



Case Reference: EA/2021/0159
NCN: [2022] UKFTT 00245 (GRC)

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard by: CVP
Heard on: 17 June 2022
Decision given on:

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER EMMA YATES
TRIBUNAL MEMBER KATE GRIMLEY EVANS

Between

DAVID GRAVES

and

THE INFORMATION COMMISSIONER

Appellant

Respondent

Representation:

For the Appellant: In person

For the Respondent: Did not appear

Decision: The appeal is Dismissed

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice IC-75225-S5L3 of 11 May 2021 which held that the Betsi Cadwaladr University Health Board ('the Board') was entitled to rely on s 41 of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner did not require the public authority to take any steps.

Procedural background to the appeal

3. Mr. Graves continued to send documents to the tribunal up to the date of the oral hearing. I ordered that the panel would not read these documents in advance of the hearing, but that they would be stored on the electronic file to which the tribunal had access during the hearing, so that Mr Graves could draw the panel's attention to any relevant documents. Mr. Graves drew our attention to a number of those documents and the panel read those documents.
4. After the hearing had taken place, the Judge was forwarded an email from Mr. Graves sent to the tribunal on the morning of the hearing stating that he could not access the bundle because the link had expired. Mr. Graves was sent the following email dated 21 June 2022:

Judge Buckley was not aware of your email sent at 09.05 on 17 June until 20 June. The panel was accordingly not aware that you did not have access to the bundle during the hearing.

You should inform the tribunal and the Commissioner as soon as possible and by no later than 7 days from the date of this email if:

- (i) you would still like to be provided with a link to the bundle, and
 - (ii) you would like the tribunal to consider whether to allow you to make any additional written representations once you have access to the bundle
5. The Commissioner has since confirmed that Mr. Graves had been sent a hardcopy of the bundle, but it appears that he was unable to locate it on the morning of the hearing.
 6. Mr. Graves sent a number of emails in reply, which did not request a link or the opportunity to make representations but included some additional submissions and links to further material in support of the appeal. One of the emails contained the statement, 'I am afraid I have had enough', referred to another matter Mr. Graves is involved in and stated 'I have to concentrate on that'.
 7. From this, the Judge inferred that Mr. Graves did not wish to be provided with another link or, accordingly, the opportunity to make additional representations once he had access to the bundle. Mr. Graves was sent the following email in response on 22 June:

Judge Buckley understands from Mr. Graves' email of 21 June 2022 that he does not wish to be provided with a link to the bundle and therefore the tribunal does not need to consider whether to allow Mr. Graves to make additional representations once he has access to the bundle.

In the circumstances, as the tribunal hearing and deliberations have already concluded, the tribunal will not take into account any documents or submissions sent in by Mr. Graves after the hearing on 17 June 2022.

8. The tribunal has not taken account of any submissions or material sent in after the hearing on 17 June 2022. The tribunal treated further emails sending in information following the hearing as an application for a direction under rule 6(1) for an order permitting Mr. Graves to provide documents, information or submissions to the tribunal following the hearing. That application was refused by order dated 4 July 2022 for the reasons set out in that order.

Factual background to the appeal

9. The Hergest Mental Health Unit ('Hergest') is based at Ysbyty Gwynedd hospital. On 20 July 2013 the Executive Director of Nursing and Patient Services visited Hergest and spoke to a number of staff who raised a number of serious concerns. In a letter dated 26 July 2013 the members of staff confirmed the exact nature of the allegations and confirmed the names of 39 staff who had signed a petition stating that the signatories had 'No confidence in the Management of the Mental Health CPG in their dealings with the Hergest Unit'. Three more members of staff subsequently came forward. The letter named three managers in which the staff said they had no confidence.
10. An independent investigation was commissioned in 2013 by the Board under the 'Raising Staff Concern/Whistleblowing Policy WP4. The investigation was asked to present a report, having reviewed the concerns raised to determine whether the concerns were proven, underlying issues contributing to any proven allegations and to advise on any remedial steps that may be required.
11. As part of the investigation 29 staff who signed the petition were interviewed as well as 13 other staff and 3 managers. A number of staff who signed the petition declined to be interviewed. Approximately 700 pages of witness statements were obtained. This appeal relates to a request for the 700 pages of staff testimonies.
12. The resulting report is known as 'the Holden Report'. It was provided to the Board on 8 December 2013. In March 2014 a summary of the findings were sent to those who had raised the concerns. At the time the Holden Report was not published. A summary of the Holden Report was published in 2015.
13. The Commissioner ordered that the Holden report be released in a Decision Notice dated 30 June 2020. The Board appealed to the First-tier Tribunal (FTT). Agreement

