Tribunals Service
Information Tribunal

Appeal under section 57 of Freedom of Information Act 2000

Information Tribunal Appeal Number: EA/2008/0036
Information Commissioner's Ref: FS50132179

Hearing on the Papers
On 28 October 2008 and 12 January 2009

Decision Promulgated
On 20 March 2009

BEFORE

DEPUTY CHAIR

Claire Taylor

and

LAY MEMBERS

Jacqueline Blake and Pieter de Waal

Between

E S GALLOWAY

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

THE CENTRAL AND NORTH WEST LONDON NHS FOUNDATION TRUST

Additional Party

Representation:

For the Appellant: In person
For the Respondent: Clive Sheldon, Counsel
For the Additional Party: Eleanor Grey, Counsel

Subject areas covered:

Public interest test s.2; Law enforcement s.31; Prejudice to effective conduct of public affairs s.36(2)(c); Inhibition of free and frank provision of advice s.36(2)(b)(i) Inhibition of free and frank exchange of views for purposes of deliberation s.36(2)(b)(ii).

Cases referred to:

Bowbrick v the Information Commissioner EA/2005/0006; *Archer v the Information Commissioner EA/2006/0037; Hogan and Oxford City Council v The Information Commissioner EA/2005/0026 and 0030; Guardian Newspapers and Brooke v ICO EA/2006/0011 and EA/2006/0013; Commissioner's decision FS50082251; McIntyre v. Ministry of Defence* EA/2007/0068; *Commissioner's decision FS50086131.*

Decision

The Tribunal dismisses the appeal against the decision notice dated 17 March 2008, for the reasons set out below.

Reasons for Decision

Introduction

1. Mrs Galloway has requested staff witness statements from The Central and North West London NHS Foundation Trust (the "Trust"). The statements were prepared for the Trust's investigation into what had happened before Mrs Galloway's late husband fell unconscious whilst in the Trust's care. The investigation looked into one aspect of Mr Galloway's care, around the point where a loud noise was heard on the ward and the action taken by the staff of that ward before and afterwards. Mr Galloway was later transferred from the ward. He was subsequently transferred to an intensive therapy unit in Middlesex hospital, where he passed away some weeks later.

2. Our task is restricted to whether the Appellant has a right to the requested information under the Freedom of Information Act 2000 ("FOIA"). It is beyond our remit to consider whether the Trust has or has not acted properly in any other regard.

The Request for Information

3. Early on 26 July 2004, Mr Galloway was found having fallen from his hospital bed, and he later became unconscious. The Trust classified the events as serious and undertook what they call a "Serious Untoward Incident" ("SUI") investigation. The investigators produced a final report and a copy was sent to Mrs Galloway. This report included a chronology of what had happened; a summary of witness statements prepared by the staff; findings and conclusions; and three short recommendations. The staff who gave statements were identified by name in the report, and within the space for the "*Coroners Inquiry and/or pathology findings*", it was noted that the cause of death was "*natural causes*".

4. Mrs Galloway was unsatisfied with the report. As she explained, she still did not know exactly what had happened to her late husband. Prior to the introduction of Freedom of Information Act, she had made a previous request for the staff statements. This had been refused.

5. On 14 March 2006, the Appellant wrote to the Trust and made what was treated as a request for information under FOIA. She wrote:

a. *"I am writing to you…regarding your refusal to provide me with details of a specific member of staff's statement of events which occurred on the night of the above incident…I understand that it is possible to have the notes with the third party blanked out and this will suffice for my requirements…"*

6. (Although the letter only refers to one staff statement, in subsequent correspondence all parties have referred to "staff statements" and none has sought to argue that the request is limited to one staff statement.)

7. On 10 April 2006, the Trust confirmed to Mrs Galloway that it held the statements requested. However, it refused to disclose them, because it maintained that the sections 40 and 41 FOIA exemptions applied to the material. There was further correspondence between the parties, including a discussion as to whether the statements could be provided with sufficient redactions so as to make them anonymous. Mrs Galloway's letter of 29 July 2006 was treated as her request for an internal review, in accordance with the process for appealing a decision not to disclose.

8. By letter of 24 August 2006, the Trust informed Mrs Galloway that the review had concluded that the information was exempt from disclosure. It also stated that it considered the report adequately set out the events in the early hours of 25/26 July 2004, and provided sufficient information extracted from the witness statements to enable an understanding of the actions of the staff. The Trust emphasized that it had tried hard to see whether it would be possible to make the statements anonymous.

The Complaint to the Commissioner

9. Mrs Galloway complained to the Information Commissioner (the "Commissioner"), on 3 September 2006, asking it to consider whether the Trust's refusal was correct. The Trust set out its position on 27 November 2007, and at that point cited sections 31, 36, 40 and 41 of FOIA as relevant exemptions to consider.

10. Because the Commissioner found that the witness statements had been correctly withheld under section 40, it did not consider the application of the other exemptions. The Commissioner issued a Decision Notice dated 17 March 2008, recording its determinations that:

a. The statements contained "***personal data*"** of the witnesses and other individuals referred to in the statements. The statements identified the staff by name and job

title, detailing their actions and opinions and the actions of some of their colleagues.

b. Staff members of various ranks who had been involved in the relevant events had given the statements in the course of an internal investigation carried out by the Trust as to what had happened. The witnesses had been informed prior to giving their statements that these would be treated as **confidential**. Having considered the nature of the witness statements and the "Root Cause Analysis" workbook used by the investigators, it concluded that the witnesses would have had a reasonable expectation that their statements would be used for internal investigation procedures only, and not placed into the public domain.

c. Disclosure of the statements would be unfair because of this reasonable expectation and the nature of the information. Therefore it would contravene the "*first data protection principle*", found in the Data Protection Act 1998. This requires the disclosure of the information to be both **fair and lawful**. Accordingly, section 40(2) of FOIA was "engaged".

d. **Redaction**: It would not be possible to redact information to a level that would make the statements anonymous. It stated: "*The Commissioner is also aware that the Report which was disclosed to the complainant contains a synopsis of the witness statements, which he believes makes it impossible for the statements to be successfully anonymised*."

The Appeal to the Tribunal

11. The Appellant appealed to the Tribunal by notice dated 7 April 2008.

12. The Tribunal issued directions joining the Trust as a party. The Commissioner had made its decision on the basis of section 40, and therefore had decided not to review the application of the other exemptions. At the directions hearing on 3 July 2008, the parties accepted that if the Tribunal did not agree with the Commissioner's findings on section 40, we would then hear submissions on the application of the other exemptions.

13. A hearing on the papers was held on 28 October 2008. The Tribunal considered the agreed bundle of documents, witness statements, submissions on section 40 and requested information. Some of the statements and submissions were submitted on a confidential basis, such that the Appellant could not have the benefit of seeing them as they related directly to the contents of the statements. During the hearing, we found that

we had questions on the evidence and legal arguments presented, and requested further information. Unfortunately, some of those questions also needed to be asked of the Trust in confidence, and the Commissioner was copied in. This is normal practice in this Tribunal, where it is necessary to discuss the contents of the requested information, which by its nature is to be treated as confidential during the appeal process. Since it is our duty to reach what we hope to be the right decision, and to ensure a fair process, we also posed certain questions that we thought a lawyer might have posed on behalf of the Appellant.

14. Our initial view, subject to the responses to these questions, was that section 40 would not apply to such an extent that all the information should not be disclosed. Therefore we also directed the parties to present arguments as to the application of sections 31, 36, and 41. We thank the parties for all further submissions made. The Tribunal met again on 12 January 2009.

Grounds of Appeal

15. In her Notice of Appeal, the Appellant states:

> *"I feel we should know why a decision was made not to send for a doctor at the adjacent NHS hospital due to doctor's protected sleep. Had my husband been found in the same state in the street a doctor would have been called within 5 hours."*

16. Given that the Commissioner's decision was reached on the basis of section 40, this was also the focus of the grounds of appeal. The Appellant produced further and better particulars to support her claim, and they were clarified as falling under the following categories during the direction hearing:

a. The information requested is not personal data because it would be possible to make it anonymous or **redact** specific parts with remaining parts not constituting personal data;

b. To the extent that it would not be possible to make the requested documents anonymous, or to redact specific parts, disclosure would still be **fair** and would not breach the first data protection principle of the Data Protection Act 1998;

c. If b) is not accepted, then, in the alternate, it would be consistent with the requirements of the Trust under section 1 of the Freedom of Information Act 2000 for it to (i) employ an independent person to "re-write/interpret" the statements without giving the identity away; or (ii) set up a meeting where the Appellant ask

an independent person questions about the contents of the statements in the presence of the Trust. (This ground is referred to as the "proposed solutions").

