IN THE FIRST-TIER TRIBUNAL **Case No. Appeal No. EA/2014/0066**

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice FS50522836

Dated 27th February 2014

BETWEEN **Mr Miguel Cubells** **Appellant**

And

The Information Commissioner **1st Respondent**

And

The General Medical Council **2nd Respondent**

Determined at an oral hearing at HMCTS Manchester on 6th January 2016 and thereafter upon the papers on 2nd February 2016

Date of Decision 2ND March 2016

BEFORE Ms Fiona Henderson (Judge)

Mr Michael Hake

And

Mr John Randall

Representation The Appellant represented himself

The Commissioner was represented by Mr Robin Hopkins

The GMC were represented by Mr T Pitt Payne QC

Subject: s40 FOIA personal data

Case Law:

MC v (1) The Information commissioner, (2) the General Medical Council [2015] UKUT 0425 (AAC) case No. GIA/4483/2014

R (Cubells) v GMC [2014] EWCA Civ 1192

Goldsmith International Business School v ICO and Home Office [2014] UKUT 563

Department of Health v IC [2011] EWHC 1430 (Admin) [2011] 2 Infor LR 27

R (Amin) v Secretary of State for the Home department [2004] 1 AC 653

R(Takoushis) v Inner North London Cornoner [2006] 1 WLR 461

Decision: The Appeal is refused

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision Notice FS50522836 dated 27th February 2014 which held that the General Medical Council (GMC) correctly applied s40(5) FOIA to the request.

Background

2. Mr Cubells' Mother died in hospital in 2007. It is Mr Cubells' contention that there was a negligent and/or criminal delay in her diagnosis and appropriate treatment and that her death might have been preventable. He has pursued complaints against 10 Doctors concerned including to the GMC[1]. The GMC decided that there was insufficient material to start an investigation in relation to 7 of these Doctors, but in relation to 3 obtained expert evidence from Dr Y whose report was broadly favourable concerning the care directed at Mr Cubells' Mother.

3. Dr Y's advice was not in accordance with the Appellant's own research and reports obtained from other experts by his family, he therefore complained to the GMC about Dr Y alleging bad faith and bias and setting out specific complaints relating to the report. The GMC dismissed this complaint pursuant to rule 4 of the *GMC (Fitness to*

[1] He has also made complaint to:
- HM Coroner (who having obtained expert evidence declined to hold an inquest),
- The Police (who obtained their own expert evidence and concluded that there was no evidence that the death was as a result of a criminal act)
- The GMC about the Police and Coroner medical experts
- The IPCC relating to the conduct of the Police investigation
- Unsuccessfully about the IPCC- Cubells v IPCC
- The Ombudsman who concluded that there was no unremedied injustice that required investigation
- A civil claim was settled by the Trust without admission of liability.

practice) Rules 2004 which they notified to Mr Cubells by letter dated 6th June 2012 enclosing a copy of the rule 4 decision. Both the letter and the rule 4 decision referred to Dr Y by name[2]. The complaint was therefore rejected at the stage of initial referral and consideration and without further investigation. A review of the rule 4 decision pursuant to rule 12 was also refused.[3]

The First Information Request

4. Mr Cubells then requested details of those involved in the Rule 4 decision and was told inter alia that one external independent barrister had played a part in the decision. Mr Cubells asked for the name of the Barrister's chambers and the town/city of the Chambers that the Barrister was working in:

   "when he/she provided legal advice in regard to the unreasonable Doctor [name given] rule 4/Triage decision".

5. The GMC refused to confirm or deny that it held the requested information on the grounds that to do so would be to confirm to the world at large[4] whether a complaint had been made about Dr Y which would breach his/her right to protection of personal data. This decision was upheld by the Commissioner and the First Tier Tribunal in decision EA/2013/0038. The First Tier Tribunal having determined that s40(5) FOIA applied did not go on to consider whether disclosure would have breached the barrister (Z)'s personal data rights under s40(2) FOIA.

