



Neutral citation number: [2025] UKFTT 77 (GRC)

Case Reference: EA/2023/0448

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

**Decided without a hearing
Decision given on: 29 January 2025**

Before

**JUDGE SHENAZ MUZAFFER
JUDGE SOPHIE BUCKLEY
MEMBER KERRY PEPPERELL**

Between

JOHN PAUL CALVERT

Appellant

and

**(1) THE INFORMATION COMMISSIONER
(2) NORTH EAST AMBULANCE SERVICE NHS FOUNDATION TRUST**

Respondents

Decision: The appeal is allowed in part as the Decision Notice contains an error of law. The Tribunal makes a Substituted Decision Notice, as follows:

1. The Tribunal finds that the North East Ambulance Service NHS Foundation Trust was not entitled to rely on section 41 of the Freedom of Information Act 2000 to withhold the information contained in paragraph 2 on page 187 of the report or the information contained at pages 191-192 of the report, save for one sentence at paragraph 8.
2. The remainder of the withheld material is exempt from disclosure pursuant to section 41 of the Freedom of Information Act 2000.
3. The North East Ambulance Service NHS Foundation Trust must take the following step within 28 days of promulgation of this Decision:

- a. Disclose paragraph 2 on page 187 of the report, and pages 191-192 of the report, subject to the redaction set out in the Closed Annex attached to this Decision.
4. Any failure to abide by the terms of the tribunal's Substituted Decision Notice may amount to contempt which may, on application, be certified to the Upper Tribunal.

REASONS

1. This is an appeal against a decision of the Information Commissioner (the "Commissioner") dated 12 September 2023, reference IC-244064-J0P5 (the "Decision Notice").
2. The Closed Annex is only to be disclosed to the Information Commissioner and to the North East Ambulance Service NHS Foundation Trust.
3. The parties opted for a paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing in accordance with rule 2 and rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009 (as amended).

Factual background

4. The appeal relates to the application of the Freedom of Information Act 2000 ("the FOIA"). It concerns information relating to an investigation commissioned by the North East Ambulance Service NHS Foundation Trust ("the Trust").

The request and response

5. The appellant made the request ("the Request") which is the subject of this appeal on 05 February 2023 in writing as follows:

"I write to you, requesting information under the provisions of the FOIA 2000. My request is for the following information, which I am aware is held by you the public body.

I respectfully request the following information from an Investigation by [redacted names] in 2020, who were commissioned by the trust to investigate a number of concerns raised by whistleblowers at the trust.

- 1) *The terms of reference for the [redacted names] investigation*
- 2) *The conclusions or finding of the said investigation*
- 3) *The recommendations of the said investigation*
- 4) *Was the said investigation shared with the regulators, the CQC and NHSE*

5) *If the investigation was shared with the regulator, the CQC and NHSE, what date(s) was the investigation shared and with whom*

6) *Should the NEAS be unable to provide the above, a full redacted copy of the investigation is requested”.*

6. The Trust responded on 01 March 2023 to each part as follows:

1) The terms of reference for the [redacted names] investigation – Requested information withheld under section 21 FOIA;

2) The conclusions or finding of the said investigation – Requested information withheld under sections 21, 40(2) and 41 FOIA;

3) The recommendations of the said investigation – Requested information withheld under sections 21, 40(2) and 41 FOIA;

4) Was the said investigation shared with the regulators, the CQC and NHSE – Response provided;

5) If the investigation was shared with the regulator, the CQC and NHSE, what date(s) was the investigation shared and with whom – Response provided;

6) Should the NEAS be unable to provide the above, a full redacted copy of the investigation is requested – Requested information withheld under section 41 FOIA.

7. The Appellant requested an internal review on 02 March 2023. The Trust completed its internal review on 28 April 2023 but, due to complications in transmission, it was not received by the Appellant until 09 August 2023. The Trust maintained its position on the same grounds as given in the initial response.

8. The Appellant initially complained to the Commissioner in relation to the perceived delay in the internal review on 27 June 2023, and then about the Trust’s application of the exemptions on 15 August 2023.

Decision notice

9. The Commissioner decided that the Trust had cited section 21 FOIA incorrectly in relation to the information requested at part one (terms of reference) and part three (recommendations of the investigation) of the Request as the information that had previously been provided to the Appellant did not match the material that was the subject of the Request. As such, the exemption was not engaged in relation to the information sought in part one and part six of the Request. He did not consider whether the exemption at section 21 FOIA was engaged in relation to the information sought at part two (conclusions of the investigation) of the Request.

10. The Commissioner decided that the Trust was entitled to rely on section 41 FOIA in relation to part two (conclusions of the investigation) and part six (full redacted copy

of the investigation) of the Request. Although the report had been generated by the Trust itself, the content contained witness statements and the conclusions reached were informed by those witness statements.

