



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

**Appeal Reference: EA/2018/0015**

**Decided upon the papers**

**Before**

**JUDGE  
FIONA HENDERSON**

**TRIBUNAL MEMBERS  
STEVE SHAW  
ANDREW WHETNALL**

**Between**

**KIRSTY READ**

Appellant

**and**

**INFORMATION COMMISSIONER**

Respondent

**and**

**NHS NORWICH CLINICAL COMMISSIONING GROUP**

Second Respondent

### **DECISION AND REASONS**

#### **Introduction**

1. This is an appeal against Decision notice FS50690104 dated 15<sup>th</sup> January 2018 which held that NHS Norwich Clinical Commissioning Group (Norwich CCG) held the requested information but that it was exempt from disclosure under s43 (2) FOIA with the public interest favouring maintaining the exemption.

#### **Background**

2. The Norfolk and Waveney Clinical Commissioning Groups (of which NHS Norwich Clinical Commissioning Group (Norwich CCG) were a part) had commissioned the services of North East London Commissioning Support Unit (NEL CSU) to manage Personal Health Budgets (PHBs) for its registered

population. The Cost Calculation Form was a tool used by NEL CSU to calculate PHBs and used throughout the period of their contract with the CCGs<sup>1</sup>. On 1st November 2017 The Norfolk and Waveney CCGs established the Norfolk Continuing Care Partnership (NCCP), hosted by Norwich CCG, who now hold full responsibility for managing all continuing healthcare (CHC) patients and PHBs. As part of an exit strategy all information held by NEL CSU in relation to CHC and PHBs has now been transferred to NCCP including the fully functioning digital cost calculation template, and subsequent versions since its original creation.

### Information Request

3. On 26<sup>th</sup> April 2017<sup>2</sup> the Appellant made a request to Norwich CCG for “*a functional digital template for this spreadsheet*” making reference to a “*CHC Cost Calculation form*” which was also described as “*Norwich CCG’s PHB budget setting tool*”.

In relation to the April request Norwich CCG originally replied that it did not hold the requested information<sup>3</sup>.

4. On 10<sup>th</sup> June 2017 she requested from NEL CSU “*complete, fully functional, digital templates for each of Norwich’s CCG’s PHB Cost Calculation Forms/budget setting tools, with details of the dates each spreadsheet was applied*”<sup>4</sup>.

NHS England on behalf of NEL CSU redirected the Appellant back to Norwich CCG. The Appellant argued that since the Norwich CCG’s response had been processed by NEL CSU they ought to have included a copy of the template if it was in fact held by them.

5. Following an internal review of the April request, Norwich CCG indicated that having made enquiries of NEL CSU, they now accepted that they did hold the information<sup>5</sup>, but identified exemptions under sections 43(1)<sup>6</sup> and 43(2)<sup>7</sup> FOIA to withhold the information.

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<sup>1</sup> 28.9.18 letter ccg

<sup>2</sup> P41 bundle

<sup>3</sup> P64 bundle (response dated 23.5.17)

<sup>4</sup> P46 bundle

<sup>5</sup> P66 letter dated 31.7.17

### Complaint to the Commissioner

6. The Appellant complained to the Commissioner about the June request which had been directed to the CSU but identifying Norwich CCG as the holder of the information. She included the correspondence relating to the April request to Norwich CCG in support of this complaint. The Commissioner initially outlined the focus of her investigation as being whether NEL CSU handed the request of 10<sup>th</sup> June in accordance with FOIA<sup>8</sup>. However, without reverting to the Appellant and following an un-transcribed telephone call with Norwich CCG, the Commissioner then purported to change the focus of the request to the April request<sup>9</sup>.
  
7. The Commissioner's decision was that information contained within a digital spreadsheet was "held" for the purposes of FOIA. She did not uphold reliance upon s43(1) but did uphold reliance upon s43(2) FOIA.

