



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

Appeal Reference: EA/2019/0428 (P)

Before

JUDGE BUCKLEY

ANNE CHAFER

GARETH JONES

Between

IAN HARTLEY

And

Appellant

THE INFORMATION COMMISSIONER

First Respondent

WEST HAMPSHIRE CLINICAL COMMISSIONING GROUP

Second Respondent

DECISION

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

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice FS50835152 of 16 October 2019 which held that the West Hampshire Clinical Commissioning Group (the CCG) did not hold the requested information. The Commissioner did not require the public authority to take any steps.

Mode of hearing

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules. The form of remote hearing was a paper determination which is not provisional (P).

Factual background to the appeal

3. Mr Hartley sets out the tragic background to his interest in the national Continuing Healthcare Programme in his notice of appeal as follows:

My interest is that my son died in May 2014 as a result of fundamental failings in how the programme was managed at that time by West Hampshire CCG. I therefore wanted to gain assurance that the areas that failed him had been recognised and were being addressed.

4. Paragraph 2.3 of a document entitled 'Collaborative Commissioning Report (November 2018)' states:

In March 2016 a review of CHC [*Continuing Healthcare*] concluded that a complete overhaul of CHC was needed...

5. Mr. Hartley's request is for the report of this review.

Request, Decision Notice and appeal

6. On 6 December 2018 Mr Hartley made a request for information to the CCG, the material part of which reads:

...
Of particular personal interest is the collaborative commissioning work around Continuing Healthcare and the work being carried out to overhaul the system. Whilst the periodic reports of progress are informative they are somewhat out of context for me as I have been unable to find the report of the March 2016 review that initiated this work. Could you please help me by directing me to where I may find this document on your website.

7. The CCG responded on 16 January 2019 stating that it was withholding the Continuing Healthcare (CHC) report of the March 2016 review under s 36 of the Freedom of Information Act 2000 (FOIA) on the basis that if disclosed the information would inhibit the free and frank provision of advice and the free and frank exchange of views. The letter included the following references to the report:

I can confirm that the Continuing Health Care (CHC) report of the March 2016 review is not available on the CCG's website...Having reviewed the report in line with Freedom of Information guidance...'

8. It provided an updated version of the action plan attached to the report which summarises the main findings of the report.
9. In the reasoning attached to the response the CCG describes the information requested as:

A report about the CCG's Continuing Health Care (CHC) services completed in March 2016 and reviewed by commissioners in April to July 2016. The report was written by an external contractor who was an interim manager in the CHC service at that time.
10. It draws attention to the executive summary to the report which contains a note of:

'...concerns amongst some staff of what might be written.'
11. The CCG conducted an internal review and upheld its decision by letter dated 20 March 2019.
12. During the course of the Commissioner's investigation the CCG withdrew its reliance on s 36 FOIA and purported to release the requested information by letters dated 26 May 2019 and 8 August 2019. Mr. Hartley disputes that the requested information has been disclosed.

Decision Notice

13. In a decision notice dated 16 October 2019 the Commissioner decided that on the balance of probabilities the CCJ did not hold any information within the scope of the request.

Grounds of Appeal

14. The Grounds of Appeal are, in summary, that the Commissioner was wrong to conclude that the information was not held on the balance of probabilities. Mr. Hartley argues, in particular, that the document released is not the document he requested because:
 1. The released document is dated May 2016. The requested document is dated March 2016.
 2. The CCG initially stated that it had reviewed the March 2016 report, but in later correspondence said that they had been unable to find it.
 3. The CCG said that the report was written by a third party, but the released document was written by the Nursing Director of the CCG.
 4. The ICO did not take up his suggestion to seek evidence by way of a purchase order etc. to prove that the document was produced by a third party.

2. It is clear from Mr. Hartley's previous correspondence that he thinks that the document that he has been given is a document prepared specifically for the meeting on 31 May 2016 'to appraise the CCG's of the service review of the CHC, its findings and recommendations for the future.' His view is that this is a precis of the full report, which exists in a separate document.

The Commissioner's response

15. In summary the Commissioner contends that the Decision Notice was correct to conclude that, on the balance of probabilities, the CCJ did not hold information in the scope of the request.

The CCG's response

16. The CCG's response is that there is no report dated March 2016. The reference to a report with a March 2016 date was incorrect. It was a reference to the report that has been disclosed to Mr. Hartley dated May 2016.
17. The CCG disclosed with the response an invoice from the independent consultant who completed the CHC report. The Director is the owner rather than the author of the report, which was written by a person contracted to undertake the review.

Legal framework

18. The question of whether or not a public authority holds the information is a factual matter on the balance of probabilities.
19. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Evidence and submissions

20. We have read and were referred to an open bundle of documents.

Issues

21. The issue we have to determine is whether, on the balance of probabilities, the CCJ held any further information within the scope of the request.

