



FIRST-TIER TRIBUNAL GENERAL REGULATORY CHAMBER

Information Rights

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| Tribunal Reference: | EA/2012/0092 |
| Appellant: | Andrew Bousfield |
| Respondent: | The Information Commissioner |
| Second Respondent: | Alder Hey Children's NHS Foundation Trust |
| Judge: | NJ Warren |
| Member: | Dr H Fitzhugh |
| Member: | J Nelson |
| Hearing Date: | 16 November 2012 |
| Decision Date: | 10 January 2013 |

DECISION NOTICE

A. Background

1. Alder Hey is an NHS Foundation Trust which runs a large hospital for children in Liverpool. Within that hospital the Alder Centre provides a counselling service for bereaved parents and also for Alder Hey staff. In summer 2010 staff in the operating theatres asked the Alder Centre to provide a workshop as an awareness raising session. The Centre then received a number of requests for advice and support concerning stress and other concerns and it was agreed that the Centre would undertake a "team diagnostic exercise" to ascertain the prevalence and causes of stress amongst staff working in the operating theatres. Something like 60 out of a workforce of 145 responded to an invitation to take part.

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2. In November 2010 the Centre prepared a report. Attached to the report were nine appendices consisting of supporting data. Management developed an action plan. There was a briefing meeting at the beginning of January 2011 attended by over 80 theatre staff. Regular communication updates followed. On 9 January 2011 the Independent on Sunday published a news story about the report including a statement made to an undercover reporter by its author, Alder Hey's Head of Psychosocial Services.
3. On 28 July 2011, Mr Bousfield, a journalist working for Private Eye, asked Alder Hey for a copy of the Alder Centre report "with any personal data appropriately redacted". On 16 September 2011 Alder Hey refused the request and, on review, adhered to that position. Mr Bousfield complained unsuccessfully to the Information Commissioner's Office. He now appeals to the Tribunal against the ICO decision.
4. In refusing to release a copy of the report, Alder Hey relied on Section 31 and Section 36 Freedom of Information Act 2000 (FOIA).

B. The Section 31 Issue

5. A copy of Section 31 FOIA is attached at Appendix One. Counsel for Alder Hey submitted that an exemption under FOIA is engaged whenever disclosure would or would be likely to prejudice the exercise by a public authority of its functions for the purpose of securing the health safety and welfare of its employees or for the purpose of protecting others against risks to their health or safety arising out of or in connection with the actions of its employees. He went on to submit in reliance on Hazell v London Borough of Hammersmith and Fulham (1992) 2 AC 1 that this embraced all the duties and powers of Alder Hey for any of these purposes.
6. The breadth of the exemption claimed is somewhat surprising reading the statute as a whole. The terms seem so diffuse as to defy any analysis of the policy behind it.

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7. Counsel for Alder Hey, founded his submission on section 31(1)(g) and section 31(2)(i) and (j) FOIA. In our judgement, section 31 does not have the meaning for which counsel contends.
8. Reading the statute as a whole, it is in Section 38 FOIA that Parliament seems to us to have made clear the policy of the Act on health and safety issues. There the test is much more focussed requiring that disclosure should endanger someone's physical or mental health or safety. That section is wider in some senses than the exemption claimed – but understandably so. The same protection extends to all risks, not just those incurred as a result of actions at work. It is also, in some senses, narrower since it does not extend to the “welfare” of a public authority's employees. It also looks to the direct effect of disclosure on an individual rather than on the effect of disclosure on the exercise of a public authority's functions.
9. The opening words of Section 31 provide a link with Section 30. The heading is “Law Enforcement” and reading Section 31 as a whole, this is in our view exactly what the exemptions therein contained are about. They concern public authorities with specific responsibilities for law enforcement and are not intended to engage, for example, anything a public authority might wish to do for the welfare of its employees.
10. We therefore conclude that the exemption in Section 31 FOIA is not engaged.

C. The Section 36 Issue

11. A copy of Section 36 is at Appendix Two.
12. This section deals with prejudice to the effective conduct of public affairs. We are not here concerned with references to collective responsibility or regional government. Instead, the focus is on Section 36(2)(b) and (c). This deals with the inhibition of the free and frank provision of advice; free and frank exchange of views for the purposes of deliberation; or other prejudice to the effective conduct of public affairs.

