First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FS50830858

Appeal Reference: EA/2019/0050 & 0093V

Heard remotely
On 19th November 2020

Before

JUDGE CHRIS HUGHES

Between

MR MARTIN ROSENBAUM (EA/2019/0050)
CABINET OFFICE (EA/2019/0093)
Appellant

-and-
THE INFORMATION COMMISSIONER
Respondent
- and –

CABINET OFFICE (EA/2019/0093)
MR MARTIN ROSENBAUM (EA/2019/0050)
Second Respondents

Appearances: -

Appellant (1): **Martin Rosenbaum**
Appellant (2): **Rory Dunlop QC**
First Respondent: **Leo Davidson**

DECISION

The appeal of Mr Rosenbaum is dismissed. The appeal of the Cabinet Office succeeds in part.

REASONS

1. On 3 June 2016 the Times published the results of an investigation into pricing of drugs supplied to the NHS: -

   "Millionaire businessmen have been increasing the price of drugs bought by the NHS by up to 12,500 per cent.
   A small group of entrepreneurs has made vast sums after raising the cost of medicines by £262 million a year – the equivalent of funding an extra 7,000 junior doctors a year, an investigation has found. "

2. In moving the Second Reading of the Health Service Medical Supplies (Costs) Bill in the House of Commons on 24 October 2016 the then Secretary of State for Health (Mr Jeremy Hunt) explained one of the purposes of that legislation:

   The second key element of this Bill amends the 2006 Act to strengthen the Government's powers to set prices of medicines where companies charge unreasonably high prices for unbranded generic medicines. We rely on competition in the market to keep the prices of these drugs down. That generally works well and has, in combination with high levels of generic prescribing, led to significant savings. However, we are aware of some instances where there is no competition to keep prices down, and companies have raised their prices to what looks like an unreasonable and unjustifiable level. As highlighted by the investigation conducted by The Times earlier this year, there are companies that appear to have made it their business model to purchase off-patent medicines for which there are no competitor products. They then exploit a monopoly position to raise prices. We cannot allow this practice to continue unchallenged.

3. MPs from all parts of the House welcomed this action and were highly critical of the companies involved: -

   "That was highlighted by the Times investigation a few months ago, in which one saw some of the price increases made by pharmaceutical companies that had, in effect, a monopoly on a drug because there was no competition. Let me give one or two examples to show the scale of the problem. Between 2008 and 2016, the price per packet of hydrocortisone tablets rose from 70p to £85 – a 12,000% increase. With certain antidepressant tablets, one sees a 2,600% increase. With certain tablets for insomnia, there was a 3,000% increase. Frankly, even if this is with a relatively small number of drugs, it is totally unacceptable and extremely difficult to justify." Sir Simon Burns (Conservative)

   "Utterly unethical behaviour… It is utterly despicable for any private company to think that it can do that. The Government are right to take action to end that outrageous practice" Norman Lamb (Liberal Democrat)

   "there should be a special category of obloquy for those who make themselves extremely wealthy by using loopholes in the law to prey on the sick and vulnerable and to extract

obscene profits from our health service. An investigation in The Times highlighted how a small number of companies including Amdipharm, Mercury, Auden McKenzie and Atnahs raised the cost of medicines by £262 million a year through this practice." Justin Madders (Labour)

4. On 7 January 2019 the Times published another story on the subject: -

   "A multimillionaire businessman whose company's drug price rises have cost the NHS £50 million was appointed OBE in the new year's honours list, The Times can reveal. Vijay Patel, 69, set up a company that exploited a loophole in health service rules to increase the price of old medicines for which it was the sole supplier by up to 2,500 per cent. The firm, Atnahs, raised the price of a packet of antidepressants from £5.71 to £154. An insomnia treatment now costs more than £138 instead of £12.10. Although the practice was exposed in 2016 by an investigation, prices have not been reduced. The increases meant that seven of the company's medicines alone cost the NHS an extra £16.3 million in 2017.