Evidence

17. The Tribunal was presented with a lot of evidence, all of which we have considered. It included:

    a. Mrs Galloway's comments on the SUI Report, in which she lists discrepancies she considered the report contained, includes statements such as "*Cause of death incorrect and a Coroner's Report has never been requested*." It makes comments as to what concerned her, for instance "*they will note that the b.p. is rather high!!*" and concern about the length of time it took the doctor to attend to Mr Galloway. It also asks further questions, such as "*Who arranged for the transfer from the mental health unit back to* [the hospital] *by wheelchair.*"

    b. Various statements address concerns the Appellant had in relation to Mr Galloway's treatment, such as a statement of 9 November 2004 explaining why she was concerned that the Trust's duty of care to Mr Galloway had been breached during the investigated events.

    c. A copy of the Coroner's Post Mortem Examination.

    d. The Trust asserted that it had done its best to supply as much information as it could to the Appellant, whilst complying with its duties to staff and its statutory responsibilities. In particular, it presented:

        i. The Final SUI Report;

        ii. Records of a meeting with the family on 9 August 2004;

        iii. Minutes of a meeting held on 15 September 2004. According to the minutes: at this meeting the Appellant and a friend met with the SUI investigators and the consultant in charge at the time of the event, and they discussed the SUI report that Mrs Galloway had seen. At the time it was not in final form because they were awaiting the toxicology results and Coroner's report. It confirmed that the Appellant had also received the medical notes from the Trust and Middlesex hospital. Mrs Galloway raised her concern that there were inaccuracies within the report. For instance, she said that facts such as her husband having had a knee replacement were incorrect. She

also asked questions including about treatment, staff responses and assumptions made at the time of the event. These were addressed, and the investigator explained that certain facts could not be established by the investigation. At this meeting the Appellant expressed her view that there had been a lack of care toward Mr Galloway, that the Trust's responsibility to keep her husband safe had not been met. The consultant stated that he was unsure why Mr Galloway went into a coma and passed away and that more information could be gleaned from the toxicology and coroner's reports which they awaited.

iv. Letter of 25 October 2004 answering queries raised by Mrs Galloway after having received the draft SUI report and nursing and medical notes. This included a statement that the SUI investigation was still active as the investigators were awaiting external report results (including toxicology) before they could draw comprehensive conclusions and recommendations.

v. Letter from the Trust's Director of Operations to the Appellant of 18 November 2004. This stated that the Trust had telephoned the Coroner's Officer, who advised that (1) the post mortem results had confirmed Mr Galloway had died of natural causes and (2) the Coroner had ruled that an Inquest was not required. It stated that there was "n*othing more that could be learned from this information"* so that the investigation would be resumed and quickly completed. The Appellant was offered a meeting with the consultant psychiatrist and one of the investigators to be set up once she had received the SUI report, if she thought that useful. When the final report was sent, the Appellant was again offered a meeting to discuss it with the investigator. We did not find a record of a further meeting in the bundle or statements.

vi. Letter/account sent by the Medical Director on 22 December 2004. This was a detailed chronological report about Mr Galloway's treatment and clinical comment after he was transferred from the ward where the investigated event occurred, up until he was transferred to an intensive therapy unit in Middlesex Hospital. In that report, the director acknowledged:

    1. "*As often happens when reviewing a complex case with a rapidly changing picture, I have found some areas where our recording of events, and in particular what was communicated to the*

family could have been better and I have fed this back to the clinical teams concerned. I also suspect from the information you have provided that we could have communicated better…"

2. This report did not seem to help the Appellant to ascertain the cause of death, and the director wrote that he was anxious to review a summary of Mr Galloway's clinical course at the Middlesex Hospital as part of a governance process. He envisaged both sets of consultants jointly reviewing the case and advising if there were any important clinical lessons to learn. We were not shown any material confirming that this had been done.

e. Statements from the Chief Executives of North East London Mental Health NHS Trust, East London NHS Foundation Trust and West London Mental Health NHS Trust stating:

i. "*Disclosure to the public of staff statements made in connection with an SUI inquiry could seriously prejudice the ability of the Trust to carry out effective similar investigations in the future. If staff were aware that their statements may be disclosed to the general public in the future, I am concerned that they will not engage fully in investigations or will be more cautious in giving vital evidence. The effect of that would be to damage the effectiveness of future investigations, and thus potentially the public could be put at risk*."

f. The acting Chief Executive of Barnet, Enfield, Haringey Mental Health Trust signed a similar statement, but altered the wording of the last two sentences to state:

i. "*If staff were aware that their statements may be disclosed to the general public in the future, I am concerned that they may not engage fully in investigations or may be more cautious in giving vital evidence. The effect of that would be to render future investigations less effective*."

g. Root Cause Analysis ('RCA') Delegate's Workbook: This includes the following:

i. "*Scoping the incident ... It is important that you request as much information as possible as early as possible."*

ii. "*Invitations to interview … The following points must be included to allow the interviewee to prepare ... an explanation that this is not a disciplinary process but a review of the incident with the intention of identifying the*

*cause(s)… the interview is confidential". (*The Tribunal notes that whilst the RCA handbook refers to staff providing written accounts of the event, it does not make a similar requirement stipulating that staff must be informed of the confidentiality prior to making a statement.)

h. Claire Murdoch's Witness Statement of 6 August 2008. Ms Murdoch was called by the Trust as she is the Chief Executive. Previously she was Director of Operations and a registered mental health nurse. Her statement included:

i. **Duty to conduct SUIs:** The Trust considers there is both a formal and informal duty imposed on the Trust to carry out SUI investigations when relevant incidents occur. The formal duty arises from guidance HSG(94) 27 (as amended). There is an informal and general duty for the Trust to conduct itself in a safe and responsible manner. This requires the Trust to investigate fully serious untoward incidents so that lessons can be learnt and similar incidents avoided in the future.

ii. **In accordance with RCA:** "*When a formal investigation is required this will be conducted by staff trained in the Root Cause Analysis (RCA) procedure. The RCA process is used extensively by healthcare bodies both nationally and internationally as a way of learning lessons from SUIs. The fundamental aim of the RCA process is to make formal recommendations at the end of an investigation with a view to preventing similar incidents occurring again. The aim is not to apportion blame but to learn how to prevent similar incidents occurring again. It differs sharply from a disciplinary process. As a result of this focus on "learning lessons", when staff give statements as a part of an SUI, they are not given any other documentation or the opportunity to challenge the outcome or recommendations of the investigation. Managers/Clinicians who conduct the SUI investigations are given training in Root Cause Analysis and the Root Cause Analysis Handbook is used as the central part of that training*."

iii. **Confidentiality of statements under RCA:** "*An integral part of the RCA process and thus any SUI investigation is obtaining an account from those members of staff who were directly involved… The confidentiality of the SUI investigation and any statements made is discussed within the RCA training. Whilst the staff who attend the training are made aware that statements made could be disclosed as a part of any subsequent litigation or in the*

process of an Inquest, they are not informed and would not think that their statements could potentially be disclosed to the public at large, whether under the Freedom of Information Act or otherwise. It is therefore my belief that whilst staff accept that confidentiality cannot always be absolute, since their statements may be disclosed in very specific circumstances to a defined audience, they have a general expectation that the status of the statements as confidential documents is treated very seriously, and that they will generally be kept confidential and not enter the public domain. This is indeed the view that I hold and one held as a general policy by the Additional Party. It is also consistent with staffs general expectations about the treatment of patient-confidential material, which they are accustomed to handling as part of their general roles."

iv. **General Expectation of Confidentiality regardless of RCA: "***Because of this general Trust policy even where staff have not received training in Root Cause Analysis, to the best of my knowledge, the staff as a whole have a general expectation that SUI interviews and statements will be kept confidential and will not enter the public domain. As evidence of this view I can confirm that following Mrs Galloway's request for disclosure of the staff statements, the Trust Secretary at that time made contact with and sought confirmation from each of the members of staff who had given a statement in the course of the SUI investigation. Contact was made with 6 of the 8 members of staff and each of those confirmed that they had an expectation that their statements were confidential."*

v. **Level of seniority of staff: "***It is the Additional Party's general experience that a large proportion of the staff involved in giving evidence to SUI investigations are the more junior members of the Trust's staff. Somewhat inevitably in the majority of cases, when an untoward incident occurs, the first staff to respond are those who are the closest to the patient and these tend to be junior members of staff, be they porters, care assistants or junior nurses... the staff who made statements for the SUI investigation of Mr Galloway were, in the main, junior members of staff."*

vi. **Potential impact of disclosure for future investigations:** "*Should the Tribunal order disclosure of the statements, the Additional Party would be forced to amend its current policy and inform staff that statements made in the course of an SUI investigation could be disclosed to the public. If staff*

were aware that their statements may be disclosed in this way then the likelihood and concern is that their involvement in future investigations would not be so open, and they may be defensive. .. The effectiveness of any SUI investigation rests heavily on the collection of accurate and detailed information about the incident concerned. If staff were aware that their statements or the contents of their interviews could be disclosed in such a fashion, I have real concerns that the evidence then given would not be so accurate, detailed or candid. This concern is heightened by the junior nature of many of the staff involved in such investigations."

vii. *"My experience is that due to the perceived increase in litigation and regulation, junior members of staff are often, and understandably, protective about providing information that may lead to questions being raised about their actions. However, due to the Additional Party's current policy, my experience is that staff do consider that their statements are treated confidentially. This in turn leads to a level of trust between those investigating and the staff directly involved. As a consequence, the Additional Party is confident that at present the great majority of statements given by staff are accurate, detailed and candid."*

viii. *If staff did not provide accurate, detailed or candid accounts of their involvement in an incident, then the whole purpose of an SUI investigation would be seriously compromised. ..If the basis of the investigation cannot be relied upon, then inevitably the scope for learning lessons will be seriously compromised. Clearly such an outcome is not desirable and potentially has a very serious impact for staff, future and current patients and members of the general public. I can therefore say that in my view allowing disclosure of staff statements to members of the public is not in the public interest. Indeed to the contrary, disclosure is likely to put the public at risk of harm, because SUI investigations would run the very real risk of being compromised because of guarded or incomplete disclosure by staff members. It is very important to be able to "get to the bottom" of things*."

ix. **SUI investigation concerning Mr Galloway : "***Due to his transfer to and subsequent care at Middlesex Hospital, the SUI investigation that was carried out focused on his fall from bed*".

