

MUCKAMORE ABBEY HOSPITAL INQUIRY
SITTING AT CORN EXCHANGE, CATHEDRAL QUARTER, BELFAST

RULING DELIVERED BY THE CHAIRPERSON
ON MONDAY, 5TH JUNE 2023 - DAY 47

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I N D E X

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1 RULING DELIVERED BY THE CHAIRPERSON

2
3 CHAIRPERSON: This is a determination relating to an
4 issue that has arisen in relation to section 21 and 22
5 of the Inquiries Act with reference to a patient
6 document request made to the BHSCT. 11:34

7
8 So the first headline is Introduction to the Issue.
9 This is a public Inquiry ordered to be instituted by
10 the Minister For Health for Northern Ireland under 11:34
11 section 1 of the Inquiries Act 2005, to look into the
12 abuse of patients at Muckamore Abbey Hospital. The
13 hospital is under the management of the Belfast Health
14 and Social Care Trust which holds the great majority of
15 the relevant patient notes. 11:35

16
17 The terms of reference required The Inquiry to look
18 into all the circumstances and reasons, both direct and
19 indirect, for any abuse which took place, and to make
20 recommendations to avoid such abuse happening again 11:35
21 there or elsewhere in this jurisdiction.

22
23 In pursuance of its task, The Inquiry issued to the
24 Trust a request to produce a series of patient notes.
25 The Trust, which says it wishes to produce the 11:35
26 requested notes, claims that the notices and directions
27 issued by The Inquiry are insufficient to allow it to
28 comply, and it seeks to have proceedings issued in the
29 High Court. In effect The Trust ask that I revoke the

1 notice and concede that the Trust must seek the
2 authority of the High Court.

3
4 Although I sit here to evidence with a Panel, as Chair
5 I am responsible for making all decisions as to the 11:36
6 procedure and conduct of The Inquiry and for issuing
7 any notices or directions in pursuance of the functions
8 of The Inquiry. This determination is therefore made
9 by me alone as Chair of The Inquiry.

10
11 Background:

12 The Inquiry started with opening statements on Monday,
13 the 6th of June last year, and evidence was first heard
14 on the 28th of June. The first stage of evidence
15 between June and December last year related to 11:36
16 witnesses who were either patients or relatives and
17 carers of patients at the hospital. Some 47 witnesses
18 gave evidence either orally or by way of their written
19 statement being read.

20
21 The approach of the Inquiry to obtaining patient notes,
22 which is a necessary part of the examination by The
23 Inquiry, has been often stated publicly and in
24 correspondence. By way of example, in a statement
25 issued on the 23rd of November 2022, I said this: 11:37
26

27 "On the question of documents I have repeatedly said
28 that if we wait for every document or note relating to
29 every patient involved in this Inquiry not only would

1 the Inquiry be very significantly delayed but The
2 Inquiry would be swamped with material, only a fraction
3 of which may in fact be required by The Inquiry. There
4 is a danger of losing sight of the wood for the trees.
5 Some patients will have thousands of pages of notes and 11:37
6 it will be easy to become overwhelmed with paperwork.
7 My preferred course is to make targeted requests to the
8 Trust and to other organisations, once we have analysed
9 the evidence received by The Inquiry."

10
11 Although in general terms The Inquiry has proceeded by
12 way of inviting document providers and witnesses to
13 co-operate voluntarily with the Inquiry, it was
14 recognised that certain organisations would be assisted
15 by a requirement to provide documentation by way of a 11:38
16 notice under section 21 of the Inquiries Act. In
17 protocol No.1, entitled Protocol on the Production and
18 Receipt of Documents, issued on the 10th November 2021,
19 it was stated at paragraph 18 as follows:

20
21 "The Chair will exercise his powers under Section 21 to
22 obtain relevant documents. Where, for example, a
23 request is refused, the response to a request is
24 incomplete, there's been no response to a request by a
25 stated deadline, or a delay is requested, which appears 11:38
26 to the Chair not to be reasonable, some DPs..."

