



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0028
Information Commissioner's Ref: FS50088137

Heard at Procession House, London, EC4
On 2nd and 3rd September and 15th December 2008

Decision Promulgated
15th January 2009

BEFORE

CHAIRWOMAN

Melanie Carter

and

LAY MEMBERS

Malcolm Clarke
David Wilkinson

Between

BARBARA FRANCIS

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

GENERAL MEDICAL COUNCIL

Additional Party

Representation:

For the Appellant: Mrs Francis, in person
For the Respondent: James Boddy, barrister
For the Additional Party: James Eadie QC, barrister

Subject: FOIA: Personal data s.40; DPA: Sensitive personal data s.2

Cases: Corporate Officer of the House of Commons v Information Commissioner
EA/2006/15 & 16; Common Services Agency v Scottish Information Commission [2008] 1
WLR 1550

Decision

The Tribunal allows the appeal in part and substitutes the following Decision Notice in place of the Decision Notice dated 26 February 2008.

Information Tribunal

Appeal Number: EA/2008/0028

SUBSTITUTED DECISION NOTICE

Dated 15th January 2009

Public authority: General Medical Council

Address of Public authority:

**Regent Place
35 Euston Road
London NW1 3JN**

Name of Complainant: Barbara Francis

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Decision Notice FS 50088137 is upheld save that:

1. - the Tribunal finds a breach of section 16 of the Freedom of Information Act 2000 in that the General Medical Council ("GMC") ought, further to its duty to provide advice and assistance, to have suggested ways in which Mrs Francis could have clarified and narrowed down item (3) of her letter of request dated 15 April 2005;
2. - in relation to items (3) and (4) of the letter of request, information contained in the following documents was held by Field Fisher Waterhouse ("FFW") on behalf of the GMC and should, in accordance with Mrs Francis' rights under the Freedom of Information Act 2000 have been provided to her:
 - medical reports by Dr Fowlie as referred to in paragraph 3 of the letter dated 1 September 2006 from FFW to the Law Society

- an independent medical report obtained by the then Southend Community Care Services NHS Trust in 1999 also referred to in paragraph 3 of that letter
- a letter dated 22 March 2000 sent by Hempsons, solicitors acting for Dr Killala, to the GMC and letters dated 18 July, 11 September, 5, 17 & 20 October, 14 November and 11 & 12 December 2000 sent by Hempsons to FFW redacted in the manner suggested by the GMC (other than the non-redaction of the first paragraph of the letter of 22 March 2000 and numbered paragraph 1 & 3 of the letter of 11 December 2000).

Action Required

The GMC is required to provide the information in the documents referred to above to Mrs Francis. If not already complied with, this is to be done within 30 calendar days of the date of this Substituted Decision Notice.

Dated this 15th day of January 2008

Signed:

Melanie Carter

Deputy Chairwoman, Information Tribunal

Reasons for Decision

Introduction

1. This appeal concerns a request for information made by the Appellant, Mrs Francis, to the GMC in a letter dated 15 April 2005. The request arose out of a GMC investigation and proceedings in relation to a psychiatrist, Dr Killala. Dr Killala had been treating Mrs Francis' son, Jason, prior to his death in 1998. The disciplinary charges brought against the doctor were only partly in relation to Jason Francis as there were a wider set of complaints arising from information provided to the GMC by Southend Community Care Services NHS Trust (as it was then known).
2. The Professional Conduct Committee of the GMC, which considered the charges against the doctor, transferred the case to the Health Committee which ultimately suspended him indefinitely on the grounds of ill-health.
3. Mrs Francis has been seeking for some years to piece together the information concerning her son's treatment by the NHS and social services . As part of this process, she made the request under the Freedom of Information Act ("FOIA") which has given rise to this appeal. One of the key features of this case has been the sense of frustration felt by Mrs Francis that she did not receive the information to which she felt she was entitled under the GMC's own Rules. She appeared to have been a party to the proceedings against Dr Killala and as such believed that she was entitled to a great deal more than she received.
4. As a result, a critical part of her FOIA request was expressed in terms of her perceived entitlement under the GMC Rules. This added complexity to the appeal: whilst the Tribunal was taking care to decide the matter in accordance with its jurisdiction under FOIA, Mrs Francis was understandably insistent that she should receive the information to which she believed she was entitled under the GMC Rules.

5. The Tribunal wanted to emphasise moreover the fundamental point that disclosure under the Act was in effect disclosure to the public, not to Mrs Francis as an individual. The Act is often said to be 'applicant blind' or as Counsel for the GMC put it, 'applicant insensitive'. As such the Tribunal could not take into account many aspects of the evidence and submissions which related to Mrs Francis alone – for instance, that she had been present at particular hearings and again that she might as an individual have been entitled to certain information under the GMC Rules. This cut two ways however, as it also meant that the Tribunal did not take account of certain of the submissions of the GMC, namely what it was assumed, as a complainant, she had already received and the fact that she had signed, in the context of the GMC proceedings, undertakings not to make disclosure of certain information.

