



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

Appeal No: EA/2013/0110

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50465587

Dated: 6 March 2013

Appellant: Helen Bright
Respondent: The Information Commissioner
2nd Respondent: General Medical Council
Heard at: Ipswich Magistrates' Court
Date of Hearing: 12 November 2013

Before
Christopher Hughes
Judge
and
Marion Saunders and Andrew Whetnall
Tribunal Members

Date of Decision: 16 January 2014

Promulgated: 17 January 2014

Attendances:

For the Appellant: in person

For the Respondent: did not attend

For the 2nd Respondent: Timothy Pitt-Payne QC (instructed by Toni Smerdon)

Subject matter:

S31 Freedom of Information Act 2000

Cases:

Sugar v BBC [2010] UKSC 4

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 6th March 2013 and dismisses the appeal.

Dated this 16th day of January 2014

Judge Hughes

[Signed on original]

REASONS FOR DECISION

Introduction

1. Dr Bright has a long-standing interest in the impact of GMC disciplinary proceedings on the doctors involved and is involved with a group of medical practitioners Doctors4Justice which campaigns on this issue.

The request for information

2. On 19 April 2012 she wrote to the GMC asking for information in the following terms:-

Dear General Medical Council,

This is the request under the Freedom of Information Act 2000 (FOIA):

1 Please, provide the list of names of all doctors who died following referral to GMC under Freedom of Information Act 2000 up to present date.

2 Please, state when you started collecting this data.

3 Please provide ethnicity data.

4 Please, note Data Protection Act 1998 applies to living individuals.

5 Please, note that you have misapplied Section 31(1) (g) and 31(2) (d) of FOIA 2000 in your refusal to give information to another applicant "Richard". You cannot investigate and prosecute dead doctors as you falsely claimed in your response to "Richard" on 4th February 2011.

6 Please, state if you are aware that there is any ongoing investigation (not necessarily by GMC) into the deaths of any of those doctors who died following referral to GMC.

7 Please, state if there has ever been any investigation into deaths of those doctors by GMC.

Yours sincerely,

Helen Bright

PS I note in GMC removal expenses that GMC is not looking at the cost of removal of Paranormal entities which Information Team seem to believe in and many sitting on FTP panels:...

3. The GMC responded on 25 July 2012 and confirmed its position in an internal review of 29 August 2012. It gave the number of doctors concerned (92), a breakdown of ethnicity and named six doctors who had been referred to a fitness to practice panel and died before the hearing took place. It confirmed that the GMC carried out investigations where doctors in the disciplinary process take their own lives. It resisted disclosing further names on the grounds of the qualified exemption from disclosure contained in S31- that it would prejudice law enforcement. The approach which the GMC adopted was that it refused to disclose the names of doctors within the scope of the request unless it had previously, as part of the regulatory process, put those names in the public domain. During the course of the complaint to the Commissioner and the appeal to the Tribunal the GMC has kept the matter under review and refined its approach:- it has disclosed further names of doctors who had been subject to Interim Orders since their identity would have been revealed at the time, the GMC also rectified an error in the number of doctors within the scope of the request.

The complaint to the Information Commissioner

4. Dr Bright complained to the Commissioner on 24 September 2012; she raised the completeness of the data with respect to ethnicity – an issue which was resolved during the course of the Commissioner’s investigation, and challenged the withholding of information. The Commissioner, having investigated, concluded that the exemption was engaged and the balance of the public interest lay in not disclosing the information. He found that the GMC’s regulatory processes relied to a considerable degree in the trust that doctors and their employers had in the confidentiality of its investigation procedures and without this trust the GMC’s ability to gather the information it needed for its regulatory activities would be prejudiced. If the GMC were to disclose the names of deceased doctors against whom no regulatory decisions had been made this would shake that trust and impede the GMC’s work.
5. The Commissioner weighed the arguments advanced by Dr Bright in favour of disclosure and in his decision gave specific consideration to her arguments that the

information should be in the public domain so that the extent to which doctors were given adequate support during the process could be explored; she further argued that since they were dead they had no reputations to protect.

6. The GMC pointed to the relative openness of its approach and the harm that would flow to its regulatory activity if it went further and also the distress which would be caused to the families of deceased doctors.
7. The Commissioner concluded that the public interest in upholding the confidentiality was “very strong” and concluded that the disclosure should not be made.

