



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

Appeal Reference: EA/2017/0110

**Heard at Wigan County Court
On 14 June 2018**

Representation:

Appellant: in person

First Respondent: The Information Commissioner did not appear

**Second Respondent (Wigan Borough Clinical Commissioning Group): Mrs Harvey Smith
(Counsel)**

Before

JUDGE BUCKLEY

MALCOLM CLARKE AND PAUL TAYLOR

Between

MARTIN L ADEDEJI

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

WIGAN BOROUGH CLINICAL COMMISSIONING GROUP

Second Respondent

DECISION

1. 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

1. For the reasons set out below the Public Authority was not entitled to refuse the Complainant's requests for information made on 2 August 2016 and 5 September 2016 on the grounds that they were vexatious.

Action Required

2. Wigan Borough Clinical Commissioning Group is required to respond to Mr Adedeji's requests within 35 days of the promulgation of this judgment either by supplying the information or by serving a refusal notice under s 17, indicating what grounds they rely on other than s 14(1).

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice FS50659774 and FS50661772 of 25 April 2017 which held that Wigan Borough Clinical Commissioning Group ('the CCG') had correctly applied s 14(1) of FOIA, and that the CCG had complied with s 16(1). The Commissioner did not require the public authority to take any steps. This is a majority decision.

Procedural issues

2. The CCG drew to our attention that Mr Collins from the CCG had been an audit manager providing external audit services to the board of Trafford PCT when Malcolm Clarke had been a non-executive director on the board. Mr Collins therefore remembered Dr Clarke because he had attended board audit committee meetings. This was more than five years ago and the relationship, of which Dr Clarke only had limited recollection, was restricted to formal meetings. Neither party had any objection to Dr Clarke remaining on the Tribunal, and the Tribunal saw no reason why Dr Clarke should recuse himself.

Observations outside the scope of this appeal

3. Since 2013 Mr Adedeji has attempted to make various complaints and requests for information or personal data, which he would, before their abolition in 2013 have made to the Ashton Leigh and Wigan Primary Care Trust ('the PCT'). In the absence of the PCT he has approached the Department of Health, Wigan Borough Clinical Commissioning Group ('the CCG') and NHS England. They have all referred him to each other (see table in Annex One prepared by the Tribunal). It should not be any more difficult for an individual to make a complaint or a request for information/data to the PCT than it would be if they still existed.
4. As a result of the responses from these bodies, Mr Adedeji attempted to use FOIA to find out who holds personal data relating to his complaint to the PCT in 2010 and who is the appropriate body to whom he should complain about the PCT's actions.

5. The Department of Health (see appeal number EA/2017/0137) has now sent Mr Adedeji a list of all the different organisations who have inherited all the different functions of the PCT. It does 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.
6. It is not Mr Adedeji's fault that PCTs have been abolished. Nor is it his fault that their functions and records have been dispersed to different bodies. It is extremely difficult for a lay person to identify the appropriate body that holds the relevant data and that will deal with the relevant complaints.
7. It appears from correspondence disclosed by the CCG in response to the Tribunal's decision in EA/2017/0049 that there is agreement between the different bodies that NHS England holds the personal data relating to the 2010 complaint.
8. It falls outside the scope of this appeal, but it is likely to save a lot of time if the Department of Health, the CCG and NHS England could agree **a joint letter to Mr Adedeji identifying (a) the organisation which holds the data relating to his 2010 complaints to the PCT, including contact details and, if possible, a named individual contact and (b) the organisation, by name, that is prepared to deal with each of his substantive complaints including contact details and, if possible, a named individual contact.**

