# AN ARGUMENT FOR FULL DISCLOSURE OF NHS INVESTIGATIONS - WHAT RELEVANCE DATA PROTECTION AND CONFIDENTIALITY?

**Selena Plowden, Guildhall Chambers**


A. What am I looking for?
B. What is being held back?
C. Why the reticence and what is the relevance of the Data Protection Act?
D. What are the routes for obtaining documents?
E. What falls within standard disclosure?
F. Which objections are legitimate?
G. Is confidentiality a legitimate ground for non disclosure?
H. When should an application be made?


## A. What am I looking for?

- Beyond the Patient Notes
- Serious Incident Framework - Supporting Learning to Prevent Recurrence (April 2015)
- NHS England Complaints Policy (March 2015)
- Your expert's advice
    - Training records
    - Surgery logs
    - Theatre logs

### What is a Serious Incident?

Framework p 13
Broadly:
Unexpected or avoidable injury causing serious harm or death; or
Unexpected or avoidable injury which requires further treatment by a healthcare professional in order to prevent death or serious harm.

### Management of Serious Injury:

Flow chart p 31 of Framework (enclosed)
Within 2 days:

- Identify serious injury
- report to Stakeholders and on NHS Serious Incident Management System
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Within 3 days:

- p 32 Framework
- 72 hour review
- 

Within 60 days: lead investigator and team define terms of reference and undertake investigation

- gather information e.g. through interviews
- analyse
- generate a solution
- submit final report
- 

Within 20 days: Commissioner reviews and ensures robust process

**B. What is being held back?**

The documents underlying the investigation findings other than the clinical notes are rarely disclosed voluntarily. These might include:

- Interviews
- Witness statements
- The most [redacted] parts of the *[redacted]* report which makes [redacted] feel very [redacted]

**C. Why the reticence?**

In part there is a genuine concern to protect the confidentiality of third parties. In addition, I think this is caused by a mixture of culture and confusion:

What about the statutory duty of candour?

It only goes so far...

You may remember the fears it engendered before it was enshrined in statute:

e.g. 6th March 2014 report by Sir David Dalton and Professor Norman Williams "*Building a Future of Candour- a review of the threshold for the duty of candour and of the incentives for care organisations to be candid"*

- o Series of great recommendations and then this:
- o Making candour happen – "Fear of Litigation" Paragraphs 37 – 38:

> *Fear of litigation is clearly not a principled argument against candour. Something that is not in your interests can still be the right thing to do, and candour can clearly fall into this category in some cases. We also believe that it is a bad practical argument as well. While individual acts of candour may encourage others to legal action, the aggregate effect of greater candour on levels of litigation is unlikely to be significant. It is difficult to quantify the effect precisely, but it seems that if organisations really put candour in to practice ,* ***there will be real gains in preventing drawn out cases where legal action is really an expression of the intensity of the desire to know what happened rather than an attempt to secure financial redress****.*
> *Over the long term we would encourage the Government to consider how it can ensure that the legal system is most able to support a culture of candour.* ***In particular, it could be helpful to minimise the possibility that explanations given as part of a process of candour or open disclosure are then used in evidence to support an admission of negligence****…*

- Now see the full regulation and the guide
- Nothing to say all of the underlying documents must be provided

**Serious Incident Framework: Patient/ Family entitled to know:**

- P 38 of Framework
- Access to findings of any investigation
- Footnote 42 - *this may disclose confidential personal information for which consent has been obtained or where patient confidentiality is overridden in the public interest. This should be considered by the organisations Caldicott Guardian and confirmed by legal advice, where required. NHS England is currently seeking advice in relation to*

*the development of national guidance available to further support this matter. In the meantime, advice should be sought in relation to each case.*

Complaints policy - similar

So: do not expect the documents to be offered without asking...

**Plus: Misunderstanding about the Data Protection Act:**

- The Defendant is not entitled to rely on the Data Protection Act as an exemption from the normal requirements for disclosure and inspection.