x. **Information already provided to Mrs Galloway:** "*In addition to the Appellant being fully informed of the incident on the 26th July 2004, she was invited to a number of meetings at the Additional Party's offices at which the key members of the clinical team who cared for her husband were present. These meetings were used as an informal arena in which the Appellant could raise questions and be updated on the investigation that was being carried out. Wherever possible and appropriate the Appellant was given answers to her questions… the report includes within it a synopsis of each of the staff statements. These give a brief overview of what is said in the statements."*

xi. **Attempts to make statements anonymous: "***In an attempt to respond positively to the Appellant's request, extensive attempts were made to anonymise the statements. The statements made contain each member's own personal recollection of the events. As a consequence, all of the content of those statements amounts to personal data, and to get round that problem it would have been necessary to anonymise them. My understanding that, due to the Appellant's extensive pre-existing knowledge of the incident, her access to the final SUI report (disclosed to her), and the fact that she holds a copy of the clinical notes, the redaction required to ensure that personal information was not disclosed, was extensive and left the statements in an unintelligible form. Essentially, it was not possible to ensure that each of the statements could not be "related back" to their authors, and the attempted anonymisation was therefore futile*."

i. Claire Murdoch's confidential statement of 3 September 2008. This enclosed the staff statements that are the subject matter of this appeal, supplied in confidence in order for the Tribunal to be able to determine the appeal. It also contained **attendance notes** of records of conversations mentioned above, confirming staff expectation of confidentiality. Since the attendance notes did not disclose the contents of the statements and did not otherwise appear to be confidential, we later ordered these to be disclosed to the Appellant subject to staff members' personal information being blanked out.

j. Claire Murdoch's Supplemental statement of 8 October 2008, responding to questions from the Appellant, including:

i. **Statements being made Anonymous:** "'*Had you not provided us with the information of the SUI Report would you have been in a position to provide details of the staff statements?' The Trust's response: Disclosure would not have been made even if the SUI report had not been provided…the staff provided the statements on the understanding that they would remain confidential and not be released to the public at large… it would still not have been possible to anonymise the statements for disclosure. Due to the Appellant's regular attendance on the ward and from the information provided by the Trust outside of the SUI report .. she holds a great deal of knowledge about the staff concerned*.. . "

ii. **Future Engagement** "*'Are you saying if the staff were not provided with the promise of confidentiality they would not have told the truth regarding the incident?' The Trust's response … my concern is that if staff were aware that their statements could be disclosed to the public, their willingness to engage in future investigations would be greatly reduced. This is not the same as suggesting that staff would not tell the truth. My belief is that if junior staff were aware that their statements could be made public, they would provide the minimum amount of information necessary to fulfil their role in the SUI investigation… Were the Tribunal to order disclosure ... I fear the openness of junior staff, in particular, would be compromised or end... where staff currently provide very open and detailed accounts of an incident my concern is that staff would become defensive and those accounts would be reduce to the bare minimum."*

iii. **Confidentiality: Protecting Staff?** "*'Was the purpose of confidentiality to protect staff jobs?' The Trust's response: ... The purpose of the SUI investigation is not to find fault... is to learn lessons and make recommendations with a view to preventing similar incidents occurring in the future… If during or at the end of the investigation, there is concern that a member of staff has... acted inappropriately, disciplinary action will be considered…"*

k. It should be noted that in a response to a question we posed, the Trust emphasised in its submissions that its reasons for withholding the information were not so as to spare "*officials embarrassment over poor administrative [or other] decisions*".

l. Claire Murdoch's second supplemental statement of 27 November 2008, responding to questions from the Tribunal in its directions dated 4 November 2008. This includes:

i. **Statements Confidential under RCA?** We asked: *regarding the Trust's submissions that staff acted on the understanding that statements made were to be kept confidential, the RCA workbook describes requirements for staff to be informed that the interview is confidential, but does not mention this confidentiality for staff statements.* *Part of Ms Murdoch's response:*
"*the Trust considers that statements given by staff for SUI investigations are given on the understanding that they will not be disclosed to the public at large (see paragraphs 8-10). As explained in that statement (paragraph 8), statements from staff may be taken either before or after any formal interview. The statements themselves are often a key part of the interview process. Where a full statement has been taken which provides a comprehensive overview of the incident, it is not always felt necessary to carry out a formal interview. Where a statement has been provided and an interview is carried out, this is usually with a view to discussing any discrepancies in the evidence between the staff statements and the notes or other records of the incident. Further, if a statement is not initially provided, perhaps because of time constraints on staff time or because of a degree of urgency, a formal interview will take place and the evidence taken from such interviews will be turned into a statement. Accordingly, staff statements are an integral part of the interview process. To this end the Trust considers that because of the integral nature of the staff statements to the interview process, the statements are inherently afforded the same degree of confidentiality as any interview…*"

ii. **RCA followed:** "*It is Trust policy that where two members of staff undertake an investigation the formal Route Cause Analysis procedure as set out in the workbook is to be followed. I can confirm that in this case, the Route Cause Analysis process set out in the workbook provided in the Bundle was followed."*

iii. *"I can confirm that both [of the investigators] were trained in the Route Cause Analysis procedure and, as a consequence, were provided with a copy of the workbook at such training."*

m. Claire Murdoch's confidential supplemental statement of 27 November 2008. This responded to confidential questions raised by the Tribunal. However, it enclosed a document, which we did not consider revealed confidential information such that we later asked the Trust to disclose it to the Appellant. It was the **letter sent to staff** dated 16 August 2004 requesting the staff to make statements for the SUI. It is noted that this letter did not include a statement that the information would be kept confidential. It did state:

i. "*The statement should include all that you can remember or know of the incident which happened on 26th July 2004, any event leading up to the incident or afterwards. Please be as specific as you can about times, places, event, etc."*

18. The Appellant questioned how Ms Murdoch could be called to be a witness to what happened when she was not involved in the event[1]. It should be noted that Ms Murdoch was not giving evidence in relation to any involvement in the event. Ms Murdoch was called to give evidence as to her perspective as the Chief Executive on matters such as the workings and policy of the Trust. To the extent that she gave statements as to factual matters such as whether the investigators were trained in RCA methods, it is expected that she received this information from her staff.

19. The Appellant also comments that the point of the Act is to make information available freely, and she has not experienced this. The panel are sympathetic to this, but are restricted by the confines of the Act as laid down by Parliament, such that information cannot be made available if an exemption applies. In relation to other comments the Appellant makes about the negative impact of the design of section 31, again we are sympathetic to her remarks, but hope she will appreciate that as a Tribunal we must apply the Act as written.

The Task of the Tribunal

20. Under section 50 FOIA, a complainant may apply to the Commissioner for a decision as to whether a public authority has dealt with her request in accordance with Part I FOIA. (Part I provides for the right of access to information held by public authorities.)

21. The Tribunal's remit is governed by section 58 FOIA. This requires the Tribunal to consider whether the decision notice made by the Commissioner is in accordance with

[1] The Appellant is reminded that the appeal is not about investigating the event and the panel can only look at whether she has a right to the requested information under FOIA.

the law or whether he should have exercised any discretion he had differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

The Questions for the Tribunal

22. The Questions for the Tribunal in this appeal are as follows:

    a. Should we consider exemptions raised for the first time during the Commissioner's investigation?

    b. Do any of the exemptions raised apply? If they do, is it possible to redact certain information so as to make it anonymous, and would it then be acceptable to disclose it? Alternatively, are the Appellant's "proposed solutions" consistent with FOIA?

A. Should we consider exemptions raised for the first time before the Commissioner?

23. As explained above, the Trust only sought to rely on sections 31 and 36 after the Appellant had complained to the Commissioner.

24. Whilst the Tribunal will not always agree to consider exemptions that are raised at later stages in an appeal, it has the discretion to do so. It does not seem that the wording of FOIA or the Information Tribunal (Enforcement Appeal) Rules 2005 precludes us from considering late exemptions. We agree with the reasoning in *Bowbrick v the Information Commissioner EA/2005/0006* on this point.

    a. In particular we are attracted to the reasoning in paragraph 42 of the *Bowbrick* decision:

> *"42. If a public authority does not raise an exemption until after the s.17(1) time period, it is in breach of the provisions of the Act in respect to giving a proper notice because, in effect, it is giving part of its notice late.* ***However FOIA does not say that that failure to specify the exemption within the 20 working day time limit means that the authority is disentitled thereafter from relying on the exemption in any way. If the intention of FOIA had been that the exemption could no longer apply to the information in such circumstances then it would have been expected that the Act would say this in very clear terms, because otherwise it is a very draconian consequence of the failure to comply with the statutory time limit." (****Emphasis added).*

b. We also note the reasoning in *Archer v the Information Commissioner EA/2006/0037* at paragraph 45, in relation to exercising the discretion and factors that have been considered relevant:

> "*45. In our view, the principle that emerges from Kircaldie and Bowbrick in respect of situations where a party seeks to invoke, on appeal, an exception not relied on previously, is that* ***each case must be considered on its own facts.*** *In the present case, we note that at the time of the Appellant's request, the legislation (both the FOIA and EIR) had only just come into force, and the Council's experience of the legislation is likely to have been limited. That should have been less the case, of course, for the Commissioner, particularly since his Decision Notice was not issued until June 2006. We note, however, that the Commissioner did identify that the EIR could apply, but took the view that he did not need to consider the EIR as well as the FOIA, overlooking the fact that as the Tribunal pointed out in Kircaldie, if the information comes within the scope of the EIR, the public authority is obliged to deal with the request under the EIR. However, the Decision Notice in the present case was issued a few weeks before Kircaldie. In these circumstances, and bearing in mind that the Appellant has not been prejudiced because he has had an opportunity, before this Tribunal, to make submissions in respect of the EIR exceptions now being invoked, we find that those exceptions can be relied on in this appeal, even though they were not relied on by the Council in refusing the Appellant's request, nor by the Commissioner in his Decision Notice. Our view might well be different, however, were the same situation to arise today, since public authorities and the Commissioner can now be expected to have much greater experience of the relevant legislation."*

25. In this appeal, we consider there is reasonable justification to allow these exemptions to be considered. This is primarily because we accept that there would or could be harm to the public interest if the Tribunal were to order disclosure of the information without having regard to the public interest considerations which underlie sections 31 and 36 FOIA. We do not think it appropriate in this case to restrict ourselves from considering the application of these exemptions and the principles of public interest they are concerned with because of the delay in the Trust claiming the exemptions.