was reached before the FTT heard that appeal and the report was released in November 2021.

14. The published report included a 12-page appendix containing testimony excerpts. The introduction to the testimony excerpts states:

A number of the testimonies were accompanied by a high degree of emotion. Many staff were in tears, expressing feelings of helplessness, in terms of being able to improve standards of care, and hopelessness with regard to the future.

15. It is clear from the information provided by Mr. Graves that a number of the issues raised by staff and dealt with in the Robin Holden report have still not been resolved. It is also clear that there are a number of serious ongoing concerns about Mental Health provision in North Wales being raised, for example, in the Welsh parliament and by Health Inspectorate Wales (HIW). There have also been a number of critical reports following the deaths of two patients in units run by the Board in 2021.
16. Mr. Graves informs us that there is also an ongoing investigation by the Nursing and Midwifery Council (NMC) into the conduct of various individuals involved at the time of the Holden Report.
17. In February 2021 the North Wales Safeguarding Board (NWSAB) set up an independent multiagency Task and Finish Group in because the NWSAB required reassurance and clarity that any safeguarding issues/concerns regarding alleged neglect had been responded to and managed at the time in accordance with local and national procedures that were operating at that time. In addition, in relation to any individual or cohort of cases where staff raised concerns around neglect, the NWSAB required the Task and Finish Group to establish whether the Wales Policy and Procedures for the Protection of Vulnerable adults from Abuse (POVA) in place at the time were followed. The Task and Finish Group included representatives from Police, Health, Local Authority and the Board Legal Advisor.
18. In a letter to Mr. Graves dated 10 August 2021 the NWSAB stated that following the reporting back of the Task and Finish Group this would be followed by discussions with Welsh Government to convey any key learning themes and discussion any potential actions that agencies will need to take.
19. Mr Graves was informed of the outcome of the Task and Finish Group by letter dated 13 September 2021. The letter states that the Task and Finish Group found that Holden had recorded in the individual staff testimonies, comments made by staff that suggested there had been potential incidents of poor care or neglect. However, there was insufficient information recorded, so it was impossible to identify specific individual safeguarding incidents or concerns and the Task and Finish Group were unable to determine the action under the POVA policy had or had had not been taken. An absence of specific details and information made any

wider or further investigations impossible. Therefore this issue could not be reviewed any further.

20. Likewise in relation to Mr Graves' concerns alleging criminal neglect the Task and Finish Group reached a clear conclusion that the lack of specific details and or information (names of staff/ patients/ witnesses/ location/ date of incident) means this could not be further explored. The letter states that reviewing the additional documentation (staff testimonials did not assist in giving more detail to the general statements about neglect and poor care recorded in the Holden report. Staff testimonials/ statements followed a pattern of set questions to which staff gave their individual responses; staff made no reference to POVA or to making safeguarding referrals in their statements and there is no evidence that the Task and Finish Group found that there was any subsequent follow up. In conclusion the letter stated that there was no substantiated evidence of abuse or neglect or any allegations that could be further investigated.
21. Mr. Graves has a personal interest in this issue. In 2021 the Ombudsman highlighted a series of failures by the Board in the care of his mother, who spent time at the Hergest Unit in 2013. In 2021 the Board's executive director apologised to Mr. Graves for the failings in the care of his mother and for the way in which his concerns were handled.

