Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0059
Information Commissioner's Ref: FS50074593

Heard at Procession House, London, EC4
On 1 December 2008

Decision Promulgated
11 December 2008

BEFORE

CHAIRWOMAN

Melanie Carter

and

LAY MEMBERS

Gareth Jones
Marion Saunders

Between

IAN MCLACHLAN

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

MEDICAL RESEARCH COUNCIL

Additional Party

Subject matter: - Confidential information s.41

Hearing on the papers

Decision

The Tribunal dismisses the appeal.

Reasons for Decision

Introduction

1. This appeal concerns a request for information under the Freedom of Information Act 2000 ("FOIA") by the Appellant, Mr Ian McLachlan, on 8th March 2005 for information from the Medical Research Council ("MRC"). This related to refused grant applications for research into the ME/Chronic Fatigue Syndrome ("ME"). The MRC refused to disclose this information and in turn he Information Commissioner ("IC") upheld this refusal.

The Request for Information

2. Mr McLachlan wrote on 14 January 2005 to the MRC for information about research it had funded into ME and also details of any applications for funding which had been refused. The MRC provided him with details of applications it had funded and a summary of the general areas covered by the eleven applications which had been refused since 2002. On 8 March 2005 the complainant requested from the MRC the written evidence that supported the refusal to fund the eleven applications, including the reports provided by independent experts who had reviewed the applications on behalf of the MRC.

3. On 15 April 2005 the MRC wrote to the complainant confirming that it held reviewers' reports and records of its Research Boards' assessments in relation to the applications which had been refused. However, it stated that it believed that they were exempt from disclosure under the FOIA, specifically section 40, as the

Board's discussions would identify the grant applicants, section 41, as the applications and the reviewers' reports were provided in confidence to the MRC, and section 36(2)(b), as making the information public would result in less constructive comments about applications in future.

4. On 5 May 2005 the MRC wrote to Mr McLachlan to inform him that the result of the internal review was to uphold its original decision.

The complaint to the Information Commissioner

5. Mr McLachlan was dissatisfied with this decision and complained to the IC. The IC, after a lengthy investigation, upheld the MRC's decision on the grounds that the exemptions in section 41, confidential information, and 36, prejudice to effective conduct of public affairs, applied.

The appeal to the Tribunal

6. Mr McLachlan's grounds of appeal were in essence that the section 41 exemption did not apply to either the reviewers' reports or the Research Boards' assessments on the basis that first, in relation to the reviewers, a duty of confidence did not arise and second and in any event, the public interest in disclosure outweighed any duty of confidentiality. In particular, he argued that the IC had failed to take into account or give sufficient weight to the public interest in investigating whether the MRC operated under a particular bias – that is, in favour of funding psychosocial rather than biomedical research (Mr McLachlan's terminology) into the causes of ME. He further argued that the section 36 exemption could not be relied upon on the basis that the opinion of the qualified person was flawed and, in any event, the public interest in disclosure outweighed the public interest in maintaining the exemption.

7. Mr McLachlan had been critical of the length of time the IC's investigation had taken and had argued that this had tainted his decision making. The Tribunal noted however that the IC's handling of an investigation fell outside of its jurisdiction. Its

role was restricted to deciding whether the Decision Notice was, in this case, in accordance with law.

Evidence

8. Mr McLachlan provided the Tribunal with information regarding the importance of the underlying issue (vis, the lack of biomedical versus psychosocial research) to the public and in particular the 'ME community'. These were relevant, it was argued, to the public interest defence element of the section 41 exemption and the public interest test in section 36. The Tribunal were shown letters to the press, articles and reports which whilst not directly related to the MRC's grant decisions did go to the strength of feeling amongst a certain section of society on the underlying issue. The Tribunal did not set out, in anyway, to form a view on the veracity or otherwise of this issue. It did however take this evidence into account in determining the weight of public interest in favour of disclosure.

