FIRST-TIER TRIBUNAL
(GENERAL REGULATORY CHAMBER)
INFORMATION RIGHTS

Appeal Reference: EJ/2021/0002
(previously EA/2018/0015)

Heard via the Cloud Video Platform
On 16 June 2021
Written Submissions: 16 July & 22 July 2021
UPON APPLICATION FOR CERTIFICATION TO THE UPPER TRIBUNAL FOR CONTEMPT OF COURT

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

KIRSTY READ

Applicant

and

(1) NORWICH CLINICAL COMMISSIONER GROUP
(2) THE INFORMATION COMMISSIONER

Respondents

and

NORFOLK AND WAVENEY CLINICAL COMMISSIONING GROUP

Interested Party

Appearances:

Applicant:	In person
First Respondent:	Not represented at the hearing
Second Respondent:	Not represented at the hearing
Interested Party:	Mr R Hopkins, of Counsel

DECISION AND REASONS

© CROWN COPYRIGHT 2021

Preamble

1. This matter was heard remotely, without objection from the parties, using the Cloud Video Platform. Neither the applicant nor the interested party indicated during the course of the hearing, or thereafter, that the mode of hearing led to an inability to participate in the proceedings fully and effectively.

Introduction

2. By way of a decision promulgated on 9 July 2019, the First-tier Tribunal ("the Tribunal") allowed an appeal brought by the applicant (EA/2018/0015) against a decision of the Information Commissioner, who had concluded that the NHS Norwich Clinical Commissioning Group ("Norwich CCG") – the first respondent herein, held information that had been requested by the applicant but that such information was exempt from disclosure under section 43(2) of the Freedom of Information Act 2000 ("FOIA"), with the public interest favouring maintaining the exemption.

3. The applicant subsequently requested that the Tribunal certify an offence of contempt to the Upper Tribunal, such offence, in broad terms, being the failure of Norwich CCG to comply with the Substituted Decision Notice of the Tribunal in EA/2018/0015.

4. As identified from above, the relevant public authority for the purposes of the Tribunal's decision in EA/2018/0015, was the first respondent in this matter, Norwich CCG. However, with effect from 1 April 2020 Norwich CCG was merged with four other clinical commissioning groups to form a separate legal entity, Norfolk and Waveney CCG ("NWCCG"). Having heard from NWCCG and the applicant at a remote case management hearing in March 2021, I added NWCCG as an interested party to the instant proceedings - it having been said by NWCCG that it has *"an interest in opposing this application, not least because it is concerned by some of the allegations apparently pursued by Ms Read in these proceedings against individuals who are now employees of NWCCG"* [see paragraph 4 of the written submissions of NWCCG dated 14 June 2021].

Role of the First-tier Tribunal in these proceedings

5. In Information Commissioner v Moss and the Royal Borough of Kingston upon Thames [2020] UKUT 174 (AAC), the Upper Tribunal considered the following issue: "*when the First-tier Tribunal on appeal substitutes a decision notice for that of the Information Commissioner, who is responsible for (a) deciding whether the public authority has complied with that notice and (b) taking action to enforce it?*" - concluding that the Information Commissioner does not have power to enforce a decision of the Tribunal but that the Tribunal does have such power, as conferred by section 61 of FOIA.

6. The first port of call in my consideration of the Tribunal's role in determining the instant application must be an analysis of section 61 of FOIA. Section 61 states:

> "(1) Tribunal Procedure Rules may make provision for regulating the exercise of rights of appeal conferred by sections 57(1) and (2) and 60(1) and (4).

(2) In relation to appeals under those provisions, Tribunal Procedure Rules may make provision about –

(a) securing the production of material used for the processing of personal data, and

(b) the inspection, examination, operation and testing of equipment or material used in connection with the processing of personal data.

(3) Subsection (4) applies where –

(a) a person does something, or fails to do something, in relation to proceedings before the First-tier Tribunal on an appeal under those provisions, and

(b) if those proceedings were proceedings before a court having power to commit for contempt, the act or omission would constitute contempt of court.

(4) The First-tier Tribunal may certify the offence to the Upper Tribunal.

