FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Information Rights

Appeal Reference: EA/2016/0313

Decided at Field House Without a Hearing

Before

HON MR JUSTICE LANE
ROGER CREEDON
ANDREW WHETNALL

Between

LISA ARMITAGE

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

THE HEALTH AND CARE PROFESSIONS COUNCIL

Second Respondent

DECISION AND REASONS

1. On 4 January 2015, in Bristol, Mr Mpongwana began to feel ill. By the following morning, he was complaining of a headache. At 21.45pm on 5 January, Mr Mpongwana was complaining that the light was hurting his eyes.

2. Around 22.30pm, the appellant, Mr Mpongwana's partner, reported his symptoms by telephone on the NHS 111 service. At 01:10am on 6 January, a paramedic, P,

arrived. It was not until around 3.10am, when P spoke to an out-of-hours doctor by telephone, that any action was taken by P to address the fact that Mr Mpongwana was likely to be suffering from meningitis (as indeed was the case).

3. Mr Mpongwana died in hospital, some hours later. His cause of death was stated to have been due to acute bacterial meningoencephalitis, together with HIV positivity.

4. At the inquest into Mr Mpongwana's death, a narrative verdict was recorded, that he had died from natural causes, said to have been contributed to by a failure of P to take appropriate action in the face of an obvious need.

5. This appeal concerns a request for information, made by the appellant, to the Health and Care Professions Council, relating to the aftermath of Mr Mpongwana's death. The parties were content for the appeal to be decided without a hearing and, in all the circumstances, we are satisfied that we can justly do so. In reaching our unanimous decision, we have had regard to all the written materials (including submissions).

6. In order to understand the context and significance of the appellant's quest for information, it is necessary to go into matters in some detail. What follows is largely drawn from file notes prepared by Ms Eleri Davies of Irwin Mitchell LLP, the appellant's solicitors. The Tribunal is unaware of any material criticism that has been levelled by the respondents against the accuracy of these file notes, which were prepared contemporaneously with or, at least, very soon after, the events they describe.

7. On 14 August 2015, Ms Davies was informed by the second respondent that she could attend the hearing in respect of P, which the second respondent was proposing to convene. It is apparent from the materials that this hearing was due to consider if it was necessary, for the protection of the public, to make an interim order in respect of P's ability to practise as a paramedic.

8. Ms Davies's attendance note of 20 August 2015 records in detail her attendance at the hearing held on that day. P did not appear and was not represented. The panel considered whether to proceed. The panel was not satisfied that it was appropriate to proceed in P's absence, notwithstanding they considered P had been duly served with notice of the hearing. Eventually, the panel decided to adjourn the case, as they did not think that P was voluntarily absent. It was stated that the adjourned hearing should be convened as soon as possible.

9. Ms Davies then discussed with the hearing officer when the adjourned hearing would be likely to occur. They also discussed the issue of the hearing into the issue of whether P was fit to practise, as opposed to the "interim order".

10. According to Ms Davies' file note, she was informed that the decision following the "final hearing … would go up online but not the detail of what the panel say".

11. On 26 August, Ms Davies' file note records that she checked the second respondent's website "to see if the hearing had been relisted … noting nothing appeared to have happened yet".

12. According to Irwin Mitchell's letter of 29 April 2016 to the first respondent, on 28 August 2015, the second respondent "gave interim orders preventing [P] from practising emergency medicine and required him to be supervised at all times".

13. The relevant sequence of events thereafter is best summarised in the following passages from the attendance note dated 30 November 2016 of Elise Burvill of Irwin Mitchell:-

