



ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50538242

Dated: 8th. September, 2014

Appeal No. EA/2014/0242

Appellant: William Stevenson ("WS")

Respondent: The Information Commissioner ("the ICO")

**Before
David Farrer Q.C.
Judge**

and

**Paul Taylor
and
Jean Nelson
Tribunal Members**

Date of Decision: 24th. March, 2015

Date of Promulgation: 31 March 2015

Mr. Stevenson appeared in person

The ICO did not appear but made written submissions.

Subject matter: FOIA s.1(1)(a)

Whether Monitor, a public authority, held the requested information.

Decision of the First - Tier Tribunal

The Tribunal concludes that, on a balance of probabilities, Monitor did not hold the requested information at the date of the request.

It therefore dismisses the appeal.

Dated this 24th. day of March, 2015

David Farrer Q.C.

Judge

[Signed on original]

REASONS FOR DECISION

Introduction

1. This introduction should be read in conjunction with the introduction to the decision in EA/2014/0245 which arises from the identical request made by this appellant to University Hospitals of Morecambe Bay NHS Trust (“UHMBT”).
2. This appeal arises indirectly from -
 - (i) the tragic history of gross failures in maternity services at UHMBT in the period 2004 - 2011 resulting in the avoidable deaths of babies and mothers and
 - (ii) the supervision and scrutiny of UHMBT by the regulator of clinical standards, the Care Quality Commission (“the CQC”) and by Monitor, the independent authority charged with the authorisation of NHS Trusts as Foundation Trusts and their subsequent monitoring and regulation.
3. Monitor was established by statute in 2004 and oversaw the process for UHMBT’s authorisation as a Foundation Trust (“FT”) in 2011, following the suspension of an earlier FT assessment process in 2009 due to concerns over a significant number of serious untoward incidents in hospitals within UHMBT.
4. Similar requests for information were made by SW simultaneously to all three authorities and give rise to three appeals which the Tribunal heard together but which require separate consideration and decisions. This decision relates to the request to Monitor.
5. As is well known, the deaths and their aftermath were investigated by Dr. Bill Kirkup. His report (“Kirkup”) was published shortly after these appeals were heard. A brief summary of certain of his findings appears in the introduction to EA/2014/0245.
6. Monitor’s primary responsibilities related to the governance and financial stability of trusts seeking Foundation status and the maintenance of the standards required for au-

thorisation after that status had been achieved. It is apparent that, in resuming the FT assessment and licensing UHMBT as an FT, Monitor relied to a significant degree on self assessment by UHMBT and on assurances from the CQC and the Strategic Health Authority that clinical governance had improved. Kirkup observed that there was a circularity in the way in which each of these authorities relied on the others in its assessment of UHMBT's governance and clinical standards. In the case of Monitor, he concluded that its systems for assessment were inadequate in 2010 - 2011. They were changed, following a critical "lessons learned" exercise for which Monitor commissioned KPMG. Kirkup also credited Monitor with drawing attention to particular failings within UHMBT and accepted that one important report was never shown to its representatives.

7. We include this brief summary of Monitor's role and possible failings because, as with the other two authorities to which WS addressed the request in these appeals, he makes grave accusations of bad faith and impropriety which, he says, in this appeal, lie behind its claim that it did not hold the requested information. Whilst Kirkup's conclusions are not an answer to his case, nor indeed evidence in this appeal, it is right to say that they contain no suggestion that Monitor colluded in a deceitful concealment of what was taking place within UHMBT or any other kind of misconduct. The Tribunal did not, therefore, see any need to reconvene this appeal to allow fresh argument or evidence in the light of the contents of the Kirkup report.

The Request

8. On 17th. March, 2014 WS made the same request to UHMBT, the CQC and Monitor. The text is lengthy but the scope was clear. Following a successful appeal to the Tribunal (EA/2011/0119) WS had obtained correspondence dating from May and June 2010 between Tony Halsall, then Chief Executive of UHMBT and Janet Soo - Chung, Chief Executive of North Lancashire Teaching Primary Care Trust ("NLTPCT"). That correspondence ("the Halsall letters") contained several references to a future "Board to Board meeting between UHMBT and NLTPCT", as did a report prepared for a meeting of the NLTPCT on 26th. May, 2010. The request giving rise to this ap-

peal was evidently made because it did not fall within the scope of a request directed to NLTPCT which was the subject of a decision by the Tribunal on 30th. June, 2014.

