IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2013/0038**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50476335
Dated: 12th. February, 2013

Appellant:	**Miguel Cubells**
First Respondent:	**The Information Commissioner ("the ICO")**
Second Respondent:	**The General Medical Council ("the GMC")**

Before

David Farrer Q.C.

Judge

And

Malcolm Clarke

And

Anne Chafer

Tribunal Members

Date of Decision: **2nd. December, 2013**

Representation:

The Appellant appeared in person

The First Respondent did not appear

Timothy Pitt – Payne Q.C. appeared for the Second Respondent

Subject matter:

FOIA s.40 (5) (b) (I)

Data Protection Act, 1998 ("the DPA")

Schedule 1, Part 1 Requests for personal data.

Cases : *A v ICO and Health Professions Council EA/2011/0223*

R. (on the application of Middleton) v HM Coroner for Western Somerset [2004] 2 AC 82

R (Khan) v Secretary of State for Health [2004] 1 WLR 971

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

Dated this 2nd day of December, 2013

David Farrer Q.C.
Judge
[Signed on original]

REASONS FOR DECISION

The Background

1 The Appellant`s mother died on 2nd. November, 2007 at the Royal Albert Edward Infirmary, Wigan.

2 The Appellant and other family members are convinced that her death resulted from misconduct on the part of medical staff involved in her care and treatment. He researched her relevant medical history with great dedication and complained to the GMC.

3 The GMC, in investigating that complaint, instructed Doctor Y to provide expert evidence as to the conduct of the doctors concerned. Doctor Y reported that there were no grounds for finding that they were guilty of misconduct.

4 The Appellant concluded that Doctor Y was guilty of misconduct in providing a report which reached such conclusions. On 17th. October, 2011 he made a complaint to the GMC against Doctor Y, whose name was known to him from earlier communications.. The GMC considered that complaint and dismissed it on 6th. June, 2012, pursuant to Rule 4 of the General Medical Council (Fitness to Practice) Rules, 2004. That meant that the complaint was rejected at the stage of Initial referral and consideration. A review under Rule 12 was refused.

5 The Appellant then requested the name of the Assistant Registrar, any legal advisers and any other staff involved in the Rule 4 decision ("the decision"). He further asked for the number of legal personnel involved. The GMC responded with the information that one external (independent) barrister had played a part in the decision but refused to identify him / her.

The Request

6 On 15th. September, 2012 the Appellant requested the GMC to provide the following information-

(1) *"The name of the Barristers` chambers for which the external barrister mentioned by - - in his e mail to me dated 14/9/12 (4.09pm.) was working when he / she provided legal advice in regard to the unreasonable Doctor Y Rule 4/ Triage decision;*

(2) *The town /city of the mentioned Barristers` chambers at request (1) above."*

7 On 12th. October, 2012, relying on FOIA s.40(5)(b)(i), the GMC refused to confirm or deny that it held the requested information. The Appellant requested an internal review which the GMC provided on 6th. December, 2012. It upheld the initial refusal on the ground that disclosure of the requested information, coupled with the Appellant`s knowledge of the barristers holding the relevant expertise, would permit identification of the barrister concerned. That, the GMC argued, would amount to the unfair and unlawful processing of his/her personal data, since the exemption provided by s.40(2) applied. Moreover, it would further involve disclosure to the public that a complaint had been made against Doctor Y, which would breach his/her right to protection of personal data, given that the complaint had been dismissed without the need for a public hearing.

The Complaint to the ICO

8 The Appellant complained to the ICO on the same day.

9 By his Decision Notice dated 12th. February, 2013 the ICO ruled that the GMC had been entitled to rely on s.40(5)(b)(i). He appears to have had regard to the protection both of Doctor Y and the barrister who advised as to his report, though his consideration of Doctor Y`s position is implicit. He concluded, as to each, that the information sought involved his/her personal data and that disclosure of those data would breach the first data protection principle, since neither would have had any expectation of disclosure of his/ her name to the public generally, which would be the effect of compliance with this request. In both cases the data involved would identify the individual concerned, either as the subject of a complaint to the GMC or, in the barrister`s case, the adviser of the GMC on a particular matter. The Appellant appealed.

Appeal to the Tribunal

10 The Appellant appeared, assisted by a family member. He set out his case very fully in his grounds of appeal and subsequent written and oral submissions, including a final skeleton argument. The ICO responded and submitted a skeleton argument but did not appear. The GMC was joined and submitted a response, a skeleton and oral argument.

