

# RadcliffesLeBrasseur



## Healthcare Briefing

May 2009

### Disclosure of staff statements taken for SUI reports

#### The Freedom of Information Act 2000

The Information Tribunal has recently published its Decision in the case of *E.S. Galloway -v- Information Commissioner and the Central and North West London NHS Foundation Trust EA/2008/0036*. The Tribunal held that statements produced by staff to assist in the completion of a Serious Untoward Incident (SUI) investigation were not disclosable to the public under the provisions of the Freedom of Information Act 2000 (FOIA).

Pursuant to section 1 of the FOIA, members of the public and press can request disclosure of information (including SUI reports and accompanying statements) held by public bodies, and unless an exemption under the FOIA is applicable, disclosure should be made. As many of our readers will be aware, SUI investigations are carried out by both public and private bodies when serious incidents have occurred and tend to relate to health related episodes, for example sudden unexpected patient deaths. Their main aim is to investigate the incident with a view to learning lessons for the future.



*"...if staff were aware that their SUI statements may be disclosed to the public they would not engage fully in investigations and would be less candid and more cautious in giving vital evidence."*

#### Facts of the Case

Mrs Galloway (the Appellant) requested disclosure of staff witness statements held by Central and North West London NHS Foundation Trust (the Trust). The staff statements had been taken as part of an investigation into an incident that had occurred to her late husband, Mr Galloway, whilst he was being treated at one of the Trust's hospitals. The investigation focused on one aspect of Mr Galloway's care, specifically the action taken by staff both before and after an incident where he fell from his bed.

The Trust carried out a SUI investigation into the incident and the staff members involved were asked to provide statements of their recollections and involvement. The statements were used as part of the investigation and were summarised within the final report produced. The staff who provided statements were identified by name in the report and it is of particular importance that the report, when completed, was disclosed to the Appellant. In addition to disclosing the report, the Trust facilitated a number of meetings with the Appellant to try and assist in any questions or concerns she had about the Trust's care and treatment of her husband.

In March 2006 the Appellant wrote to the Trust and requested that they disclose, under the FOIA, full copies of the statements detailed within the final SUI report. The Trust refused to disclose the statements, relying on four exemptions under the FOIA; Section 31 (Law enforcement), Section 36 (Prejudice to Effective Conduct of Public Affairs), Section 40 (Personal Information) and finally, Section 41 (Information Provided in Confidence). Ultimately, the Trust were concerned that if the staff were aware that their statements could be disclosed to the public at large, including the press, then they would not engage fully in future investigations or would be more cautious in giving their evidence. The knock on effect of that would be that future investigations would be less effective which, in the Trust's view, did not serve the public interest.

The Appellant complained to the Information Commissioner about the Trust's refusal, and the Commissioner having considered the position issued a Decision Notice dated 17th March 2008 confirming that the staff statements should not be disclosed and that the exemption under Section 40 was fully engaged.

## Tribunal Decision

In April 2008 the Appellant appealed that Decision Notice to the Information Tribunal and it is on that appeal that the Tribunal has recently published its decision. The Tribunal, in a lengthy decision notice [1] agreed with the Trust's concerns and held that the exemptions under sections 31 (Law enforcement) and 36 (Prejudice to Effective Conduct of Public Affairs) were both engaged. The Tribunal agreed with the Trust that "...if staff were aware that their SUI statements may be disclosed to the public they would not engage fully in investigations and would be less candid and more cautious in giving vital evidence [2]."

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[1]  
[http://www.informationtribunal.gov.uk/DBFiles/Decision/i299/Galloway v IC & C&NW London NHS \(EA-2008-0036\) Decision 20-03-09.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i299/Galloway%20v%20IC%20&%20C&NW%20London%20NHS%20(EA-2008-0036)%20Decision%2020-03-09.pdf)

[2]E.S. Galloway -v- Information Tribunal and the Central and North West London NHS Foundation Trust EA/2008/0036 para. 109

## Conclusions

The Tribunal's decision confirmed that, where a request is received for disclosure of staff statements taken as part of an SUI investigation, the exemptions under Section 31 and 36 can potentially, successfully be relied upon. In addition to and in conjunction with their use, the decision also gave rise to a number of important practical points which could assist practitioners faced with similar circumstances. These points are noted below :

- If a disclosure under the FOIA is not going to be made, set out all possible exemptions at the outset.
- Provide a summary of any staff statements used, in the final SUI report produced [3].
- Where a SUI has occurred, provide the family with the opportunity to discuss their concerns and consider asking them to provide their own thoughts on specific questions they would like the SUI investigation to address [4].
- Carry out a full and thorough SUI investigation [5].
- Carefully consider whether the SUI report itself should be disclosed.

The decision in the *Galloway* case clearly has positive ramifications for public bodies who regularly carry out SUI investigations, and should our readers require further detail of the case an extended version of this briefing can be obtained by contacting: [marketing@rlb-law.com](mailto:marketing@rlb-law.com)

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[3]ibid para. 76

[4]ibid para. 79

[5]ibid para. 76

## Disclaimer

For more information on any of the matters mentioned in this briefing, please contact Oliver Donald - [oliver.donald@rlb-law.com](mailto:oliver.donald@rlb-law.com)

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