The request for information

6. In the letter dated 15 April 2005 Mrs Francis asked for:
 1. *“Transcript of the hearing which took place in January 2001 (GMC rule 55).*
 2. *Transcript of the hearing which took place in August 2001 (GMC rule 55).*
 3. *All documents list in GMC rule 20.*
 4. *All medical reports/opinions obtained in relation to this Doctors mistreatment of my Son Jason.*
 5. *Has the GMC ever been provided with any evidence that my Son had been sexually assaulted or abused by Dr Killala.*
 6. *Has the GMC ever been provided with any photographs of my Son*
 7. *Did Dr Killala admit any charges in connect with my Son*
 8. *In November 2000 the Trust who had previously employed Dr Killala found 11 boxes apparently hidden away by this Doctor, these boxes contained numerous patients' records and photographs, I therefore request access to any documents/photographs relating to my Son*

9. *Any information what so ever that under this new act I am now able to gain access to.”*
7. The GMC wrote to Mrs Francis on 19 May 2005 and, amongst other things, asked her, under section 1(3), to clarify the request at item (9). She replied asking: *“was Dr Killala ever accused of any wrongdoing or charged with any offences prior to 1998?”*.
8. The GMC did not ask her to clarify any other aspect of her request or to redefine her request in relation to item (3). Nor did the GMC in any other way provide Mrs Francis with advice and assistance under section 16 of FOIA. The GMC refused the request other than in relation to item (7) in response to which they drew attention to one admission made by Dr Killala at the outset of a professional conduct committee hearing.
9. In relation to items (1), (2) & (9) the refusal by the GMC to supply the information requested was on the basis of the exemption at section 40(2) of FOIA (third party personal data) and in relation to the remainder on the grounds that it did not hold the requested information.

The complaint to the Information Commissioner

10. Mrs Francis was dissatisfied with this refusal and made a complaint to the Information Commissioner (“IC”) on 5 September 2005. The IC asked the GMC to produce the transcripts sought under items (1) & (2) of the letter of request.
11. On 26 February 2008 the IC issued a Decision Notice. This upheld the GMC’s refusal of the information request albeit it found that GMC had breached the Act’s requirements by sending an inadequate refusal notice. That aspect of the Notice has not been appealed to us.
12. The IC accepted that the GMC was entitled to have relied upon the exemption under section 40(2) in relation to the information requested at items (1), (2), (3) and (9). The IC also accepted, as asserted by the GMC, that the information requested at points (4), (5), (6) and (8) was not held.

13. The Tribunal noted that there had been significant delays in this investigation. It considered that the IC could have acted more expeditiously and the GMC more cooperatively. It noted that the GMC had chosen to challenge the IC's request to see the disputed information, necessitating the issuing of an Information Notice, which the GMC then appealed. In the event, the GMC withdrew the appeal. The net effect is that Mrs Francis has had to wait some considerable time for the IC to reach his conclusion.

The appeal to the Tribunal

14. Mrs Francis appealed the decision of the IC to this Tribunal. The parties agreed, at a directions hearing, that the issues in the appeal could be summarised as:

- a. *"The Commissioner erred in accepting the GMC's explanations regarding Rules 20 and 21 of the GMC's own rules*
- b. *The Commissioner erred in that the third aspect of the Appellant's information request related to all of the information listed under Rules 20 and 21, not just the in camera transcripts*
- c. *The Commissioner erred in failing to conclude that Mrs Francis should have been entitled to the transcript of every part of the hearing she attended*
- d. *The Commissioner fell into error because the GMC did not disclose to the Commissioner all information held by Field Fisher Waterhouse*
- e. *The Commissioner fell into error in concluding that the transcripts obtained from the GMC were Health Committee transcripts despite having issued an Information Notice to the GMC for 3 Conduct Committee transcripts*
- f. *The Commissioner erred in failing to conclude that previous inquiries into the conduct of the doctor in question should be released in order to protect the public. "*

15. The Tribunal understood the above agreed grounds of appeal, as bringing within its jurisdiction all items of the letter of request other than item (7). The appeal was, in the event, spread over two sets of dates as the Tribunal found it

necessary to direct that certain further information should be provided to the IC and the Tribunal in turn.

