



**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Information Rights**

**Appeal References: EA/2016/0101
EA/2016/0102**

**Determined without a Hearing at Field House
On 2 August 2016**

Before

**JUDGE PETER LANE
DR HENRY FITZHUGH
ROSALIND TATAM**

Between

MARIE CAMPBELL

Appellant

and

INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

A. Introduction

1. Each of these two appeals involves a challenge by the appellant to a decision notice of the respondent regarding requests for information made by the appellant to the Humber NHS Foundation Trust ("the Trust"). Under the terms of a service level agreement, the Trust provides information governance services to the neighbouring Hull and East Yorkshire Hospitals Trust ("the Hull Trust").

B. Appeal 0102

2. Appeal 0102 concerns requests for information, starting with the following on 29 September 2015:-

“Since January 2014 how many allegations relating to disability, discrimination or victimisation has the Trust received relating to the Trust’s staff or the way the Trust provides its services? Were these allegations (if any) reviewed, investigated, assessed and decided by any of the individuals named in the allegations?”

3. On 16 October 2015, the Trust replied:-

“Since January 2014 we have had two allegations relating to disability, discrimination involving four members of staff. The allegations were not reviewed, investigated, assessed and decided by any of the individuals named in the allegations.”

4. On 16 October 2015, the appellant asked:-

“Can you confirm if this part of your answer: ‘the allegations were not reviewed, investigated, assessed and decided by any of the individuals named in the allegations’ included such individuals answering questions posed in an Equality Act questionnaire or persuading the Trust management to instruct solicitors to deal with pre-action matters.”

5. On 19 October, the Trust treated this question as a request for an internal review of its response. The Trust asked the appellant for clarification regarding the additional request.

6. On 27 October 2015, the appellant provided clarification as follows:

“Did any or all of the four employees (the subjects of complaints relating to discrimination) carry out one or more of the following: (1) answer questions relating to the complaint in a questionnaire, (2) persuade the Trust management to instruct solicitors to deal with pre-action matters in relation to the complaints?”

7. On 3 November 2015, the Trust supplied further information:-

“Further to your email received on 19th October 2015 in general terms the staff who have had the allegations made against them would be required to provide information to a senior manager who would be investigating the allegations. The senior manager would make the decision what, if any, further action needs to be taken.”

8. On 3 November 2015, the appellant asked another question:-

"Thank you for your general answers. If the complaint was about senior management what would the procedure be then? Did the 2 complaints mentioned in your first answer involve senior management?"

9. On 16 November the Trust replied:-

"The initial investigation would be carried out by someone senior to the individual against whom the allegations have been made, usually the line manager."

10. On 16 November, the appellant contended that part of the request had not been answered:-

"You have failed to answer if the employees named in the two complaints were senior management or not. This was a specific question which required a specific answer not a general reply."

11. On 19 November the respondent issued a decision notice¹ under section 14(1) of the Freedom of Information Act 2000 ("FOIA"), on the basis that the respondent found the request to be vexatious within the scope of that section.

C. Appeal 0101

12. The subject matter of the requests within appeal 0101 concerns the ownership of documents and their destruction. On 7 November 2015, the appellant put the following request to the Trust:-

"In a previous reply the Trust stated that 'documents created by employees on behalf of the Trust in working hours are owned by the Trust'. Whether the documents are in paper or electronic form who can authorise the documents' destruction and in what circumstances?"

13. On 17 November 2015, the Trust replied:-

"Document management within the Humber NHS Foundation Trust is described in the policy 'records management and information lifecycle policy'" (the Trust attached a copy of the policy with its reply).

14. On 17 November, the appellant asked:-

"Could you confirm that an employee cannot make a unilateral decision to remove documents or records and destroy them without it being recorded?"

¹ FS50606658

15. On 19 November 2015, the respondent issued a decision notice² stating that it considered the appellant's request to be vexatious, within the scope of section 14(1) of FOIA.

D. Background

16. The background to both sets of requests from the appellant to the Trust is as follows. In October 2013, the Hull Trust sought advice from the Trust on a subject access request from a person ("P"), said to be closely associated with the appellant. The subject access request from P asked the Hull Trust to correct what P considered to be inaccurate information on P's health record. After the Hull Trust contacted the Trust in October 2013, the Trust's information governance department spent ten months corresponding with P in an attempt to obtain confirmation as to what information P considered to be incorrect or inaccurate and what action P wished the Trust to take. According to the Trust, P would put forward various issues of a legal nature and threaten legal proceedings but did not provide the Trust with specific information to enable it to address P's concerns. Eventually, in the late summer of 2014, P provided documentation which he said explained his concerns regarding his health record but the Trust did not consider they did so.

16. The Trust accordingly arranged a meeting between P, the Complaints Manager of the Trust and the Trust's Compliance Director, at P's home on 23 October 2014, with a view to resolving matters. The appellant was also present at this meeting. It appears that the appellant resides at the same address as P.

17. P's complaints were, in part, about the clinical care he had received from the Hull Trust. The Trust forwarded these complaints to the Hull Trust, which said they were not progressed as they had been submitted outside the relevant deadlines.