The appeal to the Tribunal

8. In a lengthy and wide-ranging notice of appeal Dr Bright challenged the Commissioner’s decision notice. She cited extensively from European legislation and specifically criticised the GMC’s collection of data with respect to doctors’ ethnicity. She argued that:-

- it was unreasonable to expect confidentiality after death since there was no right to reputation after death
- Disclosing the names would assist with the collection of data on ethnicity, age and religion of the doctors concerned
- Non-disclosure was discrimination against the doctors’ families right to know
- The GMC was protecting people who had made false allegations
- The non-disclosure breached Dr Bright’s rights under Article 10 ECHR
- The GMC was hypocritical in claiming families might be upset to discover that a complaint had been made against a deceased family member
- She argued that the Commissioner had wrongly considered another case to be analogous.
- “The applicant claims that even minimum standards have not been met into investigations of the death of doctors subject to disciplinary proceedings by GMC when the names of those who died are denied and there is no independent inquiry”

9. The Commissioner and the GMC resisted all grounds of appeal on the basis that the decision notice was correct in law; the GMC further argued that disclosure of the names would be unlawful under S44 FOIA since the disclosure by the GMC would breach its obligation under S6(1) of the Human Rights not to act incompatibly with Article 8(1) of the ECHR and the disclosure would be an interference with the right to respect for private and family life of surviving close associates of the doctors since the reputational damage, where it could not be remedied, would cause distress and there was no legitimate purpose served by the disclosure.

The questions for the Tribunal

10. Although in her voluminous documents Dr Bright raised many issues; the primary question for the Tribunal was whether the Commissioner had made a decision which was in accordance with the law, in particular whether the public interest in the GMC's regulatory investigations would be likely to be prejudiced by the disclosure to an extent which outweighed the public interest in disclosure:-

11. S31 **Law enforcement** provides (so far as is relevant to this case):

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

.....

(g) the exercise by a public authority of its functions for any of the purposes specified in subsection (2)

.....

(2) The purposes referred to in subsection 1(g) to (i) are –

.....

(d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on

12. In the event that the Tribunal considered that the Commissioner was wrong in his decision, whether the disclosure by the GMC would be unlawful as a breach of its obligation to act compatibly with ECHR.

Legal submissions and analysis

13. In her discursive submissions Dr Bright raised many issues. She emphasised the limited nature of her request – she had not asked for details of the complaints. She emphasised that it was an issue of interest to doctors. She felt that the interference with Article 8 rights was very limited in the light of the fact that there were no findings against the doctors concerned and there was no right to reputation after death. She was profoundly critical of many aspects of the GMC’s activities. She further argued that there was significant information that could be derived from a name alone. She indicated that her primary concern was the ethnicity of the doctors who were subject to GMC disciplinary proceedings. She stated that she wanted the information for research.
14. Despite Dr Bright’s arguments the Tribunal could find no significant public benefit from the disclosure of the information requested. In her submissions to the Commissioner she argued that without the requested information it would not be possible to criticise the regulatory functioning of the GMC causing deaths in the absence of the doctor’ names. Like the Commissioner the Tribunal had difficulty seeing how having this specific information could assist her in better monitoring the GMC’s activities. Nor, although she argued that information as to ethnicity, age and religion could be inferred from names, does it seem to the Tribunal to advance her case. She was critical of the way in which the GMC collects data as to ethnicity of doctors. The Tribunal could see no benefit from speculation as to the ethnicity of this small sample of medical practitioners. The issue of the relatively large proportion of doctors from ethnic minorities in the regulatory processes of the GMC is a matter in the public domain, the speculative analysis of the ethnicity of this small number of doctors (where the actual available data as to ethnicity has been disclosed) is unlikely to be of any value whatsoever in informing public discourse.
15. Nor, despite her submissions, does she have a free-standing right to information under Article 10 ECHR – *Sugar v BBC* is binding authority to the contrary.

16. The argument advanced by the GMC was that it was well understood that details of doctors in the disciplinary processes of the GMC would only be published if there was a decision to progress the case to some form of regulatory action. While the GMC could require disclosure of information under S35A of the Medical Act in order to assist it in dealing with fitness to practice issues, the Commissioner formulated the problem clearly (DN paragraph 21):-

“The Commissioner understands that, with the GMC’s formal powers, there is no question of a doctor, or any other party, refusing to co-operate with an investigation. However, the Commissioner further understands that the GMC will be at its most effective when a party, including a doctor’s employer, has faith in the confidentiality of the preliminary investigation process and thus are willing to participate fully in the investigation. This effectiveness would consequently be placed at risk through disclosure, the upshot of which is that the GMC would be likely to be hampered in carrying out its functions in a timely fashion.

17. The disclosure of the names of the deceased doctors would undoubtedly cause distress to their families and friends. This again weighs against any disclosure of those names.

Conclusion and remedy

18. The Tribunal was therefore satisfied that the Commissioner’s decision was in accordance with the law and rejected the appeal. It was therefore not necessary to further consider the submissions with respect to S44.
19. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 16 January 2014