Evidence

16. The Tribunal heard oral evidence from Anthony Rider, a partner with FFW, Julian Graves, the Information Access Manager for the GMC and from Mrs Francis. It had before it a large bundle of information that was open to all the parties as well as closed bundles containing disputed information that was seen only by the Tribunal, the IC and the GMC.
17. Mr Graves confirmed to the Tribunal that he had personally reviewed all the files held by the GMC in relation to the proceedings against Dr Killala. Mr Rider had reviewed the files held by FFW. Both men gave evidence that a great deal of the information in relation to the proceedings against Dr Killala was indeed held but that the vast majority of it did not relate to Jason Francis.
18. FFW's role in this matter was that it had acted as the so-called 'Solicitor' for the GMC in the proceedings against Dr Killala. FFW had originally acted also for Mrs Francis, as complainant. This was up until June 2000 when Mrs Francis asked that she be represented by different solicitors. She was subsequently represented by Christian Fisher, solicitors. FFW continued to act for the GMC in relation to the remainder of the complaints. In August 2000 FFW sent Jason Francis's medical records on to Christian Fisher. The Tribunal were told that no statements or other documents of any kind were sent on to Christian Fisher (in fact, whilst arrangements to take statements had been made, in the event, none had been obtained). It would appear that FFW continued to play some part in relation to Mrs Francis' complaint including jointly instructing an expert report from Dr Fowlie in late 2000.
19. The Tribunal received a small amount of information in a closed bundle before the original hearing dates, including the transcripts of the Professional Conduct Committee sought by Mrs Francis under items (1) & (2) of her letter of request. The Tribunal was concerned that the IC had not asked the GMC for the disputed

information in relation to item (3) of the letter of request and had merely accepted the assertion that the exemption in section 40(2) (third party personal data) applied. The Tribunal therefore directed that before the reconvened hearing, the GMC provide two sets of documents, first the disputed information under item (3) of the letter of request and second, a report known as the Parkhill Audit Agency Report (it had seen reference to this report in the documents and wanted to satisfy itself as to whether or not whether it might fall within the letter of request). The Tribunal was provided with a closed bundle including this information. The closed bundles did not (other than possibly in relation to the Parkhill Audit Agency Report) include information sought under items (4), (5), (6) and (8). This was unsurprising as the GMC's position with regard to this was that the information requested under these items was not held.

Decision

20. The Tribunal's jurisdiction on appeal is governed by section 58 of FOIA. As it applies to this matter it entitles us to allow the Appeal if we consider that the Decision Notice is not in accordance with the law or, to the extent that it involved an exercise of discretion, if we consider that the IC ought to have exercised his discretion differently.
21. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether the applicable statutory framework has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

Item 1 & 2 of the Letter of Request: the transcripts

22. The Decision Notice upheld the GMC's decision to refuse, under section 40(2), to provide copies of the parts of the transcripts of the hearings of the Professional Conduct Committee hearings in January and August 2001 that related to the private, in camera, sessions.

23. Section 40(2) is an absolute exemption to the duty to provide information under section 1(1). It applies where the information sought is personal data of which the person making the request is not the data subject, and where disclosure would contravene any of the Data Protection Principles.

24. Section 40(2) provides that:

“(2) Any information to which a request for information relates is ... exempt information if-

(a) it constitutes personal data ..., and

(b) ... the first ... condition below is satisfied.

(3) The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles ... “.

25. The Tribunal noted Lord Hope's observations in *Common Services Agency v Scottish Information Commissioner* [2008] 1 WLR 1550 at [7], *“there is no presumption in favour of the release of personal data under [the FOI regime].... the guiding principle [of the Data Protection Act] is the protection of the fundamental rights and freedoms of persons, and in particular their right to*

privacy with respect to the processing of personal data”.

26. Information concerning the health of an individual is clearly personal data in relation to that individual, and no party has suggested otherwise in this appeal. It is also ‘sensitive personal data’ within the definition of section 2 of the Data Protection Act 1998 (“DPA”). Section 2 includes within this definition, information as to *“physical or mental health or condition”.*

27. The Tribunal found that the information contained within the withheld parts of the transcripts, concerning as they did the mental health of Dr Killala, fell within the definition of “sensitive personal data” as set out in section 2.

28. Disclosure of that information would amount to *processing* of that sensitive personal data within the meaning of DPA. Processing is defined in section 1 of DPA as follows:

“processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data”.

The definition goes on to specify four operations which would amount to processing, including:

“disclosure of the information or data by transmission, dissemination or otherwise making available.”.

29. The processing of personal data must comply with the eight so-called Data Protection Principles. The first principle states that:

“Personal data shall be processed fairly and lawfully, and, in particular, shall not be processed unless:

(a) at least one of the conditions in Schedule 2 is met; and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”.

Thus, compliance with the First Data Protection Principle would require, in this case, compliance with a condition in both Schedule 2 and 3. The Commissioner

considered that there would be a breach of the first Data Protection Principle if the information were to be disclosed, for two reasons:

- (a) disclosure would be unfair because it would be contrary to the reasonable expectations of Dr Killala; and
- (b) there was no basis for disclosure of the information under Schedule 2 or 3 to the DPA.

