



Neutral citation number: [2024] UKFTT 992 (GRC)

Case Reference: EA/2022/0345

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Decided without a hearing

Decision given on: 06 November 2024

Before

**JUDGE HAZEL OLIVER
MEMBER MARION SAUNDERS
MEMBER MIRIAM SCOTT**

Between

PAUL JOHN CALVERT

Appellant

and

**(1) INFORMATION COMMISSIONER
(2) NHS ENGLAND**

Respondents

Decision: The appeal is Dismissed.

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 31 October 2022 (IC-151376-P4L0, the “Decision Notice”). The appeal relates to the application of the Freedom of Information Act 2000 (“FOIA”). It concerns information about an investigation into a whistleblowing complaint requested from NHS England (“NHSE”).

2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. On 15 November 2021, the Appellant wrote to NHSE and requested the following information (the “Request”):

“Please send me the information that you hold, this regarding NHS E/I investigation and subsequent outcomes or involvement, in respect of the protected disclosure information concerning governance and wider issues, this about the North East Ambulance Service NHS Foundation Trust.”

4. NHSE did not reply until 21 February 2022, after the Appellant had contacted the Commissioner. They initially said they did not hold the requested information. The Appellant requested an internal review on 21 February. NHSE responded on 30 June 2022 and disclosed some information. They withheld personal information relating to the Appellant under section 40(1), and personal data under section 40(2). They also withheld a private board paper that the Care Quality Commission (“CQC”) had received from North East Ambulance Service NHS Foundation Trust (“NEAS”) under section 41(1) (breach of confidence). This board paper is the disputed information in this appeal.

5. The Appellant originally complained to the Commissioner on 20 January 2022 and he complained about NHSE’s response to internal review on 30 June 2022. The Commissioner decided that there was an obligation of confidence, and both the CQC and NEAS would suffer detriment if this was breached. The Commissioner also decided that NHSE would not have a public interest defence to a breach of confidence action at the time it should have responded to the Request.

The Appeal and Responses

6. The Appellant appealed on 1 November 2022. His grounds of appeal are:

- a. Section 41 was not correctly engaged because the information was a result of collaboration between the CQC and NHSE, meaning it was not provided by a third party.
- b. Section 41 was also not correctly engaged because the information is already in the public domain.
- c. There is an overriding public interest in full disclosure, based on the existing public interest in the matter and the seriousness of the issues.

7. The Commissioner’s response maintains that the Decision Notice was correct. He says that it is irrelevant if there was a degree of collaboration between CQC and NHSE, and there is no evidence that the actual disputed information was in the public domain. He also maintains that there would not have been a public interest defence at the time of the Request, as the CQC considered the underlying matter to be ongoing until it had concluded its next regulatory report concerning NEAS.

8. The Appellant provided a reply which concedes that the information was obtained from another person (from NEAS and then shared by the CQC with NHSE). He also concedes that it would be a breach of confidence if NHSE were to disclose the requested information. However, he does not agree that the breach of confidence would be actionable, because of the strength of the public interest in favour of disclosure.

9. NHSE were joined as a respondent to the proceedings. They now rely on three exemptions:

- a. Section 41(1), on the basis that there would be an actionable breach of confidence.
- b. Sections 31(1)(g) and 31(2)(c) (law enforcement - prejudice to the exercise by a public authority of its functions for the purposes of ascertaining whether circumstances which

would justify regulatory action may arise), on the basis that disclosure would prejudice the exercise of CQC's regulatory functions in both this case and more generally.

- c. Section 36 (the opinion of a qualified person that disclosure would prejudice the effective conduct of public affairs), on the basis of a qualified person's opinion obtained during this appeal.

These are all qualified exemptions, and NHSE maintains that the public interest test in each case favours non-disclosure of the disputed information.

10. The Appellant provided a reply to NHSE's response by email. He says that his previous reply stands, and that NHSE is relying on section 36 as an "afterthought".

Applicable law

11. The relevant provisions of FOIA are as follows.

1 General right of access to information held by public authorities.

- (1) Any person making a request for information to a public authority is entitled—
 - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.

.....

2 Effect of the exemptions in Part II.

.....

- (2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
 - (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
 - (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

.....

31 Law enforcement.

- (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—

...

- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2).

...

- (2) The purposes referred to in subsection (1)(g) to (i) are—

...

- (c) the purposes of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

.....

36 Prejudice to effective conduct of public affairs.

- (1) This section applies to—
 - (a) information which is held by a government department or by the Welsh Assembly Government and is not exempt information by virtue of section 35, and
 - (b) information which is held by any other public authority.

(2) *Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—*

...

(c) *would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.*

.....

41 Information provided in confidence

(1) *Information is exempt information if:*

(a) *it was obtained by the public authority from any other person (including another public authority), and*

(b) *the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

.....

