



ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50566296

Dated: 5th May, 2015

Appeal No. EA/2015/0095

Appellant: William Stevenson ("WS")

First Respondent: The Information Commissioner ("the ICO")

**Second Respondent: Lancashire North Clinical Commissioning Group
("LNCCG")**

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

Date of Decision: 11th March, 2016

Date Promulgated: 11th March 2016

This appeal was determined on the basis of written submissions

Subject matter:

FOIA 2000 s. 1(1)

s.3 (2)

Whether LNCCG held the requested information,
either directly or by an agent.

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DECISION OF THE FIRST-TIER TRIBUNAL

LNCCG did not hold the requested information. The appeal is therefore dismissed.

Dated this 11th day of March, 2016

David Farrer Q.C.

Judge

REASONS FOR DECISION

The Background

1. This appeal arises out of one of a number of requests from WS to different public authorities involved in events which led to the investigation into the University Hospitals of Morecambe Bay NHS Trust (UHMB) conducted by Dr. Bill Kirkup.
2. The sad history of those events has been briefly recounted in other Decisions of the Tribunal and it is not necessary to repeat them here. Dr. Kirkup's report examined the responsibilities of a number of public health authorities within the NHS for the failures which it identified and included an account of the administrative reorganisation which resulted from them.
3. Dr. Stevenson has campaigned vigorously for disclosure of information relating to these events by a number of those authorities. He has demonstrated a particular concern for the disclosure of documents passing between directors of North Lancashire

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Teaching Primary Care Trust ("NLTPCT") and those authorities as and after the tragedy unfolded.

4. LNCCG came into being on 1st. April, 2013 as successor to NLTPCT. This was part of the reorganisation referred to in §3.

The Request

5. On 22nd. August, 2014, WS made the following request to LNCCG –

“Copies (electronic copies only, no paper documents requested) of any recorded, written, printed, paper or electronic communication, including any associated files and replies, between all of (individually or combined) former North Lancashire Primary Care Trust Chairman William Bingley, former NLTPCT Chief Executive Janet Soo-Chung, former NLTPCT Medical Director Jim Gardner and former NLTPCT Finance Director Kevin Parkinson and Monitor and the Care Quality Commission dated during the months of June, July and August 2010, but excluding purely financial documents and any individual document/ file which is itself over 50 pages long. In other words, for each of the 4 NLTPCT directors I am requesting their individual and combined communications with Monitor and/ or CQC which convey specific information, requests, ideas etc. in either direction which may or may not be related to UHMB registration/authorisation and may or may not refer to UHMB failings, serious incidents or patients (patient names would be improbable in such documents but would be redacted in any case), but I am not requesting the text of published reports such as the PCT or UHMB Annual Report and Accounts, or the Fielding Report, for instance. I am not requesting the internal PCT report into UHMB compiled for the NLTPCT Board meeting of May 2010 which I already have, but I am requesting any internal PCT reports if they were included or specifically referred to in communications between any of the specified directors and Monitor/ CQC in the specified 3 months. Typically, the requested communications would be letters and emails of 1-10 pages long.

2. Information about whether and when each communication, document or file was provided to the Morecambe Bay Investigation”.

Obviously request 2 could be complied with only if there were documents disclosable in response to request 1.

I supplied the emphasis which is intended to focus attention on what Dr. Stevenson was requesting, namely communications between four named NLTPCT directors and the two supervisory bodies named over a three – month period in 2010.

6. LNCCG responded on 27th. August, 2014, stating that this information was "legacy information", that is information as to the historic corporate work of NLTPCT for which the Department of Health ("the DoH") was now legally responsible, No response was forthcoming to a request for an internal review until 18th. February, 2015 when a different NHS body, by letter dated 20th. October, 2014, confirmed the initial LNCCG response and apologized for the delay in its reception which, it said, was due to a mistake as to WS's Email address. This led to a claim by WS that the date was a fraudulent fabrication, a charge that I do not need to investigate.

7. WS had already complained to the ICO on 29th. December, 2014

The Decision Notice

8. By his DN the ICO found a breach of FOIA s.10 as to the delay in the initial response and criticized LNCCG's record – keeping as regards the error in its record of WS's Email address. As to the main issue, however, he accepted its case that this was "legacy information" and therefore not held by LNCCG.

