



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2017/0049

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FS50642904
Dated: 20 February 2017**

Appellant: Martin Adedeji

Respondent: The Information Commissioner

Heard at: Wigan County Court

Date of Hearing: 18 July 2017

Representation:

Appellant: in person

The Commissioner did not appear

Before

HH Judge Shanks

and

Pieter de Waal and Malcolm Clarke

Date of decision: 7 August 2017

Subject matter:

Freedom of Information Act 2000 (FOIA)

Section 1 (whether information held)

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal allows the appeal and issues the following substitute decision notice.

SUBSTITUTE DECISION NOTICE

Public Authority: **Wigan Borough Clinical Commissioning Group**

Complainant: **Martin Adedeji**

The Substitute Decision

For the reasons set out below the Public Authority did not deal with the Complainant's request for information dated 18 July 2016 in accordance with Part I of the FOIA in that, contrary to its position, the Tribunal consider that on the balance of probabilities it did hold relevant documents recording the information requested.

Action Required

The Public Authority must re-consider the request in the light of this decision and supply the Complainant with copies of any relevant documents which it holds by 1 September 2017.

HH Judge Shanks

7 August 2017

REASONS FOR DECISION

Factual background

1. The Appellant, Mr Adedeji, is a BME male. He suffers from a number of disabling mental health issues and experiences intense fears and severe anxiety. He was a patient of the Dicconson Group Practice in Wigan from August 1987 until 6 September 2011.
2. On 3 August 2009 Mr Adedeji and his support worker attended a consultation with a GP at the practice. He was very unhappy with the way he was treated by the GP during the consultation and in particular with her reaction when he said that he had been the victim of racial abuse. As a consequence he made a formal complaint to the Ashton Leigh and Wigan Primary Care Trust (the PCT) on 29 January 2010. On 16 June 2010 the GP in question wrote him a long letter of explanation and apology.
3. Mr Adedeji has considerable concerns about the way his complaint was handled by the PCT and the conduct of the PCT thereafter (including its response to subject access requests under the Data Protection Act 1998) and over the years he has sought to pursue the matter by various means, including requests for information under FOIA.
4. Following a re-organisation under the Health and Social Care Act 2012 the PCT ceased to exist on 1 April 2013 and was in effect replaced for certain purposes by the Wigan Borough Clinical Commissioning Group (the CCG), which is the relevant public authority in relation to this appeal.
5. On 19 March 2016 Mr Adedeji wrote to the CCG making a subject access request for all his personal data held by them relating to the complaint he had submitted to the PCT. The letter identified a number of types of data which he said he expected to receive under this request, including interview notes in relation to the GP and his

support worker and correspondence with the Dicconson Group Practice, the GP and the Information Commissioner.

6. The CCG answered the request on 30 March 2016 by saying that any information they held had already been supplied to him under previous subject access requests. The letter went on to say that the CCG did not hold any information relating to the period before its establishment on 1 April 2013 with regard to the complaint to the PCT and supplied him with an email address for NHS England who “should be able to assist”. That email address produced no response.

Request, decision notice and appeal

7. On 18 July 2016 Mr Adedeji made the request under FOIA which is the subject of this appeal. He asked the CCG for:

... copy of information you hold which states who is the data controller for the personal data processed by [the PCT] during their handling of the service user’s complaints made to [the PCT] from 1 April 2009

The CCG’s response was that it:

... does not hold information prior to their inception in April 2013. NHS England hold all legacy information ...

Following a request for a review by Mr Adedeji the CGG Assistant Director, Governance stated:

I confirm that the Data Controller for [the PCT] is NHS England.

8. On 19 August 2016 Mr Adedeji complained to the Information Commissioner under section 50 of FOIA. In a decision notice dated 20 February 2017 the Commissioner said that she was “... prepared to accept, on the balance of probabilities ...” that the CCG did not hold the specific information requested in recorded form but noted that they had indicated to him “... outside of the FOIA, that NHS England is the relevant data controller.”
9. Mr Adedeji has appealed against the Commissioner’s decision notice. We held a hearing in Wigan attended by Mr Adedeji in person but with no attendance by the

Commissioner or any other potential party. We have reviewed the whole position in the light of the documentary evidence and submissions placed before us and Mr Adedeji's oral representations.

Findings

10. From the material we have seen it is far from clear who is currently responsible for the data Mr Adedeji seeks and it is fair to say that he has been sent from "pillar to post" by the various bodies concerned, namely the CCG, NHS England and the Department of Health itself.
11. The position of the CCG appears from their responses in March 2016 to Mr Adedeji's subject access request and in July/August 2016 to his FOIA request which we refer to above: they say the data controller of the records in question is NHS England.
12. However, according to a letter from NHS England dated 9 March 2016 at page 29 in our bundle NHS England is not the data controller for the records in question and Mr Adedeji should contact the Department of Health, which, they say, will have archived the records.
13. But in a letter from the Department to Mr Adedeji dated 5 April 2016 at our page 34 it is stated that the CCG, as the successor organisation to the PCT, is in the best position to respond to his concerns about the way the PCT had handled a subject access request. So we come full circle!
14. There is also a much earlier letter from the Head of the Freedom of Information Team at the Department of Health dated 25 November 2015 at our page 111/2. It records receipt of a request for "... a copy of documentation [stating] who now has legal liability for service user personal data that was processed by [the PCT] in their handling of service user complaints" and it encloses by way of answer a document which is at our pages 113/4. The enclosed document contains a table and is headed "Part 8 Information, Data and Records". It appears to us to be part of a re-organisation scheme document. From the table it appears that information, data and

records relating to complaints received during the relevant period (presumably by the PCT, though that does not appear in our extract) were to be transferred to the CCG.

15. Mr Adedeji is therefore left in a deeply unsatisfactory position by the various public bodies involved. Given the background we have outlined and the wording of the request (which seeks a “copy of information”) it is clear, we think, that what he quite reasonably wanted from the CCG was sight of a document which would clarify matters. The CCG appears to deny that it holds any such document and the Commissioner appears, somewhat reluctantly, to accept that position.

16. On reviewing the facts in the light of all the material now before us we take a different view to that of the Commissioner. It seems to us that prima facie the position is as set out in the document at our pages 113/4 and that if the position is different it is up to the CCG to explain how that has come about. In any event we think the CCG must have some documentation which clarifies the position: we cannot accept on the balance of probabilities that a public body in the position of CCG would not have some record of what has become of data originally held by a body whose functions it has effectively taken over.

Conclusion

17. We therefore propose to allow the appeal and require the CCG to reconsider the whole matter in the light of this decision and to provide Mr Adedeji with copies of any documents it holds which bear on who is the current data controller of data previously held by the PCT relating to his complaint about the GP made in 2010. In view of the time of year we will allow the CCG until the end of August 2017 to do so.

18. This is a unanimous decision.

HH Judge Shanks

7 August 2017