- **S**ection 35 of the Data Protection Act explicitly exempts a data controller from the non disclosure provisions where disclosure is required in the context of litigation. When you are in the CPR, you are in the CPR.

- See *Dunn v Durham [*2012] EWCA Civ 1654 where Maurice Kay LJ emphasised this point and commented *"It is unfortunate that this dispute about disclosure has been prolonged and distorted by reference to the 1998 Act"*.

## D. So, what routes are available to obtain documents?

- Data Protection Act 1998
  - Section 7 if you write to the Data Controller you are entitled to a description of data relating to you subject to balancing of rights of confidentiality of others etc
  -
- Access to Health Records Act 1990
  - See attached
  - Potential argument re whether these documents form a part of health records

- Civil Procedure Rules & Practice Directions
  - CPR 31

## E. What falls within Standard Disclosure?

- CPR 31.6: standard disclosure requires a party to disclose documents in its control which adversely affect its own case; adversely affect another party's case or support another party's case.

  - What are the likely issues in this case?
  - Look at the pleadings (or, pre-action correspondence)
  - Are the documents or redacted parts of the report sought likely to support/ adversely affect these issues?
  - Is it evident from the investigation report that the underlying documents / redacted parts contain evidence of facts and matters which go beyond those described in the contemporaneous medical notes and which are pertinent to the issues in the case?

## F. What Legitimate Objections are there to Disclosure?:

*Are there any legal arguments which would prevent them being discloseable as part of standard disclosure?*

a) ***Legal Professional Privilege***

- Were the documents prepared for the purposes of obtaining legal advice/ in contemplation of litigation?
- Look at the subtitle of the Serious Incident framework.
- "Supporting Learning to Prevent Recurrence"
- The report was prepared because it was required for the purpose of preventing future recurrences - even if there were subsidiary/ parallel purposes of informing professional bodies/ disciplinary proceedings/ future litigation - and legal professional privilege does not apply (see e.g. *Waugh v British Railways Board* [1980] AC 521 and *Lask v Gloucester Health Authority [1991]* 2 Med LR 379, CA)
- The witness statements were gathered for the preparation of the report and the same logic must apply.

b) ***Public Interest Immunity***

Stricter test - CPR 31.19 provides procedure where public interest would damage the public interest. Not normally applicable to the documents we are concerned with - see WB 31.3.33 .e.g is withholding the documents necessary for the proper function of the public service?

c) ***CPR 35/ Expert reports***?

The fact the report was written by "*experts*" does not mean it falls within CPR 35 (*Hoyle v Rogers* & others [2014] EWCA 257 - interesting case as CA further dent argument that disclosure will interfere with candour in preparation of report "there was no reason why admissibility of the report should inhibit inspectors in their work. Inspectors were professionals...."

G. **Is confidentiality a legitimate ground?**

- This not by itself a ground for withholding disclosure. *Science Research Council v Nasse* [1980] AC 1028 HL
- But it may be relevant to other heads of privilege/ the exercise of the Court's discretion.
- This is not necessarily a non- starter by the NHS
- It requires analysis of law; of the specific documents sought; in the specific context of this case and a balancing exercise to be conducted

**CPR Discretion : - Confidentiality and Soft Privilege?**

In *Dunn v Durham CC*, having dismissed the relevance of the Data Protection Act, Maurice Kay LJ stated

"*The true position is that CPR Pt 31, read as a whole, enables and requires the court to excuse disclosure or inspection on public interest grounds*" acknowledging that, even in the absence of privilege or of strict public interest immunity, there may be grounds for non disclosure.