> "1 Sept '15 EDV looking on HCPC to find interim order and details of the conditions on paramedic's practice. LA [appellant] calling to tell EDV that she had also seen it on the website.
>
> 3 Sept '15 EDV call out to HCPC to find out decision which led to interim order. Told HCPC would review to ensure no restrictions in speaking to us and get back to EDV.
>
> EDV calling LA to tell her about the conditions but that she had been told they will be on the website in the next day or two.
>
> 30 Sept '15 Letter from HCPC informing JLS that the interim order review meeting is scheduled to take place on 30/10/15. Letter notes that JLS will be sent a further notification once the hearing is concluded. Also says that more information re hearings can be found on their website.
>
> 6 October '15 EDV receiving call from … HCPC – case [manager] on this file. Added as an interested party and will therefore receive a notice of the hearing and the outcome. EDV noting that we should also keep reviewing the website for further information.
>
> 4 Nov '15 EDV reviewing HCPC website to confirm outcome of interim review hearing. Nothing on the website re the hearing and [nothing] at all re this case now appearing.
>
> 11 Nov '15 [Case manager of HCPC] calling to confirm that there is no case to answer.
>
> 12 Nov '15 EDV calling HCPC for more information.
>
> Told:
> *The fitness for practice investigation has been ongoing and after consideration of the allegations and responses the independent panel found that there was no case to answer. Interim order will now fall away and [P] can resume practice. This is the end of the HCPC investigation."*

14. On 4 December 2015, the appellant (via her solicitors) wrote to the second respondent regarding the decision of the Investigating Committee:-

> "We … make a formal request under the freedom of information act for the reasons behind the Panel's decision that [P] has no case to answer to be provided to us."

15. On 5 January 2016, the second respondent refused to disclose the information. It relied upon sections 31(1)(g) (law enforcement), 40 (personal information) and 41 (information provided in confidence) of the Freedom of Information Act 2000. Following an internal review, which confirmed the decision not to disclose, the second respondent additionally relied upon section 30(2) (investigations and proceedings).

16. The first respondent's decision notice, against which the appeal is brought, is dated 24 November 2016. It is based entirely on section 40(2) of FOIA. The first respondent has made no attempt in these proceedings to support the other exemptions relied upon by the second respondent. Furthermore, the second respondent, having been joined as a party to the appeal on 24 May 2017, has not sought to rely upon those other provisions.

17. Section 40 (personal information) of FOIA provides, so far as relevant:-

> "40(2) Any information to which a request for information relates is also exempt information if –
>
> (a) it constitutes personal data which do not fall within subsection (1), and
>
> (b) either the first or the second condition below is satisfied.
>
> (3) The first condition is –
>
> (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene –
>
> (i) any of the data protection principles … "
>
> Paragraph 1 of Schedule 1 to the Data Protection Act 1998, so far as relevant, provides:-
>
> "1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
>
> (a) at least one of the conditions in Schedule 2 is met … "

18. It is common ground that the relevant provision of Schedule 2, for the present purposes, is as follows:-

> "6(1) The processing is necessary for the purposes of a legitimate interest pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

19. The relationship between FOIA and the DPA 1998 has, in the past, given rise to some difficulty. In Information Commissioner v CF and Another [2015] [UKUT 449] (AAC) Upper Tribunal Judge Jacobs reiterated that any balancing involved in paragraph 6(1) of Schedule 2 is different from the balance that has to be applied under the so-called "qualified" exemptions in FOIA. The processing in question must be "necessary" unless there is "prejudice to the data subject".

20. Judge Jacobs explains that applying paragraph 6(1) may involve up to three stages:-

> "• The first stage is to consider whether the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data would be disclosed. If not, it is not necessary to proceed to the other stages …
>
> • The second stage only arises if the consideration passes the first stage. It is then necessary to identify the rights and freedoms or legitimate interests of the data subject. If there are none, it is not necessary to proceed to the third stage.
>
> • The third stage only arises if the consideration passes the first and second stages. It is then necessary to consider whether the processing is unwarranted, or overridden, in any particular case by reason of prejudice to the data subject's rights, freedoms or legitimate interests."

21. In Haslam v Information Commissioner and Another [2016] UKUT 0139, Upper Tribunal Judge Markus QC held that, in considering whether personal data can be disclosed fairly in connection with the first data protection principle, regard must be had to the possible consequences of disclosure on the individual; the reasonable expectations of the individual; and any legitimate interest in the public having access to the information and the balance between these and the rights and freedoms of the individuals who are the data subjects.