Requests, decision notice and appeal

The request

22. This appeal concerns the following request made on 20 October 2020 for staff testimonies given in the course of the investigation leading to the Robin Holden report:

The 40 staff then gave 700 pages of SUIs and safeguarding concerns in testimony...As they relate to my Mum and the harm, she suffered can I have those 700 pages of testimony. If others are named therein please redact those names and any identifying information other than...job titles.

The response

23. The Board replied on 13 November 2020. The Board confirmed that it held the requested information and was withholding it under s 36(2)(b)(ii) and (c) (prejudice to the effective conduct of public affairs), s 40(2) (personal data) and s 41 (information provided in confidence).
24. Mr. Graves requested an internal review on 13 and 30 November 2020 and on 14 January 2021. The Board upheld its refusal on 2 February 2021.
25. Mr. Graves referred the matter to the Commissioner on 2 February 2021.

The decision notice

26. In a decision notice dated 11 May 2021 the Commissioner decided that s 41(1) was engaged. She did not consider the other exemptions raised by the Board.

S 41(1) – information provided in confidence

27. The Commissioner was satisfied that the information was obtained by the Board from another person. She concluded that it had the necessary quality of confidence. The Commissioner concluded that there was a clear and explicit obligation of confidence in relation to the withheld information.

28. The Commissioner noted that the loss of privacy can be a detriment in its own right and there is no need to be any detriment to the confider in terms of tangible loss in order for it to be protected by the law of confidence. Having considered the withheld information, the Commissioner noted that the testimonies contained personal accounts of events relating to the Hergest Unit and very candid opinions in respect of colleagues and management, the disclosure of which was likely to cause significant distress, and possibly detriment to the confiders.

29. The Commissioner accepted that there was a public interest in the disclosure of the information regarding staff concerns about the management of a mental health unit. She acknowledged that the testimonies referred to concerns regarding the style and actions of management, which in some cases the confiders believed compromised patient safety. However, these concerns were outlined in the summary to the Robin Holden report, which is in the public domain, and the Robin Holden report itself. The report was the subject of the Commissioner's decision notice referenced FS50882004 in which she concluded that the Health Board was not entitled to rely on section 41 of the FOIA and which was, at the time, under appeal to the FTT.

30. In weighing this against the public interest in maintaining trust between confider and confidant, and the likely distress and possible detriment to the confiders, the Commissioner considered that the Health Board would not have a public interest defence for breaching its duty of confidence.

31. Having considered all the circumstances of this case, and the information withheld under section 41 of the FOIA, the Commissioner concluded that there was a stronger public interest in maintaining the obligation of confidence. Therefore, the Commissioner found that the information was correctly withheld under section 41 of the FOIA.

Notice of Appeal

32. Mr. Graves' grounds of appeal appear to be as follows:

- (1) The request was made under the DPA as well and the Commissioner has not considered this.
- (2) The information does not have the necessary quality of confidence and was not imported in circumstances importing an obligation of confidence. The 42 whistleblowers did not want their evidence to be confidential. It was the Board, not the whistleblowers who adopted 'WP4' (the Raising Staff Concern/Whistleblowing Policy).
- (3) The request did not include the testimonies of management, only of the original 35 whistleblowers and a further seven staff raising concerned about management.
- (4) There would be a public interest defence. In a response to a FOI request the Board stated that no deaths occurred whereas inquests have taken place into deaths on Hergest.
- (5) The testimonies have been withheld from North Wales Safeguarding Board, North Wales Police (Protection of Vulnerable People Unit), Wales Audit Office, HIW and the NMC.
- (6) The testimonies concern misconduct, illegality and gross immorality.
- (7) The disclosure of the Holden report is irrelevant because the deaths, bullying, nutritional neglect and the non-reporting of SUIs are not mentioned in the Robin Holden report.

