



Appeal Number: EA/2020/0189

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

Between:

David Phelan

Appellant:

And

The Information Commissioner

Respondent:

Date and type of Hearing: - 1 December 2021. - Oral Hearing on GRC - CVP.

Panel: Brian Kennedy QC, Stephen Shaw and Suzanne Cosgrave.

Representation:

For the Appellant: David Phelan as a Litigant in person.

Observer from the Public Authority: Simon Richardson.

Date of Decision: - December 2021.

Result: The Tribunal refuses the Appeal.

REASONS

Introduction:

[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“the FOIA”). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“DN”) dated 6 May 2021 (reference FS50861021), which is a matter of public record.

Factual Background to this Appeal:

[2] Full details of the background to this appeal, the complainant’s request for information and the Commissioner’s decision are set out in the DN which arose from the Appellant’s, request on 21 May 2019, for information on a whistleblowing concern sent to a Public Authority, being the Care Quality Commission (“CQC”). The issue is whether the Commissioner correctly upheld the CQC’s decision to withhold some of the requested information on the basis of Section 40(2), 44(1)(a) and 31(1)(g) of the Freedom of Information Act 2000 (“FOIA”) and also refused to confirm or deny if some of the information was held under the exclusions at these same exemptions.

[3] The information requested on 21 May 2019 was as follows;

“Please provide me with further and better particulars in relation to the Concerns raised in 2014 in relation to fraud and information governance breaches at KGH.

In particular please provide;

- a. A copy of the details of the whistleblowing submission that was made,*
- b. Confirmation of the date that the whistleblowing submission was made,*
- c. A schedule of the meetings that took place in relation to this whistleblowing event,*
- d. Any report or reports consequent upon this whistleblowing submission,*
- e. Any and all communications such as email and/or letters issued/received consequent upon this whistleblowing submission.*

[4] The CQC responded on 19 June 2019 providing some information but withholding the information requested at parts a & b of the request and neither confirming nor denying if the information at parts c, d, and e was held. The decision was made on the basis that any disclosure or confirmation or denial could allow a motivated person to identify or not specific individuals. The exemptions relied upon were as set out at §2 above.

[5] The complainant requested an internal review of this decision on 19 June 2019 which was conducted. The original response was upheld and this outcome sent to the Appellant on 24 July 2019. The Commissioner maintains the position set out in her DN; namely that the cited exemptions at Para [2] above are engaged and apply to the withheld Information and further that the public interest favours the withholding of the information. The Appellant now appeals against the DN. The Commissioner opposes the appeal and invites the Tribunal to uphold the DN.

Legal Framework as set out in the DN.:

[6] Following the Commissioner's investigation, she published the DN and her reasoning therein can be summarised as follows;

Section 31 of the FOIA states that:;

- (1) *Information, which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –*
 - (a) *the prevention or detection of crime,*
 - (b) *the apprehension or prosecution of offenders,*
 - (c) *the administration of justice.*
- (2) - - - -
- (3) *The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).*

[7] In this case the CQC did respond and confirm that the information in parts a and b of the request was held – this was the whistleblowing submission and the date the submission was made. The CQC refused to provide this information citing section 31(1)(g). The CQC refused to confirm or deny if the information in parts c, d and e of the request was held – this was essentially the information on whether any follow-up action was taken such as meeting information, report and communications about the whistleblowing submission under section 31(3).

[8] For both the information the CQC has confirmed it holds and the information it is neither confirming nor denying holding, the Public Interest arguments are according to the Commissioner broadly similar (DN Para 32).

Parts a & b of the request:

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to prejudice, - - - (g) the exercise of any public authority of its functions for any of the purposes specified in subsection (2),”

[9] The CQC has indicated the subsections in 31(2) it considers relevant in this case are:

- “(a) the purpose of ascertaining whether any person has failed to comply with the law,*
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,*
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,*
- (d) the purpose of ascertaining a person’s fitness or competence in relation to the management of bodies corporate or in relation to any profession or activity which he is, or seeks to become, authorities to carry on.*

[10] The Commissioner went on to consider whether prejudice would or would not be likely to occur from disclosure and if so the nature and likelihood of such prejudice.

a. The Commissioner considered the information being withheld in this case identified as the submission itself and the specific date the whistleblowing allegation was made. The purpose of whistleblowing policies and mechanisms is to allow for a confidential and anonymous means of raising concerns. As the CQC is the regulator of health and social care in England it relies upon information it receives from people who work in and for those services to help it detect breaches in regulations, poor care, and risk to welfare and safety of people who use those services.

b. The CQC uses information from whistleblowing concerns to identify risk, target its inspections, provide evidence for judgments and to support enforcement action. The CQC emphasises that it requires significant courage for a health or social care professional to become a whistle-blower and that there will always inevitably be some fear that identification as a whistle-blower could have a significant impact on individuals careers and working relationships.

c. Whilst the CQC acknowledges that the Public Interest Disclosure Act 1998 gives a right to bring action where a whistle-blower has suffered victimization or detriment as a result of making a protected disclosure this does not eliminate the risk and fear that many whistle-blowers feel.

d. The CQC is therefore of the view that it must rely on trust and making a disclosure under the FOIA that could deter whistle-blowers from coming forwards with their concerns would be detrimental to a number of its functions listed under section 31(2) of the FOIA.

