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**First-tier Tribunal  
(General Regulatory Chamber)**

**Information Rights**

**Appeal Reference: EA/2018/0141**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50717414**

**Dated: 15 June 2018**

**Date of Hearing: 20 November 2018**

**Before**

**JUDGE ROBERT GOOD**

**TRIBUNAL MEMBER(S)**

**MR NARENDRA MAKANJI AND MR MALCOLM CLARKE**

**Between**

**WILLIAM STEVENSON**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

**Subject Matter:**

Freedom of Information Act 2000 (FOIA)

Section 36 (Prejudice to effective conduct of public affairs)

## DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal dismisses the appeal.

### REASONS FOR DECISION

#### **Factual background**

1. On 21 October 2017 the appellant, Mr William Stevenson, applied under FOIA for disclosure of the National Health Service Improvement (NHSI) Board document BM/17/48(P) "Provider policy and new care models", written by Miranda Carter and considered at the NHSI Board meeting on 25/05/2017.
2. This request was refused on 17 November 2017 on the grounds that the information was exempt under S36 FOIA. The Chief Executive at the time, Mr Jim Mackey, the qualified person, concluded that the document was exempt under S36(2)(b)(i) and (ii) and 36(2)(c). An internal review conducted on 16 January 2018 came to the same conclusion. This review was conducted by the new Chief Executive, Mr Ian Dalton.
3. Mr Stevenson contacted the Information Commissioner's Office (ICO) on 21 December 2017 to complain about the decision and the Commissioner investigated this complaint. As part of the investigation a request for this document was made on 7 June 2018. NHSI provided a copy of the document on 12 June 2018. On 15 June 2018 the Commissioner upheld the decision not to disclose this document.
4. One of Mr Stevenson's observations at the hearing was that, given the internal procedures required before a decision is issued, three days between receipt and the issuing of the decision, does not indicate that the document was properly considered, if at all.

5. The appeal bundle consists of 151 pages plus Mr Stevenson's skeleton argument dated 5/11/2018. There is also a closed bundle. NHSI has not been made a party to this appeal and the Commissioner stated that she would not be represented at the hearing. Mr Stevenson attended and gave evidence and made submissions and answered the Tribunal's questions. The hearing started at 10.10am and finished at 12.15pm. Just before the end of the hearing, there was a short adjournment for the Tribunal to consider if there were further issues it wished to raise with Mr Stevenson.
6. At the outset, Mr Stevenson helpfully agreed that the provisions for an exemption under S.36 were made out and that the issue before the Tribunal was whether, as a qualified exemption, there should be disclosure in the public interest. Accordingly, the Tribunal only considered this issue.
7. The Tribunal considered whether it should adjourn to seek further information, which might assist Mr Stevenson, but decided against this course of action because it is unlikely that an adjournment would produce any further relevant information. Although not present, both the views of the Commissioner and NHSI have been articulated in the written material.

### **Request, decision notice and appeal**

8. On 21 October 2017 Mr Stevenson made a request under FOIA as set out in paragraph 1 above.
9. On 17 November 2017 NHSI refused the request. In respect of the public interest test, the letter referred to the need for a 'safe space' in which to consider advice and views without concern of inappropriate disclosure and the need for open and confidential discussions in order to ensure effective

decision making. The public interest in having this 'safe space' is greater than the public interest in transparency and openness.

10. On 16 January 2018 the internal review came to the same conclusion about balancing the public interest in transparency and the public interest in policy makers having a 'safe space'. In addition, the review considered that NHSI "publishes information about its settled provider policy, including the development of new care models". This rightly suggests that timing is an issue. The balance of public interest during policy development may be different than once a policy has been agreed.
11. Mr Stevenson complained to the ICO on 21 December 2017, who then investigated. As part of this investigation NHSI wrote to the Commissioner stating that it accepted there was a strong public interest in being provided with information about NHS improvement policy. The letter goes on to say that the policy "is a subject of ongoing and sensitive discussions between NHS Improvement, NHS England and the Department of Health. In my view disclosure of policy thinking that does not amount to settled policy has the potential to be misleading and cause confusion."
12. The Commissioner decided on 15 June 2018 that the exemption should apply. The consideration of the public interest test starts on page 5 of the decision notice. She considers that, having accepted the reasonableness of the qualified person's opinion, this opinion should be given weight when considering the balance of public interests. The Commissioner accepted the general proposition that there is a need for a 'safe space' to develop policy. In this particular case the need is greater because the issues were sensitive and ongoing at the time of the request.
13. The Commissioner also considered the severity, extent and frequency of the inhibiting effect of disclosure on free and frank discussions. She found the

