First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2018/0154

Before
Judge Stephen Cragg Q.C.

Tribunal Members

Mr David Wilkinson
Mr Narendra Makanji

Heard at the Reading Tribunal Centre on 21 January 2019

Between

Ben Dean

Appellant

-and-

The Information Commissioner (1)
NHS England (2)

Respondents

Attendances:

For the Appellant: In person

For the 1st Respondent: Did not appear

For the 2nd Respondent: Mr Robin Hopkins

DECISION AND REASONS

BACKGROUND

1. The Appellant is a doctor who works for the NHS. On 16 July 2015 the then Secretary of State for Health, Mr Jeremy Hunt, made a speech in which he explained the government's interest in 7-day services in the NHS (7-day NHS). He made the claim that around 6,000 people every year lose their lives 'because we do not have a proper 7-day service in hospitals' and that there was a markedly greater percentage likelihood of a patient dying who is admitted, for example, on a Sunday rather than on a Wednesday.

2. The speech was made in the context of the proposed introduction of new contracts with consultants and junior doctors for NHS work, with the proposals causing controversy.

3. Six weeks after the Secretary of State's speech an academic study on weekend mortality rates was published by Freemantle and others (Freemantle 2015). In short, that study concluded that there may be many reasons why mortality rates were higher at weekends, not least that there is a tendency for weekend admissions to include a higher proportion of patients with high risk conditions.

4. In summary, the Appellant and others have had concerns about the source of Mr Hunt's comments in his 2015 speech, as Freemantle 2015 had not been peer-reviewed or published at the time of the speech, and did not, in any event, support the assertions made by Mr Hunt about the link between increased mortality at weekends and the need for a 'proper 7-day service in hospitals'.

5. The Appellant and a colleague have made a large number of FOIA requests of the Department of Health and NHSE with the aim of establishing the source of Mr Hunt's information used in the 2015 speech.

6. In a previous Tribunal decision (*Dean and Sturgeon v IC, Department of Health and another* (EA/2016/0140) (26 May 2017)), the Tribunal had to consider a request made by the Appellant in September 2015 to the Department of Health (not NHSE) for information about how Mr Hunt had got to know about Freemantle 2015 before it was published. In the course of its decision, the Tribunal concluded that it was satisfied that Mr Hunt had received information in conversation with Sir Bruce Keogh of NHSE who was drawing on a previous Freemantle report published in 2012 (see paragraph 33 of the decision). The Tribunal also noted that Freemantle 2015 in fact discussed a figure of 11,000 more people admitted to hospital on weekend days dying than on other days of the week (paragraph 34), and that Mr Hunt would have been more likely to cite this figure in his speech if he had been aware of it (paragraph 35).

7. The Tribunal had heard evidence that a company called Deloitte had been advising NHSE in 2014 and 2015 on the 'weekend effect' and in March 2015 figures from the latest analysis were shared with senior health service and medical policy personnel, including personnel from Deloitte, and that Deloitte had also carried out work calculating excess deaths (paragraph 25), but the Tribunal concluded that the Appellant's request did not cover a request for information concerning Deloitte's work. However, the Tribunal went on to say at paragraph 37:-

> 37. …. as we have explained, we can identify no written documentation within the scope of the request that the Department could be ordered to disclose, with the result that we uphold the Information Commissioner's decision, it is possible that there may be material relevant to the Department's reliance on the weekend effect and its general relevance to policy in a form produced by Deloittes. We accept this is a matter for another FOIA request. Dr

Dean's general arguments on the invalidity of both the existence of the effect and the policy based on it may apply with equal force to any claim that there are 11,000 excess deaths due to a weekend effect. The disagreement may or may not be capable of conclusion, although the published materials Dr Dean has cited appear to be very relevant. The more the arguments and analysis of all parties are exposed, the better chance of reaching a reasoned conclusion on an important matter and the better public understanding will be.