[11] The Commissioner considered the whistle-blowing submission and was of the view that the concerns raised would have related to all of the subsections referred to by the CQC viz: – 31(2)(a) , (b), (c) and (d) - as the allegations (if found to be of merit) would require investigation into all of these areas.

[12] The Commissioner considered that in most cases whistle-blowing concerns are likely to relate to areas around failure to comply with the law, improper conduct (DN Para20), potential regulatory action or fitness to practice. Whistle-blowing allegations, she properly opines, generally tend to relate to serious matters that individuals feel they need to make with an expectation of trust and anonymity. She concludes that undermining the principle of this by disclosing details of the submissions, as well as potentially identifying whistle-blowers (in some cases where motivated individuals may be able to piece information together) is likely to have an impact on the effectiveness of the whistle-blowing process. As the CQC has stated, it uses the information gathered this way to inform the action it takes, including regulatory action (section 31(2) (c) the FOIA. Accordingly the Commissioner found that section 31(1)(g) is engaged (DN Para 20).

The Public Interest Test.:

[13] As section 31 of the FOIA is a qualified exemption the Commissioner was required to consider the Public Interest test before reaching a conclusion in her DN. Having balanced the different interests in play, the Commissioner concluded that the public interest in maintaining the exemption outweighs the public interest in disclosure (§21 - 23 DN.).

Parts c, d & e of the request:

[14] Section 31(3) provides that a public authority is not obliged to confirm or deny holding information described in a request if to do so would, or would be likely to, prejudice any of the matters mentioned in section 31(1). The CQC has advised the Commissioner that the relevant matters in this case are those set out in sections 31(1)(g) in conjunction with section 31(2)(a), (b), (c) and (d).

[15] The issue for the Commissioner in this case is whether confirming or denying that the requested information is held would, or would be likely to prejudice the ability of the CQC to ascertain if circumstances requiring regulatory action existed, if the law had been complied with, if there had been improper conduct or if a person was fit to practice. The Commissioner

concluded that confirming or denying whether or not the CQC holds the information requested in parts c, d & e of the request would in effect disclose whether or not the CQC carried out further investigation as a result of the whistle-blowing allegation/s. The Commissioner accepted that such confirmation or denial related to the cited subsections as confirming or denying if the information was held would reveal whether the CQC was conducting further investigation into compliance with the law, into improper conduct, fitness to practice or into ascertaining if regulatory action was necessary as a result of the concerns raised.

[16] The Commissioner continued to consider whether issuing a confirmation or denial in response to the request would be likely to result in real and significant prejudice of these interests. The prejudice in confirming or denying whether relevant information to parts c, d, and e of the request is, the Commissioner properly reasoned, is that it would reveal if further action was taken. Disclosing potentially sensitive information about a whistle-blowing allegation, if held, would, in the Commissioners' view, be likely to undermine the action the CQC could take and their ability to deliver effective regulatory functions. The Commissioner further, and properly, reminded herself that there is an inherent trust built into the whistle-blowing process and whilst it might be appropriate in some cases to confirm that an allegation has been received, there is a difference in then confirming if any further action was taken as a result of any such allegation. The Commissioner took the view that that confirming or denying an allegation of concern would not only have a detrimental effect on the CQC's ability to continue taking any further action, if any action was already underway, but if no further action was taken it would potentially deter whistle-blowers from coming forwards if they did not think their concerns would be followed upon. Therefore the Commissioner was of the view that confirming or denying if the information at parts c, d, and e was held it would be likely to have a prejudicial effect on the ability of the CQC to undertake activities set out in the cited subsections and the Commissioner made a finding that section 31(3) had been correctly applied by the CQC, the public authority herein

[17] Again as this is a qualified exemption and the Commissioner applied the Public Interest test balance as she had before and reached the same

conclusion for the same reasons and therefore made a finding that there is significant weight to the Public Interest in non disclosure as confirming or denying would be likely to prejudice the CQC's regulatory functions which outweighs the Public Interest in favour of disclosure, i.e. in the CQC being open and transparent (DN Para22).