The second information request

6. Mr Cubells did not appeal this decision and during the course of the appeal to the First Tier Tribunal he had accepted that confirmation or denial of his request would result in the disclosure of Dr Y's personal data to the public. He reframed his request on 29th April 2013[5] to ask for the same information but without identifying Dr Y directly in his information request:

[2] It is not apparent whether a copy of the legal advice was also enclosed with the 6th June Letter (see para 47 et seq below).
[3] Mr Cubell's sought leave to judicially review the rule 12 decision which was refused following an oral hearing
[4] Mr Cubells obviously already knew a complaint had been made as he was the complainant.
[5] Prior to the determination of the FTT appeal

"Under the provisions of FOIA/DPA protocols can you please provide the below thus:

1) The name of the barrister's chambers involved in advice provided in respect of GMC Rule 4 letter sent to me dated 6 June 2012.

2) The town/city of which the barristers chambers mentioned in request (1) above is situated."

7. The GMC maintained their refusal under s40(5) FOIA on the grounds that the request read in conjunction with the letter of 6th June 2012 identified the Doctor concerned. This decision was upheld on internal review by the GMC and by the Commissioner.

8. Mr Cubells appealed to the First Tier Tribunal (the second appeal) on 27th March 2014 however, the case was struck out by the then President of the General Regulatory Chamber of the FTT on the papers pursuant to rule 8(3)(c) of *the First Tier Tribunal (General Regulatory Chamber) Rules 2009* on the grounds that
   i) The request related to Dr Y's personal data, in respect of which the decision of the first FTT was clearly correct; or alternatively
   ii) The request involved the personal data of Z and no reasonable tribunal could consider that disclosure of those data would be lawful and fair.

9. Mr Cubells was granted permission to appeal by Upper Tribunal and the case was considered in *MC v (1) The Information commissioner, (2) the General Medical Council [2015] UKUT 0425 (AAC) case No. GIA/4483/2014*. Mr Cubell's appeal was successful, Upper Tribunal Judge Turnbull holding that the request did not name Dr Y directly and that there was no need for the reply to do so. The letter of 6th June 2012 was not publicly available and the public were not entitled to a copy of it. The terms of the request did not include the contextual rubric which referred back to the earlier request which had named Dr Y.

10. In relation to the second basis for strike out, he held that it was inappropriate to strike out the second appeal on the grounds that it had no prospect of success as the onus was on the GMC to establish whether they could rely upon s40(2) FOIA. It was

possible that Mr Cubells did have a basis for complaint and the issue involved balancing the interests of Z against the interests of the public in knowing Z's identity.

Scope

11. The case has therefore been remitted for reconsideration by a differently constituted First Tier Tribunal the issues being:
    i) Would the disclosure of the disputed information constitute the processing of Z's personal data,
    ii) If so would that processing contravene any of the data protection principles.

12. Mr Cubells argues that his request was a DPA request and contends that the appeal should not be confined to consideration of the FOIA request. This is an appeal under s57 FOIA which confines our jurisdiction to consideration of whether FOIA has been appropriately applied. Whilst it is true that the application of s40(2) FOIA requires consideration of some elements of the DPA, the Tribunal does not have jurisdiction to consider any application save under FOIA.

Is the disputed information personal data?

13. The Tribunal has already given its oral decision that the disputed information is personal data. The reasons for this are as follows, personal data is defined under s1 DPA as:
    "data which relate to a living individual who can be identified –
    (a) From those data, or
    (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller…

14. Mr Cubells' contention was that the name of a Chambers and the Town/city where it is located (where many individuals work) is not personal data as it does not identify an individual.

15. We accept the Commissioner's and the GMC's argument that the use of the word "can" rather than "will" or "is likely to be" indicates that the standard is reasonable likelihood with a hypothetical possibility of identification being insufficient.

16. A google search of the name of the chambers concerned + GMC produces a list of a few individuals. (The Tribunal has seen the results of such a search in a closed bundle). Mr Cubells argued that even if he were to perform that search he would only be able to speculate as to which barrister was Z and hence Z would not be identifiable.

