



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2013/0109

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FS50472250
Dated: 8 May 2013**

Appellant: Wendy Stephen

Respondent: The Information Commissioner

Heard on the papers: Field House

Date of Hearing: 20 September 2013

Before

Chris Hughes

Judge

and

Dave Sivers and Nigel Watson

Tribunal Members

Date of Decision: 10 October 2013

Subject matter:

Freedom of Information Act 2000

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 8 May 2013 and dismisses the appeal.

Dated this 10th day of October 2013

Judge Chris Hughes

[Signed on original]

REASONS FOR DECISION

Introduction

1. This case arises out of the publication by the Lancet in 1998 of the flawed paper by Andrew Wakefield et al which led to the MMR scare. The Legal Aid Board supported proceedings by parents against the pharmaceutical companies. In 2006 the statutory successor to the Board – the Legal Services Commission (LSC) provided some of its documents relating to this funding to the General Medical Council (GMC) for the purposes of its disciplinary proceedings against Wakefield.

The request for information

2. On 19 July 2012 Ms Stephen asked the GMC for:-
“(a) A copy of the “Legal Aid Board Authority to do contract work” dated September 1994 in respect of the MMR litigation referred to an entered into the GMC transcript on day 11, page 2 onwards in the examination of Ms Joanne Cowie by Ms Smith QC
(b) A copy of the “amended” Legal Aid Board Authority to do contract work” dated 26 September 1994 (details/source as above).”
3. The GMC, initially and on review, refused to supply the information on the basis that there was a statutory prohibition on its disclosure.

The complaint to the Information Commissioner

4. Ms Stephen complained to the Respondent – the Information Commissioner (ICO) who investigated and obtained copies of the requested information from the GMC. One of these documents had a slightly different date and one been redacted by the LSC before providing it to the GMC.
5. In his decision notice the IC upheld the stance of the GMC and set out the statutory framework of the prohibition on disclosure. S38(1) of the Legal Aid Act 1988 prohibited disclosure of information which had been supplied to the Legal Aid Board, this provision remained in force through the re-organisation of the provision of legal aid. The IC found:-

“Whilst the documents themselves were issued by the Board the information they contain is essentially a repetition of the information originally furnished by the appellants’ solicitors. Therefore the information within the documents falls within S38 LAA.”

6. He further found that none of the statutory gateways within s38(1) which permitted disclosure applied

The appeal to the Tribunal

7. In her appeal to the Tribunal Ms Stephen argued that since the material had been disclosed already to the GMC s38 LAA could not now be engaged. She further argued that the IC was inconsistent in that during the investigation he had relied on the provisions of the Access to Justice Act 1999 (AJA) to explain the disclosure to the GMC – it was not possible for both Acts to apply since AJA had repealed LAA.
8. From her analysis of correspondence with the IC she concluded that the release of the disputed information to the GMC could have been done under s38(2) LAA *“in the form of a summary or collection of information so framed as not to enable information relating to any particular person to be ascertained from it”* if this was the case it could be disclosed to her. She concluded:-

“In conclusion I would ask that the Tribunal investigate the handling of this application by the ICO and review the refusal to allow me these documents on the basis of Section 38(1) LAA/Section 44(1) FOIA when clearly prohibition to disclosure contained in s38(1) has not prevented them being disclosed before. The means (at present unidentified by the ICO following his error) whereby these documents were permitted to be disclosed by the LSC to the GMC must surely allow for them to be disclosed to me since it is indicative of the fact that no previous prohibition to the release of documents exists allowing for section 44(1) FOIA to be engaged. I am perfectly willing to accept documents in compliance with section 38(2) LAA if that is the gateway by which the documents were already disclosed by the LSC, though the material read into the GMC transcripts suggest otherwise.”

9. Ms Stephen has provided extracts from the transcript of the GMC hearing in which an individual is questioned on the contents of the disputed documents. Her signature on one of them is identified and an extract of a document is read:-

“1. To obtain a preliminary report from Dr Andrew Wakefield pursuant to the Opinion of Counsel ... dated 22 april 1996.