   Despite this, Mr Patel was appointed OBE last week for his "services to business and philanthropy". His name was listed among more than 1,000 people given honours. Others receiving the OBE included three senior NHS staff who led the responses to terrorist attacks in Manchester and London. The decision to include Mr Patel on the list designed to recognise those who have "committed themselves to serving and helping Britain" has prompted an outcry from doctors and pharmacists. It will also raise questions about vetting by the independent committee that makes decisions on honours."

5. The story contained a response from the government department responsible for the co-ordination of the process by which individuals are nominated for honours:-

   "A Cabinet Office source said that the nomination process was confidential but that robust probity checks had been carried out."

6. Mr Rosenbaum, a journalist with the BBC sought more information from the Cabinet Office on 9 January 2019: -

   'I am sending this request under the Freedom of lnformation Act to ask for the following information
   All information held within the Honours and Appointments Secretariat relating to the awarding of an honour to Vijay Patel, the CEO of Waymade Healthcare.
   lf you need any further information from me in order to deal with my request, please call me on …
   lf you are encountering practical difficulties with complying with this request, please contact me as soon as possible (in line with your section 16 duty to advise and assist requesters) so that we can discuss the matter and if necessary I can modify the request.
   ….

lf you are able to supply some of this information more quickly than other items, please supply each item as soon as it becomes available.
lf it is necessary for any reason to redact any information, please redact the minimum necessary and send me the rest of the document(s), explaining the legal grounds for each redaction, Please can you acknowledge receipt of this request.
Many thanks for your assistance."

7. The Cabinet Office responded on 29 January refusing to provide the information (relying on exemptions in s37 and s41 (information provided in confidence). It explained its reasoning: -

The information you have requested falls within sections 37(1)(b) (the conferring by the Crown of an honour or dignity). Section 37(1)(b) is not an absolute exemption and is subject to the public interest test which we have considered in relation to your request. We have weighed up whether the public interest is better served by release of this information or withholding it. We appreciate the importance of transparency in government which encourages public interest in and interaction with the work of government. We also recognise that there is a public interest in the workings of the honours system. However, this must be weighed against the importance of confidentiality with regard to individual honours cases, which is essential to protect the integrity of the honours and without which the system could not function. Non-disclosure of information relating to individual cases ensures that those involved in the honours system can take part on the understanding that their confidence will be honoured and that decisions about honours are taken on the basis of full and honest information about the individual concerned.

Having considered all the circumstances of this case, we have concluded that the public interest is better served by withholding all of the information exempt under section 37(1)(b).

8. Mr Rosenbaum in seeking an internal review of the refusal commented: -

ln my opinion your public interest test is generic and formulaic and has been applied in a blanket way. lt takes no account of the serious and widely reported ethical questions and controversies regarding Mr Patel and the pricing of medicines purchased by the NHS, and the issues thus raised about whether his OBE is appropriate.

9. On 11 March the Cabinet Office confirmed its decision: -

I have carefully reviewed the handling of your request and I consider that Section 37 (1)(b) was correctly applied. The Cabinet Office is aware of the press reports that relate to Mr Patel, but in my opinion, they do not outweigh the importance of confidentiality with regard to individual honours cases in order to protect the integrity of the honours system.

10. Mr Rosenbaum complained to the Information Commissioner. The Cabinet Office maintained its position, arguing that all the information was protected from disclosure by the exemption in s37(1)b and some by the exemption in s41(1) which provide: -

37 ***Communications with Her Majesty, etc. and honours.***
(1) Information is exempt information if it relates to –
…..
(b) the conferring by the Crown of any honour or dignity.