(5) Where an offence is certified under subsection (4), the Upper Tribunal may –

(a) inquire into the matter, and

(b) deal with the person charged with the offence in any manner in which it could deal with the person if the offence had been committed in relation to the Upper Tribunal.

(6) Before exercising the power under subsection (5)(b), the Upper Tribunal must –

(a) hear any witness who may be produced against or on behalf of the person charged with the offence; and

(b) hear any statement that may be offered in defence.

(7) In this subsection, "personal data" and "processing" have the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(2), (4) and (14) of that Act)."

7. By section 61(4) of FOIA, the First-tier Tribunal has a discretion to certify an offence to the Upper Tribunal only where it is satisfied that the requirements of both limbs of section 61(3) have been met i.e. that 'a person' has done something or failed to do something in relation to proceedings before the Tribunal in appeals brought pursuant to sections 57 or 60 of FOIA and, if the proceedings were proceedings before a court having power to commit for contempt, the act or omission would constitute contempt of court.

8. It is striking that there is no reference in section 61 to a requirement for an applicant to obtain permission to proceed with an application for certification or an application for contempt, and I can identify no good reason why the word "*certify*", as it is used in section 61(4) of FOIA, should be read as introducing a permission stage akin to that identified in CPR 81. Indeed, the statutory language of sections 61(3) and 61(4) of FOIA, when read in context and as a whole, militates against such a conclusion. In

particular, by virtue of section 61(3), the discretion in section 61(4) to certify an offence to the Upper Tribunal may only be exercised where the relevant act or omission "*would constitute a contempt of court*" (emphasis added). If Parliament had intended the threshold at the certification stage to be that of "*prima facie case*" or "*strong prima facie case*", or "*arguability*" it would no doubt have said so in the clearest of terms. It did not.

9. It is further notable that there is no mention in either section 61(3) or section 61(4) of FOIA, or indeed elsewhere in section 61, as to the required standard of proof by which the allegation of contempt must be judged. In the ordinary course, given the seriousness of contempt proceedings, the standard of proof by which the contempt must be demonstrated is the criminal standard of beyond reasonable doubt: see for example, Arlidge, Eady & Smith on Contempt, 5th Edition, 12-50 onwards and [SC Mezhdunarodniy Promyshelnniy v Pugachev [2016] EWHC 92, at [41].

10. Whilst I accept that when read literally section 61 FOIA could, and indeed in many cases is likely to, lead at least partially to a duplication of the fact finding role as between the First-tier Tribunal and the Upper Tribunal, in my view this is not a good reason to read section 61 as either importing a permission stage into the contempt application procedure or as requiring the Tribunal to depart from the well-established authority as to the standard of proof by which an allegation of contempt must be assessed.

11. If such an offence is proven to the required standard, the Tribunal must then consider whether, in all the circumstances of the case, discretion should be exercised so as to certify the offence to the Upper Tribunal.

Discussion

12. It is prudent to begin by setting the instant application in its proper historical context.

Background

13. Some persons who use the healthcare services of Norwich CCG and NWCCG have a personal health budget ("PHB"), which is a statutory tool enabling patients in certain categories to manage a budget for healthcare and support services in ways that suit their needs.

14. The FOIA request giving rise to the Tribunal Decision in EA/2018/0015 was made by the applicant to Norwich CCG on 10 June 2017, in the following terms: "*from PHB roll-out to present day, please provide complete, fully functional, digital template for each of Norwich CCG's PHB Cost Calculation Forms/budget setting tools, with details of the dates each spreadsheet was applied*".

15. In its decision of 8 July 2019, the Tribunal considered the scope of this request, concluding in the following terms at paragraph 24:

> "The Appellant referenced the request of the 10th 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. During the duration of this appeal Norwich CCG have now disclosed working versions of the spreadsheet in accordance with the timespan of the 10th June request and have provided further information and submissions relating to the dates when it was applied. They have not sought to time the scope of the appeal to the wording of the April request. In light of the interplay between FEL 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 10th June 2017."

16. The Tribunal then said as follows at paragraphs 48 and 49:

"[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. …

[49] Although the Commissioner's guidance is not binding, we are satisfied that it is applicable on the fact 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 the PDFs which are dated 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). "

17. Having allowed the applicant's appeal, in part, the Tribunal issued the following Substituted Decision Notice:-

"**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."