9. WS appealed.

The Appellant's case

10. In his grounds of appeal WS asserted that the ICO was unreasonable in accepting LNCCG's statement that it did not hold the information. He argued that this was a device, practiced in other cases also, whereby LNCCG passed responsibility to the

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DHS, which then argued that the cost of retrieval relieved it of a duty to disclose.

11. He further argued that the finance director of NLTPCT had been appointed to the same position in LNCCG but the records in his office had been treated by both LNCCG and the ICO as personal rather than corporate records and neither had confirmed that they had been searched.

Subsequent Developments

12. A few days before a scheduled oral hearing in October, 2015, the ICO, who had lodged a response confirming his conclusions in the DN, submitted a further written argument which indicated that the ICO, whilst obtaining confirmation that LNCCG's finance director's records had been searched, had been informed by LNCCG, for the first time, that it had asked Blackpool Victoria NHS Trust ("Blackpool") to search for any records of Emails from former employees of NLTPCT over a five – year period, which might be within the scope of the request.
13. The answer to that inquiry was not provided until 29th. September, 2015 due to factors which do not affect the outcome of this appeal. Blackpool stated that it had records for August 2010 but not the two preceding months due to the installation of new FOIA compliance software in August, 2010, before which date the annual backup of files was overwritten twelve months later.

14. This raised three new issues -

(i) Did Blackpool hold information within the scope of WS's request?

(ii) If so, did it do so as agent for LNCCG ?

(iii) If so, would the cost of complying with the request exceed the limit provided for in FOIA s.12 ?

15. It therefore adjourned the hearing in Manchester, having heard procedural arguments from WS. I issued directions, joining LNCCG forthwith as Second Respondent and requiring it to file a response dealing with the issues above. It did so.

16. LNCCG indicated that Blackpool did not hold information on its behalf but for the DoH. It had received the available material from Blackpool. The cost of complying with the request would exceed the s.12 limit.

17. Shortly before the second scheduled hearing of the appeal, WS stated that he could not attend but did not ask, within the inevitably short time allowed, for a new date to be set. An application for an adjournment would almost certainly have been rejected anyway, given the inadequate explanation for non – attendance and the very late stage at which the Tribunal was alerted to the position. Dr. Stevenson's arguments had concentrated largely on such questions as the allegedly false date on the internal review response and, more widely, the alleged misconduct of LNCCG. Nothing in his communications suggested that any plausible evidence or argument would be presented on the question whether LNCCG held the requested information. The overriding objective demands a proportionate approach to any question of further adjournment of an oral hearing. The state of the evidence strongly discouraged any thought of prolonging delay or increasing costs.

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The Reasons for my decision

18. Contrary to Dr. Stevenson's apparent belief, a public authority is not under an obligation to obtain information which it does not hold. FOIA does not equate access to information to possession of information.

19. I am satisfied that, whatever it subsequently acquired, LNCCG did not itself hold information within the scope of this request on 22nd. August, 2014 or at any time near that date. There is no obvious reason why LNCCG, as successor authority, should hold documents dating back three years before it was established and potentially relevant to the Kirkup investigation.

20. Section 3(2)(b) provides that a public authority holds information -

"if it is held by another person on behalf of the authority."

It is accepted that Blackpool held material relative to NLTPCT dating from August 2010. It clearly fell within the DoH guidelines as to "historic corporate records" amounting to legacy information, which Blackpool held on behalf of the DoH, not LNCCG, the successor authority. The fact that LNCCG could obtain it from Blackpool is immaterial. Therefore, LNCCG did not hold the requested information at the date of the request, whether or not it was held by Blackpool.

21. I find that the finance director's records were searched and did not include requested information, which, if he had held it, would have been included in the material held for the DoH.

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22. Those findings suffice to determine this appeal. LNCCG further argued the s.12 issue, asserting that the necessary searches of information received from Blackpool would require about 71 hours' work, which would easily breach the costs limit. Having made the factual findings indicated above, I do not propose to determine this second issue.

23. For these reasons I dismiss this appeal.

David Farrer Q.C.

Tribunal Judge

11th. March, 2016