Discussion and conclusions

On the balance of probabilities did the CCJ hold any further information within the scope of the request?

22. The document which originally led Mr. Hartley to believe that there was a report dated March 2016 is a document entitled 'Collaborative Commissioning Report (November 2018)'. It states, under the heading 'Continuing Health Care':

In March 2016 a review of CHC concluded that a complete overhaul of CHC was needed. This started with the completion of 3 business cases for CHC which were approved by the 5 CCGs. These advocated:

- A large recruitment programme to find staff to work in the service.
- Addressing the back log of about 1,500 cases and the best solution was to outsource it to an external agency.
- Re-instatement of the Funded Nursing Care (FNC) service, the demise of which had brought about a very high number of PUPoC cases as well as a huge number of people receiving FNC within Hampshire making the 5 CCGs national outliers.

23. The request is for 'the report of the March 2016 review that initiated this work'.

24. Paper number CLIN16/051 at p 584 of the bundle was presented to the Clinical Governance Committee meeting on 15 March 2016. It states:

An in-depth review of current service provision by the Continuing Healthcare team has been undertaken and the results of this review and the Compliance and Review Action Plan will be presented to the next Committee meeting.

This report provides information on key issues identified in the draft report and current actions being taken.

25. The paper makes clear that although the review had been completed, the report of the review was only in draft form: 'a draft report has been pulled together that is currently being reviewed'.
26. The written report provided to the meeting in March 2016 was intended to 'provide information on key issues identified in the draft report'.
27. As anticipated in the paper presented on 15 March 2016, the results of the review were presented to the next Committee meeting in May 2016, in the form of a document entitled 'NHS Continuing Healthcare (CHC) Service Review April 2016, CHC Performance and Governance Meeting, 31 May 2016'. At the bottom of the cover page it states 'Final: Version 4, May 2016'.
28. We find that the 'in-depth review' referred to in the paper presented to the meeting on 15 March 2016 must be the review referred to in the November 2018

document above. It covers the same subject matter and had been completed by March 2016. It appears to have been carried out prior to March 2016 (in January and February 2016) and the report on the review appears not to have been finalised until May 2016 but on the balance of probabilities it is the same review. We find that it is inconceivable that another review was taking place at about the same time on the same topic.

29. It is therefore reasonable for the CCG to interpret Mr. Hartley's request for 'the report of the March 2016 review that initiated this work' as a request for the report of the review of current service provision by the Continuing Healthcare team that took place in January and February 2016. We refer to this review as 'the CHC review'. It should be noted that by 'the CHC review' the tribunal is referring to a process, not a document.
30. Mr. Hartley has been provided with the report presented to the meeting on 15 March 2016, which summarised the findings of the draft report on the CHC review. He has been provided with the final report on the CHC review presented to the meeting in May 2016. He has been provided with the substantial annexes to that report, and with the documents referred to within Annex 1. He has also been provided with an updated version of the action plan which formed Annex 2 to that report.
31. Mr. Hartley expresses a concern in an email to the commissioner dated 27 September 2019 about being bombarded with a 'mass of largely irrelevant documentation'. It may assist Mr. Hartley to know that a large part of the extensive documentation provided by the CCG is Annex 1 and the documents referred to therein. Annex 1 accounts for pages 172-583 of the bundle.
32. The essence of the appeal is that Mr. Hartley believes that the CCG holds a further report dated March 2016 on the CHC review.
33. There is no reference in any of the contemporaneous documents to another report of the review, whether dated March 2016 or otherwise. We do not accept that the references in part 5 of the May 2016 report to 'the report' are references to a different report. The questions addressed by 'the report' and the structure of 'the report' set out in part 5 reflect the questions addressed and the structure adopted in the May 2016 report. We do not accept that this section supports Mr. Hartley's assertion that he has been provided with a precis of the document he requested.
34. Mr. Hartley relies on the reference to a March 2016 review in the document dated November 2018. We find that it is not unreasonable to have described this review as having reached its conclusions in March 2016 given that, by that stage, the review had been completed and findings from the draft report were presented to the committee on 15 March 2016. There is nothing in the November

2018 document which suggests that a separate report dated March 2016 is likely to exist.

35. Mr. Hartley asserts that a report dated March 2016 must have been in existence at the date of the CCG's initial response on 16 January 2019, because they refer to 'having reviewed the report'. He asserts that it must then have been 'misplaced' after Mr. Hartley challenged the decision to withhold it.