### Appeal

8. All parties have consented to the case being determined on the papers. The Tribunal has had regard to all the documentary information before it including 10 working excel documents which relate to 9 versions and 1 amendment to a version of the cost calculation spreadsheet. Following the receipt of final submissions from the parties the Appellant forwarded to the Tribunal a copy of a letter from Norwich CCG<sup>10</sup> in response to a complaint she made relating to aspects of the conduct of her request and the Appeal. The Tribunal is satisfied that this is not material to any of the issues which it is required to determine in the appeal and has not taken it into consideration in reaching its decision.
  
9. Although there was a closed bundle this is now otiose in light of the disclosure of the working functional spreadsheets and the Tribunal has not had regard to closed information in its final determination.

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<sup>6</sup> Trade secret

<sup>7</sup> Commercial prejudice

<sup>8</sup> P85 bundle

<sup>9</sup> P95 OB

<sup>10</sup> Dated 18<sup>th</sup> June 2019

10. In concluding that it is in the interests of justice to determine this case without an oral hearing pursuant to rule 32 of the *Tribunal Procedure (First Tier Tribunal) (General Regulatory chamber) Rules 2009* the Tribunal has had regard to the overriding objective as set out in rule 2 and in particular:

- Proportionality,
- The resources of the parties and
- the Tribunal’s obligation to be flexible.

The Tribunal has adjourned this case twice and has issued multiple case management directions<sup>11</sup> in order to obtain further information and submissions. Whilst the Tribunal contemplated holding an oral directions hearing to ensure compliance with directions, we are satisfied that this is no longer necessary as we are satisfied that the Norwich CCG have now made direct enquiries of NEL CSU.

11. The appeal was considered at a paper hearing on 5<sup>th</sup> July 2018 and adjourned as the panel did not have sufficient information to determine the issues raised by the appeal. In particular the closed material did not include a “*functional, digital template*” as requested but rather documentary versions of two of the cost calculation forms with the formulae removed. Norwich CCG Group were therefore joined as second respondent.

12. Norwich CCG have now disclosed electronic versions of the spreadsheets to the Appellant on the grounds that NCCP only holds this information because the templates form part of the patient records for existing PHB holders, but it is not a template that NCCP will use going forward to calculate or reassess notional and/or actual budgets for PHB holders<sup>12</sup>.

13. Norwich CCG did not appeal the Commissioner’s finding that s43(1) FOIA was not operative. The Tribunal therefore considers the issues under appeal to be:

- a. The scope of the request,
- b. The applicability of s43(2) FOIA.

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<sup>11</sup> 11.7.18, 28.12.18, 31.1.19, 6.2.19, 11.3.19 and 1.4.19

<sup>12</sup> Ccg letter 28.9.18

- c. Whether (notwithstanding disclosure of working copies of the spreadsheet) the request has been answered in full because the appellant:
- i. argues that her request included a request for the dates that each version was applied.
  - ii. argues that the versions that she has had disclosed to her have been modified and are not the versions that were held at the relevant date.

### Scope

14. Ms Read's first ground of appeal is that the Commissioner has misconstrued her request. On her "Report a Concern" form she referenced her request of 10 June 2017 to NEL CSU and that she had been in touch both with Norwich CCG and NHS England. The information she said she required was: *"From PHB roll-out to present day, please provide complete, fully functional, digital templates for each of Norwich CCG's PHB Cost Calculation Forms/budget setting tools, with details of the dates each spreadsheet was applied"*.

On its face this differed from the wording of the April request which was referenced in the decision notice:

*"Please provide a functional, digital template for this<sup>13</sup> spreadsheet"*.

15. The Commissioner has identified Norwich CCG as the relevant public authority despite the June request in the complaint having been made to NEL CSU. In the joinder and directions of 11.7.18 the Tribunal required further submissions from the Respondents as to the scope of the appeal and the correct definition of the disputed information.

