



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

**Appeal No. EA/2011/0059**

**BETWEEN:-**

**WILLIAM THACKERAY**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**First Respondent**

**and**

**THE HEALTH PROFESSIONS COUNCIL**

**Second Respondent**

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**DECISION AND REASONS**

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Determined on the papers  
On 6 February and 30 March 2012

By  
Judge Alison McKenna  
Jean Nelson  
Michael Jones

Decision dated: 30 March 2012

Subject Matter: Freedom of Information Act 2000 sections 1, 2 and 31.

**DECISION**

This appeal is dismissed save that Decision Notice FS50327942 is hereby amended to correct a typographical error in relation to the name of the Second Respondent, so that it now refers to "The Health Professions Council".

## REASONS

### Background

1. This appeal concerns a request for information made by the Appellant, to the Health Professions Council ("HPC"). The HPC is the statutory regulator of fifteen health professions. HPC regulates approximately 219,000 registrants by maintaining a register and adjudicating on matters relating to their fitness to practice.
2. It was agreed by the parties that this matter should proceed by way of a paper determination, and the Tribunal agreed that it could properly determine the issues without an oral hearing. The panel originally met on 6 February but then adjourned for further evidence to be provided by the HPC. The Tribunal gave the other parties the opportunity to comment on the additional evidence before finalising its decision on 30 March.

### The Information Request

3. On 6 April 2010 the Appellant made the following information request to HPC:  
*"Please provide details of complaints about any health professionals received from an organisation names Citizens Commission for Human Rights (UK) Ltd (also known as CCHR)".*
4. The evidence before the Tribunal shows that CCHR describes itself on its website as a *"non profit mental health watchdog, responsible for helping to enact more than 150 laws protecting individuals from abusive and coercive practices."* The Appellant asserts that CCHR is closely connected to the Church of Scientology.

### The Second Respondent's Response to the Request

5. HPC responded on 21 April 2010 that it would not be able to provide the information as the information was confidential and held for the purpose of regulatory investigations. The Appellant requested an internal review, following which on 19 May 2010 HPC confirmed that the request was refused in reliance upon s. 30 (2) (a) (iii) and 31 (1)(g) of the Freedom of Information Act 2000 ("FOIA"). HPC later explained to the Information Commissioner that it was "neither confirming nor denying" that it held the requested information, although this was not initially made clear to the Appellant.

### The Information Commissioner's Decision Notice

6. The Appellant complained to the Information Commissioner on 6 August 2010. Following his investigation, the Commissioner issued Decision Notice FS50327942 on 3 March 2011. The Commissioner found that s. 31 (1) (g) of FOIA applied to the information request and did not therefore consider s. 30 (2) (a) because the Appellant had sought details of complaints made and not of investigations conducted. As the applicability of s.30 (2) (a) was not considered in the Notice under appeal, the Tribunal has not addressed it in this Decision. The Commissioner found that HPC had breached the procedural requirements of s. 17 of FOIA but did not require any steps to be taken.

## The Appeal to the Tribunal

7. By a Notice of Appeal dated 4 March 2011 the Appellant appealed to the Tribunal. The Appellant advanced three grounds of appeal, namely:
  - (1) That the release of the information would not, or would not be likely to prejudice the exercise by the public authority of any of its functions;
  - (2) That the information could be redacted in order to prevent any prejudice;
  - (3) That the public interest in disclosing the information outweighs the public interest in maintaining the exemption in this case, because CCHR campaigns against mental health practitioners.
  
8. The Appellant supplemented these arguments in written submissions as follows:
  - (i) The Appellant submitted that the test for whether a person might be discouraged from making a referral for fear that their identity might become known should be that of the “reasonable person’s reaction”. HPC replied to this that it has to consider the position of all of its potential complainants, who include vulnerable members of society and not a hypothetical complainant group.
  - (ii) The Appellant argued that HPC had not shown that CCHR would be deterred from making future complaints by the disclosure of the information sought. HPC replied that its case rested on the deterrent effect on all potential complainants, not just on CCHR.
  - (iii) The Appellant also sought to make the point that a non-individual complainant cannot be “discouraged” because it does not have feelings. Both Respondents considered this a bad point as a legal person must necessarily act in accordance with the directions of a natural person, who can feel discouraged.
  - (iv) The Appellant argued that each information request must be judged on its own merits so that it could not be argued that the response in this case would set a precedent for future cases. HPC responded that the deterrent effect could arise from one case without setting any formal precedent.
  - (v) The Appellant argued that the “public interest test” should not be restrictively applied only to a public interest in the activities of the public authority to whom the information request was addressed but could operate to require the disclosure of information about third parties by that public authority.
  
9. The Information Commissioner responded to the three Grounds of Appeal and to the other parties’ submissions as follows:
  - (1) The Commissioner had found that if HPC were to confirm or deny that it held information relating to complaints about health professionals made by a particular person or organisation, this would effectively reveal the identity of the complainant and further that if HPC revealed details of

complainants it would be likely to have a deterrent effect on future complaints. The Commissioner also found that such a deterrent effect would be likely to prejudice HPC's ability to exercise its functions for the purpose of ascertaining the fitness to practice of its registrants.