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13. The section is differently constructed from most FOIA exemptions. In most cases, a public authority can consider the issue raised by an exemption straight away. Section 36, however, interposes a pre-condition before the public authority can shelter under the exemption. It requires “a reasonable opinion of a qualified person”. That this is an important inhibition on the use of Section 36 is demonstrated by the status required of a “qualified person”. In the case of an NHS Foundation Trust it is the Chief Executive personally. The status of the qualified person will additionally usually make his or her opinion powerful, perhaps sometimes authoritative, evidence especially if reasoned, when the public authority the ICO or the Tribunal conducts the balancing tests required by Section 2(2).

D. The Qualified Person’s Opinion

14. The qualified person’s opinion as originally presented to the Tribunal (p104) is at Appendix Three.
15. It seems that the Alder Hey Chief Executive was wrongly told that she personally must not only give her opinion but also take the decision whether to disclose the information under the Act with the accompanying risk that the two roles might be confused.
16. Counsel for Alder Hey accepted that Section 36 required two different intellectual exercises but submitted, correctly in our view, that there was nothing unlawful in the same person carrying out both. He suggested drawing two lines across the document so as to divide it into three parts. Part A was the qualified person’s opinion. Part B was the decision under FOIA. Part C contained the reasons and they related to both the opinion and to the decision.
17. A copy of the opinion and decision, marked accordingly, is at Appendix Four.
18. Mr Bousfield submitted that the statutory procedure had not been followed; the confusion between the decision and what was claimed to be the opinion was so

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great that Alder Hey had failed to demonstrate that a “reasonable opinion of a qualified person” existed at all.

19. In this case, it seems to us that the qualified person’s opinion has the following defects or irregularities.

- (a) It is undated and unsigned. When we asked for a copy of the email chain from 14 September 2011 to 15 September 2011, said to be the date of the document, we were told that the Chief Executive’s emails had been deleted. We accept the Chief Executive’s recollection, given over a year later, that she was provided with a draft to which she made some minor amendments in order to fully reflect her opinion and decision and the resulting document is the one that we have.
- (b) The Chief Executive was not given a full copy of the report on which to give her qualified person’s opinion. The appendices were omitted – as they had been when the report was shown to Alder Hey’s clinical director in November 2010 and to its Board in September 2011. Counsel for Alder Hey submitted that this didn’t matter because the narrative of the report gave sufficient indication of what the appendices might contain. There is force in this argument.¹
- (c) Unaccountably, the document we are given asserts that it is not possible to summarise the information in the report in such a way as to produce a meaningful document. However, counsel told us at the hearing that an executive summary of the report had in fact been produced to a meeting of the Alder Hey Board.
- (d) The Chief Executive asserts in the document that the Board had considered her “opinion” and “fully endorsed this view and decision”. This appears to refer to a meeting of the Board a week earlier. The relevant minutes

¹ In our deliberations, the question arose as to whether this might be inadvertent compliance with s36(4). In the light of our conclusions we decided that it would be unnecessary and disproportionate to incur further delay in exploring this point.

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(page 141) refer to the withholding of the report and to a comment from the Chief Executive that:-

“The Trust has a duty to protect staff named in and/or associated with the report and that this response was appropriate. The Board agreed with this position.”

It is true that minutes are never intended to record everything that is said but this may indicate some confusion of the separate roles which the Chief Executive was bound to adopt.

- (e) It is a struggle to make sense of part A, which is put forward as the qualified person’s opinion. The heading refers to a decision, not an opinion. The heading also is restricted to Section 36(2)(b)(ii). The opinion does not seem to be so confined although it is difficult to make sense of the opening words in connection with the later reference to Section 36(2)(c). Of course, the document must be read as a whole.
20. We accept that the cumulation of defects is serious but have concluded that, whilst the process may have been managed badly, nevertheless a reasonable opinion of the qualified person does exist and the exemption in Section 36 is engaged. It seems to us however that the difficulties to which we have referred, weaken the evidential value of the qualified person’s opinion when it comes to carrying out the balancing exercise under Section 2(2).
21. The ICO, who did not attend the hearing, may wish to look again at the papers in this case and consider whether it would not be helpful for there to be a separate guidance note directed to qualified persons. It must be comparatively rare for Chief Executives and the like to be called upon to carry out this unusual statutory role and it may be that something more is needed than the general guidance already available on Section 36. For example, whilst it may be true as a matter of strict law that the qualified person’s opinion can be oral, that is hardly a suggestion which should find its way into guidance as to good practice. It might be helpful for qualified persons to receive guidance on their separate role; the importance of