Grounds of Appeal:

[18] In his reference to the Response by the Commissioner to the appeal, dated 14 July 2020 the Appellant asserts the Commissioner has misapplied the legal position and lacks appropriate robust assessment.

Specifically the appellant in relation to Requests a & b that the prejudice test has not been applied at all or robustly enough as there is not sufficient evidence of such prejudice and the CQC have failed to demonstrate any causal link and there is no valid reason to withhold this information.

[19] In essence the appellant asserts that s 31 is subject to the prejudice test, and there is no evidence in the Commissioner's response of any actual, real or substantial harm that would be done by the non-disclosure. He argues they have not evaluated the likelihood of the harm that would be done by non-disclosure. The Appellant asserts that the CQC have failed to comply with legal standards to their argument where they state: *"Detrimental impact on the whistle-blowing process "And"; CQC seemingly can legally disclose information if in the form requested in a way which does not identify the person, and it seems it is their choice not to rather than the remit of the legislation as stated in the Appellants Final Submissions.*

[20] The Appellant further argues that the Public Interest test has been misapplied, in that *"there has not been a robust assessment by the Commissioner of the prejudice outweighing the disclosure in the public interest"*.

Again in relation to the Grounds of Appeal on requests c, d & e of his request the Appellant asserts: *"There is utterly no evidence this would affect the ability*

to undertake activities. “The Appellant repeats here also that the Public Interest test has been misapplied and argues generally that: “ *Organisations such as these do tend to be guided by fairly defensive legal teams, avoiding legal risk to them at the expense of public interest.*” And adds: “*If the CQC starts deciding public interest is the same as their own legal risk, then FOIA may as well be abandoned*”,

[21] The Appellant also invites the Tribunal to issue a ruling that matters which are whistle-blown should be routinely published at least annually on the corporate website and asks this Tribunal to invite the Secretary of State to invoke legislation under section 43FA of the Employment Rights Act 1996. despite the fact that this is not within the remit of the Tribunal.

[22] Finally in his Notice of Appeal dated 2 June 2020 the Appellant indicates further by way of appeal that: “- - - *on the basics of the fact that the information is now 6 years old and the exemptions are therefor neither relevant nor applicable*”.

The Commissioner responded to this further ground of appeal as follows to the extent that the appellant considers that section 31 cannot apply due to the passage of time, he is, according to the commissioner, mistaken. The Commissioner argues that under the FOIA certain exemptions cease to apply after a certain number of years. However, in relation to section 31, section 63(4) states that: “*Information cannot be exempt information by virtue of section 31 after the end of the period of one hundred years*”.

The Commissioner submits, with some force, that it is clear, that this information (*and we suggest, all other relevant information within the scope of this request*), if such information is held, is not more than one hundred years old and so section 31 may indeed be applied.

[23] In relation to the Public Interest, the Commissioner accepts that the timing may be relevant in the balance of the Public Interest test. Generally speaking, the Commissioner accepts the Public Interest in maintaining the exemption will

diminish over time. In this case however the Commissioner points out, that the Appellant refers in his request to concerns raised in 2014; the request was dealt with by the CQC in 2019. The Appellant does not disagree with the significant Public Interest in maintaining the exemptions in this case and in the Commissioners' submission those are indisputable. Nor, as the Commissioner points out, does the Appellant identify other public interests in favour of disclosure In this case.

The hearing:

[24] The Appellant appeared as a Litigant in person to present his appeal and is clearly a citizen who harbours genuine and significant concerns about the issues pertaining to, and involving, inter-alia allegations of manipulation of Referral to Treatment time ("RTT") data at Kettering General Hospital NHS Foundation Trust ("the Trust") and has expressed this to the CQC over a number of years. The CQC did respond in detail in correspondence to the allegations he made at that time. It is evident to us from the Bundle of appeal papers before us that much information was provided to the Appellant and a substantial summary of the processes in place and actions taken have been explained by the CQC. A detailed summary was provided by the CQC who clearly were not only sympathetic, but co-operative with the Appellants concerns from the outset.

[25] After a substantial exchange between the Appellant and the Panel members of this Tribunal much was achieved by way of understanding about the FOIA and its' applications and exemptions. In the course of these useful exchanges the Appellant properly conceded that he had gained a better understanding of the issue of "Prejudice" and its role in determining, first the engagement of section 31 and then in relation to the "Public Interest test" which follows the engagement of a qualified exemption. After a lengthy exchange with the Panel members the Appellant fairly recognised and accepted that the Prejudice issues of Trust and Anonymity (where confidentiality and the protection of whistle-blowers was involved) were live. In

fact the Appellant properly accepted, that in this regard, Section 31 of the FOIA was engaged.

