



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2017/0137

Heard at Wigan County Court

On 14 June 2018

Representation:

Appellant: in person

First Respondent: The Information Commissioner did not appear

Second Respondent (Department of Health): Mr Scherbel-Ball (Counsel)

Before

JUDGE BUCKLEY

MALCOLM CLARKE AND PAUL TAYLOR

Between

MARTIN L ADEDEJI

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

THE DEPARTMENT OF HEALTH

Second Respondent

DECISION

1. For the reasons set out below the Tribunal dismisses the appeal.

REASONS

Observations outside the scope of this appeal

1. Mr Adedeji found out information in 2016 which led him to believe that Ashton Leigh and Wigan Primary Care Trust ('the PCT') did not deal properly with a subject access request. PCTs no longer exist. Mr Adedeji was aware that before making a complaint to the Information Commissioner about the handling of a subject access request, he had to complain to the organisation concerned. It should not be any more difficult for an individual to make a complaint about the PCT than it would be if they still existed.
2. Mr Adedeji attempted to make his complaint to the Department of Health (the Department), Wigan Borough Clinical Commissioning Group (the CCG) and NHS England. They all referred him to each other. As a result Mr Adedeji attempted to use FOIA to find out the rules which state to whom he should send the complaint.
3. He has now been sent a list of all the different organisations who have inherited all the different functions of the PCT, which, we find below, answered the FOI request. It did not however solve his problem. The identity of the appropriate body is still not clear to Mr Adedeji from this list. It is not clear to the tribunal. The fact that the Department, the CCG and NHS England all redirected Mr Adedeji to each other suggests that it may not be clear to those bodies. We note that no individual body was named in response to Mr Adedeji's narrowed request of 25 May 2017.
4. It is not Mr Adedeji's fault that PCTs have been abolished. Nor is it his fault that their functions have been dispersed to different bodies. It is extremely difficult for a lay person to identify the appropriate body for a complaint about the PCT's failure to respond properly to his subject access request from a list which simply shows where the different PCT functions have gone.
5. The tribunal recognises that there may exist other good reasons why a particular complaint cannot be dealt with. But confusion as to the identity of the body who will deal with that complaint is not a good reason.
6. It falls outside the scope of this appeal, but it is likely to save a lot of time if the Department, the CCG and NHS England could agree **a joint letter to Mr Adedeji identifying a single organisation which is prepared to deal with his substantive complaint, giving contact details and, if possible, a named individual.** If Mr Adedeji wishes to make other complaints about other actions of the PCT then a similar joint letter should be sent to him, telling him who is prepared to deal with that substantive complaint.

Factual background to the appeal

7. On 3 August 2009 Mr Adedeji attended a consultation with his GP at Dicconson Group Practice. On 29 January 2010 he made a complaint about the GP's conduct in that consultation to Ashton Leigh and Wigan Primary Care Trust ('the PCT'). Mr Adedeji remains unhappy with the way the complaint was handled, both by the PCT and the Ombudsman. On a date before 1 April 2013 Mr Adedeji made a related subject access request to the PCT.
8. The PCT ceased to exist on 1 April 2013 and the Wigan Borough Clinical Commissioning Group (the CCG) was created. The extent to which the CCG was the successor to the PCT or took over its functions is not clear.
9. On 26 January 2015 Mr Adedeji made a subject access request to the Department of Health ('the Department'). The information provided by the Department in its response dated 6 March 2015 contained copies of some personal data which had not been sent to him by the PCT in response to his earlier subject access request. As a result, Mr Adedeji formed the conclusion that the PCT had, amongst other things, wrongly withheld his data so he made a formal complaint about the PCT's handling of his subject access request to the Department by email dated 7 March 2016.
10. The Department's response, dated 5 April 2016 redirected Mr Adedeji to the CCG, as had previous emails:

..as my colleagues replies of 22 April 2015 and 1 June 2015 stated, NHS Wigan Borough Clinical Commissioning Group (CCG), the successor organisation to Ashton, Leigh and Wigan Primary Care Trust, is best placed to respond to those concerns.

11. Meanwhile, Mr Adedeji had attempted to make the same complaint to NHS England. The response from NHS England to the claimant dated 9 March 2016 redirects him to the Department. It states:

In this instance NHS England is unable to investigate your concerns as we are not the data controller for the records you discuss. Primary Care Trusts are no longer in operation. Records held by them that are no longer active will have been archived by the Department of Health. You will need to approach them with your concerns however it is unlikely these can be investigated due to the length of time that has passed.