22. It is common ground between the parties that the first of the stages indentified by Judge Jacobs in CF is met. As the first respondent points out in her further submissions of 8 June, the appellant's "interest lies in understanding why HCPC decided that P had no case to answer in respect of his fitness to practise as a paramedic. Ms Armitage's specific interest in P's fitness to practise arises because P treated Ms Armitage's husband, who sadly died, and criticism has been made of that treatment".

23. As the first respondent points out in those submissions, this interest of the appellant is distinct from the appellant's interest in understanding what went wrong in P's treatment of Mr Mpongwana.

24. This is important, because it undermines the case of the second respondent, to the extent that this rests upon the fact that the coroner's inquest has provided a significant amount of information about Mr Mpongwana's death and the criticism of P in that regard. The appellant's legitimate interest is one that has wider public ramifications; namely, the public's interest in ensuring that complainants are told the outcome of and reasons for fitness to practise decisions.

25. The second stage requires us to identify the rights and freedoms or legitimate interests of P. This requires an analysis of what the second respondent might reasonably be expected to do, in terms of communication of the outcome of its "fitness to practise" decision. In the present case, of course, we know that the decision was that P had no case to answer.

26. The additional significance of that decision was that, in the present case, the protective interim order, imposing conditions upon P, automatically fell away. As we have seen, interim decisions of this kind are taken by reference to the public interest, at or following "open" hearings. In contrast, the deliberations of the Investigating Committee as to whether there is a "case to answer" are held in private and neither the public (including any complainant) nor the practitioner concerned are entitled to be present.

27. The following is an extract from a document published by the second respondent, entitled "The Investigations Process – Further Information":-

> **"The Investigating Committee**
>
> After you have had the opportunity to respond to the allegation, we will pass a copy of the allegation, the information we have gathered and your response (if you have provided one) to a panel of our Investigating Committee to decide whether there is a "case to answer". Each Investigating Committee Panel is made up of at least three people, including someone from the same profession as you and a lay person (someone who is not on our Register). The Investigating Committee Panel's task is to look at the documentary evidence that is available and decide whether we will be likely to prove the facts of the allegation that has been made against you. The meeting is held in private and you (and the person who raised the concern) will not be invited to attend. The Investigating Committee Panel does not decide whether the allegation is proven, they only decide whether we have a real prospect of proving the facts of the allegation at a final hearing.
>
> The Investigating Committee can decide that
>
> - more information is needed or that the allegation needs to be amended,

- there is a "case to answer" (which means they will refer the case to a final hearing), or

- there is "no case to answer" (which means that the case does not need to be taken any further).

The Investigating Committee Panel will give reasons for their decision. We will write to you (and the person who raised the concern) after the meeting and will give you the Investigating Committee Panel's decision and reasons. There is no process to allow you to appeal against a decision at this stage." (Our emphasis)

28. The drafting of the emphasised lines lacks precision. It is, however, in our view apparent that the most appropriate interpretation is that both the practitioner and the person who raised the concern will be given the panel's "decision and reasons". In other words, the second "you" in the penultimate sentence covers both the practitioner and the person who raised the concern. Otherwise, the statement that the latter would be written to after the meeting would be meaningless. Much clearer language would be needed in order to make it plain that the person raising the concern would only be told of the decision, not the reasons.

29. Significantly, this appears to be (or close to) the view taken by the second respondent herself. At paragraph 23 of her decision notice we find the following:-

> "23. The Commissioner understands from the HCPS's website that following the Investigating Committee's meeting the person who raised concerns about the healthcare professional is informed of the reasons for its decision. It is not clear whether this means the "notice of decision" is disclosed in full to whoever raised the concern, but it appears likely that at least some of its content is made available to them. This would also be understood by the healthcare professional who was the subject of the investigation. However this would not undermine their expectation that there will be no wider disclosure of the information. It is important to recognise that the test when applying section 40(2) is whether a disclosure to a member of the public would be a breach of the data protection principles."