18. The other part of P's concerns related to the content of P's health record. The Trust explained to P that these concerns would be passed to the Hull Trust's Caldicott Guardian as the decision maker for such matters (because the Trust was providing the Hull Trust's information governance services). A "Caldicott Guardian" is a senior person responsible for protecting the confidentiality of patient and service-user information and enabling appropriate information-sharing. The requirement of each NHS organisation to have a Caldicott Guardian was set out in Health Service Circular: HSC 1999/012.

19. On 15 December 2014, the Caldicott Guardian informed the Trust that the Hull Trust would include P's statements in his medical notes, so that his views

² FS50606963

were apparent. The Caldicott Guardian, however, confirmed that the medical notes could not be amended after the fact.

20. The Caldicott Guardian's response was sent to P, who did not respond to the Hull Trust's offer to have his comments placed in his medical records. Instead, P asked who had given permission for the Trust to share his information. This was followed by a subject access request to the Hull Trust, which was passed to the Trust to process. In essence, P asked for all records, notes and communications between the Trust and the Hull Trust regarding his complaints and concerns relating to his medical records. The information was provided by the Trust under P's subject access rights.

21. On 3 February 2015, P submitted question and answer forms under the Equality Act 2010 to three specific members of the Trust staff whom P accused of discrimination and prohibited conduct. On 16 February 2015, P asked for the handwritten notes, which were taken during the meeting held at P's home on 23 October 2014. The Trust explained that the handwritten notes had been destroyed following P's signifying his agreement to the content of the typed transcripts of the meeting.

22. On 2 March 2015, P asked the Trust when the handwritten notes were destroyed and who destroyed them, as well as who authorised their destruction. On 27 March 2015, the Trust replied to P, stating that the Trust's complaints manager had typed the notes up after the meeting and had sent a copy of the transcript to P for him to agree. Once P had agreed the contents of the transcript, the complaints manager disposed of the notes. There was, in the circumstances, considered to be no need for the complaints manager to seek authority to dispose of the notes.

23. On 19 March 2015 the Trust provided P with responses to the discrimination questionnaires, completed by the three members of staff that P had accused of discrimination. P then served a letter before action against the Trust on 29 April 2015 claiming victimisation and discrimination. The Trust solicitors wrote to P on 22 May 2015, denying all the allegations. The letter also explained that P had failed to set out any basis in fact or law as to how the Trust had breached the Equality Act 2010. P then threatened to take the matter through the small claims track.

24. On 28 July 2015, we understand that NHS England informed the Trust it had received correspondence from P questioning the Trust's use of public funds in instructing solicitors "to defend a small claim (about £20)".

E. Were the requests vexatious?

25. Section 14 of FOIA provides that the general right of access to information held by public authorities does not oblige such an authority to comply with a request for information if the request is vexatious. In his decision notice relating to the requests within appeal 0102, the Commissioner reminded himself of the relevant law in respect of section 14 of FOIA, as set out in the decision of the Upper Tribunal in Information Commissioner v Devon CC and Dransfield [2012] UKUT 440 (AAC) and in the judgment of the Court of Appeal in Dransfield v Information Commissioner and Devon County Council and Craven v Information Commissioner and the Department for Energy and Climate Change [2015] EWCA Civ 454. The Commissioner noted, in particular, the requirement – stressed by the Upper Tribunal – of adopting a holistic and broad approach to the determination of whether a request is vexatious, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterises vexatious requests (paragraph 45).

26. The Commissioner looked at whether the requests could be characterised as “obsessive”; that is to say, one where the request was attempting to re-open an issue which had already been comprehensively addressed by the public authority or otherwise subjected to some form of independent scrutiny. The Commissioner considered that, in answering that question, it was necessary to focus on what a reasonable person might consider to be obsessive in the circumstances. For instance, if the request was the latest in a long series of overlapping requests or other correspondence, then it could form part of a wider pattern of behaviour that a reasonable person would regard as vexatious. An obsessive request could also be identified as one where a complainant continues with requests despite being in possession of other independent evidence on the same issue.

27. The Commissioner noted that in the present case the Trust had stated that it had already provided the appellant with what information it had. It was also relevant that the request was similar in nature to previous requests from P. The Trust provided information to the Commissioner which indicated that a request involving 56 emails had been made, but that a further 80 emails from the appellant or P were also relevant.

28. According to the respondent, the Trust considered that P was waging a campaign against the Trust, which involved a misuse of FOIA. Any response made by the Trust “merely prompts further emails”. The behaviour was said to have cost the Trust a significant amount of resources in terms of staff time, as well as legal costs.

30. Overall, the Commissioner decided that the requests covered by appeal 0102 were vexatious. Applying a similar approach to section 14, the Commissioner reached the same conclusion regarding the request covered by appeal 0101.