policy issues were live, under debate and that no settled policy had been formed and, in these circumstances, disclosure would inhibit free and frank discussions in the future.

14. Mr Stevenson appealed on 13 July 2018. In his grounds of appeal, he stated that members and governors should be told that the Government had abandoned its Foundation Trust policy. He states that this policy has been scrapped but the NHS has not disclosed this policy change. He states that the Foundation Policy has been responsible for a succession of catastrophes and the public should know this and be aware of the change of policy. Mr Stevenson attached various comments on the Gosport hospital deaths and the deaths from contaminated blood in the 1970s and 1980s.

15. These were included to illustrate the length of time before these catastrophes came to light. Mr Stevenson is concerned that there may be a similar delay in revealing the truth about the Morecambe Bay failures. He sees these failures as linked to the decision to postpone or defer making Morecambe Bay a Foundation Trust in May 2009 and then, without further consideration, making it a Foundation Trust in October 2010. He wants disclosed policy documents that deal with this issue.

### **Findings, Reasons and Conclusions**

16. The Tribunal accepts the Commissioner's conclusion that the requirement for a S36 exemption is established. This is also accepted by Mr Stevenson. The response from the Commissioner sets out clearly why this is the case and the Tribunal accepts this reasoning.

17. This exemption is qualified, and the Tribunal needs to consider whether the public interest test is met. The appeal documents set out clearly both the value of disclosure, creating a transparent and more accountable NHS, and the

factors against disclosure. The value and importance of a 'safe space' is well recognised. Mr Stevenson recognised this in the hearing. He accepted that it will be in the public interest in some cases for policy discussions to be private and that, if they were public, this would inhibit free discussion and the quality of decision making.

18. However, his view was that NHSI had forfeited the right to have confidential, private discussions because of the history of concealment and failure to acknowledge the past failings of hospitals and Foundation Trusts and that because of this, the document he seeks should be disclosed.
19. Mr Stevenson believes that the policy of creating Foundation Trusts has been abandoned and he seeks confirmation of this. In support of his belief he gave evidence that it has been three years since the last Foundation Trust was created and that recent creations have been by way of merging an existing Foundation Trust with a non-Foundation Trust.
20. There is a strong public interest in knowing what health policy is and a public interest in the policy being transparent. However, the issue for the Tribunal is not whether this policy should be made public but whether it is in the public interest for the discussions and discussion papers developing this policy to be available to the public at an early stage of the process.
21. There is merit in the publication of how a policy is developed but, during the period when the options are being explored and the policy developed, this must be balanced against the negative effects of possible inhibition of full and frank discussion of options if this policy exploration takes place in public. It is likely that these discussions will be adversely affected by the knowledge that they are taking place in the public arena. There is also a risk of policy proposal documents being misconstrued.

22. The Tribunal did not have the benefit of knowing what decisions NHSI Board took on the report, but noted that it anticipated a further report in November 2018. The Tribunal accepted the NHSI submission that the issues in the report were still live at the time of the request and internal review.
23. Had the report revealed a settled change of policy which was not being disclosed, this would have affected the assessment of the public interest. But this was not the case.
24. The Tribunal finds that the public interest is in allowing the development of policy to be conducted in private. The document sought by Mr Stevenson is a document discussing policy options for the future and as such should not have been disclosed at the time of the request.

Signed

R Good

Judge of the First-tier Tribunal

Date: 20 November 2018