27
28 - and that stood for document providers:
29

1 "...may be facilitated in their production of documents
2 by receipt of a Section 21 notice, whether in general
3 terms or in respect of certain documents or categories
4 of documents. Such DPs should alert the solicitor to
5 the Inquiry promptly."

11:39

6
7 By letter dated the 7th of December 2021, The Trust
8 wrote to the Inquiry in relation to the extensive
9 documentation held by it. The author of the letter,
10 the Acting Assistant Chief Legal Adviser wrote:

11:39

11
12 "The Belfast Trust anticipates that the Inquiry will
13 appreciate that the Belfast Trust holds an extensive
14 volume of highly sensitive and confidential material.
15 Further, the Belfast Trust is bound by the terms of
16 data protection legislation. In the circumstances the
17 Chairman will understand when the Belfast Trust says it
18 would prefer to receive a general Section 21 notice
19 requiring the Belfast Trust to produce to the Inquiry
20 any material relevant to the Inquiry's terms of
21 reference. This would then provide legal protection to
22 the Belfast Trust to provide material."

11:39

11:39

23
24 The letter went on:

25
26 "This observation should not be seen as any indication
27 of a lack of co-operation on the part of the Belfast
28 Trust but rather to ensure that there is no impediment
29 to the provision of material to the Inquiry."

11:40

1 In January 2022, I issued a notice to the Trust under
2 Section 21, which was amended on the 10th of February
3 2022. The notice directed The Trust to provide any
4 documents under their custody and control, relevant to
5 the Inquiry's terms of reference, on or before the date 11:40
6 specified in any request to produce documents under
7 Rule 9 of the Inquiry rules.

8
9 It is worth noting that the Section 21 notice required
10 any issue over production of the documents to be raised 11:40
11 promptly, and a letter contained the following
12 direction:

13
14 "If you wish to make a claim under Section 21(4) of The
15 Inquiries Act that you are unable to comply with the 11:41
16 request to produce documents to the Inquiry served
17 pursuant to this notice, or that it's not reasonable in
18 all the circumstances to require you to comply with a
19 request to produce documents to the Inquiry served
20 pursuant to this notice, you must submit any such claim 11:41
21 in writing to the solicitor to the Inquiry providing
22 reasons for any such claim within 14 days of receipt of
23 a notice to produce documents to the Inquiry served
24 pursuant to this notice."

25 11:41
26 Since service of that notice The Trust has provided The
27 Inquiry with unsolicited confidential material,
28 including patient specific material not covered by the
29 notice.

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On 25th of August 2022, The Inquiry wrote to the Trust requesting any policy, protocol, guideline or practice in respect of weighing and recording and monitoring the weight of patients. The request made clear that the Inquiry was not requesting at that stage specific records for individual patients.

11:41

In response, The Trust, by letter dated 24th of February 2023, provided by way of example a summary of weight management relating to a specific patient whose notes, which were also provided, were used as an example of the material held by The Trust. The notes alone comprised 1,898 pages.

11:42

In relation to that correspondence, The Inquiry wrote on the 8th of March this year reminding The Trust that the letter of the 25th of August specifically stated that the Inquiry was not at that stage seeking documentation relating to individual patients, and the furnished material was not accordingly being provided to the Panel.

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11:42

On the 2nd of March 2023, the solicitors to the Inquiry had, however, written to the Trust enclosing a document request. What was termed a "patient document request", or as we've now called it a PDR, issued under Rule 9 of the Inquiry rules. This request was for a selection of patient notes and documentation in pursuance of the

11:42

1 Inquiry's policy at making targeted requests. This
2 request was governed by the original Section 21 notice
3 referred to above, and the target date for production
4 of the requested material was the 21st of April this
5 year.

11:43

6
7 On the 21st of April The Trust wrote to the Inquiry
8 indicating that they would write soon asking for the
9 clarification of certain matters that bear on what they
10 described as the ability of The Trust to comply with a
11 request, and asking for an extension of time.