9. The MRC provided a significant amount of evidence both in terms of documents and statements. The majority of this information was contained in an open bundle available to all parties, including various reports into the working of the peer review system and its importance to the research world, both in the UK and internationally. There was, in addition, a closed bundle containing, amongst other documents, the information sought but not disclosed to Mr McLachlan ("the disputed information"). This consisted of reviewers' reports for the eleven failed applications and a number of Research Board assessments.

10. The witness statement from Nicholas Winterton the Executive Director of the MRC explained the application and peer review system to the Tribunal. Applications to the MRC are reviewed by scientific experts drawn from the MRC's College of Experts and other specialist referees from the UK and overseas. It is common for six or eight of the reviewers to be approached in relation to each application, some, but not all, of which will have direct expertise in the application's particular scientific field.

11. Peer reviewers are not paid and see this, the Tribunal was told, as part of their scientist's professional responsibilities. A chosen reviewer is sent the full application, together with relevant assessment criteria and guidance on their responsibilities.

12. The MRC provides grant applicants with anonymised copies of peer review reports relating to their proposals. In relation to most applicants this is done prior to the final decision being made, in order to give the applicants a chance to provide further comments and proposals in the light of the reviewers' comments. At that stage, the proposals are considered by a triage sub-group. It is only if that sub-group considers an application should go ahead, that it gets sent on to one of the MRC's Research Boards. Of the eleven applications, six were rejected at the triage stage.

13. Where sent on, the MRC Research Boards take the final decision on the applications, taking into account the reviewers' reports. Its decisions are set out in Board assessment minutes.

14. A further witness statement from Sir Leszek Borysiewicz, Chief Executive of the MRC, supported the above description of the process and sought to emphasise the importance of confidentiality to the research grant system. He emphasised that the basis upon which scientific work is conducted both in the UK and internationally is dependant upon a free dialogue between scientists and on the understanding that whilst they may share ideas, there should be no plaguarisation or exploitation of each others' intellectual property rights. Research proposals will usually include detailed information as to scientific hypotheses, methodology, the personal details of the researchers involved and in some cases clinical information. He gave evidence that a great deal of commercially sensitive information would be likely to be included in the applications. He told the Tribunal further that reviewers' reports may also include intellectual property, insofar as they contained the results of reviewers' own research and ideas.

15. Sir Borysiewicz stated that he himself had made many research applications and that had he thought his information would be disclosed to the public, he would not have made the application to the particular body. There were bodies, other than the MRC, both in the UK and internationally that funded research and which were not

subject to the requirements of FOIA. He gave further evidence that he had acted as a peer reviewer on many occasions and that, again, had he thought his comments would be made public he would not, in certain of those cases, have agreed so to act. He had understood that the whole process was confidential and that other than anonymised comments being given to the applicant, the reviewers' reports would be kept confidential.

The Tribunal's jurisdiction

16. The Tribunal's jurisdiction on appeal is governed by section 58 of FOIA. As it applies to this matter it entitles the Tribunal to allow the Appeal if it considers that the Decision Notice is not in accordance with the law or, to the extent that it involved an exercise of discretion, the IC ought to have exercised his discretion differently.

17. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether the applicable statutory framework has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

Decision

18. The Tribunal wished to indicate at the outset that, in its view and for the purposes of FOIA, all of the disputed information fell into two categories:

    a. information describing the proposed research and obtained from the applicant ("applicant information"); and/or

b. comments by either the reviewers or the Board upon the merits of the application ("comments on the application").

Most of the information under category (b) belonged to both categories (a) and (b) as comments on the application were almost always intertwined with applicant information. They could not, in the Tribunal's view, sensibly be separated out so as to retain meaningful content. The Tribunal considered moreover that the information falling outside of these two categories in both the reviewers' reports and the Boards assessments was so minimal and of such little value, that it did not warrant separate consideration under FOIA.

19. The Tribunal considered first the application of section 41 as the MRC had refused disclosure of the majority of the information on the basis that it owed a duty of confidentiality to both the applicants and the reviewers. Section 41 of the Act, so far as relevant, provides:

"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."