18. Norwich CCG subsequently sent Ms Read a letter dated 12 August 2019, in the following terms:

"Dear Ms Read

Re: EA/2018/0015 Kirsty Read v Information Commissioner and NHS Norwich CCG – OPEN RESPONSE

I write further to the decision of the First-tier Tribunal in the above case.

NHS Norwich Clinical Commissioning Group (NCCG) has in line with the Tribunal's decision, undertaken a review of a random sample of personal budget holder files held by North East London Clinical Commissioning Group (NEL CSU) on behalf of NCCG at the time of your original request in 2017. The reviews incorporated a combination of physical health, mental health and learn disabilities packages of care.

The dates on which the cost calculation were first conducted and subsequently updated are set out below, along with the versions used.

PHB Holder	Date Cost Calculation Conducted	Template Version Used
Patient 1	August 2012 February 2015 July 2015	Version 2 Version 6 Version 6
Patient 2	October 2014 November 2014	Version 6 Version 6
Patient 3	April 2016 March 2017 June 2018	Version 6 Version 7 Version 7
Patient 5	December 2014 March 2016 September 2016 November 2016	Version 6 Version 6 Version 7 Version 7
Patient 4	No cost calculation template used	-
Patient 6	September 2015 October 2015 March 2016	Version 6 Version 6 -
Patient 7	July 2013	Version 4
Patient 8	October 2013 March 2017	Version 4 Version 4
Patient 9	November 2015 -	Version 6-
Patient 10	October 2017	Version 8

Using the above building blocks of information, we can only assume that each cost calculation template was in use (by NEL CSU) during the following periods, however we cannot determine which month the template was updated in each year:

- 2012/13 – Version 2 in use for first calculation or a PHB or recalculation if clinical need had changed the package of care required.

- 2013/14 - Version 4 in use for first calculation or a PHB or recalculation if clinical need had changed the package of care required.

- 2014/15 – Version 6 in use for first calculation or a PHB or recalculation if clinical need had changed the package of care required.

- 2015/16 – Version 6 in use for first calculation or a PHB or recalculation if clinical need had changed the package of care required.

- 2016/17 – Version 7 in use for first calculation or a PHB or recalculation if clinical need had changed the package of care required.

- 2017/18 – Version 8 in use for first calculation or a PHB or recalculation if clinical need had changed the package of care required.

In November 2018, all cost calculation templates became obsolete.

From the files we cannot see that Versions 3 or 5 were used.

In relation to the above information, please note as follows:

1. NCCG is relying on information created by NEL CSU that was transferred over to the NCCP when the service was brought in house. NCCG had no say over the naming or filing convention for the Cost Calculation spreadsheets, which were not saved with the date of their creation or the period they relate to and which were based on NEL CSU's business model.

2. Each PHB holder did not necessarily have a cost calculation carried out on an annual basis. A cost calculation spreadsheet was only used when a clinical assessment identified that a PHB holder's care needs had changed.

3. Where a clinical need had changed, it did not mean that the current version of the cost calculation template would have been used to calculate the budget. This is to ensure that recalculation did not have an adverse impact on carer's remuneration, i.e. since it is not appropriate to keep changing individual's pay mid-way through their contract of employment. Sometimes a change in clinical need only had a minor impact on the budget for equipment.

NCCP no longer uses this method of calculating the PHBs and haven't since the service was transferred over. We are in the process of rolling out a system called MyCare Banking which gives PHB holders full visibility of their package and expenditure.

Yours sincerely

…"

19. On 14 August 2019, the applicant wrote to the Tribunal attaching the letter of 12 August 2019, stating as follows:

"Please see Norwich Clinical Commissioning Group's response to the First-tier Tribunal's decision.

For consideration, NCCG has failed to comply with the decision notice, …

The CCG's response was dated 12 August 2019, but was not provided until 13 August 2019 … This was not within the directed 35 days.

The CCG's response is lacking in specificity as it has only relied upon a very small sample of patients. This sample was taken at the CCG's own discretion. It has failed to identify any dates of application for versions 1 (set wages), 3a, 3b, 5 or 9. Furthermore, it has provided only the month and year as opposed to the actual date that is held at the top of each PHB calculation. I do not believe that this response satisfies my request, or complies with the Tribunal's directions.