(2) The Commissioner understood this ground to be that the details of individuals could be redacted in relation to institutional complainants. However, the Commissioner did not accept this argument because he found that the deterrent effect of revealing the names of complainants would be the same whether they were individuals or institutions.

(3) In considering the public interest test, the Commissioner had taken into account the desirability of increased transparency and accountability which militated in favour of disclosure and balanced this against the risk of prejudice to HPC's ability to perform its functions through the risk of deterring complainants from coming forward in the future. On balance the Commissioner had found that the public interest in maintaining the exemption from the duty to confirm or deny outweighed the public interest in disclosure of whether the information was held. The Commissioner had also found that there was no specific public interest in revealing the activities of CCHR, distinguishing another first instance Tribunal decision in which the Appellant had argued that there was a public interest in information about Scientology. The Commissioner noted that this was not a case in which there was said to be a public interest in knowing whether HPC (as a public authority subject to FOIA) was operating effectively and that such interest in CCHR as existed was subordinate to the public interest in facilitating HPC to perform its statutory functions.

10. HPC was joined as a party to this appeal on 19 April 2011. It responded to the Grounds of Appeal and the other parties' submissions as follows:

(1) The evidence before the Commissioner and now before the Tribunal is that there would be likely to be a deterrent effect on referrals if HPC adopted a policy contrary to its general "neither confirm nor deny" stance.

(2) The arguments about redaction are addressed to the question of disclosure, whereas this appeal is about the duty to confirm or deny so that the question of redaction does not apply.

(3) This is not a case where the adequacy of HPC's own procedures, in particular those for screening vexatious complaints, is challenged. The Appellant cites the public interest in revealing the activities of CCHR, which to the extent that this is a relevant consideration under FOIA cannot outweigh the public interest in ensuring that HPC continues to receive complaints from voluntary sources.

### The Evidence

11. For the hearing of this matter, the Tribunal was provided with an "open" bundle running to some 300 pages. The Tribunal was not provided with any "closed" material (i.e. papers not disclosed to the Appellant) but it did ask to

see un-redacted versions of material which had been redacted prior to inclusion in the open bundle, in order to ensure fairness to the Appellant. The Tribunal was satisfied that the Appellant was not prejudiced by the redaction of this material and that there were good reasons for it to be redacted. The Appellant did not raise any objection to the redaction in any event.

12. The evidence presented to the Tribunal consisted of (a) correspondence relating to the request and the Information Commissioner's investigation; (b) miscellaneous documents supplied by the Appellant regarding Scientology and CCHR and (c) a witness statement supplied by the director of fitness to practise at HPC, explaining that HPC receives referrals regarding the fitness to practise of its registrants from a wide variety of sources, and that it is only if there is a "case to answer" that the identity of the complainant would become known to the registrant and even then there may not be a hearing in public. She confirmed that HPC has review procedures in place to monitor and if necessary screen out vexatious and multiple complaints or abuses of the system. The evidence was that in the 2010 -2011 financial year, 34% of referrals to HPC were from members of the public who had no duty to refer matters to HPC. HPC's opinion was that this significant number of referrals would be likely to be lost to it if complainants were deterred by the thought that their details might become public and further that this would be an area of risk most evident in relation to practitioner psychologists, whose patients might be vulnerable. The evidence was also that, as complaints are only disclosed to registrants if they meet the "case to answer criteria" (about 57 % of complaints) the disclosure of information which might be used to identify the registrants concerned where there is no case to answer might result in unnecessary damage to their reputations.
13. The Tribunal was concerned about HPC's apparently "blanket" policy of not confirming or denying that it held certain information. The panel did not feel that HPC had provided adequate witness evidence in support of its position in this regard because it had not dealt in its witness evidence with the Appellant's arguments as to the possible redaction of personal information so as to counter the risk of identification and consequent deterrence. The Tribunal therefore adjourned in order to ask HPC to provide it with further evidence to answer the question "*Does the Second Respondent take the view (and if so on what basis) that if the name of the complainant (whether an individual or an institution) and the name of the registrant complained about were to be redacted from any information which is was required to disclose, then such disclosure would or would be likely to prejudice the exercise of its functions for the purpose of ascertaining the fitness to practise of its registrants by discouraging future complaints?*". The Tribunal subsequently received a further witness statement on behalf of HPC which stated that "*even if the name of the Registrant or the Referrer was redacted, the person making the request would be able to connect the information contained within the redacted document to the Registrant or Referrer concerned*". The other parties did not make any further submissions on this statement although they were given the opportunity to do so. The Tribunal was content to proceed on the basis of this additional evidence.

