in information tribunal case [Redacted]; and*
*[3.1] correspondence submitting such forms to the ICO; and*
*[3.2] any ICO response to MHT; and*
*[3.3] any information thereafter submitted in either direction on that matter of fact.*

*4[0]. Information evidencing any internal MHT deliberations or any discussion leading up to contact made by MHT with the ICO [or vice versa] (believed to have begun on 24.07.15) and/or to any ICO assessment of said 31 July 2015 opinion forms or the opinions stated therein; and information evidencing any internal MHT deliberations or any submission seeking*
*[4.1] (a) a statutory finding under section 50*

*that either of such opinions was reasonable; or*
*[4.2](b) the pleading by the ICO on 29.09.15 or by MHT thereafter that such opinions of the MHT chief executive were reasonable.*

*Please provide the requested information by hard copy."*

3. The Trust replied on 21 August. It provided emails between the Trust's lawyers and the IC which led to the signing of two qualified person's opinions (QPO) by Maria Kane (redacting them under s40(2) as relating to the personal data of individuals). It relied on s21 with respect to those QPOs as they had already been provided to Mr O'Hanlon. It withheld the remainder of the advice relying on s42 -legal professional privilege.

4. Mr O'Hanlon made a detailed request for an internal review to which the Trust responded on 27 September clarifying the response it had already made and releasing further information. The effect of this response was that it did not hold information within 1.0, 1.1, 1.2, and 3.3. It relied on the s40(2) exception to withhold some information relating to 1.3, 3.0, 3.1, and 3.2. It relied on s42(1) to withhold information relating to 2.0, 2.1, 2.2, 4.0, 4.1 and 4.2.

5. Mr O'Hanlon complained to the IC who accepted the complaint for investigation and wrote to Mr O'Hanlon on 22 March 2019 referring to the Trust's internal review listing the areas of request where the Trust stated that material was not held and the points where the Trust relied on section 40(2) and section 42. The email continued:-

*"The focus of any investigation would be to consider whether the Trust can rely on section 40(2) and section 42 to withhold information you have requested.*

- *You first submitted your complaint to us on 29 August 2018. Please confirm that, given the passage of time since you submitted your complaint, the situation remains the same and you would still like to progress your complaint with us.*
- *Please let us me know if there are matters other than those described above that you believe should be addressed. This will help avoid any unnecessary delay in investigating your complaint.*

*…"*

6. Mr O'Hanlon replied on 25 March:-

*"I do wish my section 50 application to progress.*
*My submission on section 21 is that it exempts information accessible by means <u>other than the Act</u>.*
*For section 40 my submission is that the exemption cannot affect names as data in the public domain.*
*I still do not believe the Trust has a code complaint internal review procedure…*
*Given the passage of time I reserve the right to supplement this reply to your e-mail once I have time to review the history of the Request made to the Trust and its handling."*

7. The scope of the IC's investigation was therefore set by this exchange of emails. The issues identified were the reliance on s40 and s42 and the claim as to the effect of s21. No other issues were identified at the time the IC defined what was to be investigated. After her investigation the IC issued a decision notice addressing these three issues.

8. Section21(1) FOIA provides (so far as is relevant):-

   *21 Information accessible to applicant by other means.*

   *(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.*

9. The Trust confirmed that it held four qualified person opinion forms and had sent them to Mr O'Hanlon. It had received an e-mail from him on 22 August 2018 in which he had stated that the forms were already in his possession (DN paragraph 18). In the light of this the IC concluded that the information was reasonably accessible to Mr O'Hanlon (DN para 19).

10. The Trust confirmed to the IC that the data withheld under s40(2) was the personal data – names and direct telephone numbers of employees of the ICO (DN paragraph 26) which formed part of the correspondence between the Trust and the ICO. For the processing of this data (ie disclosure to Mr O'Hanlon) to be lawful the IC considered that either the data subjects should consent GDPR 6(1)(a) or the disclosure was justified by a legitimate interest 6(1)(f). In considering the three fold test, the Trust had considered that there was some legitimate interest in knowing how decision-making about the request moved forward and the seniority of ICO staff involved. However, the Trust considered that the disclosure of the substantive contents of the communications and the job titles of those involved rendered the disclosure of the names unnecessary to meet the legitimate interest. The IC concurred with this view and concluded that there was insufficient interest to outweigh the data subjects' fundamental rights and freedoms in this case and there was no Article 6 basis for disclosing the information.

11. The material withheld under s42 (legal privilege) comprises email correspondence between the Trust and its legal team and between the ICO and the Trust and its legal team. The core issue was the mechanics of the application of s36 FOIA which provides that an exemption preventing disclosure of information where the disclosure would be prejudicial to the conduct of public affairs requires a qualified person to sign an opinion (a QPO) to that effect. In 2014 the QPO was signed, in response to a request by Mr O'Hanlon and in the absence of the chief executive, by an executive director. In 2015 in his appeal against a decision of the ICO upholding the Trust's decision not to disclose the information Mr O'Hanlon argued the individual did not have authority to give the opinion. In response to this a further QPO was provided. (The FTT considering the case admitted the new QPO as a late

exemption. On Mr O'Hanlon's application for permission to appeal to the Upper Tribunal on the grounds that FTT should not have relied on the second QPO this ground was rejected, although the Judge in the Upper Tribunal did not consider it was a late exemption but rather it supported an exemption always relied upon (EA/2017/0232 paragraph 9)).