"*It would be wrong to treat all cases in which a public authority seeks exemption from disclosure or inspection on public interest grounds as being cases of public interest immunity in the strict sense.*"

As an example, the Court of Appeal considered the way in which the law as to disclosure had moved on in care proceedings so that there is no longer an automatic exemption for disclosure of social worker records and *a balancing exercise was now required between a party's right as to a fair trial pursuant to Article 6 of the Convention for the Protection of Human Rights and the rights of his opponent or a non party to confidentiality or privacy under Article 8*[1]*.*

*The approach required that (a) obligations in relation to disclosure and inspection arose only when the "relevance" test was satisfied. Relevance could include "train of enquiry" points which were not merely fishing expeditions. That was a matter of fact, degree and proportionality; (b) if the relevance test was satisfied, then it was for the party in possession of the document, or who would be adversely affected by its disclosure or inspection, to assert exemption from disclosure or inspection; (c) any ensuing dispute fell to be determined ultimately by a balancing exercise, having regard to the fair trial rights of the party seeking disclosure or inspection and the privacy or confidentiality rights of the other party and any person whose right might require protection. Consideration of competing Convention rights would generally be involved; the denial of disclosure or inspection was limited to circumstances where such denial was strictly necessary; (d) in some cases the balance might need to be struck by a limited or restricted order which respected a protected interest by such things as redaction. Again, the limitation had to satisfy the test of strict necessity.*

**Application to Clinical Negligence / Hospital Investigations:**

First: Do not just accept that the need to undertake the balancing act arises in every case:

- In *Dunn*, the records were not social worker records "in the strict sense" but Maurice Kay LJ considered that they were not dissimilar in nature (local authority personnel files of carers which included references to other children who had potentially been abused) and he considered that they should "attract the same approach" as social work records.
- The documents you seek are likely to relate to medical treatment of the Applicant. Not personal but professional information regarding the clinicians - i.e. not article 8 matters.
- Where they stray beyond that - e.g. personnel / training records of the clinicians a very clear argument will need to be made out re their relevance before we arrive at this stage.
- Or where they concern other patients (e.g. queue for the theatre) - can they be anonymised/ redacted save where relevant e.g. to timings?
- Protection for those identified in the documents: The statements cannot be used by the Applicant for any purpose other than to resolve this dispute. (Practice Direction for Pre Action Conduct paragraph 9.2).
- In the context of the specific case, can it really be said that disclosure might infringe somebody else's Article 8 rights?

Second: If the balancing exercise is to be undertaken:

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[1] Article 6 - right to a fair trial & **Article 8 –** Everyone has the right to respect for his private and family life, his home and his correspondence.

- For Defendant to assert exemption.
- Balance: the fair trial rights of the party seeking disclosure or inspection and the privacy or confidentiality rights of the other party and any person whose right might require protection.
- Necessity: the denial of disclosure or inspection was limited to circumstances where such denial was strictly necessary;
- Limited: in some cases the balance might need to be struck by a limited or restricted order which respected a protected interest by such things as redaction. Again, the limitation had to satisfy the test of strict necessity.

**H. When to apply / Pre Action Disclosure**

Clinical Negligence Pre- Action Protocol

Pre Action Disclosure: CPR 31.16 (3)
The Court *may* make an order for pre- action disclosure pursuant to s 33 (2) of the Senior Courts Act under this rule where:

*(a) The Respondent is likely to be a party to subsequent proceedings;*

*(b) The Applicant is also likely to be a party to those proceedings;*

*(c) If the proceedings had started, the Respondent's duty by way of standard disclosure, set out in rules 31.6, would extend to the documents or classes of documents of which the Applicant seeks disclosure; and*

*(d) Disclosure before proceedings is desirable in order to -*
*i. Dispose fairly of the anticipated proceedings;*
*ii. Assist the dispute to be resolved without proceedings;*
*iii. or save costs*

CPR 31.16 (a) and (b)

- It is clear on the authorities that this provision of the rules does not require the court to undertake an examination of the merits of the case. There is no requirement for the Applicant to establish either that proceedings are likely to be issued nor that s/he has real prospects of success. It is sufficient for the Applicant to demonstrate a prima facie case of entitlement to substantive relief (*Black v Sumitomo Corp* [2001] 1 WLR 1562 CA at 70 -73; *Smith v Secretary of State for Energy and Climate Change* [2013] EWCA Civ 1585 [23] Underhill LJ & see note White Book 31.16.4; 31.16.5.).