11. The Commissioner decided that the information contained within part two and part six of the Request had the necessary quality of confidence as it was more than trivial and was not otherwise accessible. Investigators had made a commitment to those that they spoke to that their personal information would be kept confidential, and the investigation had been conducted under the 'Freedom to Speak Up: Raising Concerns (whistleblowing) Policy for the NHS which imported a right to confidentiality on all witnesses who participated in the investigation unless they were legally ordered to disclose the information. The Commissioner decided that anyone with a knowledge of the Trust would be likely to be able to identify individuals in the report quite easily if the information were to be disclosed, even if those witnesses were not named in the report.
12. The Commissioner decided that the Trust was only entitled to rely on section 41 FOIA in relation to one paragraph of the document at part three (recommendations of the investigation) of the Request, as the remainder of the information that was the subject of that part of the Request had not been provided by any other person.
13. He only considered section 40(2) FOIA in relation to part three of the Request and concluded that the Trust was not entitled to rely on that exemption as the information did not fall within the applicable definition of 'personal data' for the purposes of that section.
14. The Commissioner required the Trust to (i) disclose the 'terms of reference' as set out on pages 5-11 of the report and (ii) disclose the 'recommendations' as set out on pages 187-190 of the report, with the exception of paragraph 2 on page 187.

Grounds of appeal

15. The Appellant appealed on 17 October 2023. An extension of time for the filing of the appeal was granted to 17 October 2023 by a Registrar on 20 November 2023.
16. The Grounds of Appeal are, in essence, that:
 - a. The Commissioner had not considered the legitimate interests in disclosure of the requested information;
 - b. The Commissioner had failed to carry out a 'legitimate test' or balancing exercise between the public interest in disclosure and the fundamental rights of the data subjects;
 - c. The Commissioner had failed to correctly apply the law in respect of whether there is a public interest in disclosure which overrides the public interest in maintaining the duty of confidence; and

- d. The terms of reference supplied were not the terms of reference that were used by the investigation.

The response of the Commissioner

- 17. The Commissioner's response maintains that the Decision Notice was correct. He says that the first two grounds of appeal are misconceived, as any concept of a 'legitimate interest' test is not relevant to the application of section 41 FOIA. The issue raised in the fourth ground of appeal – namely whether the supplied terms of reference were, in fact, the ones used by the investigation – is an issue of fact and therefore the Commissioner says that it does not constitute a matter on which the Tribunal have the power to adjudicate.
- 18. In relation to the third ground of appeal, the Commissioner says that the exemption under section 41 FOIA is absolute and, whilst he recognises that the duty of confidence may be outweighed by a countervailing public interest in disclosure such that section 41(1)(b) would not apply, the public interest in disclosure in relation to the information that was the subject of the appeal did not outweigh the interest in maintaining the confidence in which the information was provided. Amongst other factors, he had regard to the fact that a commitment had been given to those individuals who had provided information to the investigation that their information would be confidential, that disclosure of the information would make it likely that the identity of individual witnesses in the investigation could be ascertained, and that any breach of confidentiality would seriously harm any future 'Freedom to Speak Up' cases.

The response/submissions of the Second Respondent

- 19. The Trust responded on 27 December 2023, maintaining their position that the exemptions under section 40(2) FOIA and section 41 (FOIA) applied, and that disclosure of the information would be in breach of the undertaking of confidentiality that was given to all witnesses who participated in the investigation.

Legal Framework

- 20. The relevant provisions of FOIA are as follows:

S.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.

.....

S.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.

21. Section 41 provides, so far as relevant:

S.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.”

22. The starting point for assessing whether there is an actionable breach of confidence is the three-fold test in **Coco v AN Clark (Engineers) Ltd** [1969] RPC 41, read in the light of the developing case law on privacy:

- a. Does the information have the necessary quality of confidence?
- b. Was it imparted in circumstances importing an obligation of confidence?
- c. Is there an unauthorised use of the information to the detriment of the party communicating it?

23. The common law of confidence has developed in the light of Articles 8 and 10 of the European Convention on Human Rights to provide, in effect, that the misuse of ‘private’ information can also give rise to an actionable breach of confidence. If an individual objectively has a reasonable expectation of privacy in relation to the information, it may amount to an actionable breach of confidence if the balancing exercise between article 8 and article 10 rights comes down in favour of article 8.

24. Section 41 FOIA is an absolute exemption. However, the public interest may constitute a defence to an action at common law for breach of confidence. As such, the public interest must still be taken into account in determining whether disclosure would constitute an actionable breach of confidence. The burden is on the person seeking disclosure to show that the public interest justifies interference with the right to 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.

The role of the Tribunal

25. The Tribunal’s remit is governed by section 58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner’s decision involved an exercise of his discretion, whether he ought to have exercised it differently. The Tribunal may receive evidence

that was not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

26. The issue for the tribunal to determine is whether disclosure of the information would constitute an actionable breach of confidence, including whether disclosure would be in the public interest such that it would not amount to an actionable breach of confidence.

Evidence

27. We read and took account of an open bundle containing 130 pages plus index. We also read and took account of a closed bundle held under Rule 14 containing the withheld material and an unredacted copy of the correspondence contained at pages D105-D107 of the open bundle.

28. It is necessary to withhold the above closed information from the Appellant because it consists of the withheld information and to do otherwise would defeat the purpose of the proceedings.