12. The Trust had argued that legal advice privilege had not been waived. The IC accepted this position. The IC did not find that any public interest argument in favour of disclosure had been presented, emphasised the importance of the exemption and upheld it.

13. In his notice of appeal Mr O'Hanlon argued three substantive points. The first is that the IC erred in law by applying s21 to the Qualified Persons Opinions. *"The simple point in law is that the Appellant obtained those forms only via the FOI Act (albeit by a Tribunal Direction in the face of the ICO's refusal as a party) and that section 21 applies only to material accessible by means other than recourse to that Act."*

14. He argued that the IC's handling of his information request had been partisan and beyond the IC's statutory functions and he had a legitimate interest in being able to name one ICO employee who he considered had been obstructive.

15. He argued that the reliance on Legal Professional Privilege was based on generic assertions and did not protect partisan conduct by the IC. He argued that the IC had failed to have regard to SFO v ENRC [2017] EWHC 1017 (QB) which he claimed had established principles although the decision had been overturned by the Court of Appeal.

16. The Appellant also sought to raise the issue of whether further information was held by the Trust.

17. In resisting the appeal the IC drew attention to the exchange reproduced at paragraphs 6-7 above and noted that Mr O'Hanlon had not stated that he wished the issue of whether further material was held to be explored. Our task is to consider whether the DN showed an error in law, since the DN did not address this issue the ground should be dismissed.

18. With respect to the s21 ground, the IC noted that Mr O'Hanlon had been provided with the QPOs in the open bundle in a previous appeal to the tribunal, Mr O'Hanlon had stated that he had already had access to these documents and accordingly the Trust did not need to provide them again.

19. In addressing the s40(2) ground, the IC noted Mr O'Hanlon's claim of obstruction and secretive assistance to the Trust, but argued that this legitimate interest was negligible and the rights, freedoms and expectations of the data subject outweighed this. The IC also argued that given his "intransigence" disclosure would be unlikely to meet the necessity test because Mr O'Hanlon "is unlikely to be satisfied".

20. In resisting the appeal with respect to Legal Professional Privilege the IC noted that the case relied upon had been overturned and that she had considered the relevant caselaw and was not required to cite it in her decisions.

21. In response to this the Appellant produced a 30 page document in reply arguing that the conduct of an authority was a relevant circumstance to considering a claim of legal professional privilege. He argued that the emails relating to the new QPO's were done secretively and therefore could not attract privilege. He drew attention to a previous FTT decision (EA/2017/0232). In his skeleton argument Mr O'Hanlon argued that the kernel of his appeal was that the case officer in preparing the decision notice should have considered whether "iniquitous but non-criminal conduct" and the wrongful adoption of a principle that section 36 opinions can be reached by an unauthorised alternative to the "qualified person".

22. In his oral argument Mr O'Hanlon repeatedly pressed the argument that what he saw as misconduct meant that privilege could not have attached to these exchanges. He further argued that a solicitor employed by the IC had been prejudiced against him, had been guilty of serious misconduct and should not be allowed the protection of her personal data. He submitted that s36 did not permit the delegation of the power to give a QPO from the Trust's chief executive to another person.

Consideration

23. Mr O'Hanlon in his written and oral arguments has raised many issues of tangential or negligible relevance to the questions this tribunal has to decide. The precise interpretation of s36 and the circumstances, if any, in which the s36 function can be discharged within a NHS Trust by any individual other than the Chief Executive to which it was given, is one such. A QPO was given in 2014 by an individual who was not the chief executive. Following the launching of an appeal by Mr O'Hanlon in which the issue was raised, further QPOs were prepared by an individual entitled to give them. That is not a matter with which the tribunal is seized.
24. While Mr O'Hanlon attempts to paint this as very serious so as to remove any possibility of legal professional privilege, the tribunal is unable to accept this view. While the tribunal in EA/2017/0232 reflected some of Mr O'Hanlon's concerns those concerns are a long way from misconduct so as to defeat legal professional privilege. The IC in her inquisitorial role is concerned to ensure the proper governance of public information and of personal data and that decisions are made on the correct basis. In this case the issue of whether the person giving the QPO was entitled to give one was in doubt and a further QPO was given. The tribunal does not consider that any threshold of misconduct such as to prevent reliance on s42 has even been approached.

25. The tribunal is also satisfied that no valid grounds have been advanced to justify the disclosure of an individual's name. There is no consent and there is

no necessity for disclosure to enable any (tenuous) legitimate interest in the public understanding the decision-making about the second QPO.

26. The challenge with respect to s21 is devoid of logic. Since Mr O'Hanlon has the documents he does not need to exercise a right under s1 in order to access them; they are already in his possession. Why should he be entitled to request them again – there is no credible basis for this ground of appeal.

27. The scope of the IC's decision was set out clearly in the exchange of communications at the start of the investigation and there is no basis upon which the tribunal could go beyond that scope.

28. The tribunal is satisfied that this appeal is without merit and it is dismissed.

Signed Hughes

Judge of the First-tier Tribunal

Date: 4 March 2020