11:43

12
13 It has been a feature of correspondence with the Trust
14 that despite The Inquiry setting time limits the
15 request for an extension comes on the very day the time
16 limit expires. I mention in passing that while
17 recognising that the Trust is currently having to meet
18 a high administrative burden, I don't find that
19 approach courteous or helpful.

11:43

20
21 On the 28th of April the solicitor to the Inquiry
22 responded, reminding The Trust that the Rule 9 request
23 was issued in accordance with Rule 9 and Section 21 and
24 that the Inquiry required a substantive response to
25 that letter by the 5th of May this year.

11:44

26
27 On the 5th of May The Trust wrote to the solicitor to
28 the Inquiry raising, for the first time, and outside
29 the time limit, an issue in relation to providing the

1 notes under Section 21 of the Act and raising arguments
2 under Section 22. The letter stated that the Trust
3 could not be required to produce or provide any
4 documents which it could not be required to provide if
5 the proceedings of The Inquiry were civil proceedings 11:44
6 in a court in Northern Ireland. The author suggested
7 that in each case The Trust would have to assess the
8 patient's capacity to give consent and where
9 appropriate seek consent, or apply to the High Court
10 for permission to provide the material to the Inquiry. 11:45
11 The letter asked for The Inquiry's co-operation and
12 support for a High Court application.

13
14 On the 9th of May, the solicitor to the Inquiry
15 responded on my behalf and made it clear that the 11:45
16 Section 21 notice provided a clear and unequivocal
17 basis for the production of the material, and that the
18 proposition that the Trust could not be required to
19 produce the documents sought in civil proceedings was
20 "unsustainable". 11:45

21
22 Further correspondence has passed between the parties.
23 But it is sufficient to state that written submissions
24 were received on 22nd of May seeking to justify The
25 Trust's position and requesting an oral hearing so that 11:45
26 further submissions could be made. Although I felt
27 that this could have been fully dealt with in written
28 submissions, I granted that request for an oral
29 hearing.

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This is a public Inquiry, and in general terms the public and any interested party is entitled to know, not only about any evidence being given to the Inquiry but also any legal submissions being made which might affect the conduct of The Inquiry.

11:46

Accordingly, I listed an oral hearing for Thursday the 1st of June and heard submissions from Mr. Aiken KC on behalf of The Trust, and received brief submissions from Mr. Doran KC, senior counsel to the Inquiry.

11:46

Argument:

Section 21 of the Inquiries Act provides a power to the Chair of a public inquiry to issue a notice directing any individual or organisation to deliver up to the Inquiry any material which is relevant to its terms of reference. It is for The Inquiry to make that determination, and there are very few exceptions when the recipient of such a notice can refuse to comply. Section 21(4) provides that a claim by a Person (a) that is unable to comply with a notice or, (b) that it is not reasonable in all the circumstances to require him to comply with a notice, is to be determined by the Chair, who can revoke or vary the notice.

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Mr. Aiken does not seek to argue that Section 21(4)(b) is in play. Instead he focuses his argument on Section 21(4)(a) and Section 22(1)(a). He suggested that the

1 Trust is unable to comply as the Section 21 notice does
2 not provide sufficient legal authority for production
3 of the material by reason of the application of Section
4 22(1)(a).

5
6 Section 22 is headed "Privileged Information", et
7 cetera, and subsection (1) states that:

8
9 "A person may not under Section 21 be required to
10 produce any evidence or document if:

- 11 (a) he could not be required to do so if the
12 proceedings of the Inquiry were civil proceedings in a
13 court in the relevant part of the United Kingdom or;
14 (b) the requirement would be incompatible with a
15 retained EU obligation."5

16
17 The principal authority upon which the Trust's argument
18 is based is that of John O'Hara -v- Belfast Health and
19 Social Care Trust [2012] NIQB 75. This related to the
20 public inquiry into Hyponatraemia related deaths of
21 children in Northern Ireland. It was not set up under
22 the Inquiries Act. Its statutory powers flowed from
23 the Interpretation Act (Northern Ireland) 1954, which
24 had a provision governing production of materials in
25 different terms to the provisions in the Inquiries Act.