The ICO's response

Section 41 – Breach of confidence

33. Whilst the WP4 procedure does include a form on which a complaint under the procedure may be raised, that does not mean that complaints under WP4 must be raised exclusively by means of that form. The Commissioner considers it reasonable and sensible for an organisation to treat serious allegations in line with the formal procedure regardless of the precise means by which those concerns were first raised. The Board did in this case proceed broadly in line with the WP4 procedure.
34. The WP4 procedure does not provide expressly for confidentiality for interviewees as opposed to those raising concerns, the Commissioner considers:
 - 34.1. that the content of the policy is geared to strongly towards protecting confidentiality where appropriate;
 - 34.2. that the same rationale as compels the protection of the identities of those raising concerns where appropriate applies just as strongly in respect of the identities of the witnesses;
 - 34.3. that the protection of witnesses' identities in sensitive investigations is a widespread and proper practice in the interests of encouraging them to be forthcoming with full and frank information in important investigations;
 - 34.4. even absent the WP4 procedure the Commissioner would still have expected that the testimonies would be treated as confidential.

35. The Commissioner had to assess confidentiality at the time of the request. The fact that two people who may be named in the withheld information have come forward since the request and told Mr. Graves that they do not consider the information sought to be confidential does not alter the analysis as to confidentiality. Even if those two individuals were content to waive confidentiality and even if they appeared in the testimonies the same does not necessarily follow in respect of other individuals.
36. There is no evidence to suggest that at the time of the request the individuals did not see their interviews within the testimonies as confidential. It cannot be inferred from the fact that a person signed a letter of complaint about a sensitive issue that they are also willing for their detailed allegations about the same, given to an investigator, to be made public to all the world. From the nature of the interviews and the fact that they were stated at the time to be confidential the Commissioner considers that each interviewee gave their testimony in confidence.
37. On the basis of an ITV news article that suggests that a leaked copy of the Holden Report has been seen by ITV News, Mr Graves appears to allege that the testimonies are in the public domain and are therefore no longer confidential. In the Commissioner's view there is nothing within the article to suggest that ITV News has seen the testimonies. The fact that another document may have been leaked to a news organisation and then referred to in a news article does not mean that underlying documentation is in the public domain.
38. The Commissioner is content that any concern about a cover up does not substantially advance Mr Graves' case in the public interest. The investigation is publicly known to have taken place and a summary of the Holden Report's findings has been published online. The Commissioner is content that the appropriate regulators would have had and do have the ability to make suitable enquiries and requests for information about the situation pursuant to their own statutory powers if need be.
39. Disclosure under FOIA is disclosure to the world at large. References in the notice of appeal to Mr. Graves' own circumstances are relevant only insofar as they go to the wider concept of public interest.

S 36 and s 40(2) FOIA

40. Should the tribunal determine or form a provisional view that s 41 does not apply the Commissioner invites the tribunal to invite additional submissions from the Board and the Commissioner and/or join the Board to proceedings.

Mr. Graves' reply

41. By a case management order dated 14 September 2021 it was ordered that a number of emails and attachments sent to the tribunal by Mr Graves would be treated as his

reply. The reply, as contained in those emails, is detailed and repeats some of the points already made. We have read and taken it into account in full.

Evidence

42. We have read and taken account of an open and a closed bundle of documents. We have also considered a number of additional documents sent separately to the tribunal by Mr. Graves. We have also read the Holden Report and its appendix which are available at <https://bcuhb.nhs.wales/about-us/governance-and-assurance/publication-of-the-holden-report/robin-holden-final-report-revised-redactions-applied-v1-0/>
43. In accordance with the guidance in Browning, the tribunal records that the closed bundle contains a sample of the withheld information and a note from the Commissioner on the withheld information. Disclosure would reveal the contents of the withheld information and therefore it is necessary to have a closed bundle to avoid defeating the purpose of the proceedings.
44. The closed bundle also contained, at pA5, a note from the Commissioner with suggestions as to how the tribunal might approach the hearing. Whilst this note had no influence on the tribunal's decision or the conduct of the proceedings, the Judge determined that it was not necessary to withhold this from Mr. Graves. After allowing the Commissioner the opportunity to raise any objections, this note has been placed in an open annex to this decision. The Commissioner suggested one minor redaction, which was accepted by the Judge on the basis that it would otherwise reveal the contents of the withheld information.