41 ***Information provided in confidence.***
(1) Information is exempt information if –
(a) it was obtained by the public authority from any other person (including another public authority), and
(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

11. The effect of s2(2) is to qualify the exemption in s37(1)(b): -

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

12. In her decision she recognised (as did Mr Rosenbaum) the importance of confidentiality in the honours system and that disclosure of information that would erode this confidentiality, and thus damage the effectiveness of the system, which would not be in the public interest. Having considered the arguments and material she concluded that there was a real lack of public understanding why this honour had been made and there was a public interest disclosing the information so that the public could understand how this decision was made, however she did not order the disclosure of all the information in understanding decided (dn para 27):-

to do so would result in too great an infringement into the safe space needed in respect of this particular honours case and would result in too great a chilling effect risk in respect of discussions in future cases. However, the Commissioner has concluded that the public interest tips in favour of disclosing one piece of the withheld information. In the Commissioner's view disclosure of this piece of information will go some considerable way to meeting the public interests identified in favour of disclosure, whilst at the same time largely maintaining the confidential space needed for the honours process.

13. Mr Rosenbaum appealed against the decision arguing the public interest in ordering the disclosure of all the information.

14. Helen Ewen, an official in the Cabinet Office, gave written and oral evidence. In considerable detail she explained how nominations for honours are

collected from members of the public and government departments, how they are collated allocated between departments. In this case the department responsible for carrying forward the process was the Department for Business Energy and Industrial Strategy. Departments are expected as a minimum to: -

a. Verify professional work through the relevant professional body
b. Verify voluntary activity with the charity concerned and check the Charity Commission register
c. Check with other Departments when the activities cross departmental boundaries (magistrates, foster carers, school governors, people carrying out reviews etc)
d. Seek discrete advice from policy and stakeholder contacts

15. She confirmed that: -

Departments are responsible for ensuring there is nothing untoward associated with a nominee that may bring the honours system into question should they be recognised. Departments are advised to create an internal mechanism to ensure that all nominees have been subjected to appropriate probity checks and that the Department is satisfied that there is nothing in the nominee's background which would bring this nomination into question. Checks include using internet resources to search for any material that might cast doubt on the probity of the individual, and which may necessitate further follow up with Departments or others. Those cases are then submitted to the Honours and Appointments Secretariat in the Cabinet Office for a specific honours round.

16. She described the somewhat limited role of the ten expert honours committee, (which are independent and have a majority of members from outside the civil service) which is to assess and priorities the nominations in their area using as a starting point the information provided to them. She confirmed that the nomination had been considered by the Economy Committee. In describing the approach of the committees to their work she stated: -

A nominee's history will often form part of the merit discussion and will in some cases also form part of probity discussions. there is any serious suggestion from an official or otherwise informed source that a nominee is/has been involved in matters which touch the integrity of their reputation or conduct, committees will usually wish to pause until such time as better information and/or a formal legal/regulatory judgement is available. Each case will be considered individually, with examples of potential issues for repute being a) a high-risk tax status, b) involvement in a criminal investigation or controversial court case until the outcome was known,

17. She emphasised the centrality of checking *to protect the integrity of the honours system and thereby the Crown …by proactively identifying information which may affect a nominee's standing and reputation.* She confirmed that she considered that the processes should have discovered the Times story, the comments in Hansard including the Secretary of State for Health describing the business practices as unethical and unacceptable and that these were matters which could have fed in at multiple stages when the information was identified.

18. She emphasised that this was an exceptional case which (given the thousands of nominations) showed how well the system worked. She confirmed that the giving of an honour was a recognition of certain forms of behaviour and an incentive to behave in certain ways, such as philanthropy, and not others.

19. She was concerned at the effect of disclosure. Confidentiality was stressed at every stage of the process, nominators were enjoined not to tell the nominee that they had been nominated, recipients were never told who had nominated them. Members of the committees were similarly enjoined to respect confidentiality, while at the same time explaining the system to the public: -

    Committee members are asked not to disclose any information about the nominees of honours to any third party, except in the exceptional circumstances of taking soundings in confidence on specific nominees from trusted sources. Further, members may be privy to a great deal of sensitive information as a result of validation or probity checks carried out on candidates. It is very important that such information remains confidential.

    … we encourage committee members to become involved in publicity events but we hope that the focus should be on how the system works, not individual cases.