16. Direction IV(a) of the joinder directions required Norwich CCG to explain:

*"the chronology of the request, and the relationship and responsibilities between NHS England, the CCG and CSU. In particular the Tribunal notes that a request to CCG was responded to by CSU but a request to CSU was responded to by NHS England"*.

17. In their response dated 13<sup>th</sup> August 2018 Norwich CCG stated:

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<sup>13</sup> Emphasis added

*“Norwich CCG has utilised a commissioning support service to coordinate the management of any FOI Act requests it receives. At the time of Ms. Read’s FOI, NEL CSU were commissioned to provide this service. It was the responsibility of NEL CSU to acknowledge receipt of all FOIs, coordinate the gathering of information either held by the CCG or the CSU on behalf of the CCG, and issue the final response to the requester. NEL CSU were also responsible for the coordination of all correspondence with the Information Commissioner’s Office on behalf of Norwich CCG relating to the FOI Act (FOIA).*

*Where a request contained information that is not held by the CCG, it is our usual practice to redirect the requester to the provider holding the information. In the case of Ms. Read’s FOI, the cost calculation form was not information held by the CCG (at the time of the request) and therefore this element was redirected to NEL CSU [whose FOIA requests were dealt with by NHS England].”*

18. Although the wording of the requests is different, the Tribunal takes into consideration the fact that NEL CSU were processing FOIA requests for Norwich CCG, and the June request was part of a triangular discourse between the Appellant, Norwich CCG and NEL CSU which had originated with the April request. As FOIA agents for Norwich CCG, NEL CSU knew that the Appellant was of the view that this was information she was trying to get from whomever would agree that they held it for the purposes of FOIA”<sup>14</sup>. We therefore agree with the Commissioner who has formed the view that “[the June request] would appear to correlate with request 1 of 26<sup>th</sup> April.<sup>15</sup>” and are satisfied that the disputed information is that defined by the June request. We are supported in this view as this is consistent with Norwich CCG’s disclosure of multiple versions of the spreadsheet and evidence and submissions relating to the dates of use as specified in the June request.

19. We observe that the interplay between Norwich CCG and NEL CSU with regards to the Appellant’s requests was unhelpful. There is a duty to provide advice and assistance under s16 FOIA and in our judgment, being passed between 2 legal

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<sup>14</sup> Email 12.06.17 p 47OB

<sup>15</sup> P169 para 4 ICO supplementary submissions.

entities by the same organisation with “two hats on” is bound to lead to confusion and is against the spirit of s16 FOIA.

Who holds the disputed information?

20. The ICO noted<sup>16</sup> Norwich CCG's position now appears to be that the requested information was held by NEL CSU, on behalf of NHS England whereas NHS England's internal review<sup>17</sup>, concluded it did not hold the disputed information. The ICO's position is that as a practical matter, this is unlikely to affect the substantive issue as to whether the appropriate public authority was entitled to rely on s.43(2) FOIA to withhold disclosure. We agree, the submission that s.43(2) is engaged has been made by Norwich CCG on behalf of NEL CSU, on the basis that disclosure of the Spreadsheet would be likely to prejudice NEL CSU's commercial interests.

21. Norwich CCG's position upon appeal was that the spreadsheet “*was not a tool designed or owned by Norwich CCG*” arguing that it was a “*business tool developed by NEL CSU*”<sup>18</sup>. This is despite the fact that this response contradicts:

- their own Internal Review findings relating to the April request,
- the position of NEL CSU (as set out by NHS England) and
- the position of the Commissioner in the Decision notice FS50690104.