58 Determination of appeals

(1) *If on an appeal under section 57 the Tribunal considers—*

(a) *that the notice against which the appeal is brought is not in accordance with the law, or*

(b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

12. **Section 41 (information provided in confidence).** The basic requirements for establishing a breach of confidence are as set out in ***Coco v A N Clark (Engineers) Ltd*** [1969] RPC 41:

- a. The information must have the necessary quality of confidence about it. The Commissioner's guidance on section 41 states that, in order to have the necessary quality of confidence, information must be more than trivial and not otherwise accessible in the public domain.
- b. The information must have been imparted in circumstances conferring an obligation of confidence. This can be explicit, or can be implied from the circumstances in which the information is imparted.
- c. There must be an unauthorised use of that information to the detriment of the person communicating it. Separate detriment may not be necessary where the confidential information is personal in nature. But, in a case where the information is commercial in nature, it is necessary to show that there would be detriment to the person who communicated the information.

13. Section 41 requires the information to have been obtained by the public authority from another person. It is an absolute exemption. However, the public interest must still be taken into account in determining whether disclosure would constitute an actionable breach of confidence. The public interest may constitute a defence to an action at common law for breach of confidence. There is an assumption that the information should be withheld unless the public interest in disclosure outweighs the public interest in upholding the duty of confidence.

Issues and evidence

14. The issues are:
- a. Was NHSE entitled to rely on section 41 FOIA to withhold the disputed information?
 - b. If not, was NHSE entitled to rely on sections 31(1)(g) and 31(2) FOIA to withhold the disputed information?
 - c. If not, was NHSE entitled to rely on section 36 FOIA to withhold the disputed information?
15. Some information has also been withheld under sections 40(1) and 40(2) FOIA. The Appellant's appeal is only about the information withheld under section 41. He has not challenged the use of the exemptions in section 40 and so we have not considered them in this decision.
16. By way of evidence and submissions we had the following, all of which we have taken into account in making our decision:
- a. An agreed bundle of open documents, which includes the appeal, responses, and replies from the Appellant.
 - b. A closed bundle of documents held under Rule 14 containing:
 - i. the disputed information;
 - ii. the qualified person's opinion, although this has also been provided to the Appellant on an open basis;
 - iii. exchange of emails between CQC and NHSE regarding the application of exemptions to the disputed material; and
 - iv. exchange of emails between NEAS and NHSE regarding the application of exemptions to the disputed material.
17. Items b(iii) and (iv) were shown in the index to the closed bundle but were missing from the closed bundle originally provided to the Tribunal panel. We made directions after initially considering the appeal on 16 August 2024 and obtained these documents from NHSE before finalising our decision. The documents are as described above (in an index previously provided to the Appellant).

Discussion and Conclusions

18. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision. We deal in turn with the issues.
19. **Section 41 (information provided in confidence).** The first part of the test is *whether the information was obtained by the public authority from any other person*. The Appellant has now conceded in his first reply that this is the case. In his appeal, he had said that the information was from a collaboration between the CQC and NHSE. However, the information is actually contained in a report that was provided by NEAS to the CQC, who then provided it to NHSE. It is clear that NHSE obtained the information from the CQC, and they are separate legal entities.
20. The second part of the test is *whether the disclosure of the information to the public by the NHSE would constitute a breach of confidence actionable by that or any other person*. The Appellant has now conceded this in his first reply, so we have considered this point relatively briefly. We agree that disclosure of this information would constitute a breach of confidence actionable by the CQC. We have considered the parts of the test for breach of confidence as follows:

- a. ***The information must have the necessary quality of confidence about it, and it must be more than trivial and not otherwise accessible in the public domain.*** The disputed information is a report from NEAS which arises from a private board meeting and is watermarked as confidential. It covers sensitive matters regarding NEAS's coronial reporting. It is not otherwise accessible and is not in the public domain. In his appeal, the Appellant says that the information is already in the public domain. This is on the basis that the matter has been reported in the media, the CQC and NHSE have made disclosures in response, and there is evidence about the serious concerns raised and related investigations in the public domain. We disagree. This does not mean that the disputed information itself is in the public domain. There may have been public disclosures about the underlying issues that led to the report from NEAS. There is no evidence, however, that the report itself or its contents have ever been in the public domain.
- b. ***The information must have been imparted in circumstances conferring an obligation of confidence.*** NHSE argue in their response that this is implicit from the circumstances, based on the test of a reasonable person. They say that it would have been obvious at the time the report was disclosed to NHSE that it would have been provided to the CQC by NEAS in confidence, and NHSE was aware that the CQC ordinarily maintains the confidence of internal confidential documentation provided by registered providers. They say that it would have been implicit that NHSE would keep the Report confidential, and that the CQC would have naturally expected and anticipated NHSE would do so. They say that the CQC has also refused disclosure of the same information under FOIA, which indicates an expectation of confidentiality. We agree with these submissions and find that the report was provided to NHSE on the basis of an implicit expectation of confidentiality.
- c. ***There must be an unauthorised use of that information to the detriment of the person communicating it.*** NHSE argue in their response that NEAS supplied the CQC with the report as part of the CQC's regulatory role, and the CQC provided the report to NHSE as part of its role to consider disclosures. They say that the CQC would be subject to a significant detriment if the report were to be disclosed by NHSE, summarised as follows – "*Registered providers which are regulated by the CQC may lose confidence in the CQC's ability to keep sensitive information confidential. The natural consequence of this is likely to be that registered providers become more reluctant to provide sensitive information to the CQC. This would significantly hamper the CQC's ability to properly regulate registered providers and could therefore lead to decreased accountability, safety standards and potentially an increase in patient harm*". We accept these submissions and agree that disclosure in these circumstances would be unauthorised and would be to the detriment of the CQC.