F. The grounds of appeal

31. In her grounds of appeal, the appellant contends that neither she nor P was provided with any opportunity to examine, challenge or comment on the claims made by the Trust. The appellant submits that “the whole factual matrix ought to have been considered including evidence from both sides” before making assumptions. The Trust was said to have failed to mention the money it spent on instructing an international business firm of solicitors to defend its employees on a small claim in the county court, where the value was £20.

32. The grounds also make reference (as does material in the bundle) to reports in local newspapers concerning complaints made following the death of a patient (unrelated to the appellant and P). The grounds refer to confidential documents from the Trust having been stolen from a car. What are said to be “financial black holes” in the Trust’s finances said to be causing great concerns in the Trust’s area.

33. In a further communication (page 38 of the bundle) the appellant contends that she should have been given a chance by the Commissioner to respond to the points being made by the Trust, during the Commissioner’s investigations. The fact that she was not amounts, the appellant says, to a breach of the rules of natural justice.

G. Mode of decision etc

34. The appellant was content for the appeal to be determined without a hearing. In all the circumstances, we concluded that it was compatible with the overriding objective in rule 2 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 for us to do so. In reaching our unanimous decision, we have had regard to the Tribunal Bundle of documents and to the appellant’s reply to the Commissioner’s response, with attached material.

H. Discussion

35. In reaching our decision, we have had regard to and applied the Upper Tribunal and Court of Appeal judgments in Dransfield, following those of the Court where there might be any point of difference with the Upper Tribunal. In our view the following paragraph from the Court of Appeal judgments is of particular significance:-

"68. In my judgment, the UT was right not to attempt to provide any comprehensive or exhaustive definition. It would be better to allow the meaning of the phrase [vexatious] to be winnowed out in cases that arise. However, for my own part, in the context of FOIA, I consider that the emphasis should be on an objective standard and that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation, that is, no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requestor, or to the public or any section of the public. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and that it is consistent with the constitutional nature of the right. The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious. If it happens that a relevant motive can be discerned with a sufficient degree of assurance, it may be evidence from which vexatiousness can be inferred. If a requestor pursues his rights against an authority out of vengeance for some other decision of its, it may be said that his actions were improperly motivated but it may also be that his request was without any reasonable foundation. But this could not be said, however vengeful the requestor, if the request was aimed at the disclosure of important information which ought to be made publicly available. I understand Mr Cross to accept that proposition, which of course promotes the aims of FOIA."

36. On all the evidence before us, applying the requisite holistic approach, we are in no doubt that the requests which are subject of both of the appeals fall to be treated as vexatious. The allegation of a breach of the rules of natural justice is devoid of merit. The respondent was under no obligation to give the appellant an opportunity to give a running commentary on the respondent's investigation, as it was being conducted.

37. In any case, the appellant knows the basis on which the Commissioner concluded that her requests were vexatious. The appellant has been provided with full information regarding the background to the requests, so far as the Trust was concerned. At page 97 we see a detailed letter dated 11 March 2016 from the Hull Trust to the Commissioner, followed by several pages of a table setting out the multitudinous requests made by the appellant and P to the Trust.

38. The present appeals provide the opportunity for her to demonstrate to the Tribunal why that basis may be false. Having considered the submissions and materials submitted by the appellant, the Tribunal can find no reason for concluding that the Commissioner was wrong to describe the background as he did in the decision notices.

39. The notice that generated appeal 0102 shows beyond question that the appellant was merely asking question after question of the Trust, without any objectively valid reason for doing so. Significantly, as recorded at paragraph 17 of the decision notice, the appellant stated that it "is not this refusal notice which is my main concern, but the misleading nature of the Trust's answers along with answers which I believe to be false". The Commissioner's response; namely, that it is not his function to "challenge the accuracy or the nature of the information supplied", is undoubtedly correct.

40. We find there is no public interest whatsoever in the line of questions covered by appeal 0102. The appellant's motivation is not to uncover information but, rather, to use the requests as opportunities to berate the Trust for engaging commercial solicitors in order to defend the discrimination claim brought by P. That is not a proper use of FOIA. We are in no doubt that a hypothetical reasonable bystander would so conclude.

41. Both in relation to appeal 0102 and 0101, the appellant has, we find, attempted to make spurious and opportunistic use of concerns raised about other, quite separate, issues regarding the Hull Trust. The fact that the Trust and the Hull Trust are legitimate objects of public interest (as is any other NHS Trust) does not enable the appellant to categorise the questioning regarding P's discrimination claim as having any legitimate purpose.³

42. The request covered by appeal 0101 relates to the destruction of handwritten notes of the meeting held at P's home (at which we are satisfied the appellant was present). We consider that any reasonable observer would regard the appellant's line of questioning on this issue as having no rational purpose whatsoever. The handwritten notes were destroyed because a transcript of the letter had been agreed by P. No more needed to be said.

I. Decision

43. The appeals are dismissed.

**Judge Peter Lane
13 September 2016**

³ On 11 August 2016, the appellant submitted an email report from the Hull Daily Mail, regarding alleged problems with the Hull Trust's mental health services. This material post-dated the panel's deliberation and has not, so far as we are aware, been seen by the respondent. The email takes the appellant's case no further.