Legal framework

Information provided in confidence

45. S 41 provides, so far as relevant:

S 41 – Information provided in confidence

- (1) Information is exempt information if –
 - (a) it was obtained by the public authority from any other person (including another public authority), and
 - (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
46. The starting point for assessing whether there is an actionable breach of confidence is the three-fold test in Coco v AN Clark (Engineers) Ltd [1969] RPC 41, read in the light of the developing case law on privacy:
 - (i) Does the information have the necessary quality of confidence?

- (ii) Was it imparted in circumstances importing an obligation of confidence?
- (iii) Is there an unauthorised use to the detriment of the party communicating it?

47. The common law of confidence has developed in the light of Articles 8 and 10 of the European Convention on Human Rights to provide, in effect, that the misuse of 'private' information can also give rise to an actionable breach of confidence. If an individual objectively has a reasonable expectation of privacy in relation to the information, it may amount to an actionable breach of confidence if the balancing exercise between article 8 and article 10 rights comes down in favour of article 8.
48. S 41 is an absolute exemption, but a public interest defence is available to a breach of confidence claim. Accordingly, there is an inbuilt balancing of the public interest in determining whether or not there is an actionable breach of confidence. The burden is on the person seeking disclosure to show that the public interest justifies interference with the right to confidence.

The role of the tribunal

49. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Issues

50. The issues for the tribunal to determine are:
- 50.1. Is the disputed information confidential within the meaning of s.41(1) FOIA?
 - 50.2. Would disclosure be in the public interest such that it would not amount to an actionable breach of confidence?

Submissions

51. The claimant made oral submissions at the hearing. We have taken those into account where relevant, but it is not necessary to repeat the arguments here.

Discussion and conclusions

The DPA request

52. Mr. Graves states in his grounds of appeal that he also made the request under the Data Protection Act. It is not within our remit to make a ruling on any request

under the DPA. If the request was for Mr. Graves' personal data, it would be exempt under FOIA in any event.

The scope of the request

53. The request states that 'the 40 staff' (this is a reference to the whistleblowers), gave '700 pages of SUIs and safeguarding concerns in testimony' and asks, 'can I have those 700 pages of testimony'. It was clarified via email on 21 October 2020 that the reference to the 700 pages of testimony related to the Holden Report.
54. The Holden Report includes a reference at para 1.03 to 'approximately 700 pages of witness statements' which had been obtained from 29 staff who signed the petition, 13 other staff and 3 managers, we find that it was objectively reasonable to interpret the request as including the full 700 pages of testimony, even though Mr. Graves specifically refers to the testimony of the 40 whistleblowers.
55. However, if we had concluded that the request did not include a request for the testimonies of the managers and/or the other 13 members of staff this would not have altered our conclusions below. The precise scope of the request does not make any difference to our conclusions.
56. In any event, despite our conclusions on the scope of the request above, we have focussed on the testimonies of the whistleblowers when reaching our conclusions, because subsequent to the request Mr. Graves has made clear that he is, in particular, not interested in the testimony of the managers.

Confidential information – s 41

57. The information was provided to Robin Holden and then to the authority by employees of the authority. We find that it was information provided by another person.
58. We consider first whether the information was imparted in circumstances importing an obligation of confidence.
59. We accept that the signatories of the letter dated 26 July 2013 were happy to put their names to the concerns that they raised. It is likely that it was not their intention at the time that they submitted the letter that the concerns raised in the letter would be kept private.
60. However, this is not a request for a copy of that letter. It is a request for verbatim transcripts of 700 pages of interviews in the course of the investigation that was instigated as a result of that letter.
61. The Board initiated the investigation. Not all the staff who signed the petition wished to be interviewed for the investigation. Those that did, along with the

other 13 staff who were interviewed, were informed at the start of the interview, before they had given their testimony, that 'your testimony will be treated confidentially'.