20. She stressed how the entire honours system was structured with confidentiality ingrained, and that this confidentiality had specific recognition in law: -

    In summary, all of those involved can fairly assume the honours system is a closed and confidential process. For those who sit on honours committees, those who nominate, and anyone else involved in the nomination process, the expectation is that their comments are kept confidential, rather than quoted and released into the public domain. When individuals and committee members are asked to comment on a nomination, they are informed that their input will be treated in the strictest confidence and not shared outside of those involved in processing and assessing the nomination. This is a critical factor in ensuring nominations can be discussed robustly and openly and underpins the assessment role of the departmental sift processes and independent honours committees. The first time a nominee will be aware they have been nominated for an honour is when they are sounded. It is implicit that nominations will be handled in confidence. This expectation is recognised in law through exemptions in the FOIA (albeit qualified) and DPA, as well as by Parliament which set the disclosure period for honours material at 60 years instead of the 20-year period customary for other public records.

21. She confirmed that it was very difficult to assess what effect disclosure would the requested information would have on the system, she noted that despite requests *there has never been any disclosure under FOIA of discussions about whether to award a living person an honour. Thus, those involved in such discussions*

can have a reasonable expectation that if there were a request for their discussions, the balance would be very likely to come down in favour of maintaining the exemption.

22. She summarised her assessment of the risks of disclosure: -

"24. I know from experience that those involved in the process expect that the views they give will remain confidential. They are aware that there is no absolute exemption under FOIA for such discussions but nonetheless they currently expect that details of discussions held will not be made available to the general public. This is because the nature of the honours system allows for confidential information to be gathered and used in making an informed and balanced decision, and that decision making in this space is at its most effective and robust when a very wide range of information is available (and particularly where there are a high volume of nominations to choose from). Having confidence that Lord Lieutenants and Committee members can be full and frank in both their provision of information and deliberation is an essential part of building and sustaining collective confidence in the system and its decision-making processes.

25. Due to the nature of information such as this, the circumstances under which it made and the expectations of confidentiality, any disclosure of such discussions would create a real and serious chilling effect which would damage the effectiveness of the system and undermine this collective reliance on frankness at all stages."

23. Closed evidence

Ms Ewen confirmed the closed parts of her witness statement, which set out the background to Dr Patel's OBE, including the history of nomination, discussions, and decision-making. It also explains the extent to which the price-fixing issue was known about during that process.

Ms Ewen then gave some supplementary evidence, which clarified some of the processes and persons/bodies involved, and the timeline. Altogether, this covered the extent to which Government departments (including BEIS) and the various Committees were involved.

There was then discussion of some further general statistics about different types of case, such as how often concerns come to light and in what ways, processes which are followed, persons who are consulted

In particular, Ms Ewen commented further about the involvement of the Lord Lieutenant.

Ms Ewen discussed the extent to which the CO's concerns – about safe spaces, chilling effects and fairness to Dr Patel – applied to different types of information and maintained that it would have a broad albeit not consistent application.

In response to a question from the judge, Ms Ewen gave further evidence about the possible effect of disclosure on external nominators.

24. Closed submissions

Mr Dunlop QC made submissions on the identified information and argued that disclosure would be likely to have both the chilling effect and the 'poisoned chalice' effect referred to in his open submissions, which would affect many future cases. Conversely, the identified information would do little to advance the broader public interest outside of this exceptional case. He also submitted that it would be unfair to Dr Patel, as well as to others referred to (expressly and impliedly) in the identified information.

The Tribunal highlighted certain parts of the identified information and put it to Mr Dunlop QC whether his concerns applied less to those parts, when viewed in isolation, than it did to other parts, or the identified information taken as a whole. Mr Dunlop QC accepted that the highlighted parts were less of a concern than other parts but maintained that disclosure would still chip away at the confidentiality of the system and that therefore public interest in maintaining the exemption would still outweigh the public interest in disclosure.

Mr Dunlop QC also addressed the residual information and submitted that disclosure would have the chilling effect and 'poisoned chalice' effect referred to in his open submissions. He also noted that some of the material in the CLOSED bundle was, strictly speaking, out of scope of the request, but had been included for completeness.