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27 The exception to the power to require the production of
28 documents under the Interpretation Act was drafted as
29 follows:

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"Nothing in this paragraph shall empower the person appointed to hold The Inquiry to require any person to produce any book or document or to answer any question which he would be entitled on the ground of privilege or otherwise to refuse to produce or answer if The Inquiry were proceeding in a court of law."

11:49

Under the Interpretation Act the focus is on the recipient of the notice, and the basis upon which they would be entitled to refuse production is upon the basis that the material is privileged or otherwise, which includes some other basis for refusal.

11:49

Mr. Justice Gillen, as he was, in that case determined that the provision of material in breach of Article 8 would come within the definition of "otherwise", and so a court order over and above the order of the Chair of that Inquiry was required to produce the material.

11:49

Mr. Aiken has also referred to a case arising from the Redfern Inquiry, which examined the removal of tissue from the bodies of individuals who had worked in the nuclear industry at Sellafield. That Inquiry was not set up under the Inquiries Act. In order to obtain medical records, application was made to the Queens Bench division where Mr. Justice Fossett conducted an exercise of weighing the balance between the public interest in determining what had happened against the

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11:50

1 public interest in maintaining the confidentiality of
2 medical records. For reasons that I will come to,
3 neither decision has been of much assistance to me.
4 Each is clearly and obviously distinguishable.

11:51

5
6 Mr. Aiken also raises the argument that Section 22
7 requires that a balancing exercise is conducted, not by
8 The Inquiry but by the High Court. The effect of his
9 submission is that in every case where there was a duty
10 of confidentiality in documents which a public Inquiry 11:51
11 wanted to see, the public Inquiry would need to seek an
12 order from the High Court which would conduct a
13 balancing exercise on its behalf.

14
15 Finally, Mr. Aiken sought to draw a distinction between 11:51
16 what he described as confidential material which he
17 said fell into one category, and documents in relation
18 to which there was a duty of confidentiality, which he
19 suggested fell into another. If such a distinction
20 exists, which I was unpersuaded, it is unnecessary to 11:51
21 make it, given the wording of section 22.

22
23 I also received short and helpful submissions from
24 counsel to the Inquiry. The role of counsel to the
25 Inquiry on such occasions is to ensure I am fully 11:52
26 informed in relation to the relevant law on the topic
27 under discussion and to advise me. It is merely
28 advice. I do not have to follow it. The decision in
29 all such cases is solely mine.

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I do not need to set out Mr. Doran's submissions here. He takes the opposing view to Mr. Aiken and sets out a number of propositions as to why he said Mr. Aiken's submissions are flawed.

11:52

In his view, both the O'Hara and Redfern cases can be clearly distinguished. Helpfully he drew my attention to the explanatory notes to the Act, which I will refer to below.

11:52

I am grateful to both counsel for setting out their opposing arguments so clearly.

Consideration:

11:52

I deal first with section 21(4)(b) which allows for the recipient of a section 21 notice to claim that compliance for such a notice will, in the circumstances, be unreasonable. Such an application might be made, for example, where a request is made for documents, the relevance of which is said to be without the terms of reference, or the request is so wide as to be unduly burdensome, or in breach of Article 8, to which I will turn, as not being proportionate to the Inquiry's purpose.

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11:53

As a public Inquiry, this Inquiry is obliged to act in a manner compatible with convention rights under the European Convention on Human Rights and under the Human

1 Rights Act 1998. Article 8 ECHR, which protects the
2 right of an individual to a private life, is a
3 qualified right. An interference with an individual's
4 right to privacy must be in accordance with the law and
5 it must be necessary in a democratic society in the 11:53
6 interests of public safety, the protection of health
7 and morals, or the protection of the rights and
8 freedoms of others.