30. Mrs Francis argued before the Tribunal that the transcripts of the in camera sessions of the Professional Conduct Committee ought not to be subject to the section 40(2) exemption. She relied upon the fact that she had in fact been present during these particular proceedings and drew the Tribunal's attention to her belief that she was entitled to the transcripts under the GMC Rules. She argued that it was in the public interest that she should have been able properly to instruct her solicitors by reference to those transcripts. Mrs Francis was unable however to indicate to the Tribunal which of the conditions in Schedules 2 and 3 she considered applied.

31. The Tribunal was itself satisfied that no condition in Schedule 3 applied. Given this it was not necessary to consider Schedule 2 (see paragraph 29 above). It found moreover that insofar as Dr Killala would reasonably have expected the transcripts not to be made public, it would be unfair for the transcripts to be released. In both these ways to release the information contained in the transcripts to a member of the public would be a breach of the First Data Protection Principle such that the absolute exemption in section 40(2) applied.

32. As noted at paragraph 5 above, the Tribunal had to treat the request as 'applicant blind' and could not therefore take into account the fact that Mrs Francis had attended the particular Committee hearings or indeed that she may or may not have been entitled to those transcripts under GMC Rules. The question for the Tribunal under FOIA was whether the information should in effect be disclosed to the general public. The Tribunal noted that it would be odd indeed if the GMC were enabled under its own legislation to hold private hearings only to have the transcripts made available on demand to the public under FOIA.

33. The IC acknowledged that he had made a mistake in referring to the transcripts in the Decision Notice as those of Health Committee hearings rather than Professional Conduct Committee hearings. The Tribunal noted the annoyance this may have caused Mrs Francis but accepted the IC's contention that this could not render the Decision Notice unlawful. The Tribunal accepted that this mistake, whilst unfortunate, did not have any bearing on the substance of the IC's decision or reasoning.

Item 3 of the Letter of Request: Rule 20 information

34. Mrs Francis asked, under item (3) of her letter of request, for "all documents list in GMC rule 20". Rule 20 of the General Medical Council Preliminary Proceedings Committee and Professional Conduct Committee (Procedure) Rules ("the Conduct Rules") provided, insofar as relevant:

"Without prejudice to rule 16 the Solicitor (or the complainant as the case may be) shall on request of any party to an inquiry and on payment of the proper charges send to him copies of any statutory declaration, affidavit, explanation, answer, admission or other statement or communication sent to the Council by a party to the inquiry or any statement in writing in the possession of the Solicitor or the complainant made by a person who may be called by the Solicitor or the complainant to give evidence at the inquiry....."

35. Rule 16 disapplied any right of access to information for complainants, informants etc. where no notice of inquiry was referred. Rule 21 provided for a party to issue a notice requiring any document relevant to the inquiry and in the possession of another party to be provided.

36. Mrs Francis argued that her request for information under item (3) should have been treated as a request under both rules 20 & 21. The Tribunal noted that in her letter of 31 May 2005, in which she clarified item (9) of her original request she did state "(see rule 21)". However that letter went on to reiterate, in terms, that Mrs Francis' request was for information under rule 20. Thus, the Tribunal considered it reasonable for the GMC to have interpreted the letter of request as

not being defined in scope by rule 21. This was supported by the fact that rule 21 was no more than a mechanism by which any party could give notice to another party to produce documents. Its scope was moreover so wide as to make it a completely impractical request without further clarification or a narrowing down by Mrs Francis. The Tribunal considered that this was more properly considered in relation to section 16 of FOIA (duty to provide advice and assistance), a matter which is addressed later in the decision.

37. The GMC had interpreted rule 20 as not applying to Mrs Francis on the basis that the right to call for information under this rule only applied to parties other than the complainant and the Solicitor. Thus the GMC letter of 19 May 2005 refused this item of the request under the GMC Rules and not on the basis of an exemption under FOIA. This was a mistake which was subsequently picked up by the IC and acknowledged by the GMC. On further consideration the GMC sought to rely upon the exemption in section 40(2). It was argued that the documents which Mrs Francis might have seen under rule 20 contained third party personal data and that the absolute exemption at section 40(2) precluded disclosure.
38. The Tribunal called for the disputed information in relation to item (3) of the request. In pursuance of this direction the GMC provided 9 letters redacted to remove information which it said did not fall within the scope of the letter of request. It no longer argued that the section 40(2) exemption applied.
39. Insofar as the FOIA request was made by reference to rule 20, it had become necessary for the Tribunal in turn to form a view as to the scope of rule 20. This was not the same as determining Mrs Francis' actual entitlement to documents under rule 20. This was an important distinction and one which, in the event, has probably led to greater disclosure than an application of rule 20 itself.
40. The Tribunal took the view that the GMC ought not to have treated item (3) of Mrs Francis' letter of request so narrowly. Even if it believed that she was not entitled under rule 20, a matter upon which the Tribunal did not form a definite view, it could and should have treated this as request under FOIA and as such as a list of the documents described in rule 20. The issue then arose as to the

scope of rule 20 if it were to be treated as a list of information requested under FOIA, rather than a question of strict entitlement under GMC Rules.