26. The exemptions were claimed when the Commissioner was investigating the complaint and not at a late stage in this appeal. Therefore the Appellant has had sufficient opportunity to make submissions on sections 31 and 36. As regards the passage of time, we do not consider the actual delay in claiming the exemptions has caused prejudice. The Trust set out its arguments in relation to sections 31 and 36 in a letter to the Commissioner of 27 November 2007, and this was included in the bundle of documents, such that the Appellant would have been aware of the arguments the Trust was seeking to rely upon and had sufficient time to prepare her case.

27. We recognise that the appeal process becomes more cumbersome and uncertain when public authorities fail to raise the exemptions at the correct time. Therefore the public authority ought to have good reasons for their late claims. The Trust noted that there is a countervailing argument for allowing late claims in that otherwise we might encourage the public authorities to take a 'belt and braces' approach by claiming all conceivable exemptions at the outset, so as to preserve their position for later. We find this argument less compelling. In this case the Trust has explained its reason for late reliance on sections 31 and 36 as primarily being that its original notice was provided in April 2006 at a relatively early stage in the implementation of FOIA. It explained that it had limited experience of the exemptions at that stage. We accept this. It initially claimed section 30, and then changed this to section 31, and it asserted that there is a close relationship between these sections.

28. Since the Commissioner has restricted its decision to section 40, we have considered whether we must do the same. We think not. It is within our remit to review his decision and his exercise of discretion. This includes considering the application of exemptions that he might have considered but chose not to, and considering whether or not to allow the public authority to raise exemptions during the Commissioner's investigation. As explained above, we have concluded that we need to consider whether any of the exemptions claimed applies to the requested information, including sections 31 and 36. To decide otherwise would unfairly prejudice the Trust. It had put its arguments on all the exemptions it was claiming to the Commissioner, and it was the Commissioner's decision to end his scrutiny with the application of section 40.

B. Do any of the exemptions raised apply?

29. Generally, under the FOIA, anyone requesting information from a public authority is entitled to have that information communicated to him, unless an exemption applies. The Trust claims that four exemptions apply to the staff statements.

Section 31

30. So far as material, section 31 reads:

"(1) .. information ... is exempt information if its disclosure under the Act would, or would be likely to, prejudice (1)(g) ... the exercise by any public authority of its functions for any of the purposes ... of …

(2)(a).. ascertaining whether any person has failed to comply with the law',

> *(b).. ascertaining whether any person is responsible for any conduct which is improper',*
>
> *(c).. ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise',*
>
> *(e).. ascertaining the cause of an accident,*
>
> *(i) .. securing the health, safety and welfare of persons at work, and*
>
> *(j).. protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work."*
>
> *(Emphasis added.)*

31. If the information is exempt by virtue of section 31, then the person is not entitled to have the information communicated to her if *"in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."* (*Section (2)(b) FOIA – emphasis added*.)

32. Therefore, we need to decide whether disclosing the information would be likely to prejudice the Trust in the exercise of any of the functions described above. If so, we need to consider where the balance of the public interest falls.

The functions of the Trust

The Trust's Submissions

33. The Trust submits that disclosure to the public of staff statements prepared solely to aid the investigation of an SUI would, or would be likely to, prejudice all of the purposes described in paragraph 30 above.

34. It argues that it has both a formal and informal duty to carry out SUI investigations:

35. It says the informal duty arises from the Trust's need to conduct its business in a safe and responsible manner.

36. The formal duty arises under Health Service Guidelines HSG(94)27 (as amended). The relevant paragraphs are 33 to 36. For independent inquiries into mental health services, the guidelines were replaced on 15 June 2005 - i.e. after the SUI in question had been completed. (The Trust presented both sets of guidelines. Since the Tribunal is concerned with whether the particular disclosure would have been likely to prejudice the Trust's exercise of its functions at the time of the request, it is the amended rules that are

relevant. However, our decision would be the same even if we looked only at the earlier guidelines.)

37. The guidelines require the health authority to commission independent investigations and to generate a report in very serious cases. An example of a serious case is given as where the authority determines that an adverse event warrants independent investigation, for example if there is concern that an event may represent significant systemic service failure. The guidelines specify such matters as the investigation process including an internal management review to take place, usually within 72 hours, followed by an investigation led by the Trust, using an approach such as "root cause analysis" ("RCA").

38. The Trust also draws attention to the duty placed upon all NHS bodies under section 45 (1) of the Health and Social Care (Community Health and Standards) Act 2003, "… *to put and keep in place arrangements for the purpose of monitoring and improving the quality of health care provided by and for that body."*

39. In addition, the Trust asserts that it owes a common law duty of care to patients. This may require investigations to be carried out for untoward events, to discharge a duty to the particular patient or to avert a risk of future harm.

40. Having asserted that the carrying out of SUI investigations falls within its functions, it then submits that the investigations primarily fall under three 'purposes' described in sub-sections 31(2)(b); 31(2)(e) and 31(2)(j). It claims that to a lesser extent, the investigations are also for the purposes set out in sub-sections 31(2)(a); 31(2)(c) and 31(2)(i). (*See paragraph 30 above*.)

The Appellant's Submissions

41. The Appellant's submissions did not specifically address this point. In a letter to the Trust dated 29 July 2006, she argued that the relevant events were investigated at her request and not as a result of a statutory requirement. However, this does not refute the Trust's position that it has the function to carry out SUI investigations.

The Commissioner's Submissions

42. The Commissioner did not agree with the Trust on this point. He is not satisfied that the Trust has provided sufficient evidence that it has the relevant functions, but does not elaborate much further.

Findings

43. Function: The Tribunal is satisfied that the Trust has a function to carry out SUI investigations both under HSG(94)27 (as amended) and section 45 (1) of the Health and Social Care (Community Health and Standards) Act 2003, and as a common law duty. We also accept that the purpose for carrying out this function might be any of those listed in paragraph 30 above.

44. By way of example of such a function, we are satisfied that the Trust had a function to investigate the incident concerning Mr Galloway either by virtue of the guidance or its common law duty and so as to satisfy section 45 (1) of the Health and Social Care (Community Health and Standards) Act 2003. In this case we have been told that the aim of the SUI was not to apportion blame, but to learn how to prevent serious incidents occurring again. Whilst this may be the primary purpose we are also told that if something untoward had been found, jobs would potentially have been at risk. We consider that the purpose of the SUI concerning Mr Galloway was to investigate what had happened primarily to ensure that any concerns were addressed, so that future similar incidents might be prevented. This would fall within the one of the purposes listed in section 31(2)(b) or (e) or (j).

45. Since we have accepted that the Trust has a general function to undertake investigations, and since these might fall within any of the section 31(2) purposes listed in paragraph 30 above, we must proceed to consider whether disclosure in this case would prejudice the exercise of the function.

<u>Is disclosure likely to prejudice the exercise of the function?</u>

46. For section 31 to be engaged, the disclosure of the staff statements must be considered likely to prejudice the Trust's ability to perform the functions described above. We were referred to the analysis of this "prejudice test" set out at paragraphs 27 to 36 of the judgment of this Tribunal in *Hogan and Oxford City Council v The Information Commissioner EA/2005/0026 and 0030*. Of relevance here, we must consider

    a. the **nature** of the 'prejudice' being claimed;

    b. whether this prejudice would or would be likely, were **disclosure to be made to the public as a whole**. It is considered a disclosure to the world at large because information that is disclosed under FOIA may not be made subject to any further conditions as to use;

c. the likelihood of prejudice arising must be **real and significant**, though it may fall short of being more probable than not;

The Trust's Evidence and Submissions

47. The Trust submits that:

a. Disclosure to the public of staff statements prepared solely to aid the investigation of an SUI would, or would be likely to, prejudice all of these purposes for the reasons set out in the witness statements of Ms Murdoch, and because undertaking an SUI investigation requires that Trust staff provide their honest recollection of the events surrounding the incident or accident. Obtaining the fullest possible information, as quickly as possible, when interviewing staff as part of an investigation depends on the implied assurance that any information provided will only be used for the purposes of the investigation. It submits that such statements can, on occasion, include candid reflections on the events surrounding the incident, which could be used, by potential litigants and/or by the press, to criticise and/or incriminate the makers of the statements and/or their colleagues.

b. If staff were aware that their statements could be disclosed to any member of the public (including the press) on request, they would be reluctant to speak candidly in interview for fear of incriminating themselves or their colleagues. Without their agreed participation, or with anything less than full participation, the benefit of investigating SUIs would be severely prejudiced.

c. This issue was raised at a meeting of all the Mental Health NHS Chief Executives across London where support for the Trust's position was unanimous. (*See paragraph 17(e) and (f) describing the declarations from four other Chief Executives of Mental Health Trusts in the London area*.)

d. The Trust accepts that employees of a public authority will have either an implied or express duty to provide statements where reasonably requested. However the Trust has grave concerns that if statements are obtained from staff in an environment where they have little or no choice and are given with the knowledge that they could be disclosed to the public at large, including the press, those statements are unlikely to be as candid as they otherwise might be. At the moment, staff participate freely, without legal representation. This would be likely to change if SUI statements were disclosable under the FOIA. As a consequence a particularly vulnerable cross-section of the public would be put at risk.

e. The Trust submits that it would be impossible to require staff to be as open and candid as they currently are if their statements were to be disclosed to members of the public in response to FOIA requests.

f. The Trust relies on the Commissioner's earlier Decision Notice FS50082251. (The request in that case seems to have been for a Serious Case Review, which appears to be a document held by the local Area Child Protection committee, carried out following the death of a child from neglect. It is distributed to the committee members and the Secretary of State. The purpose of the review was described as identifying lessons to be learned.) In that case, the Commissioner accepted "*that the willing co-operation of the professionals is essential if the reviewer is to obtain reliable information reasonably quickly*."

g. In the Trust's letter of 27 November 2007 to the Commissioner, it explained that obtaining the fullest possible information as quickly as possible when interviewing staff depends on the implied assurance that any information provided will only be used for the purposes of the investigation. Such statements can on occasion include allegations raised by a staff member against a colleague, which may or may not be substantiated. If staff were aware that their statements could be openly disclosed on request, staff would understandably be reluctant to speak candidly for fear of self incrimination and incrimination of colleagues.