Evidence and submissions

9. We have read and were referred to several bundles of documents:
 1. The bundle and 'documents referred to in the timeline at p94 of the bundle'(paginated sequentially from p1-357).
 2. Additional open documents (not paginated).
 3. Appellant's supporting documents (paginated from p1A-336A).
10. We also read written submissions from the CCG and the Commissioner's response and heard oral argument from the CCG and Mr Adedeji.
11. There is some overlap between this appeal and appeal EA/2017/0137 which this Tribunal heard on the same day. During the hearing the Tribunal provided a number of relevant additional documents from the EA/2017/0137 bundle to the CCG. Mr Adedeji had seen those documents already. The CCG's representative had the opportunity to read those documents and take instructions. She did not object to their inclusion. They were:
 1. A letter dated 20 April 2016 from the Department of Health to Mr Adedeji (p99-101 of the EA/2017/90137 bundle, 'the DoH bundle').
 2. Certain pages from a table produced by the Department of Health reproducing the content of letters from the Department of Health to Mr Adedeji between 2013 and 2016 (pp130, 132, 141, 142 and 144).

Factual background to the appeal

12. 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'). By letter dated 3 February 2010 he opted to have the complaint investigated by the PALS and Complaints Department at the PCT (p18A). In October 2012 Mr Adedeji complained to the Parliamentary and Health Service Ombudsman. Mr Adedeji remains unhappy with

the way the complaint was handled, both by the PCT and the Ombudsman. He also made another complaint about a different GP at Dicconson Group in 2010.

13. The PCT ceased to exist on 1 April 2013 and the Wigan Borough Clinical Commissioning Group (the CCG) was created. The extent to which it was the successor to the PCT or took over its functions is not clear.
14. Mr Adedeji has wished to raise, since 2013, a number of complaints, which he would have raised with the PCT if it still existed. He also wishes to obtain the data which was held by the PCT in relation to the complaints he made in 2010.
15. He has approached a number of different organisations: the CCG, the Department of Health and NHS England. The information he has been given about who now has the data and who will deal with a complaint about the PCT has been inconsistent. The Tribunal has created a table of the information he has been given which is attached at Annex One.
16. On 18 July 2016 Mr Adedeji made a request to the CCG, for:

Information ... which states who is the data controller for the personal data processed by Ashton, Leigh and Wigan Primary Care Trust (ALWPCT) during their handling of service user's complaints made to ALWPCT from the 01st April 2009.

17. In its response the CCG explained that it did not hold information prior to April 2013 and that NHS England holds all legacy information. Mr Adedeji referred the matter to the Commissioner who decided that the CCG did not hold the information. Mr Adedeji appealed and the first tier tribunal in a decision dated 7 August 2017 (EA/2017/0049) decided that the CCG did hold the information and ordered that the CCG supply Mr Adedeji with copies of any relevant documents by 1 September 2017.
18. In response to the Tribunal decision in EA/2017/0049 further documents were sent to Mr Adedeji. These included a letter dated 26 July 2013 from the Legacy Management Team at the Department of Health. The relevant part states:

Legacy claims and complaints: All the legacy claim files received from the PCTs have now been transferred to [REDACTED]. It is expected that these files will then be transferred in September to the appropriate Receiving Organisations – NHS England, Department of Health, Property Services.

19. Also in response to that decision the CCG disclosed a chain of emails dated 8 August 2017 between Tim Collins (CCG), the Department of Health and NHS England. The relevant part of the email from the Department of Health states:

When the PCT dissolved responsibilities transferred to various organisation depending on the function. You are right in what you state that PCT complaints which relate to a patient were taken on by NHS England. More general complaints now come under the control of DH Legacy Records Team mb_legacy_records@dh.gsi.gov.uk

20. Attached to that email was a redacted internal Department of Health letter of 26 July 2013 purporting to explain the arrangements. The combination of the use of professional language and acronyms and the redactions makes the implications of this letter difficult to understand for a lay person and indeed the Tribunal.

21. The relevant part of the email from NHS England states:

NHS England is the data controller for patient complaints for the former PCTs... more general complaints go to the Department of Health.