41. The Tribunal found this particularly difficult as rule 20 was problematic in the way in which it had been drafted (it has subsequently been amended). The duty to provide documents was placed either on the Solicitor or the complainant, as the case may be, whilst the right to call for documents was given to “any party to an inquiry”. At the time of the letter of request, “party” was defined in the Rules by reference to paragraph 13 of Schedule 4 to the Medical Act 1983, as then in force. This provided that:

“In this Schedule, “party”, in relation to proceedings before the Professional Conduct Committee or the Health Committee, means any person to whose registration the proceedings relate, or any person on whose complaint the proceedings are brought, or the Solicitor to the General Council”.

42. As such, it did appear that Mrs Francis as a complainant had been a party to the proceedings before the Professional Conduct Committee. One could understand therefore why, on one reading of rule 20, Mrs Francis would be adamant that she was entitled under the GMC Rules to certain information. However, it was argued by the GMC that the correct interpretation of rule 20 was that the right to call for documents only applied to parties other than the complainant and the Solicitor. The Tribunal found this submission persuasive as it would have been odd for the right to call for documents and the duty to provide them to apply to the same parties.

43. The GMC told the Tribunal that, in relation to the proceedings against Dr Killala, the only parties were the GMC, Mrs Francis and Dr Killala. The Trust had handed over certain information to the GMC but it was not formally a complainant and was not therefore a party. The Tribunal took into account the definition of “party” for the purposes of the Rules, as set out in paragraph 42 above. It was clear from this definition and from reading rule 20 in context that a distinction was made between parties and ‘informants’. As the Trust was not a party, the information it handed over was not covered by rule 20.

44. The Tribunal considered that Mrs Francis' request in relation to item (3) and rule 20 should be interpreted as a request for information that related to Mrs Francis' son. This was on the basis that the main focus of her request had been information relating to her son and not the wider complaints against Dr Killala and/or in relation to others. Mrs Francis did say at the hearing that she wanted information under rule 20 in relation to all parts of the case against Dr Killala, but the Tribunal was of the view that this had not been her intent at the time of request. A reasonable interpretation was that the focus of the request was the complaint in relation to Jason Francis only.

45. Taking all these points into consideration, the Tribunal concluded therefore that the proper scope of rule 20 for the purposes of this item of request under FOIA was:

information relating to Jason Francis, contained in any statutory declaration, affidavit, explanation, admission or other statement or communication sent to the GMC or FFW by Dr Killala or his representatives in relation to the professional conduct committee proceedings in 2000/1 and any statement in writing in the possession of the Solicitor made by a person who may be called by the Solicitor.

46. The further search for these documents, in between the hearing dates, uncovered just 9 letters. Mrs Francis submitted that this was not credible and that at the very least there ought to have been some kind of defence document served in response to the so-called rule 6 letter (setting out the original complaints against Dr Killala). The GMC assured the Tribunal that there was no such document and pointed out that Dr Killala was under no obligation (see rule 6) to provide any defence. The IC argued that, as there was no evidence to suggest that such a document existed, it had been entitled to accept that the GMC had uncovered the totality of information that needed to be disclosed under item (3) of the letter of request. The Tribunal accepted the submissions of the GMC and the IC in this regard. It had moreover seen the 9 letters in unredacted form, and, subject to the comment below, were satisfied that the

redactions were appropriate, in the sense that the information redacted did not relate to Jason Francis. They related to the other complaints against Dr Killala.