*If the proceedings had started, the Respondent's duty by way of standard disclosure, set out in rules 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure*

- See above.

*31.16 (3) (d) Disclosure before proceedings is desirable in order to dispose fairly of the anticipated proceedings; assist the dispute to be resolved without proceedings and save costs.*

- Would pre action disclosure ensure a more accurate assessment of the merits by the legal advisers and expert witnesses, enabling constructive negotiations and increasing the prospects of settlement before the expense of litigation?
- If that fails, the early disclosure will nevertheless have informed the medical experts and made it less likely that their opinions or the pleadings will need to be revised at a later stage saving additional costs and delays later?

**Remember : Pre Action Disclosure is discretionary**

**Why should the discretion be exercised in the Applicant's favour?**

(a) The importance of disclosure of relevant documents in litigation and the narrowness of any exception has long been emphasised. A good example is contained in the authority relied on by the Respondent in this case, *Dunn v Durham CC* [2013] 1 WLR 2305 . See the judgment of Mumby LJ at paragraph 46 citing his previous judgement "*It is for those who seek to restrain the disclosure of papers to a litigant to make good their claim and to demonstrate with precision exactly which documents ... require to be withheld. The burden on them is a heavy one. Only if the case for non disclosure is convincingly and compellingly demonstrated will an order be made. No such order should be made unless the situation imperatively demands it. No such order should extend any further than is necessary. The test, at the end of the day is one of strict necessity. In most cases the needs of a fair trial will demand that there be no restrictions on disclosure. Even if a case for restrictions is made out, the restrictions should go no further than is strictly necessary".*

(b) The expectation in the CPR is that parties will act reasonably in exchanging information and documents prior to litigation in an effort to avoid it (see the Practice Direction Pre Action Conduct; the Pre Action Protocol for Clinical Disputes and CPR 31.16 (3) itself).

(c) The expectation that the NHS in particular will act with candour is now enshrined in statute and has for many years been repeated in all manner of NHS documents[2].

**Costs in Pre- Action Disclosure Applications**:

Normal rule is Applicant pays - so if you are acting for the Applicant be careful- lay the ground work to enable you to argue that the Respondent has been unreasonable. And if you are acting for the Respondent - be careful to ensure any objection is on a legitimate ground - costs orders are made against Trusts for failing to give full pre-action disclosure where the issues have been properly canvassed in pre-application correspondence.

[2] Health and Social Care Act 2008 (Regulated Activities) Regulations 2014: Regulation 20. Good Medical Practice; Being Open NPSA; the NHS Constitution; Mid Staffs Public Enquiry reports and responses; NHS standard terms of Contracts etc

## Standard disclosure – what documents are to be disclosed

**31.6** Standard disclosure requires a party to disclose only–

(a) the documents on which he relies; and

(b) the documents which –

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; and

(c) the documents which he is required to disclose by a relevant practice direction.

Disclosure before proceedings start

**31.16**

(1) This rule applies where an application is made to the court under any Act for disclosure before proceedings have started[1].

(2) The application must be supported by evidence.

(3) The court may make an order under this rule only where–

(a) the respondent is likely to be a party to subsequent proceedings;

(b) the applicant is also likely to be a party to those proceedings;

(c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and

(d) disclosure before proceedings have started is desirable in order to –

(i) dispose fairly of the anticipated proceedings;

(ii) assist the dispute to be resolved without proceedings; or

(iii) save costs.

(4) An order under this rule must –

(a) specify the documents or the classes of documents which the respondent must disclose; and

(b) require him, when making disclosure, to specify any of those documents –

(i) which are no longer in his control; or

(ii) in respect of which he claims a right or duty to withhold inspection.

