IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2009/0071
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50201819
Dated: 27th July 2009

Appellant: **Dr Paul Thornton**

Respondent: **The Information Commissioner**

Additional Party: **The Department of Health**

On the papers on 2nd February 2010

Date of decision: 10th February 2010

Before
John Angel
(Judge)
and
Steve Shaw and Gareth Evans

Subject matter: FOIA s.42 Legal Professional Privilege

Cases: ***DBERR v O'Brien & Information Commissioner*** **[2009] EWHC 164**

Foreign and Commonwealth Office v Information Commissioner ***(*****EA/2007/0092)**

IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2009/0071
GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the Decision Notice dated 27th July 2009 and dismisses the appeal.

REASONS FOR DECISION

Background

1. The Department of Health (DOH) is in the process of introducing a centralised National NHS Database which will have the capacity to include records made by health workers in respect of patients in England. The project is known as NHS Connecting for Health and will involve holding a central or national spine of information which will contain patient demographic data (i.e. information which allows each patient to be identified) and Summary Care Records (SCR) which will contain a summary of key clinical information about each patient. The information will be drawn from existing local databases primarily from GPs and Primary Care Trusts. The intention is that the information will be accessible by NHS staff involved in a patient's care anywhere in England. The information is currently being transferred to the National NHS Database.

2. It is also intended that the national spine will be used to support other systems and services, including a service enabling patients to book outpatient appointments, an electronic prescription service and the "Secondary Uses Service" (SUS) which provides comprehensive (normally anonymised) data for purposes other than direct patient care,

for example, information that can be used to compile healthcare statistics so that modelling can be undertaken in relation to present and future healthcare needs.

3. NHS Connecting for Health is a massive project involving the expenditure of billions of pounds – in evidence to the Tribunal estimates of between £12 and £19 billion have been given. It also potentially involves all English citizens. Not surprisingly the project has stimulated a very high level of public interest.

The request for information

4. Dr Thornton made a request to the DOH by email dated 1st November 2007 (the Request) in the following terms:

> "I am writing to apply under the provisions of the Freedom of Information Act for the … legal advice provided to the Department of Health with regard to the NHS Database proposals."

We will refer to the legal advice in the Request as the "Disputed Information".

5. By email on 23 November 2007 the DOH issued a refusal notice on the grounds that the Disputed Information was exempt under s. 42(1) FOIA – the Legal Professional Privilege (LPP) exemption. That decision was upheld on internal review, the outcome of which was communicated to Dr Thornton on 18th March 2008.

The complaint to the Information Commissioner

6. Dr Thornton complained to the Information Commissioner on 13th May 2008 challenging the decision to withhold the Disputed Information.

7. The Commissioner investigated the matter and on 27th July 2009 served the Decision Notice on Dr Thornton and DOH in accordance with s.50 FOIA.

8. The Commissioner decided that the s.42(1) FOIA was engaged and that the public interest in maintaining that exemption outweighed the public interest in disclosure of the Disputed Information.

The appeal to the Tribunal

9. Dr Thornton lodged an appeal dated 23rd August 2009 with the Tribunal against the Commissioner's decision and set out the grounds of his appeal in letters to the Tribunal dated 23rd August and 18th September 2009. DOH was joined as a party and opposes the appeal.

10. Dr Thornton accepts that the s.42(1) FOIA exemption is engaged and that LPP has not been waived (which had previously been at issue). However he considers that the Commissioner was wrong to have decided that the public interest balance favoured maintaining the exemption.

The question for the Tribunal

11. The Tribunal is being asked to decide where the public interest balance lies. In order to do this the Tribunal must first consider the law involved.

12. In a late submission Dr Thornton asked that the Tribunal rule or express an opinion on the lawfulness of the NHS Connecting for Health proposals. However the lawfulness of the proposals is not in issue in these proceedings. It is not necessary for the Tribunal to consider whether the scheme is lawful in order to apply the public interest test in relation to the LPP exemption in respect of to the Disputed Information.

As a result the Tribunal declines to do so. Moreover the Tribunal considers it does not have jurisdiction under FOIA to determine the correctness of a legal opinion, even if it relates to a subject matter with which the Tribunal may have some special knowledge.