The Commissioner's Submissions

48. The Commissioner does not present a substantial analysis of this point.

The Appellant's Submissions

49. The Appellant makes various submissions including in her 'further and better particulars' by cover of her letter of 29 May 2008, and letters dated 14 October 2008, 5 and 16 December 2008, and earlier letters addressed to the Trust. We have considered where these arguments might be said to be relevant to this part of the applicability of section 31. Her submissions include that the investigation was carried out at her request and following her loss, rather than for the purposes specified in section 31(2) of FOIA. Accordingly, it should have been expected (including by the staff) that she would see the results, and the staff would not have expected confidentiality in this instance.

50. The Appellant points out that the RCA handbook states that confidentiality is limited and that under certain circumstances information would be made available to the public. She quotes the RCA handbook as stating "*A statement prepared as part of a serious incident*

protocol will be disclosable if a patient or a staff member decides to bring a claim in the future." The passage she quotes from continues, "*It is essential that statements just deal with facts…If a witness just sets out the facts in a statement it is unlikely they will "drop someone in it"… Ultimately staff may have to be reminded that the preparation of statements is part of their jobs. Refusals may result in disciplinary proceedings."*

51. In support of this argument, the Appellant asked whether the written information the Trust provided the staff stated that the staff statements as well as any interview would be kept confidential. (We note that the letter addressed to the staff in paragraph 17(m) does not mention confidentiality.)

52. The Appellant also questions whether the RCA handbook is a practical document that one would expect to be handed out every time that an SUI is undertaken. She questioned whether another handbook had been used. She suggested that there was an inconsistency between two statements by the Trust, where one stated that both the named investigators "*were provided with a copy of the workbook at such training*", while a letter sent to the Appellant by the Trust that stated that the "*RCA was distributed to the investigative team for use during their investigation*." Whilst the Tribunal did not accept her point about inconsistency, the Appellant was rightly questioning the validity of the RCA workbook in its strength as evidence that the staff expected confidentiality, or that it gave a legitimate expectation of confidentiality.

53. In response to the claim that staff would be reluctant to speak candidly in interview for fear of incriminating themselves or their colleagues, the Appellant states that employees must be responsible for what happens at work, especially when it results in a death. For these purposes, the implication of the argument seems to be that given the serious nature of the staff's responsibility as carers, and that it is part of their job, then regardless of how junior they might be, staff would have to give a full account of what happened.

54. The Appellant makes the point that "*the NHS is a public service and the information is merely about procedures and factual happenings or members of that organisations' duties in the workplace.*" Perhaps the relevant point is that since staff only give a factual account of what happened, and that it should be their professional duty to provide this, then it ought to be questionable to state that they would not provide an honest account of events of such a serious nature.

The Trust's Response to the Appellant's points Raised

55. The Trust acknowledged that the investigation was carried out at Mrs Galloway's family's request. However, it states that the investigation was a process that began and would have begun independently of any request by the family. It also stated that the family had seen the results of the investigation as the full report had been provided to them.

56. As regards the level of confidentiality of the statements, the Trust acknowledged that the RCA Handbook referred to the fact that confidentiality was restricted, inasmuch as it stated that, "*since the staff statements are not legally privileged, they might be disclosable 'if a patient or staff member decides to bring a claim in the future'*." However, it also asserted that "*discovery in the context of legal proceedings is a separate process from discovery in the context of FOIA requests. In particular, there are limitations on the use of any statements disclosed for the purposes of court proceedings (at least unless read out or deployed in open court), which distinguish this content from the FOIA process of disclosure 'to the world'*. It asserted that the fact that there are some, limited, circumstances in which obligations or expectations of confidentiality may be overridden does not detract from the importance of, or weight to be attached to, the general expectations of staff members in the course of the SUI process.

Findings

57. The nature of prejudice claimed is that if the Trust were required to disclose the staff statements to the public as a whole, then as a direct consequence, its ability to perform its function of carrying out SUI investigations would or would be likely to be prejudiced because investigators would be less likely to obtain from its staff the fullest possible information, as quickly as possible. Staff would be less likely to be forthcoming because they would be exposed to the possibility of the information being made public. Staff statements are likely be an important and material part of an SUI investigation.

58. We find that if disclosure made to the public as a whole, the prejudice to the Trust in exercising its function (described in paragraph 43) for at least one of the purposes set out in sub-section 31(2) would be likely. The degree of likelihood of prejudice is real and significant.

59. In reaching this finding, we accept that staff are likely to provide full and honest statements on the understanding that they will not be disclosed to the public, and that this was so in this case.

60. That is not to say that the staff would have expected that information derived from the statements would not be disclosed, as it would be needed for the SUI report, and it might

be used were disciplinary action thought necessary. However, this is not the same thing as the raw statements being disclosed to the public as a whole as a result of an FOIA request. We accept Ms Murdoch's statement that the investigators were given RCA training, and that during the training investigators are told that statements might be disclosed in subsequent litigation or an inquest. However, they would not think these statements could be potentially disclosed to the public as a whole.

61. We have been presented evidence, which we accept, that the aim of an SUI is not to apportion blame, but to learn how to prevent serious incidents occurring again. Therefore, we accept that the staff did expect a certain level of confidentiality. This finding is made having reviewed the statements made by the Chief Executives, the staff statements and the attendance notes described in paragraph 17(i) above, which we found compelling. We note that there is no mention of confidentiality on the original letters addressed to the staff described in paragraph above 17(m). It is conceivable that the reason for this would be that under certain conditions, their statements might be disclosable, for instance, in the context of discovery in the context of certain legal proceedings. However, we accept that the staff are unlikely to read the letter as a lawyer might, and question whether the lack of a written statement on confidentiality would mean that they might expect the statements to be disclosed to the public under an FOIA request. They were asked to respond rapidly stating all that they knew. Under such circumstances, we find it persuasive that staff would have expected confidentiality from a disclosure to the public.

62. We accept that regardless of whether the investigation was initially sparked as a result of the Appellant's request, and regardless of whether the staff would have expected that the SUI report would be seen by her, they would not expect their raw statements to be seen by the family or the public as a whole under an FOI request.

63. We do not consider that the RCA handbook provides compelling evidence as to the requirement for staff statements (as opposed to interviews), to be kept confidential. We have therefore not relied on this in reaching our conclusion.

64. The RCA handbook also states that only facts should be asked of the staff, not opinions. This might appear to be inconsistent with what was asked for, (see paragraph 17(m) above), and with the statements of Ms Murdoch that witnesses would be encouraged to be accurate, detailed and candid. However, to the extent that there is any inconsistency, we have relied on the evidence of what actually has been asked of the witnesses. It is plausible that the investigators have discretion as to what is asked of the witnesses. In any case we can see that there may sometimes be a fine line between fact and opinion,

not obvious to junior staff drafting without access to professional advice. Further, we accept that witnesses may not be as speedily forthcoming about facts if they thought these too would be disclosed.

65. We accept the evidence of attendance notes recording conversations with six staff members who confirmed their expectation that the statements they made would be kept confidential, and that none had said otherwise.

66. We accept the statements signed by those Chief Executives based in London that are listed in sub-paragraphs 17 (e) and (f), that disclosure could seriously prejudice their Trust's ability to carry out effective similar investigations in the future because staff would or may not fully engage and would or may be more cautious in giving vital evidence.

67. We accept Ms Murdoch's statement that "*if junior staff were aware that their statements could be made public, they would provide the minimum amount of information necessary to fulfil their role in the SUI investigation."*

68. We accept that witnesses ought to be forthcoming and candid regardless of whether their statements would be disclosed to the public. However, we also accept that in reality, staff members are presently forthcoming because the statements are treated with a reasonable degree of confidentiality. This leads to a level of trust between the staff and investigators, resulting in confidence that the majority of statements are accurate, detailed and candid. We accept that were the staff to consider that their statements would be disclosed to the public, they may become guarded and not provide a complete picture which is necessary for the investigators to perform their function. There would then be a real and significant risk that by disclosing the staff statements, staff would become aware that their SUI statements would be disclosed to the public and consequently they would be far more guarded in what they were prepared to state. As a result of this risk, it is also likely that investigators would be significantly less confident that they had the complete facts and accurate and candid statements, and this would prejudice their ability to analyse the root causes and investigate SUIs.

Balance of public interest: the law

69. Even where we accept that prejudice is likely, this does not necessarily exempt the requested information from being disclosed. Next, we consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing. This must be considered "in all the circumstances of the case". If the public interest on both

sides is equally balanced then the exemption will not exclude the duty to disclose, and (absent any other relevant exemption) the information must be disclosed.

70. In considering and applying this test, we agree with the analysis in *Guardian Newspapers and Brooke v ICO EA/2006/0011 and EA/2006/0013*. In particular:

    a. The "default setting" in the Act is in favour of disclosure: information held by public authorities must be disclosed on request unless the Act permits it to be withheld. The short title of the Act describes it as an Act to make provision for the disclosure of information held by public authorities. The FOIA has been described as designed to shift the balance in favour of greater openness.

    b. Generally, the greater the likelihood of prejudice, the more likely that the balance of interest will favour maintaining the exemption.

    c. Since the public interest in maintaining the exemption must be assessed in all the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to staff statements in SUI investigations under section 31. The authority needs to give genuine consideration to the circumstances of each particular request.

    d. When considering the public interest in favour of disclosure, there may be a broad range of factors to consider. These will always include the promotion of transparency and accountability in the activities of public authorities. This is because there is an assumption built into the FOIA, that the disclosure of information serves the general public interest in the promotion of better government through transparency and accountability. Other common public interests may be the promotion of public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process.