30. The effect of the published information set out in paragraph 27 above is to make plain that the person under investigation can have no expectation that the person or persons who raised the concern will not be told, even in basic/summary terms, what the reasons were for concluding that there is no case to answer.

31. It therefore follows, in the Tribunal's view, that the arguments made by the second respondent and, indeed, the first respondent, for refusing to disclose any reasoning whatsoever to the appellant, fall away. Any registered person engaging with the Investigating Committee Panel does so on the basis that complainants will be given at least the essence of the reasons why, if it turns out to be the case, no case to answer is found by the panel. There is no suggestion that this has, or would, impede the second respondent's functions. In particular, there is no suggestion that registered persons, such as P, would be less likely to engage with the second respondent, in

these circumstances. Indeed, it is clearly in a registrant's interest to engage in the process that may ultimately determine whether they can continue to practise their profession.

32. What we have just said applies, whether or not the appellant in the present case was the complainant. It is unclear whether she was. But, in any event, she had a highly significant and direct interest in the second respondent's process. On any view, she would have been entitled to engage with the process, as a complainant. It also matters not whether the process was, in this particular case, actually set in motion by a complaint to the second respondent. The system is constructed on the basis that registered persons must assume there may be a complainant.

33 The question arises as to the position of a complainant, as a person who may be entitled, pursuant to paragraph 6(1), to at least the gist of the reasons of the panel's decision, given that section 40(3)(a) of FOIA refers to "a member of the public". This point is dealt with in detail at paragraphs 20 to 24 of CF. Judge Jacobs' conclusion was that "the language of FOIA is relevant at the second and third stages involved in applying paragraph 6(1) rather than at the first stage".

34 Applying that approach, we do not consider that the expectation of P, and others in P's position, involves a belief that any reasons given to the complainant for the panel's decision would be given in strict confidence, so that it could be assumed those reasons would not be any further disseminated. There is nothing in the language of the information note set out in paragraph 27 above to indicate that complainants and, for that matter, the registered person, are expected to treat the decision and reasons as having been given in confidence. In this regard, we disagree with the penultimate sentence in paragraph 23 of the first respondent's decision notice (see our paragraph 29 above). There is, on the facts, no evidence of any expectation, such as as is there asserted.

35. This leads us on to the third stage, where the question is whether the processing is unwarranted. As can be seen from our analysis, it plainly is not. P's reasonable expectation would, on the contrary, have been that the reasons why no case to answer was found, and why the interim order accordingly fell away, would have been communicated to any complainant (without restriction on its dissemination) in November 2015. This would have been shortly after the inquest, when criticisms of P were made by the coroner. The fact that P's case may return to the public eye, in late 2017, is due to the fact that the second respondent failed to give the relevant reasons at the appropriate time.

36. We have, nevertheless, stepped back to consider, in the round, whether there is any merit in the assertion that disclosure of the reasons for the second respondent's decision would cause P "distress". For the reasons that must be articulated in the Closed Annex, we do not so find. Furthermore and in any event, any discomfort that P might experience is, we consider, heavily outweighed by the strong public interest (which is in no way dependent upon the amount of press coverage of the death of Mr

Mpongwana) in ensuring that complainants (and persons in the position of the appellant who were directly affected by the conduct that is being investigated) are provided with appropriate reasons why a decision has been taken that a registered person has no case to answer.

37. As we have stated, the parties in this case have proceeded on the basis that the only relevant provision in the appeal is section 40(2) of FOIA. We nevertheless find, for completeness, that the second respondent's earlier invocation of sections 30(2), 31(1)(g) and 41 would have failed. In the circumstances of this case, for the reasons set out above, the public interest in the giving of the reasons decisively overrides any such public interest as there may be in withholding the information.

Decision

38. This appeal is allowed. The first respondent's decision notice is not in accordance with the law. We substitute for it a decision notice, requiring the second respondent, within 42 days of the date of this decision, to disclose the information set out in the Closed Annex.

Signed
Judge Peter Lane

16 November 2017

Promulgated date

20 November 2017