The CCG's response further suggests that the numbered versions were used in chronological order, and that there was no fluidity in their application. Given that version 6 was used in 2014/15, it is reasonable to assume that versions 1-5 were not applied after the date of my request, and that the original copies (with the original latest modification date, pre-CCG amendments), are still held by NEL CSU, NCCP and NCCG. The First-tier Tribunal, in its decision notice, did not uphold my right to this information under FOIA.

I look forward to hearing from you with regards to my application for permission to appeal to the Upper Tribunal."

20. The latter sentence referred to an earlier application for permission to appeal made by the applicant in relation to those aspects of her appeal which had been refused by the Tribunal.

21. In response to the aforementioned letter, the Norwich CCG wrote the Tribunal on 19 August 2019, in the following terms:

"We write further to our client's letter to Ms Read dated 12 August and Ms Read's email of 14 August 2019.

Tribunal decision

In the Tribunal's decision, promulgated on 9 July ("Decision"), the Tribunal directed NCGG 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 to 10". The Decision states that NCGG has the "building blocks" from which to provide the first and last dates of use, following the Tribunal's analysis of the differences between versions of the spreadsheets.

Ms Read's email complains that "the CCG's response is lacking in specificity as it has only relied upon a very small sample of patients, [,…] it has failed to identify any dates of application for versions 1 (Set Wages), 3a, 3b, 5 or 9. Furthermore, it has provided only the month and the year, as opposed to the actual date that is held at the top of each PHB calculation. I do not believe that this response satisfies my request, or complies with the Tribunal's Directions."

NCCG's approach

In providing the information which it was directed to supply by the Tribunal, NCCG reviewed the files of 10 patients out of a possible 83 patients. The review took 3.5 hours:

this time was spent creating a list of PHB holders by NFK number, selecting 10 files at random and locating, opening and reviewing the saved documents to identify the approved and implemented personal health budget ("PHB") cost calculation forms and the version of the cost calculation spreadsheet used for each form. NCCG is only able to assess the version used by a visual inspection of each PHB form.

On the basis of the above exercise, NCCG considers it would take around 30 hours to review the files of the remaining 83 patients who had PHBs. This is several hours above the limit provided for in section 12 of the Freedom of Information Act 2000 ("FOIA") and, had this been a new request for information, NCCG would have declined to respond on that basis.

NCCG does not have the resource to spend over four days reviewing the files of patents who had PHBs in order to answer this request for information. NCCG is also unable to obtain external help for the task, given the specialist nature of the spreadsheets and knowledge of PHBs required to conduct the exercise.

Ms Read states that no first and last use date has been provided for some versions of the spreadsheet. It is possible that some versions of the spreadsheet were never in use, however NCCG is only able to work from the information provided to it by North East London Commissioning Support Group ("NEL CSU") and is not in a position to confirm this. NCCG reiterates that it had no say in the management of these records by NEL CSU.

FOIA requirements

NCCG is aware of the requirements placed upon it by FOIA and seeks to comply with its duties at all times. NCCG is also aware of the aim of FOIA to promote transparency and accountability of public authorities, but that this must be balanced against a public authority's other responsibilities and should not take up a disproportionate amount of time.

NCCG is mindful that Ms Read has previously expressed concern about the method of calculating PHBs adopted by NEL CSU. NCCG accepts, and has admitted to Ms Read, that that process was flawed. As a result, significant changes have been made and those have been communicated to Ms Read, who has confirmed that she is satisfied with the changes and with how her PHB is now managed.

Given that NCCG has spent a significant amount of time and resource (and therefore public money) in dealing with this request for information and in light of the fact that Ms Read is satisfied with how PHBs are now managed, it would be unable to justify spending further time responding to this request unless it receives a direction from the Tribunal to that effect.

Bearing in mind the purpose of FOIA and the balance of the right to information as against use of public resources, NCCG's is concerned about Ms Read's application for permission to appeal and has not itself sought permission to appeal.