The Law

13. S.42(1) FOIA provides that:

> "*Information is respect of which a claim to legal professional privilege… could be maintained in legal proceedings is exempt information".*

14. This is a class-based qualified exemption which is not subject to a harm or prejudice test. However once engaged it is subject to a public interest test under s.2(2) FOIA in that the public authority (in this case the DOH) will only be exempt from its duty to disclose the Disputed Information:

> *"if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information".*

15. There is a long line of Tribunal decisions on the application of the LPP exemption. The Tribunal does not intent to repeat them here but only to summarise the findings which have recently been endorsed by the High Court in *DBERR v O'Brien & Information Commissioner* [2009] EWHC 164:

    1. there is a strong element of public interest inbuilt into the exemption;

2. there need to be equally strong countervailing factors for the public interest to favour disclosure;

3. these countervailing factors do not need to be exceptional, just as or more weighty than those in favour of maintaining the exemption;

4. as a general rule the public interest in maintaining an exemption diminishes over time but the fact that the advice is still 'live' is an important factor in the determination of the strength of the inbuilt public interest in the exemption;

5. there may be an argument in favour of disclosure where the subject matter of the requested information would affect a significant group of people;

6. the most obvious cases where the public interest is likely to undermine LPP is where there is reason to believe that the public authority is misrepresenting the advice which it has received where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained.

16. The information which is the subject of legal opinion in the Request is patient records. Under the Data Protection Act 1998 (DPA) this is not just personal data but 'sensitive person data' which is provided with additional protection under the DPA[1] when processing such data.

[1] S.3 DPA.

The Evidence

17. Dr Thornton's main issue in this case is that every citizen in England will be obliged to have their data held on the National NHS Database, in effect, without their explicit consent. He considers this to be unlawful under common law, data protection law and human rights law. He explains his reasons for this in a discussion paper entitled "Why might National NHS Database proposals be unlawful?" dated January 2006 and subsequently in "Patient Privacy: UK Law to European Standards – obligations for the NHS Database. A report to the National Information Governance Board for Health and Social Care" dated January 2009. These are learned papers and set out among other things the privacy issues surrounding the introduction of a national database.

18. The subject of the patient records is particularly sensitive. As a result the Information Commissioner has provided guidance on the "Use and Disclosure of Health Data".[2] He has more recently provided a view of "NHS Electronic Care Records" in response to the concerns about the DOH's proposals for a National NHS Database.[3]

19. Such concerns are not just concerns in England. The matter has been considered at EU level and on 15th February 2007 the Article 29 Data Protection Working Party issued a document "on the processing of personal data relating to health in electronic health records".[4]

20. It is accepted by all parties in this case that there has been and still is a high level of public interest in the National NHS Database particularly because of the size and cost of the project and the importance of maintaining patient confidentiality.

[2] Guidance on the Application of the Data Protection Act 1998 May 2002.
[3] 18th January 2007.
[4] 00323/07/EN WP 131.

21. In relation to the introduction of the system and the concerns expressed by Dr Thornton and others, Keith Paley who is Parliamentary, Briefing & FOI Manager at the DOH provided a witness statement to the Tribunal.

22. Mr Paley's current responsibilities include the sourcing and preparation of material about the NHS Care Records Service (NH CRS) and the wider National Programme for IT in the NHS to support Ministers in their Parliamentary and departmental duties, and to manage relevant FOI casework on behalf of DOH.

23. Although Mr Paley is not directly involved in the policy work, through his work as Parliamentary, Briefing and FOI Manager he has become familiar with the arrangements within the NHS CRS and the safeguards that are in place to protect the rights of patients. He explains these as follows.

24. Patients will be able to opt out of having both their basic clinical information, including medication and allergy details, and their detailed clinical information, uploaded to the 'spine', the national database of key information about patients' health and care within the NHS CRS, by choosing not to have a Summary Care Record (SCR).

25. Patients can also request that their SCR be deleted. However, in the event that a SCR has previously been accessed in the course of NHS treatment, a copy of the record of treatment will be kept in case there is a subsequent investigation of the performance of a clinician or a dispute about the facts. This, he says, is in the best interests of both patients and clinicians. The record will not be accessible other than when it is required for an investigation or to resolve a dispute.

26. Patients are also not able to prevent their basic demographic and contact details from being held within the NHS CRS. The NHS has maintained registers of its service users from the earliest days of its

existence to support the delivery of healthcare. A record is also kept by GPs of each patient registered with them, and for reasons of efficiency and probity it is required that this information is held centrally, for example to prevent multiple GPs from being paid for the same patient, and to ensure that the correct commissioning body meets the cost of care provided. A register is also needed to enable the Secretary of State to meet the obligation to provide healthcare, free at the point of contact, for those patients who are ordinarily resident in England.