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distinguishing the particular subsections of section 36; and the value which a reasoned opinion might have for those who take decisions under FOIA.

E. Balancing the Public Interests

22. Having concluded that, by reason of the qualified person's opinion, an exemption to the Act is engaged, Mr Bousfield is not entitled to have the report communicated to him if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
23. As we have indicated the heading to the Chief Executive's opinion/decision suggests that it applies only to Section 36(2)(b)(ii). The ICO decision notice added Section 36(2)(b)(i) but not Section 36(2)(c). Counsel for Alder Hey asked us to include Section 36(2)(c) in our deliberations. So we are concerned in particular with the extent to which disclosure of the report would or would be likely to inhibit the free and frank provision of advice; would or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation; or would or would be likely to otherwise prejudice the effective conduct of public affairs.
24. Some of the arguments canvassed early in the dispute on behalf of Alder Hey seem to us to carry little weight. For example, it was suggested that disclosure might limit policy options because of adverse public reaction. Similarly, it was said that the disruption caused by managing the disclosure would prejudice the hospital's ability to deliver an effective public service. Neither of these points was pushed in argument at the hearing and it may be that they are merely attempts to make the main points against disclosure in different ways. Mr Bousfield furnished us with a wealth of information about whistle blowing in the NHS and other allegations made against Alder Hey. We did not consider them relevant to the issue before us.
25. Counsel for Alder Hey asked us to bear in mind throughout the impact disclosure would have first on the ongoing process and second on future similar exercises that might take place. We agreed with that approach.

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26. As to the ongoing process, he submitted that this was a very sensitive one. Managers had to work to resolve it and should not have been required to conduct all their affairs in public as at the time the request was made – when follow up work was still continuing. As to future similar exercises, disclosure would deter frankness. First, staff might be less likely to speak freely to future investigators if the report was to be made public. (We noted that the Chief Executive went so far as to suggest that the erosion of trust within Alder Hey would be so great as to prejudice its ability to produce counselling services for its staff at all.) There was a risk, even if the public was unable to identify individuals, that staff might feel that senior managers would be able to do so. Then there was the question of whether future investigators would feel able to be equally frank. In this context, it was important to remember that the report in this case was a one sided document which did not pretend or seek to provide balance. Might such a document be less likely to be produced if publication was to follow?
27. These are powerful points and they found favour with the ICO but, in our judgement, they have to be taken into account in context. The request specifically asks that any personal data be edited out. Nor does the request ask to see policy options or advice concerning possible responses to the report. It asks only for the diagnostic evidence presented by the report. Moreover, its author, the head of psychosocial services must have a well established routine for assuring confidentiality when reporting, to a common employer, information which has been provided in confidence. Indeed he will already have had to employ such stratagems in obtaining information and in writing the report. Staff contributing to the report might reasonably expect disclosure sufficient to be assured that their concerns were understood and being acted upon. The suggestion of lasting damage to staff confidence in the Alder Centre in our view goes too far.
28. We accept that the report, being concerned with the feelings and views of operating staff is subjective and that others may have a different story to tell. That does not mean that the report is inaccurate – indeed Alder Hey’s claim is to the contrary. They have taken action upon it.