THE REQUEST

8. It is against that background that on 12 October 2017 (4 ½ months after the Tribunal's May 2017 decision and after some further correspondence), the Appellant wrote to NHS England (NHSE) and requested information in the following terms:

"May I please:

1. *See the email correspondence you hold relating to this 7DS briefing for the SoS.*
2. *See any slide packs created for this briefing in full.*
3. *See any meeting minutes relating to preparing for this briefing or the meeting minutes of the 7DS briefing of the SoS."*

And

"I would like to make the following request as regards the attached emails:
As regards an email sent by [redacted] on page 21 on June 11th 2015 in which it states "This is the latest pack".
1. *Please may I make a request to see this 'pack'.*
On page 34 an email from Deloitte states "this should be 6700...."
2. *May I see the Deloitte slidepack which mentions the 6700 figure - obviously this may be the same pack as in the first request above, in which case this amounts to just one request."*

9. As can be seen, the request refers to slide packs which the Appellant clearly thinks are produced by Deloitte. As such, this request appears to be the request for information (this time to NHSE) that the Tribunal had said in the previous judgment was 'a matter for another FOIA request'.

10. At this point we should pause and record that Mr David Wilkinson who sat on the May 2017 Tribunal (and so was an author of the judgment in that case), also sits as a tribunal member in the current appeal. We raised this with the parties and drew attention to paragraph 37 of the previous decision, but were told that there was no objection to Mr Wilkinson sitting on this appeal. Our view is that must be right: although the previous Tribunal correctly pointed out that a further FOIA request would be needed to request any Deloitte information that might exist, the Tribunal did not express a view at all as to whether such a request would be vexatious when considered at the time the new request was made (which, as will be explained, is the issue we have to consider in this appeal).

11. NHSE responded to the request on 9 November 2017 refusing to provide the requested information and cited section 14(1) of the FOIA. Following an internal review NHSE wrote to the complainant on 22 November 2017 and upheld its previous position.

THE DECISION NOTICE

12. The Appellant complained to the Commissioner, who considered the application of section 14(1) FOIA in some detail in the decision notice dated 9 July 2018. The relevant parts of the decision notice show that that the Commissioner was satisfied that s14(1) FOIA was met on fairly limited grounds. Thus, the Commissioner explained at paragraphs 76-78 that given the interest in Mr Hunt's statement it would be difficult to say that the Appellant is pursuing a personal issue, noted that the Appellant has not used abusive or aggressive language, that there is no deliberate attempt to annoy, and the request is not frivolous. In paragraphs 79-86 the Commissioner accepts that there are frequent requests, but the request is

clear and does not lack focus. The Commissioner accepts, though, that a response to the request is likely to lead to further requests, and that dealing with unreasonable requests can place a strain on a public authority's resources. The Commissioner continues:-

> 87. The Commissioner is not persuaded that the complainant is being unreasonably persistent as he is not attempting to reopen an issue which has already been comprehensively addressed by NHSE despite the previous responses provided. Furthermore, the Commissioner does not consider that the matter is 'relatively trivial' as this issue is of significant interest not only to junior doctors, but also the general public.
>
> 88. It is the Commissioner's view that the key issue in this case is the burden imposed by the request on NHSE and whether the effort required to meet the request will be so grossly oppressive in terms of the strain on time and resources, that the authority cannot reasonably be expected to comply, no matter how legitimate the subject matter or valid the intentions of the requester.
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> 89. The Commissioner does accept that the complainant has made a large number of requests which collectively have the 7DS as the main focus. This number is exacerbated when the other applicant's requests are included. From the information provided to the Commissioner, there is no evidence that NHSE has informed the complainant that it considers he is acting in concert with the other individual. However, it is clear to the Commissioner that the two individuals referred to are known to each other.
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> 90. Despite this NHSE has responded to the majority of them up until recently when it concluded that the request was now vexatious.
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> 91. Although the latest request is not patently vexatious when taken in isolation the Commissioner acknowledges that any response is likely to result in further requests being made.
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> 92. However the request has to be seen in the context of both the other requests made by the complainant himself and those of the other applicant identified by NHSE. The Commissioner accepts that the cumulative impact of these 59 requests has placed a significant burden on the public authority.
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> 93. As referred to earlier, NHSE has devoted a significant amount of staff time dealing with the requests made by both applicants, roughly

equating to between 128 - 220 days of staff time.