17. Although Mr Cubells told the Tribunal that he had no interest in identifying Z so long as he had a mechanism for complaint, the Tribunal is satisfied that an internet search is a reasonable and likely enquiry in this context. It is not disputed that the name of the Chambers relates to Z but the issue is whether it constitutes Z's personal data if it is truly anonymous.

18. *The Department of Health v IC [2011] EWHC 1430 (Admin) [2011] 2 Infor LR 27* made clear that any analysis of the risk of identification must be approached in accordance with Directive 95/46/EC of which Recital 26 provides
"… to determine whether a person is identifiable, account should be taken of all the means likely reasonably [6] to be used either by the controller or by any other person to identify the said person; whereas the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable…"

19. Although we are not required to limit our consideration to the use to which Mr Cubells would put the information, we do take into consideration Mr Cubell's stated intentions to complain to the Chambers concerned in assessing all the means likely reasonably to be used to identify Z. We remind ourselves that even if Mr Cubells does not himself identify Z, if it leads to Z's identification by another (e.g. someone involved in the processing of a complaint) that would be sufficient to establish that the

[6] Emphasis added

disputed information constituted Z's personal data as the data would not be anonymous.

20. The GMC suggested ways in which the list of a few names could be further reduced and we accept that these are reasonably likely avenues of enquiry in the context of this case:

i) Writing to the barristers concerned asking them directly if they had provided the advice. The Tribunal cannot presume that anyone apart from Z would refuse to answer as there is no obligation on a barrister to deny their own involvement in a case.

ii) If anyone (including the Appellant) were to write to the Chambers concerned with a complaint, in order to respond to the complaint, the person responsible would be likely to seek to establish which barrister the complaint related to.

iii) It is a realistic prospect that in the course of handling a complaint, Z would have to notify his/her insurance company and possibly the Bar Council.

21. From this we are satisfied that the disputed information is personal data as there is a reasonable likelihood of Z being identified from the disputed information in conjunction with other information as set out above.

Would Disclosure breach any of the data protection principles?

22. The first data protection principle, as set out in Schedule 1, Part 1 paragraph 1 to the DPA, 1998 provides, 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 or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of

prejudice to the rights and freedoms or legitimate interests of the data subject".

23. The test to be applied in relation to Condition 6(1) of Schedule 2 to the DPA is that of *Goldsmith International Business School v IC and Home Office [2014] UKUT 563 (AAC)* where the Upper Tribunal endorsed the principles to follow which include insofar as it is material on the facts of this case:

"*Proposition 1: Condition 6(1) of Schedule 2 requires 3 questions to be asked namely:*

i) Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
ii) Is the processing involved necessary for the purposes of those interests?
iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?

Proposition 2: The test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

24. The first question is whether the person to whom the data is disclosed is pursuing a legitimate interest. We accept that we are entitled to take into account private interests (e.g. those of Mr Cubells) as well of those of the wider public.

25. Mr Cubells argued that disclosure was reasonably necessary for the furtherance of a legitimate interest. Those interests were identified as transparency at the broad level; those who do professional work for public authorities ought to expect transparency. Mr Cubells has been provided with the reasons for the GMC's decision and this disclosure in our judgment provides the basis for the GMC decision. Insofar as the argument amounts to an argument that the public are entitled to general transparency the Tribunal is not satisfied that the *Goldsmith* test is met at such a broad level, as if so the necessity test would always be met and the Tribunal would only need to consider the balancing stage iii) test. There is no presumption in favour of disclosure of personal data under FOIA except in accordance with the data protection principles.

26. However, on the facts of this case the Tribunal considers a legitimate interest is being pursued.

    a) The GMC Rule 4 decision concerned a complaint by Mr Cubells against Dr Y in relation to an expert opinion commissioned by the GMC from Dr Y. The GMC was thus adjudicating on actions it had itself commissioned Dr Y to undertake. Mr Cubells also produced evidence[7] of a professional link between Dr Y and the then Chair of the GMC. Both of these factors made it entirely appropriate that the Rule 4 decision should be based upon the advice of external Counsel, rather than on the advice of in-house lawyers alone. In these circumstances, in which external Counsel is instructed, at least in part, to overcome any perception of a conflict of interest within the GMC, there is a legitimate interest in knowing that Counsel who provided the advice was of appropriate seniority, expertise and independence.

    b) Mr Cubells wishes to complain about Counsel ('Z') who provided the advice. As the advice relates to his own complaint against Dr Y, he has a legitimate interest. He cannot make a complaint if he does not know the identity of the person against whom his complaint is directed, or even the address of that person.