## The Law

- (i) *The Powers of the Tribunal*

14. This appeal is brought under s.57 FOIA. The powers of the Tribunal in determining an appeal under s.57 are set out in s.58 of FOIA, as follows:

*“If on an appeal under section 57 the Tribunal considers -*

- (a) that the notice against which the appeal is brought is not in accordance with the law, or*
- (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

*the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*

*On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”*

The Tribunal notes that the burden of proof in satisfying us that the Decision notice is not in accordance with the law or that the Commissioner should have exercised his discretion differently rests with the Appellant.

*(ii) The Freedom of Information Act*

15. This appeal involves the interaction of sections 1, 2 and 31 of FOIA, as follows.

Section 1: General right of access to information held by public authorities.

*(1) Any person making a request for information to a public authority is entitled—*

*(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

*(b) if that is the case, to have that information communicated to him.*

*(2) ... (6)*

Section 2: Effect of the exemptions in Part II.

*(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—*

*(a) the provision confers absolute exemption, or*

*(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,*

*section 1(1)(a) does not apply.*

(2)...(3)

*Section 31 Law enforcement.*

*(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—*

*(a)...(f)*

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

*(h)...(i)*

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

*(a)...(c)*

*(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,*

*(e)...(j)*

*(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).*

16. Section 31 of FOIA thus provides that the duty to confirm or deny whether the requested information is held does not arise if compliance would, or would be likely to, prejudice the exercise by a public authority in the exercise of its functions for any of the specified purposes in s. 31 (2) of FOIA. In this case, HPC relied on its function under s. 31 (2) (d). HPC clarified that its case was that “it would be likely” that disclosure of the requested information would significantly prejudice its ability to exercise its statutory function in connection with fitness to practice. Section 2 of FOIA provides that the duty to confirm or deny in section 1 (1) (a) of FOIA is dis-applied where, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information.

The Tribunal's Conclusions

17. The Tribunal has considered all the evidence and submissions most carefully. The Tribunal is mindful of its powers (described at paragraph 14 above) and has considered whether the Information Commissioner made an error of law or fact or exercised his discretion in a way that would allow the Tribunal to overturn his decision. In so doing it has been mindful of the Appellant's burden of proof.

18. The Tribunal is satisfied that, on the basis of the evidence before the Commissioner, it was reasonable for him to conclude that “it would be likely” that confirmation or denial of the existence of the requested information would significantly prejudice HPC’s ability to exercise its statutory functions in connection with fitness to practice. The Tribunal concurs with that conclusion, having regard to all the evidence before it. This judgement engages s. 31 (g), s. 31 (2) (d) and s. 31 (3) of FOIA, but is subject to the public interest test.
19. In relation to the public interest test, the Appellant has argued that (a) CCHR is as a matter of principle opposed to all mental health professionals; (b) that CCHR is under the control of Scientology and (c) that Scientology is an anti-social organisation so that there is a public interest in information about CCHR. The Tribunal accepts the Appellant’s argument that the “public interest test” does not have to be applied to the public interest in the public body in question and that the public interest could relate to the public interest in a third party’s activities held by a public authority. The Tribunal does not doubt that the Appellant’s concern about Scientology is shared by many, however it agrees with the Commissioner that the public interest in maintaining the exclusion of the duty to confirm or deny in this case outweighs the public interest in disclosing whether the public authority holds the information requested. The Tribunal is satisfied that if HPC were to confirm or deny the existence of information about a particular complainant, this would be likely to have a deterrent effect on future voluntary complaints by undermining its policy of protecting the identity of complainants and registrants.
20. The Tribunal has considered whether the ability to redact information so as to disguise the identity of the complainant or the registrant concerned could tip the public interest balance in the other direction, and it therefore sought and considered further evidence in this regard. The Tribunal is satisfied on the basis of the evidence provided (and not challenged) that the disclosure of redacted information would still be likely to have a deterrent effect on voluntary referrals because of the likelihood of the identity of the registrant or complainant being revealed. In these circumstances the Tribunal finds that HPC’s approach of neither confirming nor denying is justified under s. 2 of FOIA and that the Commissioner’s judgement as to the public interest test in this regard should not be overturned by the Tribunal.
21. In reaching its decision the Tribunal is satisfied that it was appropriate for HPC to consider the position of all of its potential complainants, who include vulnerable members of society and not merely considering a hypothetical complainant group. The Tribunal agrees with HPC that it is irrelevant whether CCHR would be deterred from making future complaints by the disclosure of the information sought, as HPC’s case rested on the deterrent effect on all potential complainants, not just on CCHR. The Tribunal rejects the Appellant’s submission that complaints from individuals should be considered differently from institutional complainants and agrees with the Respondents that a legal person must necessarily act in accordance with the directions of a natural person in any event. The Tribunal agrees with the Appellant that each information request must be judged on its own merits but accepts HPC’s argument that a deterrent effect could arise from the handling of just one case, albeit that it did not set formal precedent.
22. For all the above reasons, this appeal is dismissed.



**Signed:**

**Alison McKenna  
Tribunal Judge**

**Dated: 3 April 2012**