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29. So far as future reports are concerned, it is important to recognise the modesty of our role. We set no precedent. The potential for publication of a report depending on the circumstances arises from FOIA itself; the risk of publication is also governed by the sometimes random event of whether a request is made. A decision by us to disclose opens no floodgates. A decision by us not to disclose gives no guarantee to authors of future reports. Their reports will be written, as no doubt this one was, in the knowledge that the FOIA has been approved by Parliament.
30. Having considered all the circumstances we have concluded that the public interest in disclosing the report carried greater weight. Large regional hospitals such as Alder Hey are important institutions for which the general public willingly pay taxes and frequently make charitable donations. It is not in dispute that the information contained in the report was capable of having an impact on the well being of children admitted to the hospital for surgery. By the date of the request, about a year had elapsed since the problem surfaced and nearly eight months since the preparation of the report. At that time the public interest in the Alder Hey Board and senior management being held to account for their actions and their stewardship outweighed, in our judgement, the factors telling against disclosure.
31. We therefore allow this appeal.
32. The steps to be taken by Alder Hey are that within 35 days of the date of this decision they must disclose the report including the appendices to Mr Bousfield.
33. Alder Hey specifically disclaimed any reliance on Section 40 FOIA. The author of the report has been careful to exclude personal information. If Alder Hey or the Information Commissioner considers that any editing is necessary to come within the terms of the request that any personal data be “appropriately redacted” then they may apply to the Tribunal within 14 days of the date of this decision to confirm any such redaction. This time table is chosen so as not to disturb the 35 day period for disclosure.

Decision Notice Continued

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Signed by

**NJ Warren
Chamber President**

Dated 10 January 2013

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APPENDIX 1

Section 31 FOIA

- (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) the prevention or detection of crime,
 - (b) the apprehension or prosecution of offenders,
 - (c) the administration of justice,
 - (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
 - (e) the operation of the immigration controls,
 - (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
 - (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
 - (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
 - (i) any inquiry held under the M1Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.
- (2) The purposes referred to in subsection (1)(g) to (i) are—
 - (a) the purpose of ascertaining whether any person has failed to comply with the law,
 - (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
 - (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
 - (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) the purpose of ascertaining the cause of an accident,
 - (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,

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- (g) the purpose of protecting the property of charities from loss or misapplication,
 - (h) the purpose of recovering the property of charities,
 - (i) the purpose of securing the health, safety and welfare of persons at work, and
 - (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.
- (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).

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APPENDIX TWO

Section 36 FOIA (as amended)

- (1) This section applies to—
 - (a) information which is held by a government department or by the Welsh Assembly Government and is not exempt information by virtue of section 35, and
 - (b) information which is held by any other public authority.
- (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—
 - (a) would, or would be likely to, prejudice—
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the Cabinet of the Welsh Assembly Government.
 - (b) would, or would be likely to, inhibit—
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
- (3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).
- (4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words “in the reasonable opinion of a qualified person”.
- (5) In subsections (2) and (3) “qualified person”—
 - (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
 - (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
 - (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
 - (d) in relation to information held by the House of Commons, means the Speaker of that House,

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- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
- (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
- (g) in relation to information held by the Welsh Assembly Government, means the Welsh Ministers or the Counsel General to the Welsh Assembly Government,
- (ga) in relation to information held by the National Assembly for Wales, means the Presiding Officer of the National Assembly for Wales,
- (gb) in relation to information held by any Welsh public authority (other than one referred to in section 83(1)(b)(ii) (subsidiary of the Assembly Commission), the Auditor General for Wales or the Public Services Ombudsman for Wales), means—
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the Welsh Ministers or the Counsel General to the Welsh Assembly Government”,
- (gc) in relation to information held by a Welsh public authority referred to in section 83(1)(b)(ii), means—
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the Presiding Officer of the National Assembly for Wales,]
- (h) ...
- (i) in relation to information held by the National Audit Office or the Comptroller and Auditor General, means the Comptroller and Auditor General,
- (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
- (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
- (ka) in relation to information held by the Public Services Ombudsman for Wales, means the Public Services Ombudsman for Wales,]
- (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means—
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
- (m) in relation to information held by the Greater London Authority, means the Mayor of London,

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- (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
- (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means—
 - (i) a Minister of the Crown,
 - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
 - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.
- (6) Any authorisation for the purposes of this section—
 - (a) may relate to a specified person or to persons falling within a specified class,
 - (b) may be general or limited to particular classes of case, and
 - (c) may be granted subject to conditions.
- (7) A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion—
 - (a) disclosure of information held by either House of Parliament, or
 - (b) compliance with section 1(1)(a) by either House,would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.