(5) Such an order may –

(a) require the respondent to indicate what has happened to any documents which are no longer in his control; and

(b) specify the time and place for disclosure and inspection

**WAUGH v BRITISH RAILWAYS BOARD (1979)**

**HL (Lord Wilberforce, Lord Simon of Glaisdale, Lord Edmund-Davies, Lord Russell, Lord Keith of Kinkel) 12/07/1979**

HEALTH - CIVIL EVIDENCE - CIVIL PROCEDURE

ACCIDENTS : PRIVILEGE : REPORTS : ACCIDENT INQUIRY REPORT : LEGAL PROFESSIONAL PRIVILEGE : PURPOSE FOR WHICH A DOCUMENT WAS PREPARED

**Determing whether a document was privileged where it preparation served two purposes, neither of which was dominant.**

The appellant's claim was in respect of the death of her husband, a train driver. She sought discovery of the defendant's accident report. She appealled against the refusal of her application on the ground that the report was privileged.
HELD: Public interest in the disclosure might be overridden so as to allow the defendant to prepare his case. The question was how close the connection had to be between the preparation of the document and the anticipation of litigation. To be privileged from disclosure, the purpose of preparing for litigation had to be the dominant purpose for which the document was prepared. In this case it was not.
Appeal allowed.

Peter Weitzman QC and Michael Brent instructed by Robin Thompson & Partners for the plaintiff.
Francis Irvin QC and Frederick Mann-Johnson instructed by Evan Harding for the board.

**: [1980] AC 521 : [1979] 3 WLR 150 : [1979] 2 All ER 1169 : [1979] IRLR 364 : (1979) 123 SJ 506**

**Lask v Gloucester HEALTH AUTHORITY (1985)**

**CA (Civ Div) (O'Connor LJ, Latey J) 06/12/1985**

HEALTH - CIVIL EVIDENCE - CIVIL PROCEDURE - LEGAL PROFESSION

ACCIDENTS : PERSONAL INJURY : PRIVILEGE : REPORTS : DISCOVERY : LEGAL PROFESSIONAL PRIVILEGE : CONFIDENTIAL ACCIDENT REPORT USED BY HEALTH AUTHORITY : WHETHER REPORT HAD DUAL PURPOSE : WHETHER HEALTH AUTHORITY FAILED TO ESTABLISH DOMINANT PURPOSE OF REPORT AS BEING TO MEET POTENTIAL CLAIM : PROFESSIONAL PRIVILEGE : PURPOSE FOR WHICH DOCUMENT PREPARED : ACCIDENT REPORT DISCOVERY : ANTICIPATION OF LITIGATION

**In the present case, the dominant purpose in the preparation of an accident report had not been to submit it to the solicitors in anticipation of litigation and should therefore be disclosed.**

Health Authority's appeal against a ruling that notwithstanding affidavits by its solicitors, a confidential accident report required by the National Health Service circulars had to be prepared to prevent further accidents, had also been prepared in case of litigation.
HELD: The dominant purpose in the preparation of the report had not been to submit it to solicitors in anticipation of litigation. The report was not privileged from discovery therefore must be disclosed to the plaintiff.
Appeal dismissed.

**[1991] 2 Med LR 379Times, December 13, 1985**

**SCOTT HOYLE (Appellant) v (1) JULIA MARY ROGERS (2) JADE NICOLA LUCINDA ROGERS (Respondents) & (1) SECRETARY OF STATE FOR TRANSPORT (2) INTERNATIONAL AIR TRANSPORT ASSOCIATION (Interveners) (2014)**

[2014] EWCA Civ 257

**CA (Civ Div) (Arden LJ, Treacy LJ, Christopher Clarke LJ) 13/03/2014**

CIVIL EVIDENCE - AVIATION - PERSONAL INJURY - NEGLIGENCE

ADMISSIBILITY : AIR ACCIDENTS : EXPERT EVIDENCE : REPORTS : NEGLIGENCE CLAIM FOLLOWING AIRCRAFT CRASH : ADMISSIBILITY OF AIR ACCIDENT REPORT : CIVIL EVIDENCE ACT 1968 s.3, s.11 : CIVIL PROCEDURE RULES 1998 Pt 35, Pt 32, Pt 35 r.35.4(1), r.35.5, r.35.4, r.35.3, r.35.2, r.35.1, s.267(8), r.35.10, Pt 32 r.32.1(2), Pt 32 r.32.1(1), r.32.2, r.32.1, r.35, Pt 32 r.32(1), r.32