47. The only exceptions to this were numbered paragraphs 1 and 3 of the letter of 11 December 2000 from Hempsons to FFW which referred to an ongoing interim suspension of Dr Killala which the Tribunal accepted was relevant to the proceedings in relation to Jason Francis and a reference to a report by Dr Fowlie, which had clearly been redacted by mistake. There was in addition one sentence in the letter of 22 March 2000 which referred to a possible adjournment, which insofar as there was only one set of proceedings, must, in the Tribunal's view relate in part to the Jason Francis complaints.
48. The Tribunal found that the IC had erroneously accepted the GMC's assertion that section 40(2) (third party personal data) applied to item (3) of Mrs Francis's request. In fact, on further investigation, the GMC had not identified any information to which section 40(2) was said to apply. The 9 letters were not redacted on the basis that the information was third party personal data but rather that the redacted information did not fall within the request. To this extent the Decision Notice was not in accordance with the law.
49. The Tribunal was critical of the GMC in that, once it appreciated that it had to consider item (3) under FOIA, it had not properly analysed what exemption, if any, applied. This had to be the case given that the 9 letters now being produced were not redacted on the basis of inclusion of third party personal data and no other disputed information under this item had been provided. More was required than this - the GMC should have gone through each piece of paper and analysed what exemption, if any, could properly be applied. The Tribunal was mindful that this might have led to a claim that the costs threshold in section 12 was exceeded. Whilst that was always a possibility in a case such as this, that required the public authority to provide a reasonable estimate of the costs of compliance. On being questioned on this, the Tribunal were told that no record had been made either as to the time the work had taken or the results of the searches to date.

50. The Tribunal was moreover of the view that the GMC had failed in its duty under section 16 of FOIA. The GMC could have reverted to Mrs Francis to seek clarification rather than turning her down simply in terms of her entitlement under the Conduct Rules. Whilst difficult to predict what information might have been sought as a result of such advice and assistance, this did not release the GMC from its duty to help requesters.
51. Finally under this heading and further to the above mentioned directions, the GMC had provided the Tribunal with an unredacted copy of the Parkhill Audit Agency Report. This was a report commissioned by the Trust into the prescribing practices of Dr Killala. The Tribunal was of the view that this report, insofar as it did not emanate from Dr Killala or his representatives, did not fall within the scope of item (3) of Mrs Francis' letter of request. This report is considered further below.

Items (4), (5), (6) and (8) of the Letter of Request: information not held

52. The IC found that the GMC had been correct in refusing Mrs Francis's request in relation to items (4), (5), (6) and (8) in her letter of request on the basis that the information was not held. The GMC told the IC that it had reviewed all files held in relation to the proceedings against Dr Killala and had not found any such information. It had also asked FFW to locate such information and their response had been that the information was not held.

Item (4) - Medical reports/opinions

53. As noted above, the GMC wrote to FFW on 7 June 2005 as a result of Mrs Francis' letter of request. The e mail quite correctly referred to medical reports/opinions. The response from FFW however was that the solicitor's firm did not hold any medical records. It was asserted that all such records had been copied to Christian Fisher under cover of its letter of 25 August 2000. The GMC mistakenly took this as a response that no relevant information was held in relation to the request for medical reports/opinions. This confusion formed the

basis of the refusal by the GMC and in turn the IC's acceptance of this in the Decision Notice.

54. The Tribunal accepted the GMC's argument that this item of the letter of request, which was for medical reports/opinions, ought not to be interpreted as including medical records. It was reasonable for the GMC to have made a distinction between the two. Nevertheless, it did appear that FFW held certain medical reports on behalf of the GMC and that its response to the GMC, insofar as it only addressed medical records, had been incorrect or at least, incomplete.
55. Anthony Rider in his oral evidence confirmed that FFW still held copies of medical reports prepared by Dr Fowlie. The Tribunal noted that FFW could have found and provided Mrs Francis with the Dr Fowlie reports had it not misread the request from the GMC as being for medical records. Whilst the Tribunal understood that Mrs Francis may have had copies of these, it reminded itself that disclosure under FOIA was disclosure to the world, not just the requester.
56. The Tribunal's attention was drawn to a reference in a letter dated 1 September 2006 from FFW to the Law Society which indicated that FFW held a copy of an independent medical report commissioned by Southend Community Care NHS Trust. The Tribunal concluded that that report ought also to have been disclosed.
57. Mrs Francis was particularly concerned to locate what were referred to variously as the 'social services' or the 'Queensway' reports. She showed the Tribunal two letters which indicated that at some point FFW had held these reports. The Tribunal accepted the GMC's argument however that being social services documents these should not be equated with medical reports/opinions, the subject of this request. Mrs Francis argued that as the social services department had worked jointly with medical staff, these should be viewed as medical reports. She had not however provided any evidence of this assertion such that the Tribunal felt itself bound to accept the GMC's argument and to uphold the Decision Notice on this point. It wished to encourage FFW, should they still be held, to disclose these to Mrs Francis as this would be likely to go

some way to meeting her needs and noted that she could, if she so wished, make separate requests under FOIA for these to the local authority.

58. The Parkhill Audit Agency report was held by FFW at the date of request. This was a report into the prescribing practices of Dr Killala, commissioned by the Trust. It was argued by the GMC and accepted by the IC that this report did not relate to Mrs Francis's son and therefore fell outside of the letter of request. It was not a medical report or opinion obtained in relation to Mrs Francis's son and it was not a document which fell within the scope of rule 20. The Tribunal considered the contents of the report and concluded that this analysis was correct.