2. To facilitate the setting up of the clinical and scientific study proposed by Dr Wakefield in respect of 10 assisted persons at a maximum cost of ££55,000 and to cover the work necessary by the solicitors in so doing at a maximum cost of”

10. The sum concerned has been redacted.

11. The IC in his response maintained the position set out in the decision notice.

The question for the Tribunal

12. The issue before the Tribunal is whether the statutory prohibition on disclosure in s38(1) LAA is effective to prohibit the disclosure of these documents to Ms Stephen by reason of s44 (1) FOIA.

Legal analysis

13. It is necessary to consider the statutory framework within which these documents need to be considered. Section 38 LAA (which is kept in force for these documents by reason of the transitional provisions in AJA) provides:-

“Restriction of disclosure of information

(1)Subject to the following provisions of this section, no information furnished for the purposes of this Act to the Board or any court or other person or body of persons upon whom functions are imposed or conferred by regulations and so furnished in connection with the case of a person seeking or receiving advice, assistance or representation shall be disclosed otherwise than–

(a)for the purpose of enabling or assisting the Lord Chancellor to perform his functions under or in relation to this Act,

(b)for the purpose of enabling the Board to discharge its functions under this Act,

(c)for the purpose of facilitating the proper performance by any court, tribunal or other person or body of persons of functions under this Act,

(d)with a view to the institution of, or otherwise for the purposes of, any criminal proceedings for an offence under this Act,

(e) in connection with any other proceedings under this Act, or

(f) for the purpose of facilitating the proper performance by any tribunal of disciplinary functions as regards barristers or solicitors.

(2) This section does not apply to information in the form of a summary or collection of information so framed as not to enable information relating to any particular person to be ascertained from it.

(3) Subsection (1) above shall not prevent the disclosure of information for any purpose with the consent of the person in connection with whose case it was furnished and, where he did not furnish it himself, with that of the person or body of persons who did.

(4) A person who, in contravention of this section, discloses any information furnished to the Board or any court or other person or body of persons for the purposes of this Act shall be liable on summary conviction to a fine not exceeding level 4 on the standard scale.

(5) Proceedings for an offence under this section shall not be brought without the written consent of the Attorney General.

(6) For the avoidance of doubt it is hereby declared that information furnished to counsel or a solicitor as such by or on behalf of a person seeking or receiving advice, assistance or representation under this Act is not information furnished to the Board or a person upon whom functions are imposed or conferred as mentioned in subsection (1) above.”

14. The disputed information in this case, as seen from the material read into the record of the GMC fitness to practice hearing, was clearly supplied to the Board by solicitors acting for applicants for legal aid setting out the plan for the use of the public funds to be disbursed by the Board. It therefore clearly falls within s38.
15. It is not apparent in these proceedings what power was used to disclose the material to the GMC. In the bundle there is a letter from the GMC’s solicitors in respect of a query the GMC received about the legal basis for the disclosure by the LSC to the GMC. This indicated that the GMC relied on its powers 335A of the Medical Act 1983 and that the GMC sought Counsel’s advice which suggested that disclosure

could be made by the LSC under s38(2) LAA. The belief of the GMC was that that was the basis upon which the LSC provided the documents.

16. However if this is a complete account of the legal basis it is unsatisfactory, since the identity of two “persons” whose identity should have been redacted from the documents was not – although other redactions were made, the redactions made do not bring the document quoted into compliance with the condition set out in s38(2) and therefore the argument advanced by Ms Stephen fails on this point.
17. The disclosure of documents by the LSC to the GMC for the purpose of conducting a disciplinary hearing did not take away the essential elements of the information contained within it; as the IC correctly found (paragraph 15 DN) that this was information supplied to the Legal Aid Board and repeated by them in the documents. The information therefore was protected by the prohibition in s38. The reading of extracts from the documents during a disciplinary hearing did not disclose the documents to the world as would result if this appeal is successful. Whether or not there has been a misunderstanding of the statutory powers which has resulted in some confusion as to the correct basis for the disclosure of the information to the GMC the statutory protection attaching to the information remains while it is in the hands of the GMC as though it were in the hands of the LSC. None of the exceptions in s38(1) apply and therefore the information falls within the protection of s44 FOIA since its disclosure is prohibited by an enactment.

Conclusion and remedy

18. The Tribunal is therefore satisfied that the decision of the IC is in accordance with the law and rejects this appeal.
19. Our decision is unanimous

Judge Chris Hughes

[Signed on original]

Date: 10 October 2013