**A report produced by the Air Accident Investigation Branch of the Department for Transport was admissible as evidence in a negligence action brought against the pilot of an aircraft which had crashed.**

The appellant (H) appealed against a decision ([2013] EWHC 1409 (QB), (2013) 163(7575) N.L.J. 16) that a report by the Air Accident Investigation Branch (AAIB) of the Department for Transport was admissible as evidence in an action brought by the respondents (R).

R were the executors of a man who had died when an aircraft piloted by H had crashed. They alleged negligence on H's part and sought to rely on the AAIB report.

H argued that the report could not be admitted as expert evidence. The intervener secretary of state

and air transport association submitted that there should be a presumption against admitting AAIB reports, as admissibility would inhibit investigators from carrying out their role and discourage witnesses from assisting investigators.

HELD: (1) H's suggestion that the report's authors had not been shown to have the necessary credentials to be experts was not well founded. The identity of the principal investigators was known and their expertise was readily discoverable. The bar to be surmounted to be an expert was not particularly high; the degree of expertise went largely to the weight to be given to the evidence rather than its admissibility. Nor was it any objection that several experts had contributed to the report. That was inevitable in a field such as air crash investigation. The case for exclusion of the report was not as compelling as it was in respect of the matters excluded in Hollington v F Hewthorn & Co Ltd [1943] K.B. 587 and Calyon v Michailaidis [2009] UKPC 34. The report was not a bare finding: its statements of fact were evidence which the trial judge could take into account as he could any other factual evidence, Hollington and Calyon considered. Its expressions of opinion were ones to which a court was entitled to have regard. It was open to an expert to express an opinion based on the facts insofar as his conclusion was informed by his expertise. The AAIB was a body with the requisite expertise. Insofar as an expert's report opined on facts which required no expertise of his to evaluate, it was inadmissible, but there was nothing to be gained from excising opinions in that category. The judge had correctly held that the trial judge should see the whole report and leave out of account any part of it that was inadmissible. H's submission that the Civil Evidence Act 1968 and CPR Pt 35 comprised a comprehensive code regarding expert evidence which excluded evidence such as the report was not well founded. Section 3 of the Act did not purport to be all-embracing or to alter the position at common law. CPR Pt 35 was concerned with persons who had been instructed to give expert evidence for the purpose of proceedings; the expert evidence in the report did not fall within Pt 35. Accordingly, the report was prima facie admissible and R did not require the court's permission to adduce it (see paras 43-55, 62-67 of judgment). (2) The court would not exercise its discretion to make a presumption against the admission of AAIB reports. The report was admissible evidence. It was of particular potential value on account of the AAIB's independence, the fact that it was the product of an investigation by experts who were not concerned to attribute blame, and the fact that the AAIB had greater ability than anyone else to obtain and analyse relevant data. The exercise of discretion was to be carried out in accordance with the overriding objective, which tended to favour the inclusion of evidence such as the report: many litigants would find it very difficult to access the relevant information. Parliament had provided for reports to be made public and had not legislated, as it could have done, to make them inadmissible. Further, such a presumption would impose an onus on the party to deploy admissible evidence when the onus should be on the party seeking to exclude such evidence. There was no reason why admissibility of the report should inhibit inspectors in their work. Inspectors were professionals who were not concerned with establishing civil liability and had no need to be circumspect because someone might want to use the report in litigation. Even if reports were not admissible, they were available and could be used, even if not evidentially, as the foundation of a claim or defence; AAIB reports had in any event been used as evidence in past cases. Further, reports were made public: the fact that they were also admissible was unlikely to be of critical inhibitory significance. Admissibility was unlikely to significantly affect the willingness of people to assist the AAIB (paras 79-86, 89-96).