11 It was apparent that the appeal involved two separate data protection issues relating to (i) Doctor Y and (ii) the barrister instructed by the GMC. If the GMC rightly invoked s.40(5)(b)(i) in respect of Doctor Y, then it was entitled neither to confirm or deny that it held the requested information, regardless of the applicability of the exemption to the request for information as to the barrister`s chambers. For this reason, with the agreement of the Appellant and the GMC (the ICO not appearing), we decided to consider first the claim to the exemption applied to the personal data of Doctor Y. If we concluded that it was not properly relied on for the protection of his personal data, then we would consider those of the barrister. In the event, our finding as to Doctor Y, which we announced after a retirement at the end of the hearing, removed the need for any scrutiny of the exemption claimed for the barrister`s personal data.

12 Section 1(1)(a) of FOIA provides that any person requesting information from a public authority is entitled, subject to s.2 among other provisions, to be informed whether the authority holds that information ; if it does, then s.1(1)(b) entitles him to have that information communicated to him. Section 2 provides for exceptions to s.1(1)(a) including s.40(5)(b)(i) which, so far as material, states that the duty to inform does not arise in relation to information constituting personal data of which the requester is not the data subject, if or to the extent that–

"the giving to a member of the public of the confirmation or denial that would have to be given to comply with s.1(1)(a) would (apart from this Act) contravene any of the data protection principles. . . . . ."

13 The first data protection principle, as set out in Schedule 1, Part 1 paragraph 1 to the DPA, 1998 provides, so far as material, that 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 . . "

The Schedule 2 conditions include –

"(5) The processing is necessary -
(a) for the administration of justice
. . . . .
(d) for the exercise of any other functions of a public nature exercised in the public interest by any person

(6) (1) –
The processing is necessary for the purpose of legitimate interests pursued by the . . third party . . . to whom the data are disclosed, except where the disclosure is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject".

14 Two points require to be made at the outset –

(a) The test as to whether the s.40(5)(b)(i) exemption applies requires the Tribunal (and earlier the GMC and the ICO) to consider possible breaches of the data protection principles resulting from confirming or denying the holding of the requested information "to a member of the public", not just to the Appellant. The Tribunal interpreted this provision by reference to disclosure to the public rather than disclosure to the Appellant in *A v ICO and Health Professions Council EA/2011/0223* at para.25. Such an interpretation seems inevitable, given the plain wording of the statute. The distinction is important here because the Appellant knew the identity of Doctor Y long before he made his request.

(b) Those whose personal data give rise to this appeal are not the doctors involved in the care of the Appellant`s mother but the medical expert instructed to advise on their performance and conduct and, as to the barrister, a legal expert advising on the conduct of that medical expert. What is in issue is, in no sense, the public identification of those whose care of his mother the Appellant has so severely criticised.

15 The Appellant accepted that his complaint to the GMC involved the personal data of Doctor Y and that a confirmation or denial that the GMC held the requested information as to the barrister`s chambers would result in the disclosure of such data to the public.

16 His case was that such disclosure, which amounted to processing Doctor Y`s personal data, was fair and justified by conditions 5(a) and (d) and 6(1) of Schedule 2 to the DPA. Accordingly there would be no breach of the first data protection principle, as alleged by both Respondents.

17 In support of that submission the Appellant relied strongly on the duty imposed on the state by ECHR Article 2 to investigate deaths which may result from the acts or omissions of its agents and to make provision for appropriate

action including compensation where culpable failures have caused or contributed to the death. He referred us to *R. (on the application of Middleton) v HM Coroner for Western Somerset [2004] 2 AC 82* where Lord Bingham, at paragraph 2, stressed the duty of the state, repeatedly affirmed by the European Court of Human Rights, not to take life and also -

"to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life"

The requirement, pursuant to Article 2 for an intensive scrutiny where a hospital death is suspected to involve misconduct by doctors or nursing staff was emphasised in *R (Khan) v Secretary of State for Health [2004] 1 WLR 971* , also cited by the Appellant. He referred to an enhanced duty in such cases. Of course, we accept the fundamental importance of the principle and its applicability to deaths in hospital. The real issue is, however, whether the principle is engaged by the particular request in this case.

18 The Appellant proceeded from this starting point to argue that, with reference to the first data protection principle, it could not be unfair to publicise the name of a medical expert who had reported to the GMC on the conduct of the doctors caring for the deceased lady and who had been the subject of a complaint from her family, even though that complaint had been dismissed at an early stage before a public hearing.

19 As to compliance with a Schedule 2 condition, he argued that the public identification of Doctor Y was necessary for the administration of justice (condition 5(a)), *"for the exercise of any other functions of a public nature exercised in the public interest by any person"* (condition5 (d)) and for the pursuit of his and his family`s legitimate interests (condition 6(1)). The functions of a public nature would be those of the GMC and, presumably, the police, who had been involved in inquiries. The Appellant has also sought relief from the Administrative Court,

20 Accordingly, the Appellant submitted that no breach of the data protection principles would be involved in confirmation or denial that GMC held this information, hence the s.40(5)(b)(i) exemption did not apply.

21 The ICO and the GMC made largely common cause. It would be unfair to Doctor Y to publicise a complaint that had been dismissed under Rule 4 since he/she would have no expectation of such publicity. The declared policy of the GMC was to publicise only complaints that proceeded to a public hearing (Publication and Disclosure Policy, paragraph 30). Publicity for a summarily dismissed complaint was personally distressing and could be professionally damaging. Furthermore, no schedule 2 condition was satisfied. Disclosure would be unwarranted by reason of prejudice to Dr.Y`s legitimate interests.

22 The GMC further submitted that it is the regulator of the medical profession, its role now enshrined in the Medical Act, 1983. Its relevant function is to rule upon complaints against doctors and to take disciplinary action, where necessary. It is not part of the state`s investigative structure. Moreover, the information requested, in so far as it involves Dr.Y, is not information as to those who treated and cared for the Appellant`s mother.

Our Decision

23 With respect to the Appellant`s carefully argued written submissions, it is not the function of the Tribunal to form, still less to express opinions on medical issues. We are therefore not assisted by arguments as to the alleged failures or misconduct of the doctors concerned, whether directly or as expert adviser.

24 Given that the Appellant`s complaint was dismissed under Regulation 4 and a review refused, there are obvious grounds for concluding that publication of Dr.Y`s name to all the world as the subject of a dismissed complaint would be unfair, especially in the light of the GMC`s known publicity policy. The Appellant`s claim that the Article 2 duty of investigation overrides such concerns

must fail because disclosure of Dr.Y`s identity would do nothing to further any such investigation, even assuming that the GMC were for this purpose part of the state`s apparatus for Article 2 compliance, which does not appear to us to be the case.

25 We therefore find that disclosure would be unfair.

26 It is right to address the Appellant`s submissions as to fulfilment of a Schedule 2 condition.

27 In our view the administration of justice refers to proceedings in a court or tribunal. Condition 5(a) is not satisfied.

28 Assuming in the Appellant's favour that "other functions" in 5(d) include the Article 2 - related functions of the police or of the Coroner in the investigation of this death, the identification of Dr. Y is not remotely "necessary" to their performance because it would do nothing to further any inquiry as to what happened. The same applies to "necessary" as regards Condition 6(1). The question whether processing would be unwarranted does not arise therefore.

29 We respect the diligence of the Appellant`s researches and the quality of his submissions. He argued his case at the hearing forcefully but always courteously. His advocacy was skilful and reasonable. We find however that the GMC was fully justified in adopting the stance that it did in relation to Dr. Y.

30 A further matter was noted by the Tribunal after the conclusion of the hearing. In its response dated 13th. August, 2012 to the Appellant`s earlier request of 9th. June, 2012 for information relating to those involved in the Rule 4 decision (see paragraph 5 above) the GMC did not refuse to confirm or deny that it held the requested information but provided it in part. The same factors seem to apply to

this as to the index request, yet the GMC response involved the disclosure of Dr.Y`s name. Whether this was an error or there is some other explanation for this apparent inconsistency, we do not know. It was not a matter relied on or referred to by any party to this appeal. After careful consideration we conclude that, whatever the practical consequences, it does not alter our judgment as to the issues arising from the GMC response to the request of 15th. September, 2012.

Conclusion

31 Accordingly, this appeal is dismissed.

32 Our decision is unanimous

David Farrer Q.C.

Tribunal Judge

2nd. December, 2013