**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50540720**

**Dated:** **8th. September, 2014**

**Appeal No. EA/2014/0247**

**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:** **17th. March, 2015**

**Date of Promulgation:** **31st. March, 2015**

**Mr. Stevenson appeared in person**

**The ICO did not appear but made written submissions.**

**Subject matter:**

Whether complying with the request would exceed the cost limit imposed by s.12 of FOIA

**Decision of the First - Tier Tribunal**

The Tribunal concludes that compliance with the request would probably exceed the cost limit.
It therefore dismisses the appeal.

Dated this 17th. 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"). The material statutory provisions are the same.

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").

3. Monitor, the independent regulator of NHS Foundation Trusts created in 2004, which was responsible for UHMBT's admission to Foundation Trust status in 2011, was also closely involved in the latter stages of this unhappy history.

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 decisions. This decision relates to the request to the CQC.

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. The CQC is the successor to the Healthcare Commission. It was set up in 2009 at what proved to be a critical time in the history of failure in maternity services within UHMBT, just when it was pressing its application for Foundation Trust status. Its function is the regulation of the quality of NHS services. It has investigatory powers. Any organisation requires registration with the CQC as a condition of providing such services.

7. The CQC later acknowledged that it missed opportunities to investigate what was wrong with UHMBT maternity services when declining to investigate a referral in 2009 and registering UHMBT unconditionally in 2010. Grant Thornton, in a report commissioned by the CQC, roundly criticised various aspects of the CQC's handling of the registration process. Nothing in either that report or the Kirkup report suggests any intention to conceal information or any deficiency in the records maintained by the CQC however. The Tribunal therefore concluded that there was no reason to invite further submissions following publication 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 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 appeal 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"*. WS added a detailed definition of "full text" as applied to emails. Nothing hinges on the precise formulation.

10. The CQC responded on 4th. April, 2014. It stated that compliance with the request would entail a manual review of everything that it held relating to UHMBT and NLTPCT and that compliance with the request would exceed eighteen hours, hence the applicable £450 limit. It therefore invoked FOIA s,12. It stated further that it was compiling all its UHMBT records for the purposes of the Kirkup Investigation and therefore had a fair picture of what compliance would involve. Following an internal review, the CQC wrote to WS on 10th. May, 2014 maintaining this position.

The complaint to the ICO

11. WS complained to the ICO on 9th. May, 2014.

12. The ICO's investigation revealed that the CQC had conducted preliminary searches focussing on late 2010. They had included inquiries with relevant employees and keyword searches and searches of emails. These preliminary steps had taken six hours. They had covered 3500 files relevant to Kirkup. The CQC thought it unlikely that it held the requested information but asserted that a substantially wider search would be required if a definitive response was to be provided.

13. This would include -

    - searching about 1100 files covering a 17 month period - estimated 7 hours
    - searching the emails of the Chair and Chief Executive for the same period - estimated 5 hours;
    - searching about 40 lever arch files (equivalent) of hard copy material relating to UHMBT - estimated 80 hours;
    - searching back - up tapes.

14. The ICO judged that the estimates appeared reasonable, though a narrower range of time for searching might suffice. Even then, the cost would generously exceed the 18 hour £450 limit. The DN therefore upheld the claim to the s.12 exemption.

15. WS appealed to the Tribunal.

The appeal

16. WS's grounds of appeal were similar to those advanced in the UHMBT appeal. He described as incredible any suggestion that the CQC did not hold or had not held the requested information. If it did not, it was because it had deliberately deleted it. The response was simply a sham search designed to achieve nothing or a dishonest attempt to cover up what had happened. Alternatively, he relied on the same argument as to there being no marginal cost in compliance, given the duty to produce material for Kirkup.

17. These points were enlarged in oral argument, in the course of which WS accused Grant Thornton of "minimising" the culpability of the CQC.

The Law

18. The relevant provisions are those examined in the UHMBT appeal.

19. FOIA s.12(1) provides -

*"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit"*

Regulation 3(3) of the *Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, 2004 (SI2004/3244)* ("the regulations") provides for an appropriate limit of £450 in the case of the CQC.

Regulation 4(3) and (4) provides -

*"(3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in -*

*(a) determining whether it holds the information,*

*(b) locating the information or a document which may contain the information,*

*(c) retrieving the information or a document which may contain the information and*

*(d) extracting the information from a document containing it.*

*(4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour."*

20. The effect of these provisions is -

(1) To insert, via regulation 4(4), a requirement that the estimate should be reasonable, at least in respect of human hours required to fulfil the request. (It is fair to assume that a similar requirement is to be implied in s.12(1)).

(2) To require that any cost other than staff working time be estimated on a case - specific basis. Hence, any time required for software to carry out electronic searches is chargeable only if a measurable cost can be attributed to it. The personal activity rate comes into the reckoning only if continuous personal supervision is required, which seems unlikely

(3) To exclude from the calculation any time taken up in presenting an explanation as to why s.12 is invoked.

21. In judging what activity is reasonable, the ICO and the Tribunal must allow for the possibility that there may be more than one sensible plan for a search and that time can be lost through understandable error or oversight in the execution of a well - organised operation. The ICO may examine the systems directly but the Tribunal does not. It is dependent on secondary evidence for the formation of its assessment of the adequacy of proposals for searches, electronic or manual and, where relevant, of their efficiency and completeness.

Our Reasons

22. The Tribunal sees no proper basis for attributing bad faith to the CQC, even though it made serious mistakes. Specifically, it sees no reason why the CQC should close its eyes in 2014 to the existence of the requested information, if it held it. Still less does it suppose that the CQC would destroy it. Its failures to act on a referral in 2009 or intervene at the registration stage were fully disclosed to Kirkup. Disclosure of the requested information, if held, would do little or nothing to aggravate its position or damage its reputation.

23. The argument as to no extra cost meets the same objection as in the UHMBT appeal. Having to produce a mass of records to Kirkup is not the same task as searching for the specific requested information.

24. A more fruitful assessment of the estimated costs derives from a detailed scrutiny of the components of the estimated hours. In reaching its decision, the Tribunal asked itself -

    - Did the estimated hours include running software without human intervention, which could not be charged at £25 per hour as human activity ?

- Would it not be more economical to combine the searches of Chair and Chief Executive emails ?
- Did the search of hard copy records involve some unnecessary duplication of work ?
- Why were the lead inspector for UHMBT and CQC's most senior managers not contactable (see CQC letter communicating results of its internal review)? Did that prolong the searches significantly ?
- Why were different keywords used for the search of Chair and Chief Executive emails from those applied to other electronic documents (see same CQC letter) ?

25. However, the Tribunal concludes that the answers to those queries are not likely to bring a reasonable estimate of cost below £450 or the demand on human activity below 18 hours.

26. It therefore finds that it is more likely than not that a reasonable search would exceed the s.12 costs limit and it dismisses this appeal.

27. This is a unanimous decision.

David Farrer Q.C.

Tribunal Judge

17th. March, 2015