12. On 6 April 2016 a further email from NHS England about the same complaint, again redirecting Mr Adedeji to the Department but giving different reasons, stated:

NHS England is the successor organisation to the Wigan and Ashton Leigh Primary Care Trust however, there is a legacy team dealing with PCT

complaints and they are based at the Department of Health. You will need to direct your complaint through them.

13. On 17 March 2016 Mr Adedeji made a request under FOIA to the Department, the operative part of which stated:

Please inform me whether or not you hold the information specified below. If you do... please be so kind as to send me a copy.

1) What is the name and full contact address details as to where one should send complaints (that complainants have only become aware of within the last 12 months) regarding the now abolished Ashton, Leigh and Wigan Primary Care Trust...

2) Complaints Policies and Procedures regarding the handling of complaints about the now abolished Primary Care Trust.

...

14. The reply from the the Department of 14 April 2016 indicated that this request did not fall under the FOIA because it was a request for general information rather than recorded information or documentation. The substantive response to (1) was to repeat that the CCG, as the successor organisation to the PCT was best placed to handle complaints about the PCT. In relation to (2), the response was that there was no specific policy for complaining about former PCTs and referred Mr Adedeji to guidance on the NHS Choices website about the NHS complaints procedure.

15. Mr Adedeji had previously attempted to raise matters relating to the PCT with the CCG. For example the CCG's email of 24 June 2014 states:

... the issues that you refer to pre-date this organisation and therefore we cannot investigate them. You should direct your enquiries to the organisation that the individuals are employed by. If you do not receive a satisfactory response you can contact the Legacy Team [at the Department of Health]

Request, Decision Notice and appeal

16. Mr Adedeji made the request under FOIA which is the subject of this appeal on 5 May 2016:

...please treat this as a Freedom of Information request. Please inform me whether or not you hold the following recorded information.

1. Which organisation/s now handles complaints (that complainants have only become aware of within the last 12 months) about the now abolished Primary Care Trusts.

2. Which organisation/s now handles complaints (that complainants have only become aware of within the last 12 months) about the now abolished Ashton, Leigh and Wigan Primary Care Trust.

...

If I need to rephrase this FOI request in order for you to handle it as a FOI request then your advice and assistance would be much appreciated.

17. The Department replied by email dated 1 June 2016 indicating that it did not consider that the request fell under the FOIA and that 'no amount of rewording will alter this'. It also reiterated:

...for information on the complaints data held by former PCTs, you should contact the relevant successor commissioning groups.

18. Further the email stated:

...as there is nothing further that the Department can add, we must now consider this matter to be closed. Unless you raise a new question, any further letters sent to the Department will be logged but you may not receive a reply.

19. Mr Adedeji emailed the Department on 25 June 2016 requesting an internal review on the grounds that the reply did not state whether the information was held in a recorded form, supply him with a copy of the information or issue a proper refusal notice. Mr Adedeji asserted that his request did fall under the FOIA.

20. The Department's response of 7 July 2016 repeated that the correspondence did not fall under the FOIA, but also asserted that:

Additionally, the information you are seeking is not held centrally by the Department of Health. For information on the complaints data held by former PCTs you should contact the relevant successor clinical commissioning groups (CCGs).

The email repeated the comments set out above about the matter being considered closed.

21. Mr Adedeji referred the matter to the Information Commissioner on 13 October 2016, referring back to a letter of 20 January 2014 in which the Department stated about a complaint about the PCT: 'Accordingly we are the correct organisation to handle your complaint.'

22. As a result of correspondence with the Information Commissioner the Department responded substantively to the request on 20 April 2017. In response to the first paragraph of the 5 May 2016 request the Department confirmed that it held the information but refused the request under s 14(1) (vexatious requests). The Department explained that the body which would handle complaints about a PCT would be the body which had inherited the particular function of the PCT about which the complaint was being made. This information was recorded in an individual transfer scheme for each PCT, held

by the Department. Extracting the relevant information about each and every PCT would take approximately 50 working weeks.