27. Mr Cubells also argued that those who discharge public functions or take decisions should expect to be accountable. However, in our judgment this is not a legitimate interest relating to the identity of Z. Z is not the decision maker, Z is the advisor. The decision maker at the GMC is named and has provided their reasoning.

28. The second question is whether the processing involved (the release of the name and location of the chambers of Z) is necessary for the purpose of those interests. This requires the Tribunal to consider the purposes underlying the legitimate interests identified in a) and b) above.

[7] P219(a) bundle

29. "Necessity" carries its ordinary English meaning (more than desirable but less than indispensable or absolute necessity)[8], and following *Goldsmith* we are satisfied that the test is one of "reasonable necessity[9]" which involves the consideration of alternative measures[10] ie a measure would not be necessary if the legitimate aim could be achieved by some other less intrusive means.

30. With respect to a), knowing the status, in terms of seniority, expertise and independence, of Counsel is, in effect, a proxy for an assurance that the Rule 4 decision based upon Counsel's advice was not flawed or tainted by conflict. It was also argued by the Commissioner and we agree that there were other less intrusive ways of ensuring that the advice was obtained from a suitably experienced and qualified lawyer (e.g. from GMC policy documents/internal guidance relating to the instruction of external counsel) without needing to know the identity of the actual lawyer.

31. With respect to b), Mr Cubells identified his principal aim was to find out the full facts of his Mother's death. However, we are satisfied that the information requested namely the Chambers of Z (which we accept is likely to lead to identification of Z) will not further that aim which is too far removed from serious concerns at the hospital. Mr Cubells did not instruct Z, and any remedy he might have in respect of any flaw in the Rule 4 decision lies against the GMC, not Z. As set out above Z was not the decision maker and the responsibility for the decision lies with the GMC.

32. The purpose underlying both legitimate interests is thus to establish whether the Rule 4 decision that was based upon the advice was flawed or tainted. The Commissioner and the GMC point out that there is no evidence that the advice was legally flawed, Mr Cubells never sought to take advice as to whether it was legally wrong, at the least the fruits of the advice have been disclosed in the decision reasons[11]. The Rule 4

[8] Proposition 3 *Goldsmith*
[9] Proposition 4 *Goldsmith*
[10] Proposition 5 *Goldsmith*
[11] See paragraph 47 et seq below

decision was reviewed subject to rule 12 and the same result was upheld as set out in a decision dated 22nd January 2014[12]. Mr Cubell's applied for leave to judicially review the rule 4 decision, this was refused and then renewed orally where it was considered by Lady Justice Arden *R (Cubells) v GMC [2014] EWCA Civ 1192*. In her ruling Lady Justice Arden reminded herself that the question was:

" whether or not the General Medical Council were irrational in reaching the conclusion that the report of Dr Y was not so flawed as to call into question his fitness to practise."

33. She quotes the review letter of 22nd January 2012 upholding the rule 4 decision and approves its contents stating at paragraph 10:

"I do not see, given the wealth of detail and care with which this letter was written, that it could be said that the result was irrational. The GMC took every point that the Cubells wished to raise. They put them in a different way but they took them very thoroughly and very seriously and I think there is no prospect of success on appeal in arguing the standard in showing that the conclusion on 22 January was irrational.

11. That was a conclusion under Rule 4. I would point out that under Rule 4 the question is not whether the court thinks that there is an allegation which falls within 35C(2) of the Medical Act 1983, ie was there misconduct or deficient professional performance, but whether the Registrar so considered. Obviously, the Registrar cannot act in an arbitrary way but the court is bound to give weight to the opinion of the Registrar in the usual run of cases."