59. In conclusion, under these items of request, the Tribunal found that the Decision Notice had not been in accordance with law insofar as it accepted the GMC's assertion that no medical reports/opinions were held (see Substituted Decision Notice). It was asserted by Counsel for the GMC that the Trust's report, as referred to in paragraph 57, was in fact to be found in the open bundle. This was disputed by Mrs Francis. The Tribunal did not make a finding on this but noted that if the GMC were correct in this, Mrs Francis would already have the report and FFW would need only to confirm this with her.

Item (5) - Evidence of sexual assault

60. Mrs Francis asked the GMC under item (5) of the letter of request whether it had ever been provided with any evidence that her son had been sexually assaulted. The GMC refused this aspect of the request by stating that the information was not held. The Tribunal was told by Mr Graves that this was the case and noted that Mrs Francis had no evidence to contradict this. Whilst the Tribunal accepted the evidence of Mr Graves, it was concerned that the GMC did not feel able to reply to Mrs Francis, at the time of its response to the letter of request, with a simple statement to the effect that the GMC did not have any evidence that Mrs Francis' son had been sexually assaulted. It had responded in pure legal terms, that is, that the information was not held. Whilst not strictly required, a straightforward plain English approach might have gone some way to assuaging Mrs Francis' fears.

Item (6): Photographs

61. Mrs Francis was convinced that the GMC, or FFW on its behalf, held photographs of her son. Her only evidence of this was her own impression that at one of the Professional Conduct Committee hearings, when a photograph had been handed to Committee they had all, in turn, looked directly at her. She assumed therefore that the photograph in question was that of her son. Against this, the Tribunal heard Mr Graves confirm that there were no photographs of her son held by the GMC and that the only photographs he had seen of people had been in photographs on the covers of pornographic magazines. FFW had told the GMC that it was unaware of any photographs at all, other than in the 11 boxes mentioned below in relation to which none were photographs of Jason Francis. This was similarly confirmed by Mr Rider. The Tribunal noted that Mrs Francis' evidence on this point was no more than speculation. It accepted the evidence of Mr Graves and Mr Rider and upheld the Decision Notice in this regard.

Item (8): 11 boxes of information

62. 11 boxes of information had been found by the Trust and the contents reviewed by FFW on 29 November 2000. Under item (8) of the letter of request, Mrs Francis asked for access to any documents or photographs in the 11 boxes relating to her son. The Tribunal's attention was drawn to a letter dated 24 July 2001 from FFW to the GMC in which FFW stated that the only "items" relating to Jason Francis (which the Tribunal took as including photographs) that they had found were two blood reports which they had sent on to Dr Fowlie and four entries in a message book dated 1995 (three years prior to the death of Mrs Francis' son) which were of little evidential value. It was Mr Rider's evidence that FFW no longer knew where these were to be found. The Tribunal accepted that this information was no longer held by either FFW or the GMC.

Item 9: Previous Complaints

63. Mrs Francis asked under item (9) *“was Dr Killala ever accused of any wrong doing or charged with any offences prior to 1998”*. The GMC refused this information on the basis that the absolute exemption in section 40(2) applied.
64. The Decision Notice treated this information as ‘sensitive personal data’ under section 2(g) DPA (on the basis that it was information as to an *“alleged commission by him of any offence”*) and that disclosure would be a breach of the First Data Protection principle on the grounds that no condition under Schedule 2 or 3 applied. The Tribunal had doubts whether the information sought under item (9) did amount to ‘sensitive personal information’. It was arguable that section 2(g) only related to criminal matters and not those which might lead to an adverse finding before a professional regulatory body. The Tribunal did not however make a determination on this point, as the issue in this appeal was settled by reference to Schedule 2 alone.
65. For the disclosure to be fair and lawful and therefore in compliance with the First Data Protection Principle, one of the conditions in Schedule 2 to the DPA needed to apply. Mrs Francis had not identified any of the conditions in Schedule 2 that might potentially be relevant. The only possible condition, in the Tribunal's view was that to be found in paragraph 6(1) of Schedule 2, whereby processing is lawful if:
- “ necessary for the purposes of legitimate interests pursued by ... the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”*
66. The Tribunal reminded itself that in considering paragraph 6, it was required to carry out a balancing exercise. This was referred to in the Corporate Officer of

the House of Commons v Information Commissioner EA/2006/15 & 16 at paragraph 90:

“a balance between competing interests broadly comparable, but not identical, to the balance that applies under the public interest test for qualified exemptions under FOIA. Paragraph 6 requires a consideration of the balance between: (i) the legitimate interests of those to whom the data would be disclosed which in this context are members of the public (section 40(3)(a)); and (ii) prejudice to the rights, freedoms and legitimate interests of data subjects However because the processing must be ‘necessary’ for the legitimate interests of members of the public to apply we find that only where (i) outweighs or is greater than (ii) should the personal data be disclosed.”