27. Whilst for these reasons it is not practicable to give patients a veto over whether their basic demographic details will be held in the system, safeguards have been built into the NHS CRS personal demographics service, which allow an individual's contact details to be hidden from NHS staff if patients request this level of protection.

28. The Secondary Uses Service (SUS) database is the repository of person and care event data relating to the treatment of patients in the NHS. It is used for management and clinical quality and safety purposes other than direct patient care. These secondary uses include healthcare planning, commissioning, public health, clinical audit, benchmarking, performance improvement, research and clinical governance. This database does not hold names and addresses, but some data items e.g. a unique NHS number and post code, which could be used to identify an individual.

29. Information provided through the SUS is normally anonymised or pseudonymised to remove information that could be used to identify individuals, but still allow cases to be tracked and linked, for example for research. In some cases, when authorised under Section 251 of the NHS Act 2006, information that could be used to identify an individual might be released when this is in the public interest, there is no reasonable practicable alternative and the purpose is authorised by the Secretary of State following advice from the statutory National Information Governance Board.

30. Patients do not have an automatic right not to have information about them held within SUS, but if they request this, for example under section 10 of the Data Protection Act 1998, records can be fully anonymised so that there is no risk of them being identified subsequently.

31. Mr Paley accepts that it is clear from the points put forward by Dr Thornton in support of the argument that the public interest favours disclosure of the legally privileged information in this case, that the Government's policy and implementation arrangements for the NHS CRS are not supported by all members of the medical profession. The DOH has engaged in detailed consultation and discussion with the medical profession, the Information Commissioner and other interested parties, in order, he says, to ensure that the NHS CRS will be an effective healthcare tool, which also respects patients' rights and complies with relevant data protection law.

32. Dr Thornton, although generally accepting Mr Paley's evidence, points out a number of issues with the operation of the proposed out-out scheme and that in practice there will be, in his view, important limits to the extent of the opt-out and the way it will be brought to the attention of the public.

33. The DOH took advice on the legality of the operation of the National NHS Database, which is the Disputed Information. The DOH maintains publicly that it has taken such advice and the system and operations described by Mr Paley are lawful.

<u>The application of the public interest test</u>

34. This case rests on our consideration of the public interest test under s.2(2) FOIA. The public interest factors put forward by the DOH and

accepted by the Information Commissioner in favour of maintaining the exemption can be summarised as follows.

35. The significant weight to be given to the public interest in favour of protecting LPP material is now well-established from the Tribunal's jurisprudence on the exemption particularly given the *dicta* of Wyn Williams J. in *O'Brien*, that the ability to seek confidential legal advice has been "*held sacrosanct by the common law for several centuries*" and must be given significant weight. That weight was properly reflected in DOH's internal review response, and in the Commissioner's Decision Notice at §§ 44-46.

36. In addition to this significant weight, the Commissioner noted two factors specific to the present case:

    (i) the legal advice contained in the requested information was, at the time of the Request, relatively recent (less than a year old); and
    (ii) the advice was also "live" in the sense that it was at the time of the Request (and is still) being relied upon to inform DOH's approach to the NHS National Database, which is a major, ongoing, policy initiative.

37. The Commissioner recognised (Decision Notice, §§50-53) those factors should be given significant weight in determining the public interest in favour of maintaining the exemption. Where legal advice is recent and informs ongoing policy-making (such that, for example, it may be critical to a future legal challenge) the importance of protecting the information is heightened. These, the Commissioner maintains, are the circumstances in this case.

38. Set against this significant weight in favour of maintaining the LPP exemption the Commissioner recognises the following main factors in favour of disclosure of the Disputed Information:

1. that the amount of public money involved is considerable;

2. that the number of people affected is extensive, almost every citizen in England;

3. the general public interest in transparency of such an important project.

39. Dr Thornton in his letter of 23rd August 2009 amplifies these factors and argues that the Commissioner "*over valued the public interest arguments in favour of withholding the information...while undervaluing the public interest arguments in favour of the information being released*". He sets out a number of reasons for this particularly in his letter of 18th September 2009.