34. This is consideration of the GMC's reasoning for upholding the rule 4 decision which was based upon Z's advice. We are satisfied that this establishes that the Rule 4 decision was neither flawed nor tainted.

Articles 2, 3 and 8 ECHR

35. Mr Cubells maintains that the investigation by the GMC of his complaint about Dr Y falls within the duty imposed on the state by Article 2 of the European Convention on

[12] which is set out in Lady Justice Arden's refusal of permission to judicially review

Human Rights to investigate deaths at the hands of the state. His case is that there were flaws in other procedures before the Coroner and conflicts in evidence between the treating Doctors and the various experts. He relies upon ***R (Amin) v Secretary of State for the Home Department [2004] 1 AC 653*** which states inter alia that the purpose of an Article 2 investigation is to ensure that the full facts are brought to light, and lessons can be learnt, which Mr Cubells maintains has still not happened. He argues that there should be enhanced scrutiny of the circumstances surrounding the death and that these proceedings are part of that process.

36. Mr Cubells further relies upon ***R(Takoushis) v Inner North London Cornoner [2006] 1 WLR 461*** – which said that in assessing the obligation under Article 2 to investigate deaths at the hands of the state *"it is the system as a whole including both any investigation initiated by the state and the possibility of civil and criminal proceedings and of a disciplinary process, [which] satisfies the requirements of article 2…"* The GMC argues that they are not part of the investigative structure by which the state discharges its duties under Article 2. The Tribunal does not need to determine whether the GMC is part of the Article 2 structure because on the facts of this case, we rely upon the observations of Lady Justice Arden in *Cubells* who on the same facts said:

"9…What Mr Cubells argues is that, since patient safety is concerned and since there was an issue surrounding the death of a patient, which brings into examination Article 2 of the European Convention on Human Rights, they should have adopted a higher standard than would normally apply to a medical expert. A medical expert is normally not negligent unless it is shown that no reasonable medical practitioner would have done what he did. They argue for a higher standard in this case. But that is to lose sight of what the issue is in respect of this decision. The decision is whether or not Dr Y was fit to practise. It is not an issue about whether or not the practices of the hospital were appropriate; we are at one remove.[13]

10. So in my judgment, there would be no prospect of success in arguing for a more intense standard of care than normally applies."

[13] Emphasis added

37. The Tribunal observes that in this case we are at two removes in that the issue for us is about the identity of Z who provided legal advice relating to whether Dr Y was fit to practise.

38. Mr Cubells other arguments relied upon:

- Article 3 ECHR in that he argued that failure to treat for the right condition and continuation of the wrong treatment amounted to inhumane treatment.

- Article 8 - Mr Cubells also argued that there is a positive obligation to provide access to personal information, refusal to provide the withheld information constitutes an unjustified interference with this right ie the GMC are required to provide information to Mr Cubells about matters relating to his Mother's death. He asserts that the identity of the barrister's chambers relates to his "private and family life". We repeat the arguments relating to Article 2 and are satisfied that they have no bearing upon our assessment of legitimate interests and necessity as they are at too many removes from the obligations where those human rights bite.

Other Schedule 2 Conditions:

39. Mr Cubells also argued that processing was necessary for
5(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

40. He argued that the administration of Justice was to enable the proper investigation of the case to be pursued through the Courts and to enable the Appellant to challenge the rule 4 Decision relating to Dr Y. We are satisfied that the administration of justice refers to proceedings in a Court or Tribunal consequently this information request relating to Z is too far removed to satisfy this condition.

41. Mr Cubells argues that the functions of a public nature would be those of the GMC and that the information is necessary for him to challenge their decision in the public

interest. The Tribunal repeats its findings in relation to condition 6(1) in concluding that it is not necessary and that this ground is not made out.

42. For the reasons set out above, the Tribunal finds that the processing involved is not necessary for the purposes of the legitimate interests it has identified and the question whether processing would be unwarranted does not arise therefore and the appeal must fail.