22. A further email from NHS England in response to an email from the CCG asking for contact details to give to Mr Adedeji stated:

I think it would be a good idea to give the appellant the Information Governance email inbox as any information governance queries should go there in the first instance. Someone would definitely get back to him/her. The email address is england.ig-corporate@nhs.net

Requests, Decision Notice and appeal

23. This appeal concerns two requests.

The August request – 2 August 2016

24. Mr Adedeji made the August request under FOIA on 2 August 2016:

1. What recorded information do you hold which states what personal data processed from the 01st April 2009 by Ashton, Leigh and Wigan Primary Care Trust (ALWPCT) during their handling of service users complaints you hold.
2. What recorded information do you hold which states what personal data processed from the 01st April 2009 by ALWPCT during their handling of service user's complaints have you shared with other organisations since April 2013.

25. The CCG replied by email on 4 August 2016

Unfortunately, [your FOI request] does not ask for any new information and can be answered by the response which was sent under reference number WIG/FOI/8295:

*Wigan Borough CCG does not hold information prior to its inception in April 2013. **NHS England holds all legacy information.** To contact NHS England please use this link: <http://www.england.nhs.uk/contact-us/foi/>.*

'Legacy information' means information relating to a previous organisation that no longer exists. Ashton, Leigh and Wigan Primary Care Trust is a previous organisation that no longer exists. All legacy information is held by NHS England, as indicated previously on multiple occasions, and therefore NHS England holds all the information relating to Ashton, Leigh and Wigan Primary Care Trust.

...

Please note that we have now responded to your request on numerous occasions and provided you with the information you requested, and as such will no longer respond to any requests for information relating to Ashton, Leigh and Wigan Primary Care Trust under section 14(1) of the Freedom of Information Act 2000.

All further requests for information relating to Ashton, Leigh and Wigan Primary Care Trust should be directed to NHS England, which is the data controller.

26. Mr Adedeji requested an internal review on 7 August 2016. The CCG refused to carry out an internal review because:

1. Wigan Borough CCG has already provided you with the information.
2. Wigan Borough CCG cannot answer questions on behalf of another organisation. All of ALWPCT's information was transferred to NHS England. You have already had an internal review for your last request, the result of which was that the CCG confirmed that the data controller for ALWPCT was NHS England and not Wigan Borough CCG.

27. Mr Adedeji referred the matter to the Information Commissioner on 6 October 2016.

The September request – 5 September 2016

28. Mr Adedeji made the September request on 5 September 2016:

I am requesting a copy of all recorded information you hold regarding allegations that any of the General Practitioner's at the Dicconson Group Practice racially abused a patient.

29. The CCG replied on 8 September 2016 indicating that it did not consider the request to be a FOI request because it was a request for personal data, and that any subject access request would need to be made to the practice itself or to NHS England as primary care commissioners and that:

It is highly unlikely that the CCG will hold much, if any, information relating to this incident...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.

30. Mr Adedeji emailed the CCG on 9 September 2016 asking the CCG to process it as a FOI request or providing advice and assistance as to how it could be re-phrased as a FOI request.

31. The CCG replied on 14 September 2016 stating that they now considered his requests to be unreasonable and persistent and therefore there would not be any further response to similar requests.

32. Mr Adedeji referred the matter to the Information Commissioner on 4 January 2017.

33. In a decision notice dated 25 April 2017 the Commissioner decided:

1. The two requests are vexatious and the CCG is not obliged to comply with them under section 14(1) of the FOIA.
2. The CCG provided adequate advice and assistance and complied with its obligation under s 16(1).
3. The CCG's refusal of request 2 breached section 17(5).

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

1. The requests were not vexatious.
2. The CCG did not provide adequate advice and assistance under s 16(1).

Issues

35. The issues we have to determine are:

1. Did the Commissioner err in finding that the CCG was entitled to rely on s 14(1) – vexatious request?
2. Did the Commissioner err in finding that the CCG had not breached s 16(1)?