40. Dr Thornton contends that disclosure of the content of the legal advice is necessary to determine if, and how, the legal requirements applicable to the National NHS Database are being fulfilled, in particular because some of the arguments he sets out in his paper to the British Medical Association are "difficult to reconcile" with the national database proposals.

41. The DOH say there is substantial information in the public domain about how the database operates and the rights of patients to access and limit the information stored, including the Commissioner's note referred to in §18 above. However Mr Paley acknowledges in evidence that the National NHS Database is a matter of public interest (§31 above).

42. The DOH seems to have recognised the need to keep the public informed, and has placed detailed information about SCR on a dedicated website (http://www.nhscarerecords.nhs.uk/), including information about patients' rights, security and confidentiality. DOH has also produced a series of leaflets for patients on confidentiality and

related issues (available on the care records website, under "publications"). Technical and other information about the Spine more generally is available on the website of NHS Connecting for Health (http://www.connectingforhealth.nhs.uk/systemsandservices/spine/faqs/).

43. Also the DOH maintain that if anyone (including Dr Thornton) wishes to obtain legal advice on the lawfulness of the database, or their rights as data subjects, they can do so.

44. We note that a differently constituted Tribunal observed in *Foreign and Commonwealth Office* (EA/2007/0092): "Everybody is entitled to seek advice as to the merits of an issue involving a public authority. Those who advise such authorities are in no better position to give a correct opinion than those to whom the public can go". Curiosity as to the legal advice a public authority has received, or the fact that its disclosure may enable the public to better understand the legal arguments relevant to the issue concerned, are, in that Tribunal's words, "weak" factors that do not outweigh the strong public interest in withholding information to which LPP applies. In the circumstances of this case we agree with this observation.

45. Dr Thornton argues that the public interest in disclosure is increased by the fact that the legal advice has not been communicated to third parties, software contractors or professional bodies.

46. The DOH argues that the fact that a public authority has chosen to keep legal advice confidential rather than to waive its privilege (even for a limited purpose) cannot be used as an argument in favour of disclosure. On the contrary, the DOH says, it demonstrates that the information remains "confidential" and that the public authority has chosen to keep it confidential. Applying the reasoning of the Tribunal in the *Foreign Office* case, third parties – like members of the public – can obtain their own legal advice if they have concerns.

47. Dr Thornton argues in his letter of 18th September 2009 that the public interest in disclosure is increased by the fact that the Commissioner has confirmed that the legal advice provided to the DOH does not refer to the "Sealed Envelope" functionality or "Secondary Users Service" and "there is a clear need to understand exactly why these fundamental components of the National NHS Database were omitted from the Counsel's opinion".

48. The DOH says that the fact that the advice does not address issues that Dr Thornton regards as particularly contentious is not a factor that increases the public interest in disclosure. The DOH considers that if anything it weakens the case for disclosure, since publishing the advice will cast no light on those issues. Dr Thornton's interest in those issues cannot, the DOH maintains, be equated with the *public interest* in disclosure of legally privileged advice.

49. Dr Thornton further argues the Decision Notice is internally inconsistent in that:

> (i) it refers to the fact that "there is no pending or contemplated litigation" but also to the fact that the legal advice is "live" with regard to issues surrounding the inception and development of the database and possible legal challenge; and
>
> (ii) it suggests that there would be no harm to DOH from disclosure other than the potential future harm to NHS patients if legal opinion cannot be presented without fear of imminent disclosure, but also observes that the potential for harm to the privilege holder was significant.

50. In the Commissioner's amended reply he explains that the statements referred to are not, in context, inconsistent. Legal advice can be "live" and relevant to a "possible legal challenge" without litigation actually

being pending or in prospect (such as might give rise to "litigation privilege").

51. The DOH argues that the potential harm referred to in the Decision Notice is precisely the harm that LPP is intended to protect against. The disclosure of recent, "live" legal advice that informs a contentious, ongoing policy programme would (in the absence of a specific, clear and compelling justification) undermine the ability of officials and ministers to obtain frank and unconstrained legal advice. It would inhibit the DOH's lawyers from giving such advice, because any advice that identified legal vulnerability would be at risk of being published and used in a way prejudicial to the client's (in this case DOH's) interests. As the Information Commissioner and Tribunal have recognised, that would ultimately lead to public authorities obtaining less robust advice, and therefore to poorer decision making, to the detriment of the public generally.