21. The final part of the test is ***whether disclosure would be an actionable breach of confidence***. The public interest can be a defence to an action for breach of confidence. We find that there is not sufficient public interest in disclosure under FOIA to provide a defence in this case.

22. The Appellant argues that there is an overriding public interest in disclosure and so any breach of confidence would not be actionable. In his appeal, he argues that these are serious matters, which are in the public interest from a patient safety perspective and in relation to the cost to the taxpayer. He says that there are issues of misconduct and impropriety, which involve public funds. He provides more detail in his first reply. He says that information from staff blowing the whistle has

been corroborated by investigations, and he claims that misconduct, illegality, negligence and maladministration by NEAS has been proved. He says that release of the information would help to promote public safety by ensuring necessary public scrutiny. He makes the point that an allegation of wrongdoing is sufficient to justify exposure. He also makes a more general point about transparency and accountability of public authorities, and how this will help the public to understand decisions made by public bodies which affect the lives of a significant population in the North East Region.

23. NHSE acknowledges the inherent public interest in transparency of public bodies. NHSE also refers to the importance of the public having confidence that protected disclosures are properly investigated by the regulator and other healthcare bodies, and assuring the public that authorities (such as NEAS) are properly deliberating issues raised by protected disclosures and, if appropriate, are actively working towards resolving any issues. However, NHSE says that an independent review chaired by Dame Marianne Griffiths was in process at the time of their response, which will serve the public interest better through a proper and reasoned independent investigation.

24. In relation to the public interest in withholding the information, NHSE refers to four matters:

- a. The withheld report is a candid self-assessment by NEAS of its procedures. If such reports were written in the knowledge that there was a real risk, or even likelihood, of disclosure to the world, they would be less value to the CQC as regulator and it would be likely that organisations would be less honest or detailed when preparing reports. It is important that both authorities and regulators are able to robustly investigate ongoing issues in an appropriate manner, including avoiding any inappropriate consequences from disclosure of associated information to the world which could prejudice their investigations, particularly while the issues are still live.
- b. The CQC's firm view appears to be that disclosure would be detrimental to the exercise of their functions and it would be contrary to the public interest for NHSE to behave in a way which is detrimental to those functions.
- c. The potential for disclosure to significantly hamper the exchange of relevant information between the regulator and the regulated, should those under investigation have concerns that the information would be made public.
- d. The potential for poorer outcomes in investigations due to participants being less willing to provide the necessary information to allow informed conclusions and recommendations/regulatory actions to be reached.

25. We have taken into account all of these arguments. In relation to the public interest in disclosure, there is a specific interest in disclosure of all information relating to the allegations about NEAS and related investigations, in addition to the more general interests in transparency. We acknowledge that the underlying concerns which led to the information being provided by NEAS to the CQC are serious ones and relevant to patient safety. However, the Appellant makes general arguments and allegations. He has not explained why disclosure of this particular report is in the public interest. We note that the independent review by Dame Marianne Griffiths will further much of the public interest in these issues. We agree with both the Information Commissioner and NHSE that disclosure would not be in the public interest because of the likely impact on the CQC's functions as a regulator. We have taken into account the four matters set out by NHSE and also the submissions on why disclosure would be to the CQC's detriment. Disclosure of this type of

confidential information while matters were still under investigation would seriously damage the willingness of regulated bodies to share this type of information with the CQC. It would also cause them to be less candid in these types of reports. Openness and honesty with the CQC is essential to it being able to carry out its functions. Damage to these functions would be detrimental to public safety.

26. We have taken into account the fact that the public interest in disclosure would need to outweigh the public interest in maintaining confidentiality in order to provide a defence to an action for breach of confidence. Having considered all the arguments as set out above, we find that it does not.

27. We find that NHSE was entitled to rely on section 41 FOIA to withhold the disputed information. As this disposes of the appeal, we have not gone on to consider the other new exemptions relied on by NHSE in their response to the appeal.

28. We dismiss the appeal for the reasons explained above.

Signed Judge Hazel Oliver

Date: 25 October 2024