22. Their evidence was that when responsibility for managing all continuing healthcare (CHC) patients and PHBs was transferred to NCCP “*As part of an exit strategy all information held by NEL CSU in relation to CHC and PHBs [was] transferred to NCCP including the fully functioning digital cost calculation template, and subsequent versions since its original creation.*”<sup>19</sup>”

23. The basis of this argument appears to be that it was not “designed or owned” by Norwich CCG. However, this argument does not take into consideration the fact

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<sup>16</sup> Submissions dated 17/9/18 p 209 OB

<sup>17</sup> OB p 57

<sup>18</sup> CCG response of 13.8.18

<sup>19</sup> 28.9.18 letter ccg

that it was being used on their behalf and that they were paying to use it under the terms of a contract. We also rely upon the fact that they were entitled to retain working copies on completion of the contract in concluding that even if it was in the physical possession of their contractor at the time, they “held” it. For the purposes of FOIA we are satisfied that “holding” information does not constitute ownership or intellectual property or a right of use outside of a contract, but it refers to having the right to access it.

#### The scope of the request

24. The Appellant referenced the request of the 10<sup>th</sup> June in her complaint to the Commissioner. Notwithstanding the lack of clarity in the wording of the decision notice, the “hard copy” print outs of the spread sheet originally provided to the Commissioner by Norwich CCG as the “disputed information” related to more than one version of the spreadsheet<sup>20</sup>. During the duration of this appeal, Norwich CCG have now disclosed working versions of the spreadsheet in accordance with the timespan of the 10<sup>th</sup> June request and have provided further information and submissions relating to the dates when it was applied. They have not sought to limit the scope of the appeal to the wording of the April request. In light of the interplay between NEL CSU and Norwich CCG (not to mention the Appellant’s assertion to NEL CSU in email correspondence referencing the June request that this was information she had sought from Norwich CCG) we are satisfied that the request that was understood by all parties to be operative was the wider request of 10<sup>th</sup> June 2017.

#### S43(2) FOIA

25. S43(2) FOIA provides:
- (2) *Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).*

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<sup>20</sup> Response dated 13.8.18



26. Norwich CCG never argued that they were prejudiced but argued that NEL CSU were. In their response Norwich CCG state:

*“NEL CSU stated at the time of Ms. Read’s FOI request that disclosure of the template to the public would have put them at significant commercial disadvantage by providing competitors with a blueprint to replicate their unique business tool”.*

In our judgment this amounts to bare assertion. No working copy was provided to the Commissioner to enable her to determine what was unique about the business tool and no detail was provided in the written submissions.

27. Norwich CCG’s case now as set out in their response that:

*“However, it is our understanding that since the transfer of the CHC and PHB functions to NCCP in November 2017, NEL CSU has withdrawn its opinion that disclosure of the cost calculation form would be prejudicial to their commercial interest, as they are no longer operating in the CHC / PHB market for the Norfolk and Waveney CCGs”.*

28. The Appellant challenges this reasoning<sup>21</sup> arguing that NEL CSU continues to operate as an autonomous organisation, and continues to bid for contracts with CCGs nationwide. If its PHB tool was commercially sensitive at the time of her request, she argues that it would be still. The argument before the Commissioner was that it would provide a “blueprint” that would undermine competitive bidding. She also points to the fact that despite NEL CSU having ostensibly conceded that the tool was no longer sensitive from (on their case November 2017) Norwich CCG continued to resist its disclosure until August 2018.

29. The Tribunal observes that it is not apparent why the fact that the spreadsheet was not being used regionally (but possibly is being used elsewhere) removes commercial sensitivity. The Tribunal have been provided with no detailed information to indicate why this would have been the case at the relevant date.

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<sup>21</sup> Appellant submissions 2.10.18

30. In the joinder directions<sup>22</sup> the Tribunal directed that Norwich CCG explains in detail the operation of the digital template(s) and with reference to the information contained within why it is said that it is commercially sensitive. Although Norwich CCG provided differences between the versions, and explained the process that was followed in order to achieve the final calculation, they stated in their response dated 13.8.18:

*“We are unable to comment on exactly which element of the spreadsheet NEL CSU felt would be prejudicial to their commercial interests if it was disclosed under the FOIA”.*

31. The Commissioner argues that the Decision Notice was correct on the facts applicable at the time and relies upon the change in circumstances namely the expiration of the contract with Norwich CCG. The Tribunal disagrees, the Tribunal is satisfied that the exact element of the spreadsheet that would be commercially sensitive was the information that the ICO would have needed in order to conclude that prejudice was likely. The level of information provided by the CCG before the Commissioner who did not herself have a copy of the actual disputed information (in that the spreadsheet provided was not functional and therefore the formulae/assumptions and workings were not evident) was insufficient for the Commissioner to have reached the conclusion that she did.

32. Norwich CCG have provided no evidence that there was technical or programming expertise in the creation of the spreadsheet that was unknown to competitors or outside of industry norms and which would be revealed by disclosure of working copies of the spreadsheet. They have explained the operation of the spreadsheet as being<sup>23</sup>:

- The fields in Step 1 are used to record the number of care hours required.*
- The appropriate rates (taken from Allied Care’s Complex rates) are applied to the data entered into Step 1 to provide a Total Annual PHB (before adjustments) in cell G53.*

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<sup>22</sup> Direction IV(e)

□ *The Total Annual PHB from cell G53 is further adjusted to take into account the cost of any County Council commissioned services, day care and respite care. This provides a PreCut Total in cell E62.*

□ *Cell E62 is then further adjusted in Step 6 on a sliding scale, and Steps 7 and 8 to provide a Final PHB in Step 9 in cell G78.*

33. In the absence of any evidence to the contrary, the formulae used to make the calculations seem to be straightforward ways of turning the inputs to a weekly, then an annual total, then a monthly entitlement. In effect the spreadsheet has been used as a calculation tool of known elements (as were apparent from the non-working copies of the PHBs provided to customers). Commercial interest relates to a person's ability to participate competitively in a commercial activity. Whilst it may be argued that the rates applied are what it is sought to withhold from the information already disclosed<sup>24</sup> included the fact of and the percentages of the cut applied and the basis of the hourly rates.

34. The Appellant through her submissions has expressed concern that the values in the various boxes have been input incorrectly (years have been shortened calculated based on 364 not 365 days and contrary to their assertion the contingency sum was subject to the sliding scale cut<sup>25</sup>), in our judgment providing a customer with sufficient information to enable them to scrutinise and check the calculation and point out errors does not constitute a commercial prejudice that is capable of protection under this exemption. We are not satisfied therefore that this exemption is engaged and we do not go on to consider the public interest. The appeal is allowed in relation to reliance upon s43(2) FOIA.

Has the information requested been provided?

35. The Appellant has argued that she has not been provided with copies of the working spreadsheets as they were at the time of the request. She relies upon the

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<sup>23</sup> Norwich CCG response 13.8.18

<sup>24</sup> P25 bundle

<sup>25</sup> Paragraphs 16-20 Appellant submissions dated 2.10.18

fact that the excel record shows modifications dated after the date of the request. In their response dated 6<sup>th</sup> February 2019, Norwich CCG contended:

*'We are unable to provide copies of the spreadsheets as they were at the time of the request before any amendments were made on or before 28th September 2018'.*

This appears to be because the copies they have disclosed were provided to them after the relevant date. The Appellant challenges this as she maintains that within these same submissions, they disclosed copies of versions 6-8 of the spreadsheets as they were at the time of the request, before any amendments were made. The Tribunal observes that each time a document is saved in Excel it constitutes a modification. We are not satisfied on the evidence that there have been any substantive modification and are supported in this by the fact that their transfer to NCCP coincided with the end of the use of this tool.

The dates each spreadsheet was applied

36. The 10<sup>th</sup> June request had a second element namely a request for “*details of the dates each spreadsheet was applied* “. In relation to this aspect of the request NCCG have provided in tabular form the date that version 1 was created and the dates that versions 2-6 were updated<sup>26</sup> . They have said in relation to versions 7-9 that:

*“From the information transferred to NCCP we cannot determine the dates that versions 7 to 9 of the following templates were updated. However, we can confirm what changes were made”* which they have done in a table<sup>27</sup> . They have also confirmed in the same letter that the changes were made after May 2015.