36. We accept that the initial response makes several references to the date 'March 2016'. It is primarily referred to as the date of the *review*, rather than the *report* e.g. 'the Continuing Health Care (CHC) report of the March 2016 review'. However, we note that the attachment to the response does refer to:

A report about the CCG's Continuing Health Care (CHC) services completed in March 2016 and reviewed by commissioners in April to July 2016. The report was written by an external contractor who was an interim manager in the CHC service at that time.

37. We can understand why Mr. Hartley might take this to mean that the author was referring to a different document, because the report provided to him in May 2019 was dated May 2016 and therefore presumably not 'completed' in March 2016.

38. We find that despite the wording used in the attachment, the document reviewed by the CCG at the initial response stage was the final report on the CHC review dated May 2016 for the following reasons.

39. The attachment to the CCG's initial response (p112 of the open bundle) at paragraph 9 quotes directly from the report's executive summary as follows:

The executive summary to the report includes a note of: '... concerns amongst some staff of what might be written'.

40. This phrase appears, word for word, in the executive summary of the report dated May 2016, which strongly suggests that this was the same document that was reviewed by the author of the initial response.

41. Further, it is clear that Mr. Hartley was requesting the report of the CHC review, which, according to contemporaneous documents, was completed in draft form in March 2016 and presented to commissioners in its final form in May 2016. It is therefore likely that 'A report about the CCG's Continuing Health Care (CGC) services completed in March 2016 and reviewed by commissioners in April to July 2016' refers to the final CHC report dated May 2016.

42. Further, Mr. Hartley relies on the fact that the file properties of the word version of the released document show the original author of the word document to be an individual who, in May 2016, was the Nursing Director of the CCG. He suggests that this casts doubt on the CCG's assertion that the May 2016 report is the report on the CHC review that they considered in their initial response.

This is because the CGC in their initial response said that the report was written by a third party.

43. The invoice provided by the CCG relates to work carried out by Waite Atkins in late 2015 and is therefore not of assistance in relation to who wrote the report dated May 2016.
44. Despite this, we accept the CCG's assertion that the report dated May 2016 was written by a third party consultant from Waite Atkins. This is an apparently credible assertion: they carried out the review, and it is therefore likely that they will have written the final report. The fact that the document properties recorded in a Microsoft Word document created on 20 May 2019 show the 'author' to be the Director of Nursing does not mean that she wrote the original report in May 2016. We do not take Mr. Hartley to be asserting that the report was only created in May 2019, but we would, in any event, have rejected that assertion on the evidence before us.
45. Accordingly we accept that the report in May 2016 was authored by a third party, and therefore do not accept Mr. Hartley's argument that it could not have been the report that the CCG was considering in its first response.
46. In an email to the Commissioner dated 27 September 2019 Mr. Hartley relies on the following quote from the CCG's letter of 8 August 2019:

We have undertaken another review of documents held to find a Review document dated March 2016 and we have located a report which was considered at our Clinical Governance Committee on 15 March 2016 – this document refers to a copy of the review being available at their next meeting (May 2016) – this is the document dated April 2016 we have already shared with you. A copy of the Committee Paper is enclosed. We do not hold a copy of the review itself dated March 2016."

47. The last sentence, taken in isolation, is ambiguous. Mr. Hartley's interpretation of the final sentence is that: (i) a document exists which is 'the review itself' (ii) this document is dated March 2016 and (iii) the CCG do not hold a copy of it. He states that this confirms the existence of the document and implies that all copies have been lost.
48. We accept that this is a possible interpretation of that sentence. Equally it could mean that the CCG do not hold a copy of a review document *that is dated March 2016*. In other words they do hold a copy of the review document but not one that it is dated March 2016. Alternatively, it could mean that the *review itself* (as in the process) took place in March 2016 but they do not hold a *document* dated March 2016.
49. Taken in context, we find that either of the latter two interpretations are consistent with the CCG's overall position and therefore more likely to have been what they meant. We do not accept that it is evidence that the CCG have

misplaced, whether deliberately or mistakenly, a report dated March 2016 since the initial response to the request.

50. For those reasons, we are not persuaded by any of the matters raised by Mr. Hartley that, on the balance of probabilities, there is another report dated March 2016 of the CHC review held by the CCG. We accept that they have carried out reasonable searches and disclosed any reports that they have found. Accordingly we conclude, on the balance of probabilities, that they do not hold any further information within the scope of the request.

51. The appeal is dismissed.

Observations

52. Although we have concluded that the CCG do not hold any further information within the scope of the request, we can understand how Mr. Hartley's suspicions arose on the basis of the language used in the initial response, which he reasonably but mistakenly interpreted as acknowledging the existence of a report in March 2016. Further, the CCG's failure to disclose at an earlier stage the annexes of the May 2016 report or the paper and report presented to the commissioner's in March 2016 compounded the problem and reasonably increased Mr. Hartley's suspicions.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 24 November 2020

Promulgated: 25 November 2020