94. The Commissioner is satisfied that there would clearly be an impact on NHSE's ability to manage requests from other applicants and disrupt the work of those in the policy and business areas responsible for the issues which the requests relate to. This is compounded by the fact that a response to one request may result in a new request being made.

95. The Commissioner has carefully considered both the NHSE's arguments and the complainant's position regarding the information request in this case. The Commissioner has carefully reviewed all the information and evidence presented to her by both parties and finds that despite the request serving a serious purpose, it is part of a pattern of behaviour that has placed a significant burden on NHSE, to the extent that it can be deemed to be vexatious. She considers, that on this occasion, in all the circumstances of this case, NHSE is entitled to rely on section 14(1).

13. Thus, the primary basis upon which the Commissioner has found that the current request was vexatious is (a) the ongoing significant burden that has been placed on NHSE from the requests made, and (b) the fact that 'a response to one request may result in a new request being made'.

14. The Commissioner mentions the previous Tribunal decision cited above in passing, but does not refer to the comments in paragraph 37, which are set out above.

THE APPEAL

15. The Appellant states that his appeal relates only to the first part of his request (set out above, but repeated here for convenience):-

"May I please:

1. *See the email correspondence you hold relating to this 7DS briefing for the SoS.*
2. *See any slide packs created for this briefing in full.*

3. *See any meeting minutes relating to preparing for this briefing or the meeting minutes of the 7DS briefing of the SoS."*

16. The Appellant's view is that it is the lack of transparency by NHSE and the Department of Health about the 7-day NHS and the announcement in 2015 which constitutes the main reason behind the level of requests he has made on the issue. He argues that NHSE has largely brought the burden of dealing with requests upon itself by the nature of responses it has made to requests. He notes that NHSE has submitted no evidence in relation to the level of resources necessary to respond to his requests. Understandably, he cites the last sentence of paragraph 37 of the previous Tribunal decision, to the effect that the 'more the arguments and analysis of all parties are exposed, the better chance of reaching a reasoned conclusion on an important matter'. The Appellant says that since the previous judgment in May 2017 it has become clear that Mr Hunt was briefed by NHSE shortly before his 2015 speech and that that briefing included the Deloitte slides and analysis which had an analysis of the 6,000 avoidable deaths.

17. The Commissioner did not appear at the hearing but her response seeks to uphold the decision notice and notes NHSE's unchallenged evidence that responding to the 59 requests of the Appellant and his colleague has taken between 128 and 220 days of staff time (NHSE at the hearing were content for the Tribunal to take the lower figure). The Commissioner highlighted the likelihood that further requests would follow on the same subject matter, and that the issue, where there were many requests, was not limited to whether this particular request could be answered without substantial burden. The Commissioner described the requests as 'secondary' as they follow on from what was said by a Department of Health witness at a previous hearing (see above).

18. NHSE has also responded to the appeal (as well as appearing at the hearing through counsel). The response emphasises the Commissioner's finding that the requests are 'part of an excessively burdensome pattern of requests on the same or very similar themes' and arguing that NHSE is entitled to say 'enough is enough'. NHSE accept that 'Deloitte did, however, produce…a number of iterations of a 'slide pack' in order to facilitate internal discussions of issues relating to the proposed '7-day NHS' '. NHSE also confirmed in the hearing that the information sought by the Appellant is held by them.

19. NHSE produced a press release by NHS (in an iteration said to be dated 23 February 2016), which had confirmed Deloitte's involvement and which had formed the basis for a request about the same by the Appellant on 24 February 2016.