37. The Appellant has drawn the Tribunal’s attention to Norwich CCG’s response dated 10.8.17 to a different FOIA request<sup>28</sup> which predates this assertion to the Tribunal in which:

- Dates are given for the update of versions 6-9,

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<sup>26</sup> p143-144 and p 183 bundle

<sup>27</sup> CCG letter 28.9.18

<sup>28</sup> P165 OB

- The date for the update to version 6 in that response is given as July 2015 whereas in the evidence to the Tribunal it is given as May 2015.

38. Norwich CCG responded to a request (which asked for the exact dates that the April 2016 PHB form was used to and from and which we consider to be equivalent to part of the request in this appeal to know the date spreadsheet version 7 was applied) as follows:

*“We do not record the exact dates; the actual date on the form is the date it was calculated, however, the template will be change (sic) over time to reflect current policy<sup>29</sup>”* and

*“The PHB have confirmed that they do not hold the exact dates for this. They do hold dates for each individual PHB, which is needed for financial monitoring but not for the tool used. Instead a version control system is used which indicates which version of the document to use, but not the creation date of the document. The PHB do not keep records of the exact dates for any documents that they use.<sup>30</sup>”*

39. We agree with the Appellant that the objective construction of the June request that is the subject of this appeal, is the dates between which each version of the request was used and is not the date that it was created. The Tribunal is satisfied that it must concern itself with the position at the relevant date<sup>31</sup> (i.e. the date when the request was refused which was when NEL CSU and Norwich CCG were still in a contractual relationship) rather than the current position when the contractual relationship has ended. Norwich CCG appeared to be looking at the information that was handed over following the termination of the contract. The Tribunal adjourned the case to enable Norwich CCG to make enquiries of the NEL CSU as their knowledge would have been material at the relevant date.

40. Norwich CCG were asked to provide an explanation as to the way that the version control software worked, as the Tribunal surmised that this might provided a record

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<sup>29</sup> P161 OB

<sup>30</sup> P163 OB

<sup>31</sup> NHS England v ICO and Dean [2019] UKUT 145 AAC para 13

of the dates when each version was in operation. However, Norwich CCG's evidence is that they have made enquiries of NEL CSU who have stated that:

- no version control software was used,
- they have not been able robustly to ascertain dates that the tools were updated.
- There is reference in CSU documents to the importance of using "*version contro with a clear creation date when naming the cost calc*" and note that there "*should only ever be one cost calc showing in a patient's files*" with previous versions moved to an archive folder.

41. The Tribunal understands Norwich CCG's argument on the apparent inconsistency between reference to "version control" and the evidence that there was none to be that the reference to "version control" refers to revised versions of an individual patient's cost calculation spreadsheet as they are updated over time and is an exhortation that the most recent one should be in use and that this does not tie directly in to which version of the spreadsheet was used. The evidence of the way that the PHB's were completed includes the creation date of each calculation<sup>32</sup> which in our judgment is consistent with the above argument and inconsistent with Norwich CCG's earlier evidence (which appears to be due to Norwich CCG not understanding fully the process utilised by NEL CSU who undertook this work on their behalf). The Tribunal is satisfied that this explains the apparent inconsistency and accepts the evidence that there was no version control software which would provide a log precising when specific versions were in use.