62. We agree with the Commissioner that it cannot be inferred from the fact that a person signed a letter of complaint about a sensitive issue that they are also willing for their detailed allegations about the same, given to an investigator, to be made public to all the world.
63. Mr. Graves has provided emails from two individuals who state that they were interviewed as part of the Holden report. In those emails the individuals state as follows:

The bottom line I think though was that we – I for sure – expected that we would get some kind of transcript to review for accuracy – as I did with the Ockenden and HASCAS Interviews – I can for instance email you and all the people on this list the Ockenden interview and I figure I should be able to be able to do the same with the Holden interview I did. There has been nothing in them that I am not prepared to have in the public domain, and I'd imagine the same is true for most of the others that I know were interviewed. (Email dated 19 April 2021 at p A79 of the open bundle).

I can absolutely say that those that contributed to these investigations from the shop floor wanted their concerns out in the open. We put our head above the parapet because we were concerned about the service and wanted things to improve. (Email dated 4 September 2021 at p A94 of the open bundle)

64. We do not accept that this is sufficient evidence to persuade us that the interviewees did not import the information in the interviews in confidence. Even if the individual is right that the interviewees 'wanted their concerns out in the open', having their 'concerns out in the open' is not the same as publishing an entire verbatim transcript of the testimony of individual interviewees who had been told that the interview was confidential.
65. In our view, given the nature of the investigation we infer that it would likely have been understood by the interviewees that the *concerns* raised would not be kept confidential, that the interviewees would probably not have expected the resulting report to be kept confidential and that interviewees would probably have expected the published report to include anonymised extracts from the testimonies. This is different from expecting the entire transcript of the interview to be published without any need to seek any further consent from those individuals.
66. Similarly, an expectation that the interviewees would be sent a transcript that they could review for accuracy and then circulate to whoever they wished is not the same as an expectation that the Board would simply publish their

transcripts to the world despite having told the interviewees that their testimonies would be treated confidentially.

67. We agree with the Commissioner, taking into account the nature of the interviews and the fact that they were stated at the time to be confidential, that each interviewee gave their testimony in confidence. We find that there was an express obligation of confidence based on the assurance given to interviewees at the start of each interview. Even if there was no express obligation of confidence, given the importance of staff speaking candidly in the context of such an investigation we would, if necessary, have found that there was an implied obligation of confidence in relation to the transcripts of testimonies.
68. Our conclusion would not have been altered if the Holden Report and the appendix containing the summary of the attached testimonies had been published at the time of the request. As set out above, given the nature of the investigation it would have been understood by the interviewees that the *concerns* that were raised would not be kept confidential, and we find that the interviewees would not have expected the resulting report to be kept confidential. Our conclusions on the actionable breach of confidence apply particularly to the verbatim transcript of the interviews. These conclusions would not have been affected if anonymised extracts and details of the concerns had been published in the Holden Report at the time of the response to the request. The quality of confidence of the verbatim transcripts of exactly what we said by each interviewee would remain, even if the report and the anonymised extracts had been in the public domain at the relevant time. We accept that the transcripts had the necessary quality of confidence – they were not trivial and not otherwise accessible.
69. Would disclosure be to the detriment of the confider? We find that this is satisfied by the loss of privacy. If necessary, we find that the disclosure of verbatim transcripts of personal accounts and candid opinions to the world without prior consent, in circumstances where confidentiality had been assured, would be to the detriment of the confiders.

Would disclosure be in the public interest such that it would not amount to an actionable breach of confidence?

70. We have taken into account the fact that this is not the application of the usual public interest test to a qualified exemption. We are considering if the public interest in disclosure is sufficient to outweigh the public interest in maintaining the confidence.
71. In terms of the interest in maintaining the duty of confidence, we take note of the inherent weight in the wider public interest in maintaining confidences. Further, we take account of the particular public interest in maintaining the duty of confidence in verbatim transcripts of interviews in the context of a

investigations arising out of whistleblowing allegations, particularly where the allegations are as serious as those in this case. It is imperative that interviewees are confident that they can speak frankly without concern of personal repercussions. If they cannot rely on assurances of confidentiality, this confidence is likely to be eroded. This does not mean that public authorities are entitled to ignore or suppress concerns raised by individuals in whistleblowing investigations. Nor does it mean the resulting reports should be kept confidential or that concerns that are raised should not be acted upon.