20. NHSE provided details of the numerous requests made by the Appellant and his colleague. NHSE also produced a copy of a letter dated 1 November 2017 to the Appellant's colleague in which the content of two of the Deloitte slides were reproduced, with the comment that:-

> 'These extracts from the slide packs are the only aspects of the slide packs which directly relate to the calculation of the 6,700 figure. The remainder of the slide packs have no relevance to the calculation of the figure'.

21. Although NHSE accept that there is a public interest in the underlying issues surrounding the 7-day NHS , it is argued that that interest has now been served by disclosures that have already been made, and compliance with the current requests would not materially further the public understanding of the issues. Despite this, NHSE argue that, 'there is no end in sight in terms of these FOIA requests'. Although his request is for

specific documents, the requests are on the same theme as his previous multiple requests.

THE LAW

22. In both the Decision Notice and her response to the appeal the Commissioner has set out in some detail the law on the meaning and applicability of section 14(1) FOIA, mainly based around the case of *Information Commissioner vs Devon County Council & Dransfield* [2012] UKUT 440 (AAC), which is uncontroversial and with which we agree.

23. Thus, section 14(1) FOIA states that "(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious". Vexatiousness is not defined in section 14 FOIA, but it is immediately noticeable that it is the request that must be vexatious and not the person making the request.

24. The Commissioner's guidance on section 14 FOIA states that it is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress.

25. The emphasis on protecting public authorities' resources from unreasonable requests was acknowledged by the Upper Tribunal in the case of *Dransfield* (see above) when it defined the purpose of section 14 as follows:

> 'Section 14…is concerned with the nature of the request and has the effect of disapplying the citizen's right under Section 1(1)…The purpose of Section 14…must be to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA…' (paragraph 10).

26. Also in *Dransfield,* the Upper Tribunal took the view that the ordinary dictionary definition of the word vexatious is only of limited use, because the question as to whether a request is vexatious ultimately depends upon the circumstances surrounding that request. The Tribunal placed particular emphasis on the issue of whether the request has adequate or proper justification. As the Upper Tribunal observed:

> 'There is…no magic formula – all the circumstances need to be considered in reaching what is ultimately a value judgement as to whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA'.

27. *Dransfield* was also considered in the Court of Appeal *(Dransfield v Information Commissioner and Devon County Council* [2015] EWCA Civ 454) where Arden LJ observed at paragraph 68 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 for thinking that the information sought would be of value to the requester or to the public or any section of the public… The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious.'

28. The Commissioner's guidance at the time of the decision notice also contains a list of indicators which, the Commissioner says at paragraph 14 of the decision notice:-

> '…may be useful in identifying vexatious requests…. In brief these consist of, in no particular order: abusive or aggressive language; burden on the authority; personal grudges; unreasonable persistence; unfounded accusations; intransigence; frequent or overlapping requests; deliberate intention to cause annoyance; scattergun approach; disproportionate effort; no obvious intent to obtain information; futile requests; frivolous requests'.

29. The recent Upper Tribunal case of *Cabinet Office v Information Commissioner v Ashton* [2018] UKUT 208 (AAC) made clear that s14(1) FOIA can apply purely on the basis of the burden placed on the public authority, even where there was a public interest in the request being addressed and where there was a 'reasonable foundation' for the request. The case also confirmed the approach in *Dransfield* to the effect that the Tribunal should take a holistic approach, taking into account all the relevant factors, in order to reach a balanced conclusion as whether a particular request is vexatious: see especially paragraph 27 of the UT judgment in *Ashton*.

DECSION AND REASONS

30. In this case we are of the view that the Commissioner has wrongly labelled the Appellant's request of 12 October 2017 as vexatious.

31. We note that although the Commissioner has referred briefly to the Tribunal decision of May 2017 she has not referred to paragraph 37 (set out above and referred to by the Appellant in his appeal). In our view that paragraph does have some relevance. In deciding, in May 2017, on a request in relation to the 7-day NHS that had not been described as 'vexatious', the Tribunal recognised that there may be further information available which was outside the scope of the request it was considering, and that that a further FOIA request could be made for that.