Section 41(a) – information obtained from another

20. The first issue before the Tribunal was whether the disputed information consisted of information "obtained…. from any other person". Information generated by the public authority, however sensitive or perceived to be confidential could not, unless it contained within it information obtained from a third party, be subject to this exemption.

21. It was not disputed that the applicant information was, by virtue of having been submitted by the applicant, obtained from a body outside of the MRC. With regard

to the reviewers, the Tribunal noted that they were not paid by the MRC and other than provision of guidance how to carry out the review process, were left to form their own views and to give whatever comments they felt appropriate. Mr McLachlan argued that as reviewers signed a contract with the MRC they were "clearly part of an integral structure".

22. The Tribunal noted that not all reviewers signed these contracts and that overall, the position was one of independence from the MRC. It concluded therefore that the reviewers' comments were information obtained from another person for the purposes of section 41.

23. With regard to the Board members, the IC submitted that they functioned as an integral part of the decision making process and that their decisions were likely to be determinative of a grant application. They were thus making decisions on behalf of the MRC. The Tribunal concurred with this view such that insofar as there was any information obtained from the Research Boards which did not include applicant information or comments on the application by the reviewers, it would not fall within the section 41 exemption.

Section 41(b) – actionable breach of confidence

24. The section 41 exemption would only apply, if pursuant to paragraph (b) of section 41, disclosure would amount an actionable breach of confidence. In determining this issue (was there a duty of confidence, would there be a breach if disclosed), the Tribunal followed asked itself, as did the IC, whether:

i. the information has the necessary quality of confidence;

ii. the information was imparted in circumstances importing an obligation of confidence; and

iii. there was an unauthorised use of the information to the detriment of the confider (although the element of detriment is not always necessary).

25. If these tests were satisfied, the Tribunal noted that it should then proceed to consider whether there would be a defence to a claim for breach of confidence based on the public interest in disclosure of the information.

Duty of Confidentiality owed to Applicants

26. Mr McLachlan did not contest the IC's conclusion that the MRC owed the applicant a duty of confidence and the Tribunal had no doubt, taking into account both the documentary evidence and the statements before it, that this was correct in law. In support of this, the Tribunal's attention was drawn to the online application form page which clearly indicated to applicants that their applications would be treated in confidence. This stated:

> *"**Confidentiality***
>
> ***-** MRC takes all reasonable steps to ensure the contents of research applications are treated as confidential.*
>
> - *The application form and any associated papers forwarded to referees/Board/Panel members by MRC are sent 'In Confidence'.*
> - *Referees and Board/Panel members involved in assessing proposals need to consult in confidence, with colleagues about individual applications."*

27. The Tribunal also saw guidance to reviewers which exhorted them to treat applicants information in confidence. This stated:

> *"**Confidentiality***
>
> *Reviewers have an obligation to protect the ideas and plans of applicants. Confidentiality also allows the free exchange of views amongst reviewers."*

28. The Tribunal was of the view that, in the light of the wording of the online application form, the applicant would expect not only the applicant information but the comments on the application (insofar as they could be separated out from the

applicant information) to be treated in confidence. The Tribunal was of the view that the words "and associated paperwork" would be understood to include all reports accompanying and resulting from the applications, including therefore the reviewers' reports when forwarded to the Board. Whilst this did not, in terms, cover those reviewers' reports which were not forwarded to the Board, this was not a distinction which, in the Tribunal's view was either intended or would be appreciated as such by applicants. The Tribunal could not perceive any good reason for this distinction and put this down to inadequacies in the drafting of the document.

29. That the duty of confidentiality owed to applicants covered all reviewers' comments regardless of whether forwarded to the Board or not, was supported by the guidance to reviewers. The second sentence of the guidance as set out in paragraph 26 above was construed by the Tribunal as evidence that the duty of confidence owed by the reviewers to the applicant went beyond the applicant information and extended to the comments on the applications themselves. Confidentiality was said to facilitate the free exchange of views amongst reviewers. Translated into legal responsibilities, this made most sense if interpreted as including the reviewers' comments within the duty of confidentiality owed to applicants. The Tribunal went on to conclude that it was highly implausible that there should be a duty of confidence owed by the reviewers to the applicants that went further than that owed by the MRC.

