FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Information Rights

Tribunal Reference:	EA/2014/0119
Appellant:	John Illingworth
Respondent:	The Information Commissioner
Second Respondent:	NHS England
Judge:	NJ Warren
Member:	P Taylor
Member:	J Nelson
Hearing Date:	22 September 2014
Decision Date:	14 November 2014

DECISION NOTICE

1. In Spring 2013 there was a controversial temporary closure of the NHS children's cardiac surgery unit at Leeds. There was a successful application for judicial review indicating flaws in the information upon which the closure was based. Shortly after the unit reopened, Mr Illingworth, a local councillor who also held responsibilities within the Leeds NHS, made a request for information under the Freedom of Information Act (FOIA). The request, which was dated 8 June 2013 was directed to NHS England and read as follows:-

> "Please can I have copies of all the email messages and reports sent or received by Sir Bruce Keogh in connection with the Leeds teaching hospital's NHS Trust from 1 March 2013 to the present day? I would prefer electronic rather than paper copies where possible."

2. The request created a huge amount of work for NHS England who say that, on reflection, they should perhaps have applied the costs limit. There was also the task

of redaction, the cost of which cannot be taken into account in respect of the costs limit. In the end, they now rely on redactions under three heads. The first is non controversial. References to Mr Illingworth himself have been removed under Section 40(1) FOIA because they are his personal data. The second set of redactions is made under Section 40(2) FOIA because they involve the personal data of over 100 others, many of whom do not work for NHS England. This aspect of the redactions is controversial. The third set of redactions is based on Section 41 FOIA which relates to information received in confidence. They concern allegations relating to fitness to practice and are no longer contested in this appeal.

3. Mr Illingworth complained to the Information Commissioner (ICO) about the way NHS England had handled his request for information. To some extent, NHS England's position shifted in the course of the ICO's investigation. In the end the only further steps which the ICO required NHS England to take were to reveal two emails previously withheld under Section 41 FOIA; they had been wrongly included because the authors were NHS England staff.

4. Mr Illingworth appealed to the Tribunal against the ICO decision notice.

5. We heard the appeal at Leeds on 22 September. Mr Illingworth appeared, as did Mr Whitehill who is the information manager for NHS England. The ICO did not trouble to attend.

6. At the hearing Mr Illingworth narrowed his focus. He no longer argued about the personal data of families who had complained about treatment. He conceded that the tribunal could not be expected to read through all the material and make an individual decision in respect of each redaction. He also accepted that phone numbers should be redacted. He said that what he wanted the Tribunal to do was as follows:-

   (a) Rule that the employer or host name appearing on the email addresses was not personal information at all.

   (b) Rule that there has been too much redaction. This he intended to demonstrate by showing that the present redactions were inconsistent and flawed. His

> proposed solution was that the Tribunal should proceed as suggested in paras 18 and 20 of his written submission dated 22 September 2014. In other words, any name redacted more than three times should be disclosed. The Tribunal was free to choose some other cut off point if it so desired.

This he stated was all that he was asking for.

7. By taking us through examples given in paras 15, 16 and 17 of his written submission Mr Illingworth was indeed able to demonstrate to us a number of inconsistencies in the redaction. Perhaps the most startling example is to be found at pages 167 and 179 of the bundle. The same email appears twice as part of two different chains. In one version the sender's name is redacted but the recipient's is not; in the other version the reverse is true. In our judgement, however, if a public authority is given such a massive task of redaction these are examples of just the sort of inconsistency which will inevitably occur.

8. Mr Illingworth was also able to make a rational case for some of the redacted names being probably senior figures rather than junior staff.

9. Before reaching our conclusion on this appeal we consider it necessary to say something about the nature of the information request. Whilst Mr Illingworth concedes that it would not be reasonable to expect the Tribunal to read through all the material and make an individual decision in respect of each redaction, this is precisely the burden which his request imposed upon NHS England and, by implication, on the ICO. We accept Mr Whitehill's statement that enormous NHS resources have been spent in meeting this request. First, staff had to go through Sir Bruce Keogh's inbox and outbox for a period of three months to separate out those email messages which related to Leeds. This produced 1100 pages of raw material, supplied to the Tribunal as a "closed bundle" but not in fact examined by us. In the course of dealing with redactions NHS England approached no less than 70 individuals, many working for other organisations, to ask whether they consented to disclosure.

10. We doubt very much whether this sort of request, involving surveillance of an individual public servant, is of a type envisaged by FOIA. It is the equivalent of saying that you wish to be seated at the member of staff's desk, given their passwords, and be allowed to browse through their work. By its very nature, it imposes a huge risk on the public authority as data controller. Human error, exposing personal data to the risk of misuse, seems inevitable. In our judgement, a request for information which really amounts to "I want to see everything that is inside that box" does not satisfy the requirement of Section 8 FOIA to describe the information which is sought.

11. Here, the request asks for the public authority to sift the contents of the box. As we have indicated the costs involved in doing this, though not the costs of redaction, may breach the costs limit under Section 12 FOIA. It is also possible that the expense and time needed to redact properly can of itself impose such a burden on the authority as to make the request vexatious.

12. We would add another concern. A request in this form demands information about every hour of an employee's working day. As such the information, although work related, may amount to a set of the employee's personal data in respect of which the public authority will have duties as data controller, including the duty to consider Section 40(2) FOIA in respect of the employee.

13. Turning to Mr Illingworth's point about senior and junior employees, we accept the rationality of some of the deductions he has made from the disclosed material. It seems to us, however, that this is to start at the wrong place. As the Supreme Court recently pointed out in South Lanarkshire Council v The Scottish Information Commissioner [2013] UKSC 55, FOIA does not relieve the public authority from its obligations as data controller in respect of personal data. A right to information under FOIA is not a right which trumps rights to privacy under the Data Protection Act.

14. NHS England, following perhaps common practice, has drawn a distinction in its redactions between senior and junior members of staff based on the idea that junior

members of staff have a higher expectation of their personal data not being disclosed.

15. However, senior members of staff have rights under the Data Protection Act too. It seems to us to be preferable to start with the question whether disclosure of personal data is lawful.

16. The answer to this question depends upon whether disclosure, which is a form of processing of data, would breach the data protection principles. Unless the special protection afforded to sensitive personal data applies, in most cases, including this one, this will involve asking whether the information requester can point to some legitimate interest which makes disclosure of the data necessary. (This is a paraphrase for the purposes of this case of the first part of Condition 6 Schedule 2 Data Protection Act. Even if this is established it is then necessary to consider whether disclosure is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.)

17. We therefore asked Mr Illingworth what extra assistance he or anyone else might derive from the additional disclosure of the personal data. Mr Illingworth was unable, in our judgment, to point to any practical benefit. It follows, in our judgment, that there is no legitimate interest which renders the disclosure of personal data necessary in this case. Nor are there any other grounds on which this processing of personal data is permitted.

18. To answer then the points on which Mr Illingworth asked us to rule:-

    (a) The whole email address of a person is their personal data, even if it is a work email address.

    (b) It would be unlawful for a data controller to accept that the criterion for processing personal data by disclosure should be that a person's name appears three times or more. On the facts of this case there is no legitimate interest making the disclosure of personal data necessary.

19. In any event, if we are wrong in any of this reasoning, we would not, in the exercise of our discretion, direct that NHS England take any further steps. It would be entirely unreasonable to expect them to expend more resources on the request than they already have.

20. For these reasons the appeal fails.

NJ Warren
Chamber President
Dated 14 November 2014