23. The Department did provide some general information as follows:

It may be helpful to know that there a number of organisations that would now handle complaints relating to the functions of Primary Care Trusts. These will usually be:

- The service provider that delivered the service (...)
- NHS England (for complaints about primary care)
- Clinical Commissioning Groups (for complaints about the 111 service and community services...)
- NHS Property Services (for issues relating to primary care buildings)
- Department of Health (for any corporate functions not related to patient care)

24. The Department also offered to consider a narrowed request:

If you are able to narrow your request by telling us the broad nature of the complaint, we should be able to identify which organisation is now responsible for progressing your complaint.

25. Mr Adedeji did submit a narrowed request after the Decision Notice relevant to this appeal. This narrowed request is not within the scope of this appeal. He wrote to the Commissioner on 9 May 2017 indicating that he was able to submit a narrowed request, and asking for advice as to whether he should submit it as a new FOI request or as part of this investigation. The Commissioner replied that he could submit a new narrowed request (about which he could then submit a new complaint to the Commissioner if needed) and the Commissioner would continue to investigate the handling of the original 5 May 2016 request in the meantime. The decision notice in this case therefore relates only to the request on 5 May 2016.

26. In relation to the second paragraph of the request the Department confirmed that it held the requested information and provided it as follows:

The Health and Social Care Act 2012 Ashton, Leigh and Wigan Primary Care Trust Property Transfer Scheme 2013 identifies a number of organisations that have inherited functions from the PCT as follows:

- Bridgewater Community Healthcare NHS Trust – for complaints about community
- NHS Wigan Borough Clinical Commissioning Group – for complaints about community services within the former PCT area
- Wigan Borough Council – for complaints about sexual health, pharmacy and public health services within the former PCT area
- NHS England – for complaints about NHS dentistry and primary ophthalmic services; complaints previously handled by the PCT; complaints about PMS and GMS contracts

- Public Health England – for complaints about Quality Outcomes Framework payments
 - Department of Health – for complaints about corporate functions
- These organisations should be approached with any complaint about the functions that they have inherited.

27. Mr Adedeji was unhappy with the response and complained to the Information Commissioner. In a decision notice dated 5 June 2017 the Commissioner decided:

27.1 In relation to the first paragraph of the request the Department was entitled to rely on s 14(1) (vexatious complaint)

27.2 In relation to the second paragraph the Department had complied with its obligations by confirming that it held the requested information and communicating it to Mr Adedeji.

27.3 The Department did not breach s 16(1) (advice and assistance)

27.4 The Department's delay breached s 10(1) and 17(5).

28. Mr Adedeji appealed against the Commissioner's decision notice. The notice of appeal challenges the Commissioner's decision notice on the grounds that:

18.1 The request was not vexatious.

18.2 The information requested in the second paragraph of the request has not been provided.

18.3 The Department did breach s 16(1) by deliberately obstructing his request.

Issues

29. The Department of Health raised s 12 (cost of compliance) for the first time on 4 May 2018. There was no objection to the Department relying on this additional ground and we find that Mr Adedeji had sufficient notice before the hearing.

30. The issues we have to determine are:

30.1 Did the Commissioner err in finding that the Department was entitled to rely on s 14(1) – vexatious request?

30.2 Is the Department entitled to rely on s12(1) – cost of compliance?

30.3 Did the Commissioner err in finding that the Department had complied with FOIA in providing Mr Adedeji with the information that it held falling within the scope of paragraph 2?

30.4 Did the Commissioner err in finding that the Department had not breached s 16(1)?

Legal framework

S 14(1) Vexatious Request

31. In deciding whether or not a request is vexatious under s 14(1) a tribunal takes account of the relevant jurisprudence in particular the decisions of the Upper Tribunal and the Court of Appeal in *Dransfield* ([2012] UKUT 440 (AAC) and [2015] EWCA Civ 454). This means taking into account all the circumstances, in particular the motive of the requester, the value or serious purpose of the request, the burden imposed by the request and the harassment or distress to staff, and deciding whether the request represents a “manifestly unjustified, inappropriate or improper use of a formal procedure” and is therefore vexatious.

S 12 Cost of Compliance

32. Under s 12(1) a public authority is not obliged to comply with a request for information where:

the authority estimates that the costs of complying with the request would exceed the appropriate limit.

33. The relevant appropriate limit, prescribed by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (‘the Regulations’) is £600 (24 hours of one person’s work). In making its estimate, a public authority may only take account of the costs it reasonably expects to incur in relation to the request in–

- (a) determining whether it holds the information,
- (b) locating it, or a document which may contain the information,
- (c) retrieving it, or a document which may contain the information, and
- (d) extracting it from a document containing it. (See regulation 3).