Procedural Matters

The Commissoner's skeleton argument

43. The Information Commissioner had provided a skeleton argument to the Tribunal and all parties dated 11th December 2015. Mr Cubells objected to this on the grounds that it had not been specifically provided for in the case management directions and as the Appellant, he ought to have had the "last word" as the FTT Rules provided for the Appellant to provide a "reply" to the Respondent's "response". He had anticipated that the Tribunal would rule on this prior to the hearing but it does not appear that the Tribunal office had understood him to be objecting to its admission. The Appellant asked for a ruling on the point at the hearing.

44. The Tribunal acknowledges that Mr Cubells is a litigant in person and may not have understood the status of a skeleton argument, however, we are not satisfied that any unfairness arises from its use. The Tribunal reminds itself that this is not evidence, it is argument and it could all have been said orally by the Commissioner during the oral hearing, the Appellant has not therefore lost his opportunity to respond. The Tribunal is satisfied that allowing the skeleton argument to be used was in the interests of justice pursuant to the overriding objective as set out in rule 2. By providing it in written format in advance, all parties including the Appellant have a fuller and clearer explanation of the case that the Commissioner will be putting. It avoids delay in that it assists in the navigation of the arguments and facilitates the participation of the parties.

Disclosure of Z's legal advice

45. The GMC's letter of 6th June 2012 stated

".. The Assistant Registrar has decided that a GMC investigation into the doctor's fitness to practices is not warranted. This decision is based on legal advice that we have obtained, a copy of which I have provided with this letter for your reference. I understand that this is not the decision that you wanted to hear but I hope that this will go some way to explaining the reasoning behind this conclusion."[14] .

46. It was explicitly pleaded throughout the case by the GMC that enclosed with that letter was the legal advice of Z. There was no copy of any legal advice in the bundle. At the hearing on 6th January 2016 the GMC explained that they could not tell from the records that they had retained whether they had in fact sent Counsel's opinion along with the rule 4 decision as an annex to the June 2012 letter. This was because there was no hard copy retained and it was not clear from the electronic files what had been attached. Although the terms of the letter seemed to indicate that they had sent the advice itself, the GMC argued that on balance they did not think Mr Cubells had been sent a copy because:

i) Mr Cubells had never provided or submitted a copy in these or associated proceedings,

ii) Mr Cubells told the Tribunal that he thought that the decision was the legal advice although he clarified that this issue took him by surprise and he had not checked his files to see if there was an additional document which was the legal advice.

iii) An internal GMC email (that the Tribunal has not seen) and which predates the June 2012 letter to Mr Cubells discusses what should be disclosed at that time to Mr Cubells and attached to that was a file entitled "advice" which contained a draft of the rule 4 decision and not the actual legal advice from Counsel. The inference being that what was discussed internally was disclosure of the document attached to the email chain and not Counsel's advice.

[14] P61 bundle

47. The Tribunal finds it extraordinary that this matter should only be clarified now part way through an oral hearing in response to a direct question from the Tribunal (bearing in mind that the case has already been before the First Tier Tribunal (case EA/2013/0038) once and to the Upper Tribunal) as waiver of privilege and disclosure of the actual advice would be expected to inform Counsel's expectations as to confidentiality relating to their own involvement in providing advice in such a case. The contention that the legal advice had been disclosed was provided as part of the weighting of the decision to withhold the information and was repeated as recently as October 2015 in pleadings from the GMC[15]. The Tribunal did not have sufficient information before it to determine whether the advice was in fact disclosed and had this been determinative of appeal would have had to adjourn to enable Mr Cubells to check his records and to see a copy of the email chain etc. from the GMC. However, as set out above the Tribunal has determined that disclosure would not be necessary and the question of whether processing would be unwarranted does not arise thus the issue of the expectation of Counsel did not in fact arise.

Conclusion

48. Having found that the information requested is personal data we are satisfied that s40(2) FOIA was applicable as disclosure would breach the data protection principles and the appeal should be refused.

49. Our decision is unanimous.

Dated this 2nd day of March 2016

Fiona Henderson
Tribunal Judge

[15] P191