Appeal dismissed

Counsel:
For the appellant: Robert Lawson QC, Timothy Marland
For the respondents: Michael Crane QC, John Kimbell
For the first intervener: Malcolm Sheehan
For the second intervener: Akhil Shah QC

Solicitors:
For the appellant: Clyde & Co LLP
For the respondents: Stewarts Law LLP
For the first intervener: Treasury Solicitor
For the second intervener: Holman Fenwick Willan

**LTL 13/3/2014 : [2015] QB 265 : [2014] 3 WLR 148 : [2014] 3 All ER 550 : [2014] CP Rep 30 : [2014] 1 CLC 316 : [2014] Inquest LR 135**

**SCIENCE RESEARCH COUNCIL V NASSE : LEYLAND CARS V VYAS (1979)**

**HL (Lord Wilberforce, Lord Salmon, Lord Edmund-Davies, Lord Fraser of Tullybelton, Lord Scarman) 01/11/1979**

CIVIL PROCEDURE - EMPLOYMENT

DISCOVERY : DISCRIMINATION : DOCUMENTS : PUBLIC INTEREST IMMUNITY : SEX DISCRIMINATION : CONFIDENTIAL DOCUMENTS : DISCOVERY OF CONFIDENTIAL REPORTS

**Two appeals in which appellants challenged refusal to disclose confidential reports.**

Two appeals against discharge of orders for discovery of confidential reports made on complaints of sex discrimination. The appellant in the first appeal, Nasse, was a married woman employed by the Council. She claimed she had been passed over for promotion because of her sex, marital status and her active trade unionism. The Council had annual detailed assessments on every employee which were confidential. The appellant claimed the disclosure of reports relating to two of her colleagues who had been promoted.

HELD: This was not a case of public interest immunity, but even in ordinary cases, the court had a discretion with regard to disclosure and in the exercise of that discretion could have regard to the issue of confidentiality, as part of the test of whether discovery was necessary for fairly disposing of the case. The Court of Appeal had rightly held that discovery should not have been ordered in either case.
Appeals dismissed and both cases remitted to the industrial tribunals for examination of the documents in the light of their Lordships' observations.

**: [1980] AC 1028 : [1979] 3 WLR 762 : [1979] 3 All ER 673 : [1979] ICR 921 : [1979] IRLR 465 : (1979) 123 SJ 768**

**DURHAM COUNTY COUNCIL v D (2012)**

[2012] EWCA Civ 1654

**CA (Civ Div) (Maurice Kay LJ, Munby LJ, Tomlinson LJ) 13/12/2012**

CIVIL PROCEDURE - LOCAL GOVERNMENT - CPR - ADMINISTRATION OF JUSTICE - FAMILY LAW - HUMAN RIGHTS

CHILD ABUSE : DISCLOSURE AND INSPECTION : LOCAL AUTHORITIES' POWERS AND DUTIES : PUBLIC INTEREST IMMUNITY : RESIDENTIAL CARE : PUBLIC AUTHORITY OBJECTING TO DISCLOSURE ON PUBLIC INTEREST GROUNDS : APPLICATION OF DATA PROTECTION ACT 1998 AND CPR : DATA PROTECTION ACT 1998 s.35, s.7(5), s.15, s.35(b), s.35(2)(a), Pt 2, s.1(2), s.7(9), s.7, s.1(4), s.7(1)(c) : CIVIL PROCEDURE RULES 1998 Pt 31, r.31.10(4), r.31.19(3), Pt 31 r.31.10(4), Pt 31 r.31.3(b), Pt 31 r.31.19(3), r.31.19(6)(a), Pt 31 r.31.19(6)(b), r.31.19(5), r.31.19(8), Pt 31 r.31.19(5), r.31.3, Pt 31 r.31.19(8), r.31.19, r.31.16, r.31.10(2), Pt 31 r.31.19(6)(a), r.31.19(1), Pt 31 r.31.10(2), Pt 31 r.31.19(1), (1), (b), r.31.19(6)(b) : EUROPEAN CONVENTION ON HUMAN RIGHTS 1950 art.6, art.8