Legal framework

S 14(1) Vexatious Request

36. Guidance on applying s 14 is given in the decisions of the Upper Tribunal and the Court of Appeal in Dransfield ([2012] UKUT 440 (AAC) and [2015] EWCA Civ 454). The Tribunal should take 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 consider whether the request is a ‘manifestly unjustified, inappropriate or improper use of a formal procedure’ and is therefore vexatious.
37. The Upper Tribunal said, at para 29: ‘The context and history of the particular request, in terms of the previous course of dealings between the individual requester and the public authority in question, must be considered in assessing whether it is properly to be characterised as vexatious.’
38. The Tribunal considers the four factors identified by the Upper Tribunal to be a helpful framework to structure its consideration of whether the request was vexatious but has had regard to the fact that it is not intended to be an exhaustive definition or a checklist for determination of this issue.
39. The factors above are considered in the context that the Court of Appeal held that “vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public”.

Section 16 – Advice and Assistance

40. 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 role of the Tribunal

41. 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 he 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.

Discussion and conclusions

S 14 - vexatious request

42. The Commissioner decided that the August request was vexatious because the CCG has informed Mr Adedeji on more than one occasion prior to the submission of his August request that it does not hold any information concerning the PCT because it is not the successor to the PCT. Mr Adedeji was therefore aware when he submitted the request that the CCG was not the successor organisation to the PCT.
43. In relation to the September request the Commissioner found that it was vexatious on the basis that Mr Adedeji's requests to the CCG are an attempt to use the FOIA to keep open matters that appear to have been dealt with, to Mr Adedeji's dissatisfaction, some time ago. Considered cumulatively with the August request and the earlier contacts set out in the timeline provided by the CCG, the September request was vexatious because the requests are placing an unjustified burden on the CCG.
44. The Commissioner referred in the decision notice to her decision in FS50642904. The appeal against that decision has been upheld by the first tier tribunal EA/2016/0049 as outlined above.
45. The Commissioner's response to the Notice of Appeal makes the following additional points:
 1. Mr Adedeji's argument that emails from other organisations demonstrate that NHS England is not the data controller for data processed by the PCT concerning complaints received from 2009 reflects Mr Adedeji's mistrust of the CCG despite NHS England agreeing it is the successor to the PCT.
 2. Mr Adedeji is likely to continue to seek to engage the CCG in correspondence and divert its resources in an attempt to revisit matters arising from his complaint to the PCT despite the Ombudsman's substantive decision about his 2010 complaint and the Commissioner's decision that the CCG do not hold information relating to the PCT (overturned by appeal EA/2017/0049).
 3. It is not clear to the Commissioner how disclosure of the information would benefit the public.
 4. The contacts and requests taken as a whole are an inappropriate use of FOIA as per Dransfield UT.
 5. If the Tribunal finds that the requests have a serious purpose and that FOIA is an appropriate means, this is outweighed by the serious burden on the CCG in dealing with the requests and associated correspondence.
46. There are two issues relied on in the Decision Notice to support the finding that the requests were vexatious. Firstly, in relation to the August request, that Mr Adedeji had been told by CCG that NHS England and not the CCG was the appropriate body to whom he should make the FOI request several times before he made the August request. Secondly that the September request was vexatious in the light of the past history of correspondence and requests between the CCG and Mr Adedeji.
47. In relation to the first issue, we find that it was not clear to Mr Adedeji at the time that he made the request that NHS England were the appropriate body. Attached at Annex A is a table the Tribunal has collated showing the information he has been given by the CCG, NHS England and the Ombudsman as to the identity of the appropriate body.
48. The table shows that in April 2016 Mr Adedeji was told by NHS England to contact the Department of Health. It shows that the Department of Health has consistently told Mr Adedeji that the CCG is the successor organisation to the PCT and that he should contact the CCG, including on 14 April 2016, 1 June 2016 and 7 July 2016.