52. Dr Thornton argues that possible technical difficulties in enabling patients to remove their data from the National NHS Database is a factor that strengthens the public interest in disclosure. The Commissioner considers that Dr Thornton has misinterpreted the point being made in the Decision Notice. Also the DOH has explained in its Reply and in Mr Paley's witness statement, arrangements are in place to ensure that patients can opt not to have a SCR and can have personal data deleted (subject to the conditions Mr Paley mentions), or limit the amount of information shared though the database. The arrangements, and the corresponding rights of patients, are explained on the care records website and in other DOH publications. Compliance with data protection and other relevant laws is, and will be, overseen by the Information Commissioner and the Tribunal and, ultimately, by the courts.

53. The DOH further argues that while the interest of the public in seeing confidential legal advice may increase where large numbers of people

or large sums of money are involved, that is not the same as the "public interest" being served by disclosure. On the contrary, where government departments are required to take decisions that affect the lives of many millions of people and involve significant public expenditure, it is all the more important that they have access to frank, unconstrained legal advice that considers all the legal risks, prior to.

Conclusion

54. In this case we find there is a strong public interest in maintaining the exemption for the reasons set up in §§35 to 37 above. The Disputed Information has the inbuilt weight in favour of maintaining the exemption. It is recent advice which in our view is still 'live' which makes it even weightier.

55. However we also find there is a strong public interest in disclosure of the Disputed Information for the reasons set out in §§38 onwards despite the Commissioner's and DOH's counter arguments. The National NHS Database is of significant public interest because it involves the processing of the sensitive personal data of almost all citizens in England. It is a very large project involving significant amounts of public money in an area of great public concern.

56. The concern is heightened by the not infrequent occurrence of unauthorised disclosures of personal data which we hear about in the press and with which the Commissioner is much involved.

57. If the strength of the public interest is evenly balanced then we should find in favour of disclosure of the Disputed Information.

58. We have had the opportunity of seeing the Disputed Information which is the advice of distinguished barristers. Clearly we cannot reveal its contents. In our view, however, it **does not** reveal any of the concerns potentially raised by Dr Thornton particularly that the DOH has

misrepresented the advice which it has received where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained.

59. This factor persuades us that the public interest in disclosure is less strong than that in favour of maintaining the exemption.

60. We make this finding whether or not the legal advice or any part of it is correct or not as it is not a matter which we are able or required to comment on for the reasons already stated above. This was recognised by Dr Thornton in his letter of 18th September 2009, although his late submission asks us to take a different approach.

61. In all the circumstances of this case we find that the public interest in maintaining the exemption outweighs the public interest in disclosure. We therefore dismiss the appeal and uphold the Decision Notice.

62. Our decision is unanimous.

Signed

John Angel
Principal Judge

Date 10 February 2010

IN THE FIRST TIER TRIBUNAL
(INFORMATION RIGHTS)

RULING on an APPLICATION for PERMISSION to APPEAL
By

Dr Paul Thornton

1. This is an undated application received on 10th March 2010 for permission to appeal part of the decision of the First Tier Tribunal (Information Rights) ("FTT") dated 19th February 2010. That decision upheld the IC's Decision Notice dated 27th July 2010.

2. The right to appeal against a decision of the FTT is restricted to those cases which raise a point of law. The FTT accepts that this is a valid application for permission to appeal under rule 42 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 as amended ("the Rules").

3. Dr Thornton criticises the Tribunal's finding at §58 of its decision:

> *We have had the opportunity of seeing the Disputed Information which is the advice of distinguished barristers. Clearly we cannot reveal its contents. In our view, however, it* ***does not*** *reveal any of the concerns potentially raised by Dr Thornton particularly that the DOH has misrepresented the advice which it has received where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained.*

4. Firstly he refers to §12 the decision where the Tribunal deemed it "*not necessary for the tribunal to consider whether the scheme is lawful in order to apply the public interest test*." Also he challenges the Tribunal's finding that it did not consider that it had jurisdiction under FOIA to determine the correctness of a legal opinion, even if it related to a subject matter with which the Tribunal may have some special knowledge.

5. He says that this is in direct conflict with the argument cited by Tribunal at §15.6. which he says is restated at §58. This derives from §29 of a differently constituted Tribunal's decision in *FCO v Information Commissioner* EA/2007/0092 which was endorsed, as the Tribunal in this case observed, in *DBERR v O'Brien & Information Commissioner* [2009] EWHC 164. Dr Thornton points out that in so doing the Tribunal in this case failed to insert a comma found in §29 in the *FCO* decision between "*received*" and "*where*".

6. He further contends that in *FCO* the Tribunal observed that the obvious cases where the public interest is likely to undermine the Legal Profession Privilege (LPP) exemption under s.42 FOIA is *"where there is reason to believe that the public authority is pursuing a policy which appears to be unlawful"*. This is distinct and separate from the assessment of whether the public authority "*has misrepresented the advice it has received*". There is a clear requirement, he says, to clarify whether the action being taken by the public authority corresponds to the instructions provided to the lawyer, corresponds to the advice provided by the lawyer and whether the advice provided appears consistent with the law.

7. He further contends that the *FCO* decision obliges the Information Commissioner and the Tribunal at appeal to consider the lawfulness of the action being taken by the public

authority, if the public interest was not otherwise sufficiently fulfilled to require publication of the disputed information. He continues there is nothing in FOIA to preclude this and it is particularly appropriate in this case as the Information Commissioner and the Tribunal have expertise in respect of data protection, confidentiality and privacy. It cannot be the case that the public interest in the release of legal professional privileged material is weakened if the public authority has dutifully followed legal advice which is incorrect.

8. He accepts that it is clear that the Tribunal regards the activities of the Department of Health (DOH) as being consistent with the advice the DOH received in the disputed information.

9. He also accepts that it is clear that this Tribunal was unwilling to comment on whether that advice is correct or not.

10. However he contends the Tribunal had erred in law by not doing so.

11. His second ground is that, although he accepts that the Tribunal cannot reveal the content of the Disputed Information, there is ambiguity in respect of the Tribunal's description of what the advice does not contain in the clause *"It does not reveal any of the concerns potentially raised by Dr Thornton"* because he submits it could be interpreted in a number of ways:

    a. that the Disputed Information does not omit consideration of *any* of the arguments put forward in his paper, and resolves them all to the satisfaction of the DOH; or

    b. that the Disputed Information does not address *any* of the arguments put forward in his original paper.

12. He considers that the Tribunal's use of the term "*any* concerns" appears to rule out an interim situation in which the Disputed Information addresses some, but not all, of the arguments put forward in his paper and contends this is unlikely.

13. The Tribunal disagrees with Dr Thornton that it has erred in law for the following reasons:

    a. Although accepted that the Tribunal inadvertently did not insert a comma after the word "received" in §58 (as it also inadvertently did in §15.6) of its decision the meaning of the paragraph is clear. The wording was taken, as Dr Thornton recognises, from §29 of the *FOC* decision. In full §29 states:

> *What sort of public interest is likely to undermine the maintenance of this privilege? There can be no hard and fast rules but, plainly, it must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it obtained*

    b. At §58 the Tribunal found that the Disputed Information did not undermine the maintenance of the privilege in terms of the three obvious cases set out in §29 of the *FOC* decision.

    c. It is accepted that this finding may not have dealt with all of Dr Thornton's potential concerns. However his other concerns were generally either not relevant to the proceedings before the Tribunal or were not matters which could be determined by the Tribunal. The particular concerns which were relevant to the appeal were those addressed in §58.

    d. Dr Thornton is wrong to maintain that the Tribunal should have determined whether the legal advice was correct or not. Parliament never intended that FOIA

should be used in this way, even in relation to another statute where the Tribunal has some jurisdiction. This is even more so because the composition of the Tribunal comprises of two lay members (plus a legally qualified chair) who are experts in freedom of information (FOI) or data protection, not both. In this case the members were FOI experts only because it was a FOIA appeal.

e. What the Tribunal did in this case was to read the legal advice in question and to conclude that the DOH had not undermined the maintenance of the privilege on the basis of the obvious cases set out in §29 of the *FOC* decision. This helped the Tribunal determine the public interest balance.

14. It follows that the appeal has no prospect of success and that permission to appeal is refused.

15. Despite this refusal Dr Thornton has a right to apply directly to the Upper Tribunal, under rule 21(3) the Tribunal Procedure (Upper Tribunal) Rules 2008 as amended, for permission to appeal. He should lodge such an appeal with

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Professor John Angel
Judge
First-tier Tribunal (Information Rights)
15th March 2010