30. Further, the Tribunal concluded from the third bullet point in the quote in paragraph 26, that applicants would have an expectation that all consultation on their applications between Research Boards members would also be in confidence. Thus, it concluded that the duty of confidentiality owed to applicants extended to the Boards' comments on the application.

31. In the light of the above, the Tribunal concluded that the duty of confidence owed to the applicants by the MRC covered both the applicant information and the comments on the application, in other words all of the disputed information.

32. The Tribunal accepted the IC's analysis of whether there would be an actionable breach of confidentiality by the applicants if there was disclosure of any of the disputed information insofar as it concerned the three part test set out in paragraph

24 above. This part of the IC's reasoning was not disputed by Mr McLachlan and the Tribunal's written decision does not therefore repeat that set out in the IC's Decision Notice.

33. Mr McLachlan's arguments with regard to section 41 and the duty of confidentiality owed to applicants, was essentially with regard to the public interest defence. It will be recalled that there will only be an actionable breach of confidence where there is no public interest defence to disclosure – see paragraph 25 above. The Tribunal reminded itself that the public interest defence would only apply where the public interest in disclosure outweighed the public interest that arose as a result of the duty of confidentiality. This was the reverse of the so-called public interest test which applied in relation to qualified exemptions under FOIA.

Public interest defence

34. Factors in favour of disclosure: The Tribunal agreed with the factors in favour of disclosure that the IC had taken into account in his Decision Notice. This included that disclosure would serve transparency and accountability in that the public would be able to both judge and better understand the ways in which the MRC reached its decisions.

35. The Tribunal did not however accept the IC's assertion that this particular aspect of the public interest in favour of disclosure was lessened on the grounds that the decisions taken had resulted in refusal. It was asserted that a decision to spend public money would have added greater weight to this factor as this would add in the element of scrutiny of the spending of public funds. The Tribunal considered however that this missed the fundamental point being made by Mr McLachlan that there was an equivalent public interest as to why the funds were not being spent - or put differently why the funds were being allocated elsewhere.

36. Also in favour of disclosure was the possibility that other applicants in the same or similar scientific areas may have benefited from better understanding of the MRC criteria and how it was applied. The Tribunal noted however that reviewers' reports were provided, in an anonymised fashion, to applicants whose proposals had been

refused in order to assist with resubmitting an application or the making of an application in the future.

37. In this regard, Mr McLachlan argued that the IC had failed to give sufficient weight to the underlying controversy with regard to biomedical versus psychological research into ME and the alleged bias on the part of the MRC in favour of the latter. The Tribunal noted that the IC had made reference to this in his paragraph 53 Where he stated:

"The release of the information would have been of particular assistance to members of the public who believed that there might have been a bias in favour of particular forms of medical research to the detriment of other approaches and were of the view that this had resulted in political pressure being brought to bear on the MRC. Disclosure of the reports would have allowed an objective assessment of the basis on which funding decisions had been taken.".

38. The Tribunal considered that the IC could have set out his considerations in relation to this aspect of the public interest in more detail. It was difficult to see what weight he had given to this aspect and could understand why this had given rise to particular dissatisfaction on the part of Mr McLachlan. The Tribunal considered further that, on the basis of the information produced by Mr McLachlan, it was likely that the public interest went further than just assistance to those who believed the alleged bias existed. It seemed likely that there was a more widespread interest amongst the public in ascertaining whether or not the bias existed. It was important for the Tribunal to ensure that the fact that Mr McLachlan might be identified with a particular interest group was not taken into account. The Act was said to be 'applicant blind' and the purposes behind a request under FOIA were, in these circumstances, immaterial.