34. The estimate must be sensible, realistic and supported by cogent evidence (*McInnery v IC and Department for Education* [2015] UKUT 0047 (AAT) para 39-41).

Section 16 – Advice and Assistance

35. Section 16 provides:

‘(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

The Task of the Tribunal

36. The tribunal’s remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner’s decision involved exercising discretion, whether she should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

Evidence and submissions

37. We have read and were referred to a bundle of documents, a skeleton argument from the Department and the Commissioner's response. We read a witness statement and heard oral evidence from Brendan Sheehy on behalf of the Department and we heard oral argument from the Department and Mr Adedeji.

Discussion and conclusions

The first paragraph of the request – s 12

38. There is clear evidence that the cost of complying with the request *as understood by the Department* would exceed the appropriate limit. We accept Mr Sheehy's detailed and cogent evidence that it would far exceed this limit. Mr Adedeji argues that the Department has misinterpreted his request, and that the request has a much narrower scope. Mr Adedeji argues that, in the light of his past correspondence with the Department, it was not reasonable for them to interpret the request as widely as they did. He argues that it was not reasonable for them to answer the request in relation to all complaints when he had been in correspondence with the Department about a particular complaint, namely the PCT's failure to comply properly with his subject access request, and when he had specified in the request that it only concerned complaints which had surfaced within the last 12 months.

39. The scope of the request must be considered objectively in the light of any relevant background facts. The tribunal finds that the request is objectively unambiguous, even looked at in the context of Mr Adedeji's correspondence with the Department. The request asks which organisation(s) handle(s) complaints about the now abolished PCTs. It does not specify which complaints, nor does it specify which PCTs. It must therefore refer to all complaints and all PCTs. This is so even in the light of previous correspondence between the Department and Mr Adedeji that showed that he had a particular interest in a particular complaint against a particular PCT. This interpretation is supported by the presence of the second paragraph of the request, which repeats the request but against one particular PCT. If the first paragraph is interpreted as referring only to that PCT, the second paragraph becomes meaningless. This supports a broad interpretation of the first paragraph.

40. The only limit which is expressly contained in the first paragraph is that it only includes complaints that complainants have become aware of within the last 12 months. Mr Adedeji asserts that this limitation means that it relates only to 'legacy' issues and consequently that there is likely to be only one body responsible for all complaints and all PCTs, probably the Department of Health legacy team. His argument as we understand it is as follows. If all 'legacy' issues

are dealt with by one body it cannot be argued that naming it would exceed the appropriate limit.

41. There is no evidence before the tribunal that there is a blanket rule in relation to all complaints, of any type, which have surfaced in the last 12 months. Mr Adedeji relies on a number of letters to support his argument. These include a letter from the Department dated 20 January 2014 in relation to a complaint by Mr Adedeji that the PCT had breached the Data Protection Act 1998. That letter states in relation to PCTs:

The Department is now the body legally responsible for answering requests relating to historic and corporate matters of these organisations, where these functions have not transferred to an organisation in the new system. Accordingly, we are the correct organisation to handle your complaint.

42. The phrase 'where those functions have not transferred to an organisation in the new system' suggests that there is no blanket rule in operation. Mr Adedeji referred to a number of other letters but none of these letters, or any of the other letters in the bundle, would support a finding that one organisation is responsible for all complaints that have surfaced in the last 12 months. Consequently we find that the fact that the scope of the request is limited in this way would not effect the amount of time it would take the Department to deal with this request.
43. We note that Mr Adedeji was given the opportunity to and did narrow his request subsequently, but as set out above this particular appeal is concerned with the original request.
44. For the above reasons we conclude that the Department's interpretation of the scope of the request was correct and that they were entitled to rely on s 12.

The first paragraph of the request - s 14 vexatious request

45. As the tribunal has concluded that s 12 has the effect that the Department has no duty to comply with the request, it is not necessary for the tribunal to consider whether the Information Commissioner erred in concluding that the request was vexatious under s 14.

The second paragraph of the request – information provided

46. The Department asserts that it has complied with the second paragraph of the request by providing the requested information. Mr Adedeji disagrees. He makes a number of arguments which broadly come under the submission that the Department has interpreted the request too widely and/or the information provided is inconsistent with information previously provided.