42. NEL CSU have also stated that the individual responsible for developing and updating the tool is no longer part of the CSU and as such whilst we observe that had the appropriate enquiries been made at the relevant date, it may be that there would have been more clarity on the process involved for applying updates, that is no longer possible. However, we are not satisfied that this would necessarily have provided clarity even if that information had been available in light of the Appellant's observation that the lower level of qualifying earnings pension rates figure (cell H38) in version 1 (dated May 2012) of the template was £5876 (the 2017-18 figure) rather than £5564 the 2012-13 figure. Which implies that version

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<sup>32</sup> P161 OB

1 was still being used (i.e. applied) despite the 8 subsequent updates that would have been expected to supersede it. This would indicate to the Tribunal that there was fluidity as to which version of the spreadsheet was applied and that the creation date is not definitive of the first and last application dates. For the same reasons even if minutes of NEL CSU meetings provided evidence of the dates that versions were approved (upon which we do not have clear evidence) this could only provide clarity as to the date that each version was approved and not the dates when it was applied. As such the Tribunal was satisfied that it was not proportionate to pursue this avenue of enquiry further.

Is the information held in the form of PDFs?

43. Norwich CCG have said in their response:<sup>33</sup>

*“A PHB is counted when it has started, and a copy of the tool used to calculate this is retained. However, there is no requirement for the PHB Team to hold this information regarding which version of the tool is used”.*

44. The Tribunal understands this to mean that the CCG do not have a list or an explicit marking on the file stating which version was used but have retained a PDF copy of each cost calculation. The Appellant argued in her submissions<sup>34</sup> that:

*“A definitive chronology could certainly be established from the analysis of historic budget calculations of other PHB holders”.*

45. The Tribunal drew Norwich CCG’s attention to ICO guidance version 3:

[https://ico.org.uk/media/for-organisations/documents/1169/determining\\_whether\\_information\\_is\\_held\\_foier.pdf](https://ico.org.uk/media/for-organisations/documents/1169/determining_whether_information_is_held_foier.pdf)

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<sup>33</sup> P163 bundle

<sup>34</sup> P153 paragraph 31

which summarises the FTT’s view in other cases that information is held if it can be derived from the collation of other held information “*if it holds the building blocks required to generate it and no complex judgement<sup>35</sup> is required to produce it*”.

46. In their response dated 29<sup>th</sup> January 2019, Norwich CCG contended that they cannot determine which version of the Cost Calculation Form has been used by inspecting a PDF copy of a PHB calculation. Their case was variously:

- i. Only a PDF copy of the spreadsheet is retained, and as such this copy cannot be modified to remove all the figures to establish which version is on file.

We accept that only a PDF copy is held and that therefore this is not a case where a computer programme could be used to “depopulate” the spreadsheets. Nevertheless, we are satisfied from the totality of the evidence that pdf copies of previous calculations are archived, and thus held by Norwich CCG. They are marked with the date that they were completed and thus if the version of a spreadsheet were evident from a visual inspection of the PDF we are satisfied that this would show in relation to each PHB when a particular version of the spreadsheet was applied.

- ii. When considering to what extent a visual inspection of the PHB calculations held on file for each PHB holder would provide an answer to the Appellant’s question they assert that the CCG “*would only be able to make an assumption based on the information it holds, which would not satisfy disclosure in accordance with the Public Interest Test*”. This is to misapply the law, there is no public interest test in the consideration of whether information is held. The Tribunal must be satisfied on a balance of probability whether information is held and if it is satisfied that it is, then consider any exemptions relied upon (some of which have public interest tests attached). If (as the Appellant contends) the differences between the versions are evident from a PDF, the Tribunal is not satisfied that any “assumption” would be required, rather than a form of triage based upon objective differences between the format of different versions of the document.

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<sup>35</sup> Emphasis added



iii. Norwich CCG argue that they “do not feel that it would be appropriate to consider the Appellant’s argument in relation to disclosure of information under the FOIA, as accessing individual records to conduct an analysis in order to generate information to satisfy a FOI request is not consistent with the legal basis for processing these types of records under the Data Protection Act 2018”. The Tribunal reminds itself that in order to determine whether the information was held at the relevant date the Tribunal would need to apply the data protection act 1998 which was then applicable. Additionally, the Tribunal has had regard to the fact that providing what amounts to statistical analysis of information held in order to disclose a series of date ranges for the use of a business tool is not attributable to any individual data subject, neither does it require analysis of the specific data as it is reliant upon differences upon the forms completed (rather than the data input to complete the forms). The only basis upon which the data protection act (in either of its forms) is material to a public authority’s obligation under FOIA is if s40 is engaged. As set out above the information disclosed would be entirely anonymous and as such would not fall within the scope of FOIA. As such we consider this argument misconceived.