Balance of public interest: submissions

71. The Trust's arguments include:

    a. Since disclosure of the requested information would be likely to prejudice the Trust's exercise of its functions to establish the cause of SUIs, it would be contrary to the public interest.

    b. There is a strong interest in <u>establishing the root cause of accidents</u> and other apparently serious untoward incidents in hospitals. Conducting SUI investigations

effectively enables authorities to learn lessons and make recommendations with a view to preventing similar incidents occurring in the future. Disclosure would have adverse consequences for the value of future incident investigations and greatly reduce the candour with which witnesses will be prepared to speak. Undermining the confidential status of statements taken for SUI investigations will undermine the effectiveness of those investigations. There is a public interest in ensuring SUIs are investigated as effectively as possible. The Trust further notes that certainty in this sphere is important – namely, the staff need a clear understanding of the principles which apply to these types of investigations.

c. As stated by Ms Murdoch, "*I am confident that under the Trust's current policy staff are very open in their statements, and the consequence of this is SUI investigations that lead to changes in practice and a safer service. Were the Tribunal to order disclosure, … where staff currently provide very open and detailed accounts of an incident my concern is that staff would become defensive and those accounts would be reduced to the bare minimum. The knock on effect of that is that the quality of the investigations would be compromised and the subsequent lessons learnt and improvements in practice reduced*."

d. The Trust's letter of 27 November 2007 asserts that the release of the witness statements would have adverse consequences for the value of future investigations and so greatly reduce the transparency and openness of the investigative process.

e. The Trust referred to the Guidance on section 31(2) from the DCA's guidance (adopted by the Ministry of Justice) which states:

    i. *'All accident investigations have in common the aim of improving safety by the establishment of the causes of accidents and subsequently making recommendations or reports with the aim of improving safety. It is important to note that there is a strong public interest in establishing the cause of accidents – and the more serious the accident, the greater is likely to be the public interest. A disclosure likely to prejudice the exercise by a public authority of its functions for this purpose, therefore, would to that extent be contrary to the public interest.'*

f. The Trust argues the public interest in disclosing the statements is weak. It asserts that Mrs Galloway had already been supplied with a full copy of the investigation report itself, which contains a very significant amount of information. It informs the

reader both about the process of the investigation (and, therefore, its adequacy) and the details of the SUI itself, and summarises witness statements. As described above, the Trust also met with the Appellant and answered her further questions by letter. Against that background, there is comparatively little public interest in the release of the underlying factual information obtained by the investigation team, and the balance of the various interests concerns favours, it is submitted, withholding the statements.

g. The Trust also relies on the Commissioner's Decision Notice FS50086131: *"The Commissioner considers that disclosure of the information would not add significantly to public debate, as there is already a significant source of information as to the particular Doctor's competence to practice, available from the records of the General Medical Council investigation conducted in 2005, and the public interest in disclosing this additional information is outweighed by the adverse effect that disclosure could have upon the ability of this and other NHS Trusts to readily call upon the best possible expertise to advise on matters having a direct bearing upon the safety and wellbeing of patients in their care."* It pointed out that in weighing the balance, the Commissioner attributed particular significance to the fact that there was already a significant source of information about the same subject matter. It asserts that the same is true here – it claims the SUI report satisfies the public interest in the deceased's family seeing the results of an investigation. (They were additionally provided information such as that set out in paragraph 17(d) above).

h. Appellant's argument that Further information is Required to Answer Outstanding Questions: The Trust has argued (not specifically in relation to section 31, but more generally), that it is not within the scope of the Tribunal's task to adjudicate on the extent to which information which has been supplied to the Appellant has or should have answered, or indeed could answer her questions about the events of 26 July 2004. It states that we should not, for instance, enter into a debate about medical records.

Appellant's Submissions

72. In addition to the general interest in promoting transparency and accountability outlined in paragraph 70 above, the Appellant's arguments insofar as they relate to a public interest in disclosure to the public include:

a. **Finding out the Cause of Deaths Generally:** The public interest in ensuring the Trust is performing its functions properly and to find out why someone - a husband and father - originally in the Trust's care has died.

b. **Transparency and Accountability**: This is within the context of the NHS being a public service and the fact that the requested information relates to procedures, factual happenings and duties of staff during their working hours. Staff should be accountable for their actions at work and have specific procedures they follow. It is in the interests of future patients to have transparent and accountable procedures, and to have the information that can prevent this occurring again. We found it an attractive argument that it is also in the interests of future patients to ensure that those working for the Trust are doing their job properly, including the investigators.

c. **Finding out the Cause in this Case:** The public interest in being given a clear picture of what happened. When the family considered the information disclosed (report and medical records, medical notes and vital statistics) they felt that it did not satisfy basic questions; and was inconsistent and therefore unreliable. This is in the context of the family's belief that the SUI report was inaccurate, and that the family are not satisfied that "*the Trust has not discovered the real root cause [presumably of death] and cannot rely on it to improve services which was their explained purpose for the report*."

d. **Inadequacy of Report:** The Appellant claims that the SUI investigation was inadequate, as is the report. She states that if the investigation had been carried out effectively and established the correct facts they would not need to see the statements. She explains that the Trust has a duty to carry out the investigation, and standards must be adhered to. The list of inadequacies include:

    i. Date of Death is incorrect - The report states that the Trust were told that Mr Galloway passed away on 20 August 2004 in Middlesex hospital. The coroner's report records that "*death confirmed: 22 August 2004*", and this is what Mrs Galloway's record of events states. Likewise the witness statement of 27 November also stated the wrong date of death. Tribunal Comment: To the extent that the Trust argues that the death occurred after Mr Galloway had left its care, and it was reliant upon information from elsewhere, this seems to us a poor response. One might have expected those drafting the report to clarify this. However, in this instance, the inaccuracy of the date would seem to have no bearing on the actual events being investigated.

ii. Employment status – Mr Galloway was not retired as stated in the report. Tribunal Comment: Any inaccuracy would seem to have no bearing on the actual events being investigated.

iii. Coroner's inquiry – in the report, this is entered as 'natural death', which the Appellant submits is incorrect. The Appellant states that a Coroner's report has never been requested. Tribunal Comment: A copy of a "Coroners Post Mortem Examination" was in the bundle. This stated the identifiable cause of death was left ventricular failure; left ventricular hypertrophy and neuroleptic malignant syndrome. Whilst the Trust did not address this in any detail in submissions, the letter of 18 November 2004 summarised in paragraph 17(d) above records a conversation with the Coroner that concluded a natural cause of death and that there would be no inquest, and this is consistent with what is stated in the report. Accordingly, the report description appears to be correct, albeit somewhat brief.

iv. Knee Replacement: the Report states that Mr Galloway had additional problems of "*knee replacement a few years ago infective arthritis in right hip, awaiting surgery – September 19th 2004*". Tribunal Comment: We were not certain what this meant. However, given that the Appellant already mentioned her concern to the investigators at their meeting on 15 September 2004 that this was one of the inaccuracies in the preliminary draft of the report, it seems peculiar that this would not have been clarified in the report. Even so, any inaccuracy would seem to have no bearing on the actual events being investigated.

v. In the Appellant's other comments on the final report, she listed outstanding questions, concerns and additional information that she had that was not in the report. (E.g. why a care-plan was not signed, or about use of ECT, the blood pressure being high, concerns Mr Galloway had at the time, whether injuries were found at the time of the incident, and why it took so long for a doctor to see Mr Galloway). Tribunal Comment We find that these could not be described as inaccuracies of the report. They are items of information the Appellant would have liked to have knowledge of, and therefore may be more relevant to the question of whether the report is adequate.

e. **Research:** It is in the interests of the public that the primary care trust, NHS users, taxpayers, medical research organisations, MIND, UCL etc have all the information

available in order that welfare can be improved for everybody. Tribunal Comment: We did not find this an attractive argument in this case in relation to disclosing staff statements prepared for an internal investigation, in circumstances where there is already a SUI report; where staff statements may not necessarily be reliable given that staff are not necessarily given documentation when they recall events; where staff may not be given an opportunity to comment on statements made about them; and where they are not given an opportunity to challenge the outcome or recommendations of the report; and having reviewed the statements requested.

f. **Grieving Process:** It is in the interests of the public for the information to be publicly available to help the widow of someone who dies within the health care system to understand what happened as part of her grieving and healing process. Tribunal Comment: Whilst it is clearly important and a public (as well as private) interest that a widow and a family be helped in their grieving process, we cannot measure the likelihood of disclosure actually helping this. We cannot presume to be able to assess what information may or may not help the grieving process. The impact of disclosure of the requested information may or may not be of assistance. The grieving process is a personal one, and we do not consider that strong weight should rightly be placed on this factor.

g. Not disclosing the information would prejudice the administration of justice and the purpose of ascertaining the cause of an accident, and protecting persons at work against risks to health and safety.

73. **To have as much information as Possible:** In addition to these points, it might also be argued that where an individual is in the care of a mental health ward, at night, such that it would be difficult for him to leave, and the family have thus entrusted him to the Trust's care, and there is an incident which is so serious that it results in an SUI, there is a strong public interest in the family being given as much information as much as possible as to why it happened. This is because the public puts its trust and funds in the Trust, and needs to be sure that it takes proper care of its charges and the family that has trusted it. Tribunal Comment: There is a public interest in finding out the real facts, but this is not the same thing as finding out as much information as possible, since some might contradict others, and it would seem to be part of the investigator's task to elucidate the facts and present them.