9. The request was for “*the full text of documents, emails and calendar/diary entries referring to this Board to Board meeting*” other than the Halsall letters themselves. WS added a detailed definition of “full text” as applied to emails. Nothing hinges on the precise formulation.
10. Monitor responded on 4th. April, 2014, stating that it did not hold such information. It maintained that response following an internal review.

The complaint to the ICO

11. WS complained to the ICO on 9th. May, 2014.
12. The ICO’s investigation revealed that Monitor claimed to have conducted preliminary electronic searches in its IT network, including documents from the original assessment of UHMBT’s 2009 application to become an FT and the resumed assessment in 2010. The only documents found were the Halsall letters themselves. Inquiries had been addressed to relevant employees for searches of their emails at the relevant time. This likewise produced further copies of the Halsall letters but nothing more. The internal review prompted a search of a further folder using such search terms as “Board”, “Board to Board”, “Halsall” and “Soo Chung”. In response to the ICO’s investigation, Monitor further searched the records of FOIA requests held by its Legal Services Directorate.
13. These searches, which the DN judged to be thorough, captured nothing within the scope of the request. The ICO accepted that Monitor had no business reason to hold the information, since it would take no part in such a Board to Board meeting nor necessarily expect to receive records of it, though it was possible where it was assessing a Trust for FT purposes.

14. The DN therefore found, on a balance of probabilities, that Monitor did not hold the requested information so that FOIA s.1(1)(a) was not engaged. He upheld Monitor's claim. The appellant appealed to the Tribunal.

The appeal

15. WS advanced similar grounds of appeal as in the other two appeals. He stressed the importance of the Halsall letters and of the Board to Board meeting, which, as it turned out, never took place. Whether the letters were really as central to this unhappy history as he claims may be questionable. They receive one very brief passing reference in the Kirkup report at 5.25, where a comment is made as to Mr. Halsall's angry response to a letter from Ms. Soo - Chung. They contain nothing of which either authority denied knowledge. WS further argued that Monitor glossed over its failures in relation the FT assessment and colluded with KPMG to hide them. It had undertaken sham searches and probably deleted responsive documents, partly in collaboration with the CQC. He directed sharp criticism against the ICO, which has little bearing on our task of determining whether Monitor held this material. Much of the attached documentation was concerned with issues of clinical governance and the content of earlier reports, which were significant to Kirkup but far removed from the narrow question posed to the Tribunal, namely - "Apart from the Halsall letters, did Monitor hold documents referring to a Board to Board meeting in 2010 ?"
16. In addition to written submissions and oral argument WS relied strongly on a subsequent amendment made by Monitor to the minutes of a board meeting in 2009. It involved an abridgement of the original account of concerns within Monitor which led to the suspension of the first FT assessment and steps to be taken. Monitor described it as a summary of the original designed to protect the personal data of James Titcombe, the father of Joshua, whose death led to vigorous action by his father and a highly significant inquest. WS also treated as significant what he regarded as the collusive exoneration of Monitor by KPMG. He regarded Monitor as untrustworthy.
17. It will be apparent that a great deal of the appellant's case related to very general criticisms of Monitor's conduct, often quite remote from the issue before the Tribunal.

Essentially, his submission was that Monitor, like UHMBT and the CQC, was so devious and unreliable that it was probably lying as to possession of the required information.

Our Reasons

18. The Tribunal starts by pondering two questions: why should Monitor hold further documents referring to a meeting that never took place and to which it would not have been invited ? Why should its Chief Executive and Board now seek to conceal such information, if it held it ?
19. There is nothing in the evidence, nor in Kirkup, to support assertions of disingenuous denials that the relevant information was held by Monitor nor of any motive to hide its knowledge of failures within UHMBT.
20. We have no reason to doubt that Monitor undertook the searches and obtained the negative results which the DN relates. There is not a shred of evidence to support the claim that these searches were deliberately directed down blind alleys, as WS alleges. Indeed, to the outsider, the records searched appear the most obviously relevant to a discovery of the requested information.
21. WS has demonstrated admirable tenacity and humanity in pursuing these matters but has allowed his fervour to blur his judgement in advancing certain of the arguments which we reject.
22. We therefore uphold the DN and dismiss this appeal.
23. This is a unanimous decision.

David Farrer Q.C.

Tribunal Judge

24th. March, 2015