72. We accept that there is an extremely significant public interest in transparency in relation to the operation of mental health services in North Wales, and in particular in relation to the operation of the Hergest Unit. We accept that this interest remains extremely significant despite the passage of time since the Holden Report because of the ongoing serious concerns, the evidence of recent serious incidents including deaths of patients and the evidence that not all matters raised in the Holden Report have been satisfactorily addressed. In reaching this conclusion we have taken account of all the matters raised by Mr. Graves and we note the letters from certain members of the Welsh Parliament in which they give the view that it is in the public interest for the testimonies to be disclosed.
73. Although the Holden Report had not been published at the time of the request, the Commissioner had reached her decision that it should be published and had issued a Decision Notice to that effect on 30 June 2020. In our view it is legitimate to take account of that in our consideration of the public interest. At the date of the request the Board was required to publish the Holden Report and the attached 14 pages of anonymised extracts from testimonies. There is no suggestion that the Holden Report was in any way a 'whitewash'. It was an independent report. It detailed and dealt fairly with the concerns of those interviewed. It quoted extensively from the testimonies, including quotes relating to the allegations of bullying, the difficulties in reporting SUIs and nutritional neglect. It made critical findings and a total of 19 recommendations for improvements. The Commissioner's decision that the Holden Report and its appendix be published in our view significantly reduces the public interest in the publication of the verbatim records of the testimonies themselves.
74. In our view, any public interest in transparency is largely satisfied by fact that publication of Holden Report and its appendix had been ordered at the relevant time.
75. Mr. Graves raises concerns about the fact that the testimonies have not been seen by a number of regulatory bodies such as North Wales Safeguarding Board, North Wales Police (NWP), Wales Audit Office, HIW and the NMC. We note from the correspondence provided by Mr. Graves that a number of these organisations have not seen the testimonies.

76. The Public Services Ombudsman for Wales (PSOW) in a letter dated 29 January 2021 states '...whilst we have obtained a copy of the Holden Report itself from the Health Board, we have not obtained a copy of the staff witness statements upon which it was based.' There is no suggestion in that letter that the PSOW thought it was necessary or appropriate to obtain a copy of the testimonies, or that they had asked for them and they had been withheld.
77. Mr. Graves stated in an email to the ICO dated 21 March 2021 (p D166 of the open bundle) that 'the NMC were struggling to get this information from (*the Board*) and I still am unclear whether (*the Board*) met the third and final Deadline 20/10/20 to hand these documents over'. The NMC have their own procedures and powers to obtain the documents they require in the course of an investigation and it is not appropriate for the tribunal to circumvent that by ordering disclosure to the world through FOIA.
78. NWP stated in a letter dated 30 December 2021 that they had previously reached a policy decision that there would be no criminal investigation into the matters raised by Mr. Graves. In that letter NWP states that the Head of Enforcement for HIW has not highlighted any matters they wish to refer to NWP which is the protocol for such requests for a police investigation. Further, there had been no recommendation or request for a criminal investigation from the NWSAB Task and Finish Group (who had reviewed the testimonies). Again, if NWP wished to investigate, they have the power to obtain the testimonies. Further, the tribunal notes that a representative of NWP was on the Task and Finish Group and has therefore read and reviewed the testimonies.
79. None of the correspondence from the Wales Audit Office (WAO) in the bundle could support a finding that the testimonies have been 'withheld' from the WAO. As with the other bodies mentioned, WAO have their own powers and processes to obtain information and it is not appropriate for the tribunal to circumvent those using FOIA.
80. There is correspondence from HIW in the bundle. None of this suggests that HIW consider it necessary to obtain a copy of the testimonies. Mr. Graves may disagree with HIW's assessment, but there is no evidence that the Board is withholding the testimonies from HIW. In any event, HIW have their own powers and processes to obtain information and it is not appropriate for the tribunal to circumvent those using FOIA.
81. Similar considerations apply to any other organisations which Mr. Graves is concerned have not seen a copy of the testimonies.
82. Mr. Graves points out that in response to a FOIA request (ref 492-15) about deaths on Hergest in 2012 and 2013 the Board stated that no deaths occurred in 2012 and 2013. Mr. Graves points to two press reports of inquests into two

deaths on Hergest in March 2012 and November 2013. In our view, this does not increase the public interest in disclosure of the testimonies. Inquests have taken place into both deaths, the outcomes of which were reported to the public in the press.