74. **Confidence In NHS:** The Guidance on section 31(2) from the DCA's guidance (adopted by the Ministry of Justice) also describes the public interest in disclosure: *"Particularly to*

the extent that the investigation is intended to reassure public opinion and restore confidence in public safety, there will be a corresponding public interest in demonstrating the competence of the investigation. For this reason, investigating authorities will seek to be as open as possible in ensuring that families of victims, those directly affected, and where appropriate the public are kept informed of the broad progress of investigations. In many cases a report or findings will be published." Tribunal Comment: Whilst this is interrelated with transparency and accountability, to the extent that it could be argued that there was strong evidence that the investigation and report were unsatisfactory, the argument for disclosing on the basis of restoring confidence might be increased.

Findings

75. We find that the public interest in not disclosing the statements outweighs the public interest in disclosing them.

76. That is not to say that staff statements would never be disclosed. It is necessary to consider the weight of the competing interests within the facts of any particular case. We are of the view that if an SUI report were clearly unsatisfactory, and either the statements would assist in getting to the truth of the matter, or the report materially fails to summarise the statements correctly, this could indicate that the public interest in ensuring the Trust performs its functions properly outweighs the public interest in withholding the statements.

77. None of the submissions referred to or questioned the independence of the investigators. However within the notes of the meeting held on 15 September 2004, one of the two investigators explained to the Appellant that although an employee of the Trust, he was acting in an independent capacity as he did not work in the Harrow services and did not know Mr Galloway. We have seen the workbook that illustrates the method for conducting such investigations, and the investigators seem to have reasonably complied with this. Within that context, the extent to which we as a Tribunal could question the adequacy of the investigation is limited. We have not found material inconsistencies within the SUI report. The Appellant has already been given this report, which provides detailed information from the staff statements and a chronology of events.

78. As an observation, we thought that the findings could have been more detailed. However, there are findings on the key facts and they are not so limited that we would consider the report manifestly inadequate. We recognise that the Appellant was given the opportunity to discuss her outstanding questions with the Trust. We have seen that the Trust sought to respond to such questions. However, the key meeting with the investigators apparently

happened before the receipt of the toxicology and Coroner's report, such that the consultant psychiatrist was not able to address why Mr Galloway went into a coma and later passed away. This was obviously a key concern for the Appellant. However, correspondence in the bundle indicates that the Appellant was offered such a meeting.

79. We make another observation. It is clear that the family had a lot of questions to be answered. We question whether it might be helpful in future for the investigative process to allow for families to be invited to raise specific questions they would like the investigation to address. (The Appellant might have welcomed this).

80. In weighing the public interest, we consider that it is of primary importance to make sure that investigators are able to gather full facts so as to establish the root causes of an SUI. In order for them to be able to do this, there needs to be a level of trust, between the Trust's investigators and its staff. The public are less likely to have confidence in a report if they think the statements have been made in a context of fear of disclosure. Factored into this, we also consider the risk of prejudice is high. Given that on the evidence before us, we find that the report was not manifestly inadequate; that the Appellant was given additional information from the Trust as discussed above; and that disclosing the staff statements in reality would be unlikely to add significantly to the pursuit of the public interests listed by the Appellant; we consider the public interest in maintaining the exemption outweighs the public interest in disclosure of the witness statements in this case.

81. We do not undervalue transparency and accountability. However, the investigators, who are trained in the task, must be able to gather the facts to do their job. Whilst it might be important for the public to have as much information as possible about the operations of the NHS, the accuracy of such information is paramount. It should be remembered, that since each staff present their own perspective, their statements might contradict each other, and some might not be correct. It is conceivable that they might place blame unfairly on other staff members or themselves. They do not have a chance to comment on each other's statements or the resultant report, and thus the process would risk being seen as unfair if personal statements were unreasonably disclosed to the world at large because of a request under FOIA. That perception of unfairness would increase the risk that staff would not be fully open to the process.

82. In reaching this finding, we have considered what weight should be given to each of the factors identified above as favouring disclosure, including taking into account the extent to which disclosing the information would serve the public interest that has been claimed. We

find that when we weigh the public interest considerations represented by section 31 alone, it has greater weight than the combined measure of all factors favouring disclosure.

Redaction

83. Is there a way of blanking out any parts of the requested information, such that section 31 might not be said to apply to the redacted paragraphs? In our view, this could only be considered if, first, there was a way of making the statements anonymous. This is because the staff would be less likely to be inhibited from providing full information if they thought their contribution would not identify them publicly. We have not been able to do this. First, the report summarises the staff statements, identifying them by name. Given that there can be no conditions applied to information disclosed under FOIA, the report or other background information combined with redacted witness statements would still be likely to prejudice the exercise of the functions of the Trust.

84. The Appellant has suggested that if it is not possible to make the documents anonymous, the Trust should employ an independent person to "re-write/interpret" the statements without giving the identity away; or (ii) set up a meeting where the Appellant may ask an independent person questions about the contents of the statements in the presence of the Trust. Neither the Trust nor the Commissioner addressed this to any extent, other than stating that it would not be consistent with the FOIA to require the Trust to do so. In any event, we do not find that it would be possible to do so in a way that would keep the identities anonymous, given the information already in the SUI Report.

Section 36:

85. So far as material, section 36 reads:

> "(*2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act— …*
>
> *(b) would, or would be likely to, inhibit—(i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation, or*
>
> *(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs*." *(Emphasis added.)*

86. If the information is exempt by virtue of section 36, then the person is not entitled to have the information communicated to her if, *"in all the circumstances of the case, the public*

interest in maintaining the exemption outweighs the public interest in disclosing the information." (*Section (2)(b) FOIA.)*

87. In other words, if the qualified person is of the reasonable opinion that disclosure of the information requested would or would be likely to inhibit free and frank provision of advice or of exchange of views for the purpose of deliberation, then we must consider whether in all the circumstances of the case the public interest in maintaining this exemption outweighs that of disclosing it.

Trust's Submissions

88. **Qualified Person**: As stated in 40A, Annex D of the DCA Guidance on section 36, the 'Qualified Person' for an NHS Foundation Trust is the Chief Executive. In this case, that would be Ms Murdoch.

89. **Opinion**: Ms Murdoch's opinion was first submitted with the letter from the Trust to the Commissioner of 27 November 2007. This states that having read the SUI Report, staff statements and the letter of 27 November 2007, and in the light of her knowledge of SUI investigations and how they are conducted, that she confirms that in her opinion the disclosure of the statements:

    a. "*would be likely to seriously prejudice the ability of the Trust to carry out effective similar investigations in the future. If staff were aware that their statements may be disclosed to the general public in the future, I am concerned that they will not engage fully in investigations or will be more cautious in giving vital evidence. Frank and constructive debate about the circumstances of an accident and how similar incidents may be avoided is also likely to be inhibited. The effect of that would be to damage the effectiveness of future investigations and thus potentially the public could be put at risk*." (Emphasis Added.)

90. The Trust stated that Ms Murdoch, had further expanded on this view in her witness statements, where she makes it clear that it was and is her opinion that disclosure of the staff statements would be likely to inhibit the free and frank provision of views, evidence or advice, and would prejudice the effective conduct of the Trust specifically with regard to its duty to carry out SUI investigations.

91. **Opinion is Reasonable**: The Trust asserts that Ms Murdoch's opinion is clearly reasonable:

a. There is good reason to think that disclosure would have the effect Ms Murdoch is concerned about. (*See paragraph 47 above*).
b. Ms Murdoch's opinion of the effect of disclosure represents the consensus of the chief executives of Mental Health Trusts within London. (*See paragraph 47 above*). This strongly suggests that her opinion was reasonable.
c. The Ministry of Justice guidance on section 36 tends to support Ms Murdoch's opinion. At pages 6-7 of the guidance, there is a series of questions, which, if answered affirmatively, would indicate that the effect of disclosure would prejudice the effective conduct of public affairs. The Trust submits that the answer to all of them in this case is 'yes'

" *would it make it more likely that the person or any other offering advice will be unwilling to do so in future?*

- *would it inhibit that person or any other from offering unwelcome advice?*
- *would it make it more likely that the person being advised will not ask for advice in future?*
- *would it have a similar inhibiting effect on other people in future?*
- *would it make it more likely that advice will be given that is materially different because of the possibility of disclosure?*
- *will it make people less likely to engage in discussion (oral or written) as part of the deliberative process?*
- *would it distort or restrain that discussion?*
- *would it result in pressure being brought to bear on officials to provide particular advice?*
- *would officials be less likely to record this sort of information if it were subsequently disclosed*?"

d. There is no suggestion that the opinion was not "reasonably obtained".

Commissioner's Submissions

92. The Commissioner adopts the argument set out by the Trust in its letter to the Commissioner dated 27 November 2007. This includes that "*Staff statements are obtained as part of the deliberative process, namely, the SUI investigation. They may go beyond the 'bare' facts to contain statements of belief and opinion. Reflections on practice are encouraged, and there are examples of this in the present case. This candid expression of views will be prejudiced if the statements were to be disclosed*."

93. The Commissioner reminds the Tribunal that to fall within the ambit of section 36(2)(b), the inhibition of the '*free and frank exchange of views for the purposes of deliberation*' is that which 'would probably occur' (i.e. on a balance of probabilities, the chance being greater than 50%) or that there would be a "*very significant and weighty chance*" that it would occur. A '*real risk'* is not enough. (See Guardian Newspapers & Brooke v. BBC EA/2006/0011 at paragraph. 53.)