47. The Appellant has set out her arguments<sup>36</sup> specifying ways in which she maintains that the information would be evident from the face of the pdfs held by Norwich CCG. This is in part also reflected in the submissions and evidence that Norwich CCG have provided to the Tribunal e.g. they have been able to discern between pdfs of documents in their 13.8.18 response and have set out differences between versions.

48. The Tribunal has had regard to the 10 documents (versions 1-9 with 2 versions of version 3) and has set out in a table below its observation of differences evident from the presentation of the hourly calculation. These are not exhaustive but reflect the Tribunal’s finding that on a balance of probabilities a quick visual inspection of each completed pdf version of the spreadsheet ought to enable the version to be ascertained.

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<sup>36</sup> Submissions 26.2.19

version	Norwich CCG observations	Approximate date	Panel's observation of differences within presentation of hourly calculation
Version 1		May 12	8 steps in hourly calculation
Version 2		May 12	10 steps and the configuration of hours differently presented
Version 3		October 12	No step 2  night working different configuration
Update to version 3		April 13	Cost per week column introduced at end. Notes different eg in step 10  Step 7 different from v4
Version 4		August 13	Step 7 different from v3
Version 5		February 14	Ref to if patient LD or MH and new cut rate but old hourly rate
Version 6	Guidance notes included  Cost calculation form includes fields to capture number of sleeping nights completed per	Updated May 15	NCCG able to discern which document used from its face 13.8.18  Hourly rates increased

	day <sup>37</sup>		
Version 7	Fields amended to capture waking and sleeping nights worked  Step 3 significantly changed.	After May 15	NCCG able to discern which document used from its face 13.8.18  Complex and non complex needs referenced, step 3 set out differently and hourly rates changed
Version 8	Daily non-complex hourly rate increased from £16.04 per hour to £16.70 per hour	After May 15	Daily non-complex hourly rate increased from £16.04 per hour to £16.70 per hour
Version 9	Reference to cost of any County Council commissioned services removed.		NCCG able to discern which document used from its face 13.8.18  Step 6 references to “cut” are replaced by “reduction”

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<sup>37</sup> This in fact appears to have been introduced in version 5

49. Although the Commissioner's guidance is not binding, we are satisfied that it is applicable on the facts of this case. Compiling a list of date ranges from the pdf copies of completed forms does not constitute the creation of new information. The public authority holds the building blocks (in the form of PDFs which are dated and on their face distinguishable from each other) the compilation of the information asked does not require the exercise of complicated judgment but the application of objective markers to sort the date range for the use of each version. It is tantamount to asking for a copy of the earliest version and the latest version of each PHB version with only the date of completion remaining but with all the personal data removed (by way of name, and completed fields).

#### Conclusion

50. For the reasons set out above the appeal is allowed and the Tribunal is satisfied that the decision should be substituted to reflect the Tribunal's findings that:

#### **SUBSTITUTED DECISION NOTICE**

- i. Norwich CCG held the cost calculation spreadsheets at the relevant date,
- ii. S43(2) FOIA was not engaged,
- iii. Norwich CCG held the dates of application of each version as evidenced on the face of the completed PHBs.

#### **STEPS:**

Norwich CCG are directed within 35 days to provide the first date and last date of use for each of the versions of the cost calculation spreadsheet already disclosed as documents 1-10.

51. This decision is unanimous.

Fiona Henderson  
(Judge of the First-tier Tribunal)

Dated this 8<sup>th</sup> day of July 2019  
Date Promulgated: 9<sup>th</sup> July 2019