



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

Appeal Reference: EA/2019/0318/P

Before

**JUDGE BUCKLEY
Sitting alone in Chambers on 24 March 2020**

Between

MICHAEL O'GRADY

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

Determined on the papers, the Judge sitting alone in Chambers on 24 March 2020.

DECISION

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

MODE OF HEARING

1. All parties consented to this appeal being heard on the papers. The Chamber President has determined that this appeal is suitable to be decided by a judge alone. I am satisfied that I can properly determine the issues sitting alone and without a hearing.

REASONS

Introduction

2. This is an appeal against the Commissioner's decision notice FS50816849 of 19 August 2019 which held that Swansea Bay University Health Board (the Health Board) held no information within the scope of the request. The Commissioner did not require the public authority to take any steps.

Factual background to the appeal

3. This appeal arises out of Mr O'Grady's dissatisfaction with the service provided by Talybont Surgery GP practice. The requests were initially made to the Health Board's predecessor Abertawe Bro Morgannwg University Health Board ('ABMU').

Requests, Decision Notice and appeal

Requests

4. On 23 December 2018 Mr O'Grady made the following information request:

I would like to make a FOI request for any and all information preferably application files that contain the word Facebook that have been generated or accessed by Talybont surgery Pontarddulais please.

5. On 29 December 2018 Mr O'Grady made the following information requests:

I would like to make a FOI request to ABMU IT department. My request is for all files including from backups for any file containing the work 'facebook' generated or accessed by Talybont surgery, Station Road, Pontarddulais, Swansea SA4 8TJ.

I would like to make a FOI request for all CCTV footage from Talybont surgery, Station Road, Pontarddulais, Swansea SA4 8TJ.

Response

6. In three individual responses to the above requests dated 11 January 2019 the Health Board stated that it did not hold any information within the scope of the request. Mr O'Grady requested an internal review on 15 January 2019. By letter dated 5 February 2019 the Council upheld its decisions on internal review.
7. Mr O'Grady referred the matter to the Information Commissioner on 29 January 2019. During the Information Commissioner's investigation the Health Board explained, in a letter dated 16 July 2019 that the Health Board has no responsibility for GP systems which are managed by NWIS (NHS Wales Informatics Service).

Decision Notice

8. In a decision notice dated 19 August 2019 the Commissioner decided that on the balance of probabilities the Health Board did not hold any information within the scope of the request. In reaching this decision it considered the Health Board's explanation as to why they held no information, what information she would expect the Health Board to hold and whether there was any evidence that the information was ever held.

Grounds of Appeal

9. The Grounds of Appeal are in summary that:
 1. the Commissioner was wrong to conclude that the Council did not hold the requested information. In support of this the grounds of appeal state that:
 - i. The NHS structure has been made deliberately impenetrable;
 - ii. Any files generated on any machine connected to any NHS IT infrastructure have to be backed up.
 2. The Commissioner should not have decided the issue on the balance of probabilities.

The Commissioner's response

10. In summary the Commissioner submits:
 1. The fact that files have to be backed up is irrelevant, because the Health Board does not have responsibility for or access to the IT systems used by the GP surgery.
 2. The Commissioner was correct to decide the issue on the balance of probabilities.

Legal framework

11. The tribunal must determine whether or not a public authority holds the information. This is a factual matter. The standard of proof to be applied is in issue and is addressed in the tribunal's conclusions below.
12. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Evidence

13. I read and took account of an open bundle of documents.

Issues

14. The issue I have to determine is whether the Health Board held any information within the scope of the request.

Discussion and conclusions

What is the appropriate standard of proof?

15. When a tribunal or a court determines a factual dispute, it must apply a standard of proof. The standard of proof is the degree of likelihood or certainty with which facts have to be established. Where the applicable legislation does not specify the standard of proof the common law standard should be applied. There are two standards of proof in British common law: the civil standard and the criminal standard. Under the criminal standard facts have to be proved beyond reasonable doubt. Under the civil standard of proof facts have to be proved on the balance of probabilities.

16. Because the tribunal is remaking the decision by the Commissioner, the question for me is not whether the Commissioner applied the correct standard of proof but rather what standard of proof the tribunal should apply. Should the tribunal apply the civil standard or the criminal standard?

17. The normal burden of proof applied by the information rights tribunal (and the Commissioner) is the civil standard, i.e. the balance of probabilities. There is no binding authority which has directly considered the issue of the appropriate standard of proof in the Information Rights Tribunal. However, I conclude that the tribunal, and for the same reasons the Commissioner, is right to apply the civil standard of proof.

18. First, although I am not bound by other information rights first-tier tribunal decisions I note that the civil standard has consistently been applied without challenge by other first-tier information rights tribunals when deciding this issue.

19. Second, I find that there is no good reason why the tribunal should adopt the criminal standard. The proceedings in the information rights tribunals are more akin to civil than criminal proceedings. The tribunal does not deal with criminal or quasi-criminal allegations which, if proved, would have 'serious consequences' for the individual concerned in the sense described in R (McCann) v Crown Court at Manchester [2003] 1 AC 787 at para 82.

20. Third, it has been held by the Court of Appeal that the civil standard of proof applies to the Mental Health Tribunal (formerly the Mental Health Review

Tribunal), another first-tier tribunal, in R (AN) v MHRT (Northern Region) [2005] EWCA Civ 1605.

21. Fourth, the civil standard is more suited to the informal and inquisitorial and nature of tribunal proceedings, where the strict rules of evidence do not apply.
22. *On the balance of probabilities did the Health Board hold any information within the scope of the request?*
23. The argument that the information is held by the Health Board is based on the premise that the GP practice's computer systems are operated and managed by the Health Board. If that were the case, I accept it is likely that any information which existed on the computer systems would also be held by the Health Board. Conversely, I find that the information requested would not be held by the Health Board if another body operated, managed and had responsibility for the GP practice's computer systems.
24. The Health Board asserts that NWIS manages GP practices' systems. The question of whether or not the Health Board operates the IT system is within the knowledge of the Health Board. The assertion that it is NWIS and not the Health Board is an apparently credible assertion. There is nothing before me to support a finding that the Health Board is deliberately attempting to mislead the tribunal.
25. Mr O'Grady has asserted in correspondence with the Commissioner that the GP practice's system is a Health Board system. It is not clear on what this assertion is based. In correspondence he has noted that the Talybont IT system is not completely independent because he has seen information accessed by Morrison Hospital and vice versa. This is not inconsistent with the Health Board's assertion that the system is managed by NWIS. Neither is the fact that files have to be backed up. They could be backed up to the system operated by NWIS.
26. I accept that the structure of the NHS is often opaque and the question of who would hold this information would not be immediately clear to an individual. It was not unreasonable of Mr O'Grady to have assumed initially that the Health Board would hold this information. However, I have before me no evidence that could persuade me to conclude that this assumption was correct.
27. I am therefore faced with an apparently credible assertion by the Health Board that they do not manage the IT system challenged only by an assumption by Mr O'Grady, unsupported by evidence, that the Health Board do manage the IT system.
28. On the balance of probabilities, I accept the Health Board's assertion that it is NWIS and not the Health Board that operates the IT systems for GP practices. On this basis I find that the Health Board do not hold the requested information on the balance of probabilities. The appeal is dismissed.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 25 March 2020

Promulgated Date: 26 March 2020