29. We also read the 'Freedom to Speak Up policy for the NHS', found online at <https://www.england.nhs.uk/wp-content/uploads/2022/06/PAR1245i-NHS-freedom-to-speak-up-national-Policy-eBook.pdf>.

Discussions and conclusions

30. The first part of the test in section 41 FOIA is whether the information was obtained by the public authority from any other person. The information in the report was obtained through interviews with witnesses, conducted by the Public Authority. The Appellant does not seek to argue that the requirement in section 41(1)(a) FOIA is not met.

31. We then considered whether the information was imparted in circumstances conferring an obligation of confidence. The Trust's investigators made a commitment to everyone that they spoke to during the investigation that their personal information would be kept confidential. Witnesses were informed that they were referred to in the report by a witness identification key, not by name, and that the witness identification key was only known to four individuals and would not be shared further.

32. In addition, the investigation was conducted under the 'Freedom to Speak Up policy for the NHS'. The Trust indicated that, as a consequence, all witnesses who participated in the investigation had the right to confidentiality unless there is a requirement to disclose by law or court order. The policy emphasises that the most important aspect of speaking up is the information provided, not the identity of the provider of the information, and that people have the opportunity to speak up in confidence.

33. We are satisfied that the witnesses who spoke to the investigation had been given an assurance that their personal information would be kept confidential.
34. The Trust submit in their response that disclosure of the information would allow others, particularly employees within the Trust, to deduce the identify of some or all of the witnesses in the report through their knowledge of the investigation and the content and context of the narrative in the report. We recognise that an undertaking that the identity of a witness will be kept confidential does not automatically also mean that the substance of their testimony will be kept confidential. However, the nature of the testimony provided in this case is such that no real distinction can be drawn. Similarly, the nature of the testimony is such that we cannot envisage additional steps that could be taken to further anonymise the information, and nor can we identify discrete parts of the report that could be disclosed without breaching the confidentiality undertaking. We agree with the submissions of the Trust that disclosure of the information would therefore breach the guarantee of anonymity that was given to the witnesses.
35. We also find that disclosure in these circumstances would be to the detriment of the providers of the information, namely the witnesses, given the loss of privacy and the breach of the confidentiality undertaking that had been given to them.
36. The final consideration is whether disclosure would be an actionable breach of confidence. We have taken into account the fact that this is not the application of the usual public interest test to a qualified exemption. We are considering if the public interest in disclosure is sufficient to outweigh the public interest in maintaining the confidence.
37. We take note of the inherent weight in the wider public interest in maintaining confidences, particularly in the context of an investigation arising out of whistleblowing allegations. It is imperative that witnesses are confident that they can speak frankly during an investigation without concern about personal repercussions. If they cannot rely on assurances of confidentiality, this confidence is likely to be eroded and one of the fundamental elements of a whistleblowing policy will be undermined. We also take note of the public interest in ensuring that Public Authorities are able to investigate cases of this nature comprehensively.
38. We accept that there is a public interest in transparency in the workings of NHS Trusts, particularly where issues of public safety are concerned. We note that, in his Notice of Appeal, the Appellant refers to concerns over the Trusts' 'deaths scandal' and that "it has been agreed in a review by NHS England, that the NEAS had doctored reports and concealed evidence from families and the coroner in instances whereby patients died". However, as can be seen from the recommendations (which have already been disclosed) and the additional information that is subject to the substituted Disclosure Notice, the report that is the subject of the Request does not directly address the issue of patient safety and does not illuminate on the substantive

concerns raised by the Appellant. Whilst there is some public interest in transparency regarding concerns relating to the internal culture and management of the Trust, we do not find that there is a sufficient public interest in disclosure under FOIA to provide a defence to a breach of confidence claim.

39. The tribunal therefore concludes that the public interest in maintaining confidentiality is not outweighed by the public interest in disclosure of the requested information, and that the Trust was entitled to rely on section 41 FOIA to withhold the disputed information. We reach this finding in relation to the information sought at part two (conclusions or findings of the report) and part six (full redacted copy of the report) of the Request.

40. We find two limited exceptions to the conclusions outlined in paragraphs 29 to 38 above. Firstly, we find that paragraph 2 of the 'recommendations' at page 187 of the report, does not constitute information that was provided in confidence for the purposes of section 41 FOIA. The disclosure of the information contained in paragraph 2 to the public would not constitute an actionable breach of confidence. We reach the same conclusion in relation to the information contained at pages 191-192 of the report under the heading 'Other Areas for Consideration', save for one sentence contained in paragraph 8 on page 191. The tribunal concludes that the exemption under section 41 FOIA applies to one sentence on page 191 as the information contained therein is intrinsically linked to the information contained in the body of the report, and we are satisfied that disclosure of that sentence would constitute an actionable breach of confidence for the reasons outlined above.

41. The Tribunal has also considered whether the exemption as section 40(2) FOIA is engaged in relation to the information contained in paragraph 2 on page 187 of the report and in pages 191-192 of the report. We are satisfied that it is not engaged as the information does not contain personal data within the meaning of that section.

42. The Tribunal allows the appeal in part for the reasons explained above.

Signed: Judge Shenaz Muzaffer

Dated: 27 January 2025