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APPENDIX THREE

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Decision on applying S36 (2) (b) (ii)

As the qualified person for Alder Hey Children's NHS Foundation Trust, I have reviewed the information requested and consider the disclosure of the information would prejudice the effective conduct of public affairs through:

Section 36 (2)

(b) would or would be likely to, inhibit

(i) The free and frank provision of advice, or

(ii) The free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduction of public affairs.

It is my decision to withhold disclosure of the information to the applicant. In reaching my judgement, I have examined the guidance issued by the Ministry of Justice (14 May 2008) and the Information Commissioner's Office (11 September 2008).

As a provider of paediatric healthcare services, I believe the Trust should be transparent and accountable and have considered if releasing the information would enhance transparency and accountability, whilst enabling the Trust to conduct their business for the benefit of the patients and families we serve.

Staff involved in the confidential diagnostic made a decision whether to participate and further whether to participate in individual sessions, group session or anonymous telephone interviews. It is my view that staff members involved believed their discussions to be confidential, and that they would not have taken part if they believed that information disclosed and discussed during the sessions would be made available beyond the organisation.

I also believe that it is vital that the Trust is allowed the private space in which to conduct such internal activities to allow the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.

Having deliberated on the effects of disclosure, I do not consider that the public interest would be served by disclosure as it will prejudice the Trust's ability to conduct similar important internal activity in the future as it would inhibit the free and frank provision of advice and exchange of views due to concern that it will be placed in the public domain.

I also believe that disclosure would lead to an erosion of Trust in the organisation and prejudice the Trust's ability to maintain an effective counselling service for its staff due to concern that information they share may be placed in the public domain.

It is my opinion also that disclosure of the information requested would prejudice the organisation's ability to offer an effective public service due to the disruption caused by the disclosure and the diversion of resources in managing the impact of disclosure.

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In considering whether it is appropriate to provide a summary or redact parts of the information, I have come to the conclusion that it is not possible to redact or summarise the information in such a way as to produce a meaningful document.

The Trust's Board of Directors has considered my opinion and has fully endorsed this view and decision

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APPENDIX FOUR

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PART A

Decision on applying S36 (2) (b) (ii)

As the qualified person for Alder Hey Children's NHS Foundation Trust, I have reviewed the information requested and consider the disclosure of the information would prejudice the effective conduct of public affairs through:

Section 36 (2)

(b) would or would be likely to, inhibit

(i) The free and frank provision of advice, or

(ii) The free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduction of public affairs.

PART B

It is my decision to withhold disclosure of the information to the applicant. In reaching my judgement, I have examined the guidance issued by the Ministry of Justice (14 May 2008) and the Information Commissioner's Office (11 September 2008).

PART C

As a provider of paediatric healthcare services, I believe the Trust should be transparent and accountable and have considered if releasing the information would enhance transparency and accountability, whilst enabling the Trust to conduct their business for the benefit of the patients and families we serve.

Staff involved in the confidential diagnostic made a decision whether to participate and further whether to participate in individual sessions, group session or anonymous telephone interviews. It is my view that staff members involved believed their discussions to be confidential, and that they would not have taken part if they believed that information disclosed and discussed during the sessions would be made available beyond the organisation.

I also believe that it is vital that the Trust is allowed the private space in which to conduct such internal activities to allow the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.

Having deliberated on the effects of disclosure, I do not consider that the public interest would be served by disclosure as it will prejudice the Trust's ability to conduct similar important internal activity in the future as it would inhibit the free and frank provision of advice and exchange of views due to concern that it will be placed in the public domain.

I also believe that disclosure would lead to an erosion of Trust in the organisation and prejudice the Trust's ability to maintain an effective counselling service for its staff due to concern that information they share may be placed in the public domain.

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It is my opinion also that disclosure of the information requested would prejudice the organisation's ability to offer an effective public service due to the disruption caused by the disclosure and the diversion of resources in managing the impact of disclosure.

In considering whether it is appropriate to provide a summary or redact parts of the information, I have come to the conclusion that it is not possible to redact or summarise the information in such a way as to produce a meaningful document.

The Trust's Board of Directors has considered my opinion and has fully endorsed this view and decision