Conclusion

NCCG hopes that the Tribunal will agree that it has adopted a reasonable and proportionate approach to providing the information sought by Ms Read and which the Tribunal has required it to disclose."

22. The aforementioned correspondence was put before Judge Henderson (the Judge who chaired the panel that determined the appeal referenced as EA/2018/0015). Judge Henderson refused the applicant permission to appeal, and treated Norwich CCG's letter of 19 August 2019 as an application to set aside. In relation to such application Judge Henderson concluded as follows, in a decision of 23 August 2019.

"**Application to set aside**

3. The CCG have responded to Ms Read's complaint in the letter dated 19.08.19 setting out the process that they followed and the time it took for this to be done, they acknowledge that this is not what was ordered by the Tribunal. On the basis of this exercise they state that they consider it would take around 30 hours to review the files of the remaining 83 patient files. They conclude that:

"*Given that NCGG has spent a significant amount of time and resource in dealing with this request and in light of the fact that Ms Read is satisfied with how PHBs are now managed it would be unable to justify spending further time responding to this request* ***unless it receives a direction from the Tribunal to that effect****.*

4. I have treated the application for directions as an out of time request to set aside the decision pursuant to rule 41 GRC Rules which provides:

(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if –

(a) the Tribunal considers that it is in the interests of justice to do so; and

(b) one or more of the conditions in paragraph (2) are satisfied.

(2) The conditions are –

(a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;

(b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;

(c) a party, or a party's representative, was not present at a hearing related to the proceedings; or

(d) there has been some other procedural irregularity in the proceedings.

5. I am satisfied that it is in the interests of justice to consider this application set aside out of time pursuant to rule 2 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (the Rules) (having regard to proportionality, facilitating the participation of the parties and the resources of the parties).

6. The issue of whether the information could be derived from an analysis of patient files was explicitly raised in the Tribunal's adjournment directions of 28th December 2019 in none of their subsequent submissions did the CCG seek to argue the considerations that they now rely upon which I am satisfied amounts to a post-decision attempt to relitigate an issue that all parties were aware was live before the Tribunal prior to the Tribunal's determination. From this I am not satisfied

that the application meets any of the conditions in rule 41(2) and the application is refused.

7. In the absence of a set aside, it is too late for the First-tier Tribunal to consider additional evidence, and there is no jurisdiction to make directions or vary the decision now that the case has been concluded. The Appeal has been decided and the Tribunal has made its ruling **which is binding on the parties** (subject to rules 40-45 of the GRC Rules).

8. I have not treated the letter of 19th August as an application to appeal as the CCG have explicitly stated that they have not sought permission to appeal, neither have I treated it as an application for a review as the CCG have not outlined any errors of law that they seek to rely upon.

Application for Enforcement

9. I have treated Ms Read's correspondence relating to compliance as an application to the Tribunal to enforce its decision. I have referred the case to the Registrar for consideration in this regard."

23. On 25 November 2020, the applicant lodged a formal *"Notice of Application for Certification to the Upper Tribunal for Contempt of Court"*. Therein, the applicant identifies the act or omission relied upon in support of the application for certification, as follows: *"Failure of the public authority to respond within the 35 days, as directed, and subsequent refusal of the public authority to provide the requested information"*.

24. By way of a decision of 5 January 2021, the Tribunal Registrar concluded that the date of receipt by the Tribunal of the certification application was the 14 August 2019 i.e. the date on which the applicant emailed the Tribunal identifying the alleged failure of Norwich CCG to comply with the Substituted Decision Notice. This decision has not been the subject of challenge. Consequently, the application for certification was made within time.

25. The Registrar also joined the Information Commissioner to these proceedings. That decision is currently the subject of an application for permission to appeal, which is awaiting consideration by the Upper Tribunal. The Information Commissioner has played no further part in the substance of these proceedings.

26. There has been recent correspondence between the applicant and NWCCG (the interested party). Of particular relevance is the correspondence of 12 February 2021, in which NWCCG provided the applicant with a spreadsheet ("the final spreadsheet") which was compiled after a consideration of the 82 completed PHBs relating to 44 patients – information which was available at the time of the relevant FOIA request.

Conclusions

27. Mr Hopkins reminded the Tribunal, both orally and in his written submissions, that for committal proceