ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50512774

Dated: 18th. February, 2014

Appeal No. EA/2014/0057

Appellant: Michael Sheaff ("MS")

Respondent: The Information Commissioner ("the ICO")

Before

David Farrer Q.C.

Judge

and

Anne Chafer

and

Jean Nelson

Tribunal Members

Date of Decision: 24th. August, 2014

Date of Promulgation: 27 August 2014

This appeal was determined on the papers

Subject matter: **Protection of personal data**

FOIA s.40(2) and 40(3)(a)(i)

Reported Cases: *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

Dated this 24th. day of August, 2014

David Farrer Q.C.

Judge

[Signed on original]

The Decision

The Background

1. This appeal arises from the sequence of events which gave rise to the first appeal, EA/2014/0005, involving these parties and the SW Strategic Health Authority ("the SHA").

2. Put shortly, MS, a non - executive director of Torbay Primary Healthcare Trust, in an email dated 11th. July, 2011, having made certain quite limited inquiries, raised questions as to the fitness of an elected candidate ("A") to act as permanent chair of a "cluster" of such trusts in the South West following reorganisation of the National Health Service for the purposes of the Health and Social Care Bill. A had been selected by directors of the trusts as interim chair to handle the transitional arrangements. MS further criticised the procedure for A's election to that interim post.

3. David Connolly ("DC"), the Torbay chairman advised A that MS's findings would be passed to the Appointments Commission ("the AC") if she maintained her candidature. A withdrew as a candidate for the permanent appointment. MS proceeded to air his criticisms quite widely, including in a letter dated 11th. September, 2011 to the Chairman of the SHA, which was copied to MPs from the region and to officers of the Plymouth Healthcare Trust. A telephone conference to review MS's conduct and that of DC, took place with the chairman and deputy chairman of the SHA on 15th. September, 2011. MS's conduct prompted a letter from the chairman to a commissioner of the AC. That was the disputed information in the first appeal. An

inquiry into the appointment was set up. The resulting report, dated 1st. November, 2011, exonerated A, whose suitability MS had impugned.

4. An independent report into MS' allegations and conduct was subsequently commissioned by the AC. On 12th. January, 2012, MS and DC met Mr. David Bradley ("DB"), the author of the report, to discuss these matters. DB, having interviewed other parties involved, including A, reported by letter to the AC on 26th. January, 2012. He advised on these issues; the decisions were for the AC. That report is the information of which MS now seeks disclosure.

The Request

5. On 19th. April, 2013 MS made the following request to the Department of Health ("the DoH") :-

> . *"I request a copy of a report submitted by David Bradley to the Appointments Commission on 26 January 2012. I understand a copy of this report is contained in files archived by the Appointments Commission. To assist you in locating the document, I attach a redacted version I received following a subject data access request. I am now requesting an unredacted version through the Freedom of Information Act."*

6. On 13th. May, 2013 the DoH replied, refusing the Request. In so far as the report contained the personal data of MS (already disclosed to him through the subject data access request), it relied on FOIA s.40(1) and no dispute

arises as to that. As to the personal data of two third parties featuring in the report, it asserted the absolute exemption provided by s.40(2). It maintained that refusal following an internal review, citing the provisions of s.40(3)(a)(i) (contravention of a data protection principle), subject to disclosure of very limited further information from the report which did not involve such third party personal data. SH complained to the ICO.

The Decision Notice

7. Following his investigation the ICO upheld the DoH's refusal. In summary, he concluded that the redacted parts of the report contained the personal data of third parties (which is undisputed), that they had neither consented nor could have expected disclosure, that disclosure could cause them reputational damage and distress and that no countervailing general public interest would prevent disclosure being unfair. MS appealed.

MS's case on appeal

8. This was set out first in his grounds of appeal and then in a commentary on the ICO's Response dated 30th. April, 2014. MS focussed on the public interest in the procedures adopted by DB in investigating the allegations made by MS and the way in which MS had publicised them. Disclosure of the unredacted report would enable the public to judge whether such matters were properly and fairly investigated within the NHS. He disputed the confidential nature of DB′s discussions with himself or other parties. He made a distinction between employees and statutory office holders, such as

himself and the third parties as to legitimate expectations. Both categories were entitled to procedural fairness. He did not explicitly challenge the ICO's findings on absence of consent at the date of the request or possible reputational damage.

9. MS contended that DB had conducted his investigation in a flawed manner by refusing MS the chance to meet and, presumably, debate the issues with the chairman or vice chairman of the SHA who had also contributed to DB's collation of evidence. He asserted that subsequent inquiries of the former chief executive of the AC indicated that DB had not been instructed by the AC that SH did not wish to meet the chairman or vice chairman, as DB allegedly told them. He pointed to the failure to identify DB's terms of reference and argued that he was not clearly accountable to any particular body. He questioned the propriety of the SHA solicitor apparently advising DB. These features, so he said, cast doubt on the source of the authority on which DB was acting. He acknowledged a personal interest in these issues but contended that they were important in a wider examination of the governance of public bodies and the role of the whistle - blower.

The Case for the ICO

10. The ICO adopted the arguments of the Decision Notice and acknowledged the possible relevance of a serious public interest to questions of fairness. He submitted, as is plain from *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47; at (7). that there is no presumption in favour of disclosure in the case of personal data. He questioned the value of disclosure to the public interest asserted by MS.

The Tribunal's reasons for its decision.

11. So far as material s.40(2) and (3) provide -

> *(2) Any information to which a request for information relates is also exempt information if—*
> *(a) it constitutes personal data which do not fall within subsection (1), and*
> *(b) either the first or the second condition below is satisfied.*
>
> *(3)*
> *(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—*
> *(i) any of the data protection principles, or...*

The first data protection principle is set out at Part I of Schedule 1 to the DPA 1998 and reads:

> *"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..."*

12. The personal data of the two third parties in question were not "sensitive" such as to engage a requirement as to Schedule 3. However, they were undoubtedly of considerable significance to their professional

reputations and disclosure would probably cause distress, at least in the case of A. These matters are further briefly considered in the Closed Annex.

13. The reasonable assumption of a senior officer, executive or non - executive, would be that discussions on such delicate issues would be confidential, unless the contrary was plainly stipulated. Seniority would not affect that expectation. The description of the report as “Strictly confidential” is not decisive of its status but reinforces a natural expectation in this case. DB’s investigation was not a quasi - judicial proceeding; his role was to advise the SHA, which would act on that advice, if it thought fit.

14. Whether or not, one of the third party data subjects would now consent, neither gave consent to disclosure at or close to the time of the request.

15. In our judgement, a very compelling public interest would be required for disclosure of these data to be fair.

16. We can see no such interest here, most importantly because disclosure of the report would serve none of the purposes to which MS refers. Specifically, the disclosure of the third party personal data, especially those of A, would serve no public purpose whatever. DB’s conclusions and advice would shed no light on the alleged shortcomings in the procedure that he adopted to prepare his report nor on any misconduct that MS apparently suspects. If flawed procedures in public affairs lead to bad advice and poor decisions (and we have seen no firm evidence that that is the case), the remedy lies in judicial review, not in exposure of possibly painful personal data to the world at large.

17. In any case, MS exaggerates the public interest in this information and the significance of what is involved. The bodies concerned no longer exist. The report into A's history and conduct acquitted A of any impropriety and did so well before DB undertook his investigation. On the limited evidence before the Tribunal, which is not, we emphasise, the forum to determine such questions, there was nothing obviously improper or unfair about DB's handling of his task. He was not performing a judicial function, as MS seems to imply. What others said about what he had told them after the event is a fragile basis for claims that his report was the product of a seriously flawed, procedure, let alone malpractice.

18. We conclude that disclosure of these data would clearly be unfair. Given that finding, we do not proceed to consider Schedule 2 conditions.

19. For these reasons we dismiss this appeal.

20. Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge

24th. August, 2014