83. Mr. Graves states that the testimonies are evidence of criminal neglect. We note that the independent multiagency Task and Finish Group set up by the NWSAB found that Holden had recorded in the individual staff testimonies, comments made by staff that suggested there had been potential incidents of poor care or neglect. However, the Group found that there was insufficient information recorded, so it was impossible to identify specific individual safeguarding incidents or concerns and the Task and Finish Group were unable to determine the action under the POVA policy had or had not been taken. An absence of specific details and information made any wider or further investigations impossible.
84. In relation to Mr Graves' concerns alleging criminal neglect the Task and Finish Group reached a clear conclusion that the lack of specific details and or information meant this could not be further explored. The letter states that reviewing the staff testimonials did not assist in giving more detail to the general statements about neglect and poor care recorded in the Holden report. In conclusion the letter stated that there was no substantiated evidence of abuse or neglect or any allegations that could be further investigated.
85. The tribunal takes account of the knowledge and combined expertise of the members of the Task and Finish Group, the remit of that group and the fact that they have reviewed the disputed information. The tribunal must assess the public interest at the date of the response to the request. In assessing the value of disclosure *at that date*, in particular in relation to the revelation of criminal neglect or other safeguarding issues which could be investigated or further explored, the tribunal is entitled to have regard to, and places significant weight on, the opinion of the Task and Finish Group. The tribunal notes its conclusions and its observation that 'the staff testimonials did not assist in giving more detail to the general statements about neglect and poor care recorded in the Holden report'.
86. In the light of the above, including the outcome of the Task and Finish Group's review of the withheld information, the tribunal finds that there is no significant additional public interest in the disclosure of the testimonies themselves that would not be satisfied by the disclosure of the Holden Report and the attached extracts from the testimonies, which had been ordered at the date of the response to the request.
87. In the light of the findings set out above, although there is a public interest in transparency, which would extend to the full transcripts of the testimonies, this interest would be largely satisfied by the publication of the report and its appendix, which had been ordered by the Commissioner at the relevant date.

The tribunal concludes that the public interest in maintaining confidences is not outweighed by the public interest in disclosure. We conclude that the authority would not have a public interest defence to an action for breach of confidence.

88. On the basis of those findings, we conclude that the Board were entitled to withhold the 700 pages of testimonies under s 41.

Signed Sophie Buckley

Date: 5 July 2022

Judge of the First-tier Tribunal

OPEN ANNEX

Contents of page A5 of the closed bundle - now open

“Oral hearing of this matter

The Commissioner understands that the Appellant would like an oral hearing of this matter. It is clear from the open bundle that the Appellant is very active as regards his concerns about the BCUHB and he has come into possession of a great deal of information, the provenance of which the Commissioner does not know.

At or before any oral hearing, the Commissioner would respectfully invite the Tribunal to set out the parameters of the hearing, specifically that the proceedings are solely for consideration of whether the public authority may or may not withhold the disputed information (i.e. all the witness testimonies) from the public under the Freedom of Information Act 2000.

The Tribunal may also find it appropriate to address the Appellant before or at the outset of the hearing on what kind of information he may put into open court in these proceedings and/ or issue a general rule 14(6) direction [redacted].

The Commissioner has advised the BCUHB that the Appellant has requested an oral hearing of this matter and intends to let the BCUHB know the date of any hearing. It may be appropriate, however, for the Tribunal to contact the BCUHB separately about the hearing. For her part, the Commissioner does not propose to attend any oral hearing, being content to rely on her decision notice and any written submissions. Should the Tribunal require anything from the Commissioner, the Commissioner will seek to assist.”