The Tribunal raised a question regarding a comparison with another case. Mr Dunlop QC gave his understanding of what would have happened in that case. Mr Davidson, in his submissions, referred to information (not in the OPEN or CLOSED bundle) which shed some light on that other case.

Mr Davidson submitted that the identified information would go some way to explaining why the honour was given. He submitted that the identified information would not be likely to have as drastic an effect as had been suggested and explored ways in which the Cabinet Office could mitigate any such effect. To whatever extent disclosure would influence people in the way suggested, that reaction would not be reasonable or widespread.

Mr Davidson then supported Mr Dunlop QC's general submissions on the residual information. However, he also identified some aspects of the residual information where the Cabinet Office's concerns would carry less weight; however, the same information had less public interest, and therefore the Commissioner maintained her position on disclosure.

In particular, Mr Davidson submitted, the public interest in the residual information would be diminished should the identified information be disclosed.

Mr Dunlop QC replied on two points which both related to the likely effect of the disclosure on members of the public.

Open submissions

25. Mr Rosenbaum succinctly summarised the issues in his skeleton argument that disclosure was necessary to enable public understanding of a controversial issue so that the important decisions and processes involved in this awarding of an honour on behalf of the nation are subject to proper scrutiny, transparency and accountability and to reassure the public as to the appropriate working of the honours system.

26. The Information Commissioner argued that: -

"The conduct in question is, on its face, diametrically opposed to the values of public-spiritedness and altruism which the system of public honours is designed to recognise and promote. It is, in particular, incongruous with the express basis on which he was awarded his honour: "For services to Business and Philanthropy." There is therefore a strong public interest in greater public understanding of how such an apparently "perverse" (as The Times editorial described it) award came to be given.

The award raised questions as to what procedures had been followed, and in particular whether the appropriate vetting processes had been adhered to. The Cabinet Office guidance has been made public in order to maximise transparency around the honours system. It follows that, where there are grounds to suspect that that guidance has not been followed, the public interest in transparency is particularly acute, either (i) to reassure the public that, despite appearances, the relevant procedures were followed; or (ii) to reveal to the public what did in fact happen, and perhaps why. In this case, aside from the apparent incongruity of the award itself, it was reported that the lord-lieutenant of Essex had not been consulted, which would be the "normal process"."

27. The Cabinet Office emphasised the importance of maintaining the confidentiality of the honours process. Were that confidentiality to be breached then individuals who nominated or commented on nominees or served on the committees might be more reluctant to contribute if their evaluations of individuals were made public, especially if a controversy arose about an issue of which they were not aware. Nominees might be reluctant to have their names go forward if something in their past (which might be long atoned for and forgotten) could be brought forward again in a glare of publicity. The Cabinet Office further argued that there was an alignment of the access regimes under the Data Protection Act and FOIA which had the effect of prohibiting the disclosure requested.

Consideration

28. Very clear and substantial public interests are put forward in favour of the solutions put forward by the parties and I am satisfied that all positions have real merit. However all positions would cause some harm to the public interests identified, the maintenance of public confidence in the honours system might be harmed if no account is given beyond the statement of 7 January 2019, the risk to the systemic confidentiality which enables the system to draw on the knowledge and judgements of many people outside government who nominate or comment on the individuals if some information is disclosed, the actual intrusion into the lives of the various individuals whose names are within the material.

29. I am unable to accept that there is such a clear and close alignment between FOIA and DPA as Mr Dunlop has argued. Subject access requests embody a right to information about an individual inhering in that individual, FOIA requests which address information held by a public body which contains personal information are subject to consideration under s40 which applies data principals which may in some circumstances permit the disclosure of personal data. If there was an intent to both prohibit SARs concerning the awards of honours and relying on that bar on the individual to prohibit disclosure of any information about honours, then the simple solution would have been to make s37(1)(b) an absolute exemption, like the rest of s37(1).