39. The Tribunal's role was to consider for itself where it considered the balance of the public interest lay and only to interfere with the IC's decision if it considered that the conclusion reached had been wrong in law. The Tribunal placed considerable weight upon the information provided by Mr McLachlan and considered that there was a particular public interest in this debate. It was of the view however, having

considered the actual disputed information, that it did not further the debate in a material way. The subject matter of the applications that had been refused were already in the public domain, such that it was already known what proportion of the research was biologically and what proportion psychologically based. The Tribunal noted moreover that the disputed information would be released to the public without the benefit of the applications themselves, such that certain parts would be misleading and incomplete. Looked at in this way, the disputed information, if disclosed, would not provide a full picture and as such the public interest in favour of disclosure was of less weight than asserted by Mr McLachlan.

40. Factors against disclosure The primary factor taken into account by the IC as being against disclosure arose from the intellectual property rights of the applicants. The Tribunal accepted that there were commercial sensitivities in the applicant information being disclosed to the public. The Tribunal received substantial evidence on this in the witness statements from Mr Winterton and Sir Borysiewicz, in the open bundle, and also from applicants for research in the closed bundle. It was said that applicants included within their proposals ideas and scientific findings which they would not want disclosed to competitors. It was thus submitted that disclosure could lead to damage to their commercial interests and/or loss of reputation.

41. The Tribunal further accepted that if it became widely known that either applicant information or comments on the application were made public, this might deter applications to the MRC in favour of other grant funding bodies internationally.

42. The Tribunal agreed with the IC that where a duty of confidentiality has been created there is a strong inherent public interest in the maintenance of that duty.

43. Mr McLachlan argued that passage of time was significant and that the IC should have considered that the information related to relatively old applications. The Tribunal agreed as to the importance of this factor, but concluded that, in fact, looking at the date of request, most of the applications had been relatively recent. Thus, the Tribunal took the view that the applicants would have a justifiable concern in protecting the scientific content and therefore their commercial interests arising

from the research proposals. The MRC had, at the IC's suggestion, written to the applicants to ask whether they would agree now to disclosure and whether, if asked at the time of the request, would have so agreed. The Tribunal noted that whilst certain of the applicants would have agreed when asked at the later date, at the time of the request, none were in favour of disclosure.

44. The Tribunal concluded that the public interest in disclosure did not outweigh the duty of confidentiality owed to the applicants. Thus, the Tribunal found that the section 41 exemption applied in relation to the duty of confidentiality owed to the applicants. As this duty covered all of the disputed information, this in fact disposed of the appeal.

Duty of Confidentiality owed to Reviewers

45. Although not strictly necessary in the light of the above finding, the Tribunal considered that it would be useful if it went on to consider the duty of confidentiality said to be owed by MRC to the reviewers. The Tribunal noted that if, in relation to a future request, an applicant waived his or her duty of confidentiality, then the MRC would need to consider whether disclosure of the reviewers' comments was nevertheless a breach of any duty of confidentiality owed to the reviewers, as opposed to the applicants.

46. Mr McLachlan argued that the comments on the applications made by the reviewers did not meet the test set out in paragraph 24 above, as they did not have the necessary quality of confidence and were not imparted in circumstances importing an obligation of confidence.

47. With regard to the first test, that is whether the information had the necessary quality of confidence, the Tribunal accepted the IC's conclusion that this information was of a sensitive nature (these were comments on the merits of the application) and were not available in the public domain.

48. In relation to the second test, the Tribunal noted that the only documentary evidence before it was that referred to in paragraphs 26 & 27 above. The MRC had produced documents which had been written subsequent to the letter of request

which set out clearly the duties of confidentiality. The relevant time for the purposes of the appeal was however the date of request. As the IC accepted in the Decision Notice, the documents referred to in paragraphs 26 & 27 above did not constitute evidence of an express duty of confidentiality to reviewers in relation to their comments. The IC took the view however that such a duty could be implied from the circumstances. In particular, insofar as the comments may have included ideas linked to the reviewers' own research, it seemed likely that they would have expected such information to be treated as confidential. The Tribunal agreed with this analysis and found persuasive the statements of Sir Borysiewicz and reviewers in the closed bundle that they had, as a matter of fact, understood that their reports would remain confidential (other than anonymised disclosure to applicants). The witnesses stated that they would not have expected their comments to be disclosed beyond the applicants and to the public at large as this was not standard practice either within the MRC process or in the UK and international research community. This evidence was supported by that of Mr Winterton.

49. In this regard the Tribunal took into account Mr McLachlan's submission that the MRC was not entitled to offer the reviewers an undertaking of confidentiality. The Tribunal noted that whilst the MRC was free to do so, this would not necessarily result in a finding that a duty of confidentiality arose as a matter of law. That would be decided by the Tribunal on a proper consideration of the circumstances surrounding any express or implied offer of confidentiality.

50. Finally, with regard to the third test, that is, whether there would be unauthorised use of reviewers' comments if disclosed, the Tribunal noted that all of the eleven reviewers had told the MRC that, if asked at the time of the request, they would not have agreed to disclosure. The Tribunal noted that a finding of actual or potential harm were there to be disclosure was not strictly necessary. It was sufficient that disclosure would be unauthorised.

51. The Tribunal proceeded to consider whether there would be a public interest defence to any claim for breach of confidence by the reviewers and their comments on the applications. The factors to be considered and balanced against each other in this regard were almost identical to those in relation to the duty of confidentiality owed to applicants (see paragraphs 34 to 44 above). Additional factors were that

there could be damage to the commercial interests of the researchers insofar as their comments included details of their own scientific research. As a result of disclosure, reviewers might have become more guarded in their comments, resulting in less useful and/or insightful assessments. This could in turn lead to a reduction in the quality of decision making by the MRC and thereby the appropriate use of public funds.

52. Balancing the factors for and against disclosure, the Tribunal decided that the public interest in maintaining confidentiality outweighed the public interest in disclosure. Thus, the exemption in section 41 applied not only in relation to the duty of confidence owed to the applicants but also that owed to the reviewers. Insofar as any of the disputed information consisted of reviewers' comments as opposed to the applicants' information, the section 41 exemption discharged the MRC from its obligation to disclose under section 1(1).

53. The Tribunal considered it highly likely, although this had not been a matter upon which it had been addressed, that applicants had understood themselves to be under a duty of confidentiality in relation to the reviewers' reports. The Tribunal had been shown documents given to the applicants which post-dated the letter of request which substantiated this as the current position. The integrity of the research grant system appeared to work on the basis that the duties of confidentiality flowed in both directions. This ensured that the intellectual property rights and reputation of both applicants and reviewers stayed intact whilst the MRC sought to come to a decision as to the best use of its public funds.

Section 36

54. Section 36 was relied upon by the MRC insofar as there was information not covered by the section 41 exemption. Given the Tribunal's findings with regard to the nature of the disputed information and the application of section 41 (that is, that this covered all the disputed information), it concluded that a decision on section 36 was not required. The only information falling outside of the applicant information and comments on the application was, as noted above, of such limited scope and

so little value as not to warrant separate treatment under FOIA.

55. Finally, one of Mr McLachlan's grounds of appeal had been that the IC had incorrectly taken into account considerations falling under section 43 of FOIA. This provided a qualified exemption where there was or was likely to be prejudice to commercial interests. The Tribunal noted that, whilst commercial sensitivities and potential prejudice had been taken into account, this had been not under section 43, but rather section 41 and 36. These factors were appropriate ones for the IC to have taken into account in assessing where the public interest lay, that is, for or against disclosure.

56. Whilst the Tribunal had found in favour of the MRC, it was of the view that the public authority might want to consider publishing summary information which indicated in an anonymised way how it had taken its decisions in relation to applications that were refused and how these related to its overall ME strategy.

Conclusion and remedy

57. In light of the above, the Tribunal concluded that the Decision Notice should be upheld and the appeal dismissed.

58. The Tribunal's decision was unanimous.

Signed:

Melanie Carter
Deputy Chair Date: 11 December 2008