94. Further, that in determining whether the opinion of the qualified person (here the Chief Executive) was a 'reasonable' opinion, that '*opinion must be both reasonable in substance and reasonably arrived at*'. (*See Guardian Newspapers & Brooke* at paragraph 64). But, *McIntyre v. Ministry of Defence* EA/2007/0068 at paragraph 31, expressed two caveats:

> "*Firstly where the opinion is overridingly reasonable in substance then even though the method or process by which that opinion is arrived at is flawed in some way this need not be fatal to a finding that it is a reasonable opinion. Secondly, we take a broad view of the way the opinion is reasonably arrived at so that even if there are flaws in the process these can be subsequently corrected, provided this is within a reasonable time period which would usually be no later than the internal review."*

95. The Commissioner considers that the opinion expressed by the Chief Executive was reasonable in substance, and appears to have been reached by a sensible process.

96. With respect to section 36(2)(c), the Commissioner reminds the Tribunal that this exemption is '*intended to apply to those cases where it would be necessary in the interests of good government to withhold information, but which are not covered by another specific exemption, and where the disclosure would prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure'*. (*See McIntyre v. Ministry of Defence EA/2007/0068, at paragraph 25*). The Commissioner considers, for the reasons expressed by the Trust in its letter of 27th November 2007, that these conditions are satisfied here.

Appellant's Submissions

97. The Appellant does not specifically address the application of section 36 in her correspondence.

Findings

98. We accept that Ms Murdoch is the qualified person for the purposes of section 36. We accept that it is her opinion that disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation, within the process of an SUI investigation. This is because she has formed the opinion that "*constructive debate about the circumstances of an accident and how similar incidents may be avoided is also likely to be inhibited".* We accept that this is a reasonable opinion to have come to in view of her belief that if staff were aware that their statements made for the purposes of an SUI investigation may be disclosed to the general public in the future, they will not engage fully in written discussion as part of the deliberative process of SUI investigations or will be more cautious in giving vital evidence. This would distort the investigator's need to deliberate. We accept that Ms Murdoch's opinion was reached by a sensible process, as she has reviewed the relevant documents and considered the matter in the light of her knowledge and experience. Her opinion was stated when the Trust claimed section 36.

Balance of public interest

99. Even where we accept the reasonableness of this opinion, we must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure. In assessing this, we need decide what weight to give to the public interest in maintaining the exemption in section 36. To do that, we need to form our own view as to the severity, extent and frequency with which inhibition of the free and frank exchange of views for the purposes of deliberation will or may occur. *(See Guardian Newspapers & Brooke, at paragraphs 88 to 92).*

Trust's Submissions

100. For the same reasons given in relation to the public interest analysis of the Section 31 exemption, the Trust submits that the public interest weighs in favour of maintaining the exemption.

101. By way of analogy (but not because we are obliged to follow them) the Trust draws our attention to two decisions of the Commissioner.

102. In Decision Notice FS50082251, (explained above), the Commissioner accepted that disclosure of reviews would inhibit the participation of professionals to the Review process, saying:

> *"53… the Commissioner accepts that the willing cooperation of the professionals is essential if the reviewer is to obtain reliable information reasonably quickly. This willingness and openness is based on a clear understanding by the professionals involved that the prime purpose of a Part 8 Review is to improve child protection and that to this end, it will only be disclosed to a very limited number of people who have a role in implementing the Review's recommendations.*
>
> *54. The Commissioner finds it a convincing argument that concerns over the possible disclosure of Part 8 Reviews to the general public would inhibit the participation of professionals who may have worries that the information could be used to direct public criticism at individuals. Any reluctance by professionals to fully and openly contribute to the Part 8 Review process would inevitably reduce the reviewer's ability to accurately identify the lessons that need to be learnt. If professionals felt the need to seek legal advice, or any other form of representation, in order to protect their own positions, this would inevitably delay the review process. Both these consequences would have a detrimental impact on child protection. In light of the above the Commissioner is satisfied that the qualified person's opinion that disclosing the information would prejudice the conduct of public affairs was a reasonable one and that the exemption was engaged."*
>
> *(Serious Case Reviews are referred to as Part 8 Reviews).*

103. The Commissioner went on to find that the public interest favoured maintaining the exemption because:

> "*56. … The purpose of the Part 8 Review is to improve services, not to determine who is culpable...*
>
> *58. The Commissioner recognises that there is a high public interest in holding public authorities accountable for their performance, particularly in relation to the protection of the most vulnerable members of our society. There are strong arguments that scrutiny of public sector performance drives up standards. However in this case the Council has presented persuasive arguments that the prospect of public scrutiny would actually compromise the reliability of the Part 8 Review and so undermine attempts to improve standards. This is not to say that public scrutiny*

does not encourage better standards, it is simply that in this case full and willing participation by professionals in the Part 8 Review is a more effective method of improving standards.

59. The Commissioner recognises that the public interest is also served by disclosing information that reveals whether the appropriate lessons have been learnt and that this builds public confidence in the ability of care agencies to change in response to such incidents, which in turn may encourage greater cooperation with these services…

61. The Commissioner accepts that an informed public debate has the potential to influence policy and perhaps to reprioritise resources. However in assessing the strength of this argument regard must be had for the degree to which this information would actually serve to inform the public debate, particularly once allowance was made for any information which could be withheld under the absolute exemptions provided by section 40 – personal information, and section 41 – confidential information. Since the executive summary already provides access to the Review's recommendations as to what actions should be taken in order to prevent a similar tragedy occurring in the future, the value in releasing additional information is weakened.

62. In a case such as this the overriding public interest must be the protection of children. The most effective and efficient way of incorporating the lessons learnt from these tragedies into working practices in order to increase the level of protection afforded to children is to provide an environment in which professionals can freely discuss the circumstances of a case as honestly as possible. The established means of achieving this is the Part 8 Review and the Commissioner accepts that this process would be compromised if professionals anticipated that reviews would be disclosed to the public. It follows that the public interest is best served by maintaining the exemption in order to preserve the best opportunity care agencies have in improving the protection they provide…"

104. It is the Trust's case that the same considerations apply here:

a. The overriding public interest in protecting the public (particularly vulnerable members of the public) is best served by preserving the established means whereby professionals can freely discuss a case as honestly as possible.

b. The public interest in disclosure is weakened by the fact that there is already a public report on the incident, which sufficiently meets the needs of public accountability and transparency.

105. The Trust also refers to the Commissioner's decision FS50086131. In that case, the complainant sought disclosure of a report, prepared by a panel of experts commissioned by the Newcastle upon Tyne Hospitals NHS Trust, as to the standard of clinical practice of a particular doctor. The Commissioner found that section 36 was engaged, following the Chief Executive's opinion that there would be "*severe and perhaps insurmountable obstacles in engaging independent experts to provide free and frank advice to the Trust in the future*" and that the public interest favoured maintaining the exemption. Again, the Trust asserts that the same principles apply here to Ms Murdoch's opinion (supported by several other Chief Executives) that disclosure would create severe and perhaps insurmountable obstacles to persuading staff, particularly junior staff, to contribute candidly to the investigation.

Commissioner's Submissions

106. The Commissioner does not make any extra points in open submission.

Appellant's Submissions

107. The Appellant's arguments in relation to the public interest in disclosure apply equally to section 31 and 36. They are therefore already stated in paragraphs 72 to 74 above.

108. We would suggest that the essence of the Appellant's arguments include that disclosure would improve knowledge of the arguments relating to a debate, and therefore improve the quality of debate. Further, the substance of the information (namely events occurring on a ward during an SUI) relates to a matter of public importance and its disclosure will inform public debate. The seriousness of a death requires transparency.

Findings

109. In applying the public interest test in section 36, we find that the public interest in not disclosing the statements outweighs that of disclosure. We agree with the opinion of the Chief Executive that if staff were aware that their SUI statements may be disclosed to the public they would not engage fully in investigations and would be less candid and more cautious in giving vital evidence. We consider the chances that this would be

likely to inhibit *"the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation"* to be very significant and weighty.

110. We agree with the principles set out in the Commissioner's decision in the Part 8 Reviews Case: Enabling investigators to ascertain the root causes of an SUI with the assistance of full, frank and honest witness accounts of the relevant events is a more effective method of improving standards than ensuring that every piece of material gathered in the process is publicly available. The overriding public interest is to ensure that patients receive proper care. This is best served by enabling the investigators to gather all relevant information and then make decisions as to its accuracy.

111. We accept that the public interest is served by disclosing information that reveals whether the appropriate lessons have been learnt and that this builds public confidence, and that informed public debate has the potential to influence policy and perhaps to reprioritise resources. However, in assessing the strength of this argument, regard must be had as to the degree to which disclosure of this information would on the facts actually serve to inform the public debate in this way. We find that that public disclosure of the statements would not contribute to this debate given the information already disclosed.

112. We have again considered the cumulative weight to be given to each of the factors identified in paragraphs 72 to 74, (and to an extent reiterated in paragraph 108) as favouring disclosure. We find that when we weigh the public interest considerations represented by section 36 alone, it has greater weight than the combined measure of all factors favouring disclosure.

Redaction

113. The question remains whether the public interest can be satisfied by the release of a redacted version of the staff statements. For the same reasons as for section 31, we think that they could not.

Conclusion

114. We have found that both section 31 and 36 apply to the statements in their entirety.

115. As stated in paragraph 28 above, the Commissioner's decision was restricted to an analysis of section 40. But our remit under Section 58 of FOIA is to consider whether the

decision notice is in accordance with the law. That can also require consideration of other exemptions claimed by the Trust and which the Commissioner might have considered but chose not to. We have found that both sections 31 and 36 apply to the statements in their entirety, and we therefore agree with the Commissioner's decision (but for different reasons) that no information is required to be disclosed. Since we have found that both sections 31 and 36 apply to the statements in their entirety, we do not set out our deliberations on sections 40 and 41.

116. Our decision is unanimous.

Signed:

Claire Taylor
Deputy Chairman

Date: 20 March 2009