47. Mr Adedeji submitted that the list provided does not make sense in the context of his complaint about the PCT's failure with his personal data. He did not request information about the specific organisations that have inherited particular functions from the PCT. The list does not help him to determine where he should make his complaint. He has been given conflicting information in the past. His request relates to historic or legacy complaints, and the Department of Health accepted in 2014 that it was the body that dealt with historic complaints.
48. We find that the request has to be interpreted objectively in the light of any relevant background facts. We find that the wording of the request was clear and unambiguous. It is not possible to read the request as limiting the information requested to complaints about the PCT's failure with personal data, even in the light of previous correspondence with Mr Adedeji. The Department has to provide the information which has been requested, not the information which it thinks might be most useful.
49. Further we find that the information was not inconsistent with information previously provided, namely that the Department of Health is the relevant organisation where the functions have not transferred elsewhere. As stated above, there is no evidence that all complaints arising during the last 12 months are dealt with by one body.
50. We conclude for those reasons that the Information Commissioner did not err in finding that the Department had complied with this part of the request.

Advice and assistance

51. Mr Adedeji makes a number of points. We summarise his arguments under four headings below:

1. The Department were intent on preventing him receiving the information by refusing to deal with the request under FOIA

52. Mr Adedeji submits that the Department's 1 June 2016 response and their 7 July 2016 response to a request for an internal review were misleading and untruthful in stating that the request did not fall under the provisions of the Freedom of Information Act. The use of the phrase 'no amount of rewording will alter this' shows, according to Mr Adedeji that the Department were intent on preventing him receiving the information. The Department had taken a similar approach to other requests, including his request of 17 March 2016, denying that it fell under FOIA.

2. The Department gave him conflicting, misleading and untruthful information about who to complain to: this led to confusion, distress, frustration and shows that the Department were deliberately mishandling the request to prevent him receiving the information

53. The Department's 14 April 2016 response to the 17 March 2016 request told Mr Adedeji that the CCG was the successor organisation to the PCT, and so was best placed to handle complaints about the PCT that complainants have only become aware of in the last 12 months.
54. Mr Adedeji states that this is misleading and untruthful in the light of the Department's letter of 20 January 2014 and the related investigation by the Department which, according to Mr Adedeji, confirms that the Department is the appropriate body to deal with complaints within the scope of the 5 May 2016 request.
55. The response of 7 July 2016 is misleading and untruthful. The Department knew that he had not requested the complaints data held by former PCTs. It was therefore misleading to say that the Department of Health did not hold such data and that he should contact the CCG. This shows that they were deliberately mishandling his FOI requests to prevent him receiving the information, in part to disrupt Mr Adedeji's wider aim of remedying injustices cause by NHS failures.
56. The weblink to the NHS complaints procedure provided in the email of 20 April 2017 did not work.

3. The request of 5 May 2016 was clear

57. The request was clear. Further, in the light of Mr Adedeji's 2014 complaint, which was a complaint about the PCT which he had only become aware of within the last 12 months, and other complaints, the Department must have known what information he was requesting.
58. The Department did not state in either of its responses or in the internal review that it found the request unclear. If they had found the request unclear, the Department should have asked him to to clarify it.

4. The failures by the Department are deliberate

59. So many breaches over a straightforward request in a department with substantial experience and expertise in handling FOI requests must be deliberate. The Department knows that these failures will impact on Mr Adedeji more because of his mental health issues.

Conclusion on s 16

60. We accept that the Department should have responded initially to the request as a FOIA request. We do not accept that this shows that the Department were being deliberately misleading and untruthful, nor that it shows that the Department were intent on preventing him from reaching the information.

61. We accept that Mr Adedeji has been referred to a number of different organisations. This has created a very confusing situation. We do not accept that this was a deliberate attempt to prevent him from receiving the information.
62. In relation to the clarity of the request, we refer back to our findings in paragraphs 38-44 and 46-50 above as to the scope of the request. Although the answer may not have resolved Mr Adedeji's problem, it was the appropriate answer given the clear wording of the request, even in the light of all the relevant factual background.
63. We find that there is insufficient evidence before us to support a finding that any of the Department's actions were deliberate.
64. For these reasons we find that the Department was not in breach of its obligations under s 16. However, as stated above, we would urge the Department to provide Mr Adedeji with the information he needs by coordinating with the CCG and NHS England and communicating to Mr Adedeji a joint position as to which body will deal with the complaints Mr Adedeji wishes to raise.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 9 July 2018

Promulgation Date: 13 July 2018