9
10 This is a public Inquiry set up in order to investigate 11:54
11 abuse at a large mental health and learning disability
12 hospital, and to make recommendations designed to
13 prevent such abuse happening again at any similar
14 establishment.

15 11:54
16 The request for patient notes has been made in a
17 careful and proportionate manner ensuring, as far as
18 possible, within the confines of a public Inquiry, the
19 continued protection of the privacy of the patients to
20 whom the requests are relevant. All patient names have 11:54
21 been given a cipher, the only persons entitled to the
22 key to that cipher are Core Participants to the Inquiry
23 who have signed a confidentiality undertaking.

24
25 I am satisfied that the request does not breach 11:54
26 individual rights under Article 8. It is a
27 proportionate and lawful request with careful measures
28 taken to continue to protect people's identities, which
29 will continue during the Inquiry.

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I would say in passing that if The Inquiry had adopted the stance advocated by some, including The Trust, of directing the production of all the patient notes for every patient who came within it's purview, there might then have been a stronger argument that such request was not proportionate to the Inquiry's purpose and might fall foul of Article 8, but that is not the approach that The Inquiry has adopted.

11:55

The Trust has correctly, in my view, not sought to make any argument under section 21(4)(b).

11:55

Dealing very briefly with the other sections as subsections to sections 21 and 22, the reference in section 22(1)(b) to a retained EU obligation is not a direct reference to the European Convention on Human Rights or any article of that convention relating to privacy. Section 22(1)(b) is not engaged. There is no argument that it is relevant and so I can put it to one side.

11:55

11:55

Section 22(2) relates to material withheld on grounds of public interest immunity, which is not relevant to the material required here. Section 22(2) is therefore not engaged.

11:56

I turn to the argument submitted by The Trust, which is under 21(4)(a) and section 22(1)(a). Section 22

1 provides that a person may not under section 21 be
2 required to produce a document which he couldn't be
3 required to produce if the proceedings of the Inquiry
4 were civil proceedings in a court in the relevant part
5 of the United Kingdom.

11:56

6
7 The central question, I might say the only question for
8 these purposes, is whether the recipient of the section
9 21 notice could be required to produce the information
10 or documentation covered by the notice if the
11 proceedings of The Inquiry were civil proceedings in a
12 court.

11:56

13
14 I note that there are two important differences between
15 section 22 and the exception to the Interpretation Act
16 provision which gave rise to the issue in the case of
17 O'Hara. Section 22 does not speak of a right or
18 refusal, nor is its ambit so wide it focuses instead
19 upon the power of the civil court to require that
20 documents are produced.

11:57

11:57

21
22 The Inquiries Act 2005 was designed to give public
23 inquiries powerful tools to ensure that the business of
24 the Inquiry could be properly and effectively
25 conducted. The drafters used simple direct and clear
26 wording to invest those powers. References to cases
27 decided by inquiries not held under the Act are of
28 little assistance to the interpretation of that
29 legislation.

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The two authorities upon which Mr. Aiken has relied to support his position have nothing to do with the Inquiries Act.

1. Lewis -v- Secretary of State for Health and Michael Redfern related to a private Inquiry and gives no assistance in relation to the interpretation of the Inquiries Act. 11:58

The other, the O'Hara case, was an inquiry which was invested with powers under the Interpretation Act Northern Ireland 1954. The wording that of provision was different in important respects from the wording in section 22, which is simpler, more concise, and provides greater powers than had existed before. 11:58

The Trust has not been able to find a single authority which supports their submission under section 22 of The Inquiries Act which signals to me at this point, unsurprisingly in my view, has never found its way into case law since the promulgation of the Act. 11:58

There is some support for Mr. Aiken's argument in one of the legal text books, Beer on Public Inquiries, in Chapter 5 at 5.59, which allides principles of privilege with the principles of duties of confidence. That is commentary without the benefit of any common law support. It seems to me, with respect to the authors, that the commentary is erroneous and should 11:58