30. In considering whether the disclosure is permissible under s40 FOIA the first matter to consider is whether it would contravene any of the data protection principles the primary issue is whether disclosure would be fair and lawful. Mr Patel is a public figure and aware that his business approach has attracted widespread criticism, he accepted the honour and the acclaim that goes with it. FOIA makes the honours process (in principal at least) subject to disclosure and in deciding to accept the honour he should have been aware of the possibility of public comment. Article 5(1)(a) of the GDPR provides that personal data shall be "processed lawfully, fairly and in a transparent manner in relation to the data subject." I am satisfied that the disclosure would be fair and transparent to Mr Patel. Under Article 6(1)(f) of the GDPR, processing is lawful if and to the extent that it is "necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data". Mr Patel could not, in all the circumstances, have had a reasonable expectation that all information about him would be kept confidential. The disclosure of the information is necessary for the legitimate interest explaining how and why this highly controversial honour was awarded and this interest is not over-ridden by the interests rights and freedoms of Mr Patel.

31. The tribunal is satisfied that the middle course steered by the Information Commissioner is broadly correct. Under normal circumstances the importance of maintaining the confidentiality of the process far outweighs the value of disclosure in one particular case. The tribunal must be alert to ensure that its actions do not undermine public confidence in a process which is generally well -regarded as performing a useful function of recognising the myriad various contributions individuals make to the well-being of our society or humanity at large. Ms Ewens evidence provided a clear picture of the systematic way the merits of individuals are assessed and the somewhat cautious and risk-averse way in which nominations are handled in order to ensure that no taint of scandal can attach to the process, a reflection of the perceived importance of the honour system in itself and also its link to the Monarch. In Bagehot's terminology, the honours system is a "dignified" part of the constitution with an "efficient" role in encouraging forms of behaviour.

32. Against this background the mismatch between the honour and the controversy concerning Mr Patel's business is stark; the Cabinet Office statement of 7 January 2019 can have done little to assuage that concern.

33. The request for information is for *All information held within the Honours and Appointments Secretariat relating to the awarding of an honour to Vijay Patel*. The public interest in disclosure is in providing an explanation as why the honour was awarded. The Information Commissioner in her decision notice acutely summarised the public interest: -

    "…there is real concern, and indeed a lack of understanding, as to why this particular honour was awarded. The Commissioner therefore agrees that there is a very significant public interest in disclosing the withheld information so that the public can better understand the decisions and procedures in respect of this particular award."

34. However, she was selective and recognised the potential harm of disclosure and sought to minimise adverse consequences: -

    "…the Commissioner has reached the conclusion that the public interest does not favour disclosure of all of the withheld information. In the Commissioner's view to do so would result in too great an infringement into the safe space needed in respect of this particular honours case and would result in too great a chilling effect risk in respect of discussions in future cases. However, the Commissioner has concluded that the public interest tips in favour of disclosing one piece of the withheld information. In the Commissioner's view disclosure of this piece of information will go some considerable way to meeting the public interests identified in favour of disclosure, whilst at the same time largely maintaining the confidential space needed for the honours process."

35. It is here that I must part company with the Information Commissioner. The public interest is in the disclosure of information which *will go some considerable way to meeting the public interests*, however she has identified a specific

document which meets that need and has not gone further. FOIA is an information regime, not a documents regime. In order to meet the public interest in disclosure identified by the Information Commissioner to explain how the decision was made while protecting the confidentiality of the voluntary participants in the system (in order to avoid damage to their confidence in the confidentiality of the system) only parts of the document referred to as "the identified information" need to be disclosed. In the closed annex to this decision I identify those parts of "the identified information" whose disclosure is necessary to achieve the public interest in transparency without damaging the public interest in the confidentiality of the volunteers who make the system possible. The disclosure of the rest of that document and of the residual information would, as Mr Rosenbaum argued, increase public understanding of the process, however that benefit is not proportionate to the harm caused to the functioning of the system.

36. Mr Rosenbaum's appeal fails. The Cabinet Office appeal is allowed in part. I direct the Cabinet Office to disclose that part of the identified information which I have specified within 35 days.

Signed Hughes

Judge of the First-tier Tribunal
Date: 4 January 2021
Promulgated Date 5 January 2021