49. Further the only 'official document' (as opposed to correspondence) which the claimant had seen at the time of the request which indicated who had inherited complaints data from the PCTs is the extract disclosed by the Department of Health (p53) and this document states that the nominated transferee was the CCG. In its submission the CCG states (para 12d) that the CCG has been trying to identify a complete copy of this document to properly consider it. The Tribunal observes that the fact that the CCG is unable to identify such a document suggests that even amongst the relevant bodies there was not a clear grasp of the respective organisational responsibilities after PCTs were abolished.
50. In the absence of a consistent response from the Department of Health, the CCG and NHS England and in particular in the light of the Department of Health's consistent redirection to the CCG we find that it was not vexatious to continue to ask the CCG for the information even though they had told him that they did not hold it.
51. We note that there appears now to be some agreement between the three organisations that NHS England is the appropriate body to deal with Mr Adedeji's request as evidenced by the emails disclosed in response to the tribunal appeal EA/2017/0049. There might be good reasons why a complaint cannot be dealt with, but confusion over the right body to deal with the complaint is not one of those reasons. As we indicate in observations above, it would assist Mr Adedeji and might reduce future correspondence if the three bodies could write an agreed letter to Mr Adedeji indicating which body was prepared to deal with his particular complaint/request.
52. In relation to the second issue, the Commissioner concluded that the September request was vexatious when considered cumulatively with the August request and four years of earlier contacts. The Commissioner took account of the CCG's submission, its timeline of contacts and her investigation of other complaints by Mr Adedeji about associated authorities' handling of requests on similar subjects. She concluded that the requests were an attempt to use FOIA to keep open matters that were dealt with to Mr Adedeji's dissatisfaction some time ago, namely the 2010 complaint about Dicconson Group Practice.
53. In relation to the factual background relied on by the Commissioner, the Tribunal notes that the Commissioner did not see the correspondence referred to in the timeline. It does not all relate to the same 2010 complaint. There is, for example, reference to a complaint about a different GP. Further, as acknowledged in the Commissioner's submission the contacts cover three not four years.
54. We find that the requests are not vexatious. Our starting point is that, in making an information request, Mr Adedeji was exercising an important statutory right and that the hurdle of satisfying section 14(1) is a high one.
55. Although these particular requests looked at individually do not place a significant burden on the CCG we accept that dealing with correspondence from Mr Adedeji has placed a significant burden on the CCG, and we accept their estimate of at least 70 hours of work.
56. The timeline bundle shows that Mr Adedeji was pursuing a number of related complaints, which he would have raised with the PCT if it had remained in existence. In September 2013 Mr Adedeji began to attempt to raise these complaints with what he had been told was the appropriate body, the CCG. At no point does the CCG deal substantively with any of these complaints, because they do not accept that they are the appropriate body to deal with them. It is not the case therefore, that Mr Adedeji is constantly trying to re-open complaints that the CCG have dealt with already. We have found, above, that it

was not unreasonable for Mr Adedeji to continue to raise these matters with the CCG in the light of the consistent response from the Department of Health that the CCG was the appropriate body to contact.

57. Mr Adedeji does raise a number of new complaints post September 2013. Some of them arise out of information he became aware of more recently (for example see p213). One of them (for example p170) does appear to be attempting to reopen the 2010 complaint. Some of them relate to a dispute over whether or not one of the complaints was in time.
58. As well as these complaints, Mr Adedeji made a number of FOI and/or subject access requests to CCG for personal data related to complaints against the PCT. In the light of the inconsistent information (set out in the table in Annex One) that Mr Adedeji was receiving about who had inherited the data from the PCT, and in the light of the fact that Mr Adedeji had seen correspondence from the CCG providing some of this data to others (e.g. p335, 336) it was not unreasonable for Mr Adedeji to think that they might hold it.
59. It is apparent from the documents in the time line bundle that a large proportion of the correspondence between Mr Adedeji and the CCG was caused by the lack of clarity and consistency from the various public bodies as to the identity of the appropriate body to deal with his complaints and requests. The motive and purpose behind this portion of the correspondence was entirely legitimate. Mr Adedeji was attempting to find out (a) who held his personal data in relation to his 2010 complaints and (b) where he should make a complaint now the PCT had been abolished. This information is clearly of value to Mr Adedeji, and although the likely number of complaints about action by PCTs will diminish as time goes on, we find that it is also of value to the public for there to be a clear answer as to who has become accountable for the actions of PCTs and who now holds personal data held by PCTs.
60. The Tribunal finds that a smaller proportion of the correspondence does, on the balance of probabilities, arise from Mr Adedeji seeking to reopen matters that have already been investigated by other bodies to his dissatisfaction, but finds that this element does not represent an unreasonable burden.
61. There is no evidence and we do not draw an inference that either the requests under consideration or any element of the correspondence arises from a desire by Mr Adedeji to cause any harassment or distress.
62. Looked at as whole we find that the requests are not a manifestly unjustified, inappropriate or improper use of a formal procedure and the Commissioner erred in concluding that they were vexatious.

Minority reasons

63. This is a majority decision. The minority member agreed with the Information Commissioner that the requests were vexatious. His reasons in summary are as follows.
64. During the hearing Mr Adedeji said: "I am trying to obtain information to overturn the unjust and unfair decision." He also stated: "Behind all of this appeal I am looking for all information arising from the incident at Dicconson Group Practice." He went on to say that: "The request did relate to my allegations but I was asking for any information held that was not personal data".

65. In his notice of appeal (p19) Mr Adedeji states: "My requests are an attempt to remedy the injustice, maladministration and harm I have suffered in respect of incidents at my former GP's the Dicconson Group Practice (DGP)..." This was investigated by the Parliamentary Health Services Ombudsman.
66. In the opinion of the minority member Mr Adedeji's own evidence shows that his requests are, as the IC put it (p7, para.37): "...an attempt to use the FOIA to keep open matters that appear to have been dealt with, to the complainants dissatisfaction, some time ago."
67. The minority member also found that the information which Mr Adedeji considered to be missing was his personal data, his belief being that he should have been provided this in response to his subject access requests. FOIA is not the correct route to address concerns about an SAR response, instead he should have gone to the IC about this.
68. The minority member agrees with the IC's findings in paras.17-39 (pp4-8).
69. All members of the Tribunal agree that although the appeal has succeeded on this issue, we urge Mr Adedeji to have fair regard for the limited resources of the CCG and the other authorities. The number of requests that Mr Adedeji has made show that he is approaching the line where requests may in the future properly be considered vexatious. We wish to make clear to Mr Adedeji that if the three public authorities concerned follow our recommendation and write a joint letter to Mr Adedeji clearly identifying by name the body who is willing to deal substantively with his complaints/answer his data requests, any further FOI requests to bodies other than the named body run the risk of being considered vexatious.

Advice and assistance

70. We find that the Commissioner did not err in concluding that the CCG had offered Mr Adedeji adequate and appropriate advice and assistance, on the basis that the CCG had attempted to redirect Mr Adedeji to the appropriate authority.
71. However, the CCG is now aware of Mr Adedeji's difficulties in identifying a body to deal with his requests and has more information about what Mr Adedeji has been told by the Department of Health and NHS England. Our view is that in order to comply with this duty in relation to these or any future requests relating to information formerly held by the PCT, the CCG should consider carefully the section 45 Code of Practice, and in particular part III 'Transferring Requests for Information'.
72. The CCG should also consider carefully the wording of the request. It is clear from the papers (p26, p335A, p336A) that the CCG has, since April 2013, shared personal data processed by the PCT during the handling of service users complaints with at least one other organisation. It seems likely therefore that if anyone holds the information in paragraph 2 of the August request, it is the CCG.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 9 July 2018

Promulgation Date: 16 July 2018