1 not be followed. The authors of the alternative
2 authoritative text book, The Practical Guide to Public
3 Inquiries, by Mitchell, Jones & others, appears to take
4 a different view. In their short section on the
5 interpretation of section 22 they discuss only 11:59
6 questions of privilege and not confidentiality.
7

8 Finally, I've considered briefly the explanatory notes
9 in relation to both sections 21 and 22. The notes in
10 relation to the use of Section 21 uses the following 11:59
11 example as to when it may be necessary to issue such a
12 notice:

13
14 A person is willing to comply with an in formal request
15 but is worried about the possible consequences of 11:59
16 disclosure. For example, if disclosure were to break
17 confidentiality agreements. And, therefore, asks the
18 chairman to issue a formal notice.
19

20 In relation to section 22, the explanatory notes reveal 12:00
21 this. Section 22(1) ensures that witnesses before
22 inquiries will have the same privileges in relation to
23 requests for information as witnesses in civil
24 proceedings. In particular, this means that a witness
25 will be able to refuse to provide evidence: 12:00

- 26 1. Because it's covered by legal professional
27 privilege;
- 28 2. Because it might incriminate him or his spouse or
29 civil partner by virtue of section 84 of the Civil

1 Partnership Act 2004, or;

2 3. Because it relates to what has taken place in
3 Parliament.

4
5 Neither of these explanatory notes provides any support 12:00
6 for The Trust's position.

7
8 At the end of the day, having read the relevant
9 sections of the statute and the relevant authorities,
10 gleaned what assistance I can from the text books, and 12:01
11 having listened from submissions, I must determine this
12 application as to whether the original notice requires
13 variation or quashing.

14
15 Determination: 12:01
16 The position of The Trust seems to me to be unfounded
17 and wrong in law. There is no common law support for
18 it.

19
20 Section 21 of the Inquiries Act 2005 is specifically 12:01
21 designed to give the Chair of a Public Inquiry the
22 power to require individuals and organisations to hand
23 over material relevant to the terms of reference of the
24 Inquiry. The organisation or individual must hand the
25 material over with the very limited exceptions provided 12:01
26 for in section 22.

27
28 Section 22 ensures that a Public Inquiry has in this
29 respect the same but no greater powers than those of

1 the High Court. Thus a public Inquiry cannot direct
2 the provision of material which the High Court could
3 not. There are very limited categories of material
4 that the High Court cannot insist upon being provided.
5 One category is material which is privileged, another 12:02
6 is material which might incriminate the maker. This
7 material does not fall into either of those two
8 categories.

9
10 There may be other material that the High Court cannot 12:02
11 order to be produced, but I am quite satisfied that the
12 section 22 has no applicability to confidential
13 material, such as patient notes, which is what this
14 application is all about. Section 22 should be
15 interpreted as it is written. The High Court has power 12:02
16 to require the production of such material and,
17 accordingly, so does the Chair of a public Inquiry.

18
19 Stepping back from the immediate argument, I have also
20 considered more generally whether the notice is 12:02
21 compliant with Article 8. I am satisfied that for the
22 reasons given above, it is a proportionate and lawful
23 request. I have again considered the public interest
24 in the material being provided, having regard to the
25 likely importance of the material in the context of the 12:03
26 Inquiry's work. I am satisfied that it is in the
27 public interest to require the material to be produced.

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29 The section 21 notice, therefore, does not require

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amendment, nor does the Rule 9 request.

The procedure to enforce the section 21 notice is by referral to the High Court under section 36 of the Act. Unless The Trust indicates its intention to comply with the order then I will issue such referral. 12:03

All right. Well can I thank you very much everybody for your attendance. I think tomorrow we're sitting at 10 o'clock? 12:03

MR. DORAN: Yes, indeed, Chair. Two witnesses tomorrow. Dr. Dougherty and Marie Heaney for The Trust on Module 2.

CHAIRPERSON: Okay. Well we look forward to that. Thank you very much everybody. 12:03

THE INQUIRY ADJOURNED TO TUESDAY, 6TH JUNE 2023 AT 10:00 A.M.