[26] After further exchange between the Panel members and the Appellant, and some detailed explanation as to why his grounds of appeal were misplaced, it became clear that the only remaining issue was the application of the Public Interest test. The Appellant continued to hold the view that any investigation by the Commissioner had been inadequate and /or simply not robust enough. He argued that even one premature death at Kettering General Hospital as a result of a failure to expose manipulation of Referral to Treatment time was sufficient to put the balance of Public Interest in favour of disclosure of the information within the scope of his request.

Conclusion:

[27] The Appellant has accepted section 31 is engaged as to the potential for prejudice to CQC but his argument is, that on the balance of the Public Interest, any harm to patients is greater than any other countervailing Public Interest in refusal to disclose. We find this is neither quantified nor demonstrated in terms of the extent of Public Interest in the matter nor has the Appellant been clear why the information relating to a single whistleblowing event in 2014 would be material. It appears there have been a number of whistleblowing events since, made in 2015, 2016 and 2017 one might infer the alleged problem, continued and yet the Appellant considers 2014 the significant one without any clear indication, as to why.

[28] The Appellant had also argued that the Tribunal should take into account the intention of Parliament (in terms of purpose - viz transparency and accountability) and referred to Hansard etc. The Tribunal accepts and are aware of that. However the intention of Parliament in creating the exemptions is the reason the exemptions are applied. The specific exemptions being applied in this case are there for a purpose and in this case they are applied (with the safeguard of the Public Interest test) to protect whistle-blowers or the

like and to prevent the chilling effect of deterring individuals from reporting concerns.

[29] The issue the Appellant is raising i.e. possible harm to patients arising from alleged manipulation of waiting lists at the Trust is clearly one of significant Public Interest, but the narrowness of the request i.e. the details of one report in 2014 which has been summarised in open evidence we have now seen is in the terms "*Concerns raised in relation to fraud and information governance*" and does not seem to shed any light on the pattern of behaviours being alleged to exist. The Appellant told us he raised concerns with the Trust Board in 2015. The Appellant has referred in his email, which we have seen (18 May 2019) to Simon Richardson about whistle-blowing in 2015, 2016 to KGH and in 2017 to CQC – so his allegations at the hearing that he had been a whistle-blower before and this statistic is unreported in the document the Panel saw, an email provided at the hearing by Simon Richardson (an observer from CQC) – does not point to any malfeasance by CQC if, as he says, his reports prior to 2017 were to the Trust (KGH) not to CQC.

[30] The Appellant referenced, in oral evidence, a meeting with NHS Protect, (which the Panel were told is the successor body to NHS Improvement) but he did so without formal evidence, What he said, suggested that NHS Protect has/had concerns more widely about the accuracy of Trusts' waiting list data generally. The Appellants concerns are clearly ones he believes deserve closer scrutiny by the Trust and perhaps more widely. Such investigations would seem to be such that would be undertaken by a body that could investigate with the powers to do so and to act. Release, to the world at large of what he is seeking on a single whistleblowing event in 2014 seems not to offer any resolution to his concerns but would come at a significant, and in our view seriously, detrimental cost to the protection of whistle-blowers in the NHS generally, and potentially, to their willingness to come forward in the first place.

[31] The Appellant argued that the requested information could be provided with the names of living persons redacted but this ignores the fact that clearly in such a specific request, if the information exists, those who work in the immediate field and probably beyond, could piece together enough information

to identify individuals concerned. The Commissioner also raised this “jigsaw” issue. Perhaps this is what the appellant wants but we are not persuaded that it would not prejudice whistle blowing or that it would be at all in the public interest

[32] In any event we take issue with the grounds of appeal in each and every respect. We accept, endorse and adopt the Commissioners’ findings and reasoning in the impugned DN. The Appellant argues there is no evidence of the harm that would be caused by disclosure. The Commissioner has referred to the experience their office have had over years of the sensitivity and delicacy of Whistle-blowing, and further the importance of trust and confidentiality in securing concerns which carry great and significant weight in the Public Interest test.. The members of this Tribunal have, between them many years of experience and have Judicial Notice of the importance of protection of whistle-blowers in the public service. We have no hesitation in finding section 31 is engaged in parts a & b of the request and the Public Interest test is weighed heavily in favour of non-disclosure. We further have no hesitation in finding Section 31(3) is engaged and provides that the CQC, the public authority herein, is not obliged to confirm or deny holding information described in parts c, d & e of the request if to do so, if it exists, would or would be likely to, prejudice any of the matters mentioned in section 31(1) which we are satisfied, on the facts and information before us, it would be likely to do.

[33] For the reasons set out in the DN and above we therefore dismiss this appeal.

Brian Kennedy QC

3 December 2021.