67. The first part of condition 6 can only be satisfied where the disclosure is ‘necessary’ for the purposes identified. The second part of condition 6 is an exception: even where the disclosure is necessary, we must still go on to consider whether the processing is unwarranted in the particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects.

68. In relation to the first part of condition 6, the test described in the House of Commons case and adopted by this Tribunal was (applied to this case):

- a. Whether the legitimate aims pursued by Mrs Francis could be achieved by means that interfere less with the privacy of Dr Killala; and
- b. If the aims could not be achieved by means that involved less interference, whether the disclosure would have an excessive or disproportionate adverse effect on the legitimate interests of Dr Killala.

69. Mrs Francis’ argument was that the public needed to know about complaints against doctors in order to protect themselves and in particular, in her own case, had she known of any previous complaints against Dr Killala she would have taken greater steps to remove her son from his care. Mrs Francis was

concerned that, on an assumption that there had been wrongdoing by Dr Killala, she wanted to ensure that this could not happen again to anyone. She clearly intended to use any information she could find out to pursue this goal. Whilst the Tribunal could not support any particular action taken by Mrs Francis, it recognised that this was a legitimate interest of hers for the purposes of paragraph 6. The Tribunal interpreted this argument, through the lens of paragraph 6 of Schedule 2, as being that the public's, and in particular her, legitimate interests ought to outweigh any prejudice to Dr Killala as a result of disclosure of information as to any previous complaints.

70. The IC and the GMC both argued that should complaints about a doctor be made public there was a very real risk of prejudice to that doctor. A list of complaints would include all complaints however unfounded, trivial or mischievous. Those complaints where there was a case to answer would proceed to a fitness to practise hearing, by which stage, it would be a matter of public record. It was submitted that the public might take the view that 'there was no smoke without fire' and regardless of the fact that some or all of any complaints had been unfounded, hold these against the doctor in question. In fact, Mrs Francis herself had perhaps unwittingly supported this contention by stating that had she known about any complaints against Dr Killala she would have removed her son as one of his patients. As counsel for the GMC pointed out, the complaints against Dr Killala in the proceedings in which Mrs Francis had been involved, had not actually been proven.

71. The Tribunal considered whether the position was made different by the fact that Dr Killala's case had been transferred to the Health Committee such that there had not been a public hearing in relation to these complaints. It considered whether the public was adequately protected where a complaint resulted in a private Health Committee hearing. It was of the view that the prejudice which might arise due to the lack of publicity could be adequately addressed by the Health Committee taking the measures required to protect the public from the particular doctor. The Tribunal understood that the protection of the public was one of the GMC's overriding purposes. In the absence of evidence to the contrary, it was legitimate for the Tribunal to assume that the sanctions imposed

and the measures taken by the GMC albeit in a private hearing would put to the fore the need to protect the public.

72. Whilst not directly relevant to their deliberations, the Tribunal had found the explanation given by counsel for the GMC as to the restoration process helpful and hoped that it had been of some comfort to Mrs Francis. The GMC informed the Tribunal that should any doctor in Dr Killala's position wish to be restored to the register, he would have to apply and go through a rigorous process examining his fitness to practise. As part of this process, the history of his registration including the proceedings against him would be taken into account.
73. In conclusion, the Tribunal found that paragraph 6 of Schedule 2 of the DPA would not permit disclosure of any information under this item of the letter of request. No other condition in Schedule 2 applied.
74. Finally, it was argued by the GMC and the IC that the doctor would have had an expectation that information as to previous complaints (if any) would be kept confidential. The Tribunal accepted that this was the case and found that, in the light of this and its finding that no condition in Schedule 2 applied, disclosure would amount to a breach of the First Data Protection Principle and that the exemption in section 40(2) did apply. The Decision Notice had been correct in this regard.

Conclusion and remedy

75. The Tribunal upheld the IC's Decision Notice other than its finding of breach of section 16 and in relation to the items of information set out in the Substituted Decision Notice. The GMC had complied with FOIA in relation to the majority of Mrs Francis' letter of request. It was concerned however that the GMC could have been more careful in its conclusions and in particular at the alacrity with which it had sought to refuse the request under its own Rules, rather than by reference to the terms of the FOIA. The Tribunal recognised that this would have been one of the first set of requests dealt with under FOIA and hoped that

the experience since 2005 had led to an improvement in the way and spirit in which requests were handled.

76. Our decision is unanimous.

Signed:

Melanie Carter

Deputy Chairwoman

Date: 15th January 2009