**It was wrong to treat all cases in which a public authority sought exemption from a disclosure or inspection obligation on public interest grounds as being a case of public interest immunity in the strict sense. A court had to determine the issue by addressing the issue of relevance and then applying the appropriate balancing exercise under the CPR concerning the prejudice**

**to one party of being deprived of information against the prejudice to the third party which the disclosure would cause.**

The appellant local authority appealed a judge's decision to allow disclosure of unredacted documents in proceedings brought by the respondent (D) for damages in respect of assaults alleged to have been committed by staff at a young people's centre for which the local authority was responsible.

D had been a resident at the centre between 1980 and 1984. D's solicitors had written to the local authority intimating a claim and requesting sight of certain documents including the personnel files of members of staff against whom the allegations had been made. The letter referred to the Data Protection Act 1998, but a fee was not included and it more closely resembled a Pre-Action Protocol letter of claim. Some redacted documents were disclosed, but the local authority objected to disclosure of the personnel files. In the course of the instant proceedings, an order for redacted disclosure of those documents was made, although the application was erroneously approached on the basis that the governing regime was the 1998 Act. That order was successfully appealed and unredacted disclosure ordered.

HELD: It was misleading to refer to a duty to protect data as if it were a category of exemption from disclosure or inspection. The court was enabled and required under CPR Pt 31 to excuse disclosure or inspection on public interest grounds. In a case such as the instant one, it might be misleading to describe the issue as one of public interest immunity. The requisite balancing exercise, which depended upon the context of the particular litigation, was between a party's right to a fair trial at common law and pursuant to the European Convention on Human Rights 1950 art.6 and the rights of his opponent or a non-party to privacy or confidentiality which might most conveniently be protected by art.8. It was a distraction to start with the 1998 Act, as the Act itself acknowledged. A data controller was exempt under s.35 of the 1998 Act from the non-disclosure provisions where disclosure was required in the context of litigation. Effectively, the court was left to determine the issue by applying the appropriate balancing exercise under the CPR whereupon the court's decision impacted upon the operation of disclosure under the 1998 Act. Public interest immunity would arise in some contexts. However, it was wrong to treat all cases in which a public authority sought exemption from a disclosure or inspection obligation on public interest grounds as being a case of public interest immunity in the strict sense. In the instant case, the disputed documents were not social work records, but were not dissimilar in nature and should attract the same approach, R (A Child) (Care: Disclosure: Nature of Proceedings), Re [2002] 1 F.L.R. 755 considered. The approach required that (a) obligations in relation to disclosure and inspection arose only when the "relevance" test was satisfied. Relevance could include "train of enquiry" points which were not merely fishing expeditions. That was a matter of fact, degree and proportionality; (b) if the relevance test was satisfied, then it was for the party in possession of the document, or who would be adversely affected by its disclosure or inspection, to assert exemption from disclosure or inspection; (c) any ensuing dispute fell to be determined ultimately by a balancing exercise, having regard to the fair trial rights of the party seeking disclosure or inspection and the privacy or confidentiality rights of the other party and any person whose right might require protection. Consideration of competing Convention rights would generally be involved; the denial of disclosure or inspection was limited to circumstances where such denial was strictly necessary; (d) in some cases the balance might need to be struck by a limited or restricted order which respected a protected interest by such things as redaction. Again, the limitation had to satisfy the test of strict necessity. The judge should not have been distracted by the 1998 Act as if it imposed additional requirements. However, ultimately his approach addressed relevance and concluded with the balancing of "the prejudice to the applying party of being deprived of information against the prejudice to the third party as a result of the disclosure". He applied a test of strict necessity, although on the basis that D had satisfied the test, whereas it had been for the local authority to establish that it was strictly necessary not to disclose. Notwithstanding those issues, his approach was substantially correct and his conclusion unassailable (see paras 21-24 of judgment).

Appeal dismissed

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