32. We do not think that the Tribunal was recommending or encouraging a further request from the Appellant, but we do think that the fact that the Tribunal could identify further information that might exist is relevant to our consideration as to whether the request subsequently made can be described as vexatious.

33. We also do not think that we can completely ignore the fact that the Tribunal finished paragraph 37, as described above, by suggesting that a reasoned conclusion and public understanding could be better achieved by arguments and analysis of all parties being 'exposed'. This statement is reinforced by the sentiments of the Commissioner in the decision notice in the current case about the serious nature of the Appellant's request and that he is not as he is not 'attempting to reopen an issue which has already been comprehensively addressed by NHSE despite the previous responses provided' as argued by NHSE.

34. However, and based on the case law, NHSE (which was not a party to the previous appeal) is entitled to rely on the issue of burdensomeness on its resources as the main argument for us to consider when deciding vexatiousness. Thus, we take into account the large amount of staff time which it is said the NHSE has spent on dealing with requests on the 7-day NHS issue already. We also take into account the large number of requests that the Appellant has made on this issue since August 2015, and the not unlikely prospect that the Appellant will continue to make requests if we find that the current request is not vexations.

35. There has undoubtedly been a burden of considerable time and cost to NHSE in dealing with the Appellant's requests over the past few years. But we also note that in 2017 prior to the current request, there had only been two requests made by the Appellant. One of these was asking for numbers of people (and a list) who had been muted or blocked by the @NHSEngland Twitter (Answer: information not held). The other related to correspondence about the delay in publication of NHS data reported by the BBC, which led to the disclosure of six pages of emails.

36. It does not seem to us that this reflects a heavy ongoing burdensomeness leading up the present request. We also note the NHSE accepts that it does hold the information requested which suggests that the current request

(which the Commissioner accepted 'did not lack focus') will not add significantly to that burden. We also take into account that NHSE is a large public authority with resources more able to cope with higher levels of FOIA requests than would much smaller public bodies.

37. It is also our view that, in accordance with the Commissioner's findings in her decision notice:-

    (a) the Appellant has not used abusive or aggressive language;
    (b) there has been no deliberate attempt to annoy;
    (c) the request is not frivolous;
    (d) the request is clear and does not lack focus;
    (e) the Appellant is not being unreasonably persistent;
    (f) the Appellant is not attempting to reopen an issue which has already been comprehensively addressed by NHSE despite the previous responses provided;
    (g) the matter is not 'relatively trivial' as this issue is of significant interest not only to junior doctors, but also the general public.

38. That view is reinforced by the May 2017 Tribunal decision to the effect that public understanding and a conclusion on this issue is best achieved by exposure of arguments and analysis.

39. Weighing all these factors in the balance, and taking an holistic approach to the issue of vexatiousness, as we must by virtue of the cases of *Dransfield* and *Ashton*, it is our view that the importance of and public interest in the information requested (together with the other factors listed above) outweigh the undoubted burden faced by the NHSE in responding to the Appellant's requests, and that therefore this request is not vexatious for the purposes of s14(1) FOIA.

40. In reaching this decision on the particular facts that are in existence at the time of this request, we should not be seen as encouraging the Appellant to continue in his requests or that this decision means that s14(1) FOIA cannot be raised against him successfully in the future. It should be noted that Mr Hunt has now moved on from the role of Secretary of State for Health, and we understand that there are new studies which update the analysis of mortality figures at weekends. To an extent, then, it can be argued that things are moving on and the Appellant's concerns about what happened in 2015 will largely be of historical interest. Certainly, it seems that the public interest will lessen as time goes on, and concerns about the burden on resources and time are likely to increase.

CONCLUSION

41. On that basis, we would allow this appeal. Our understanding is that as a result of our decision, NHSE must now comply with the request for information, unless one of the exemptions in FOIA is made out.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: February 21, 2019

(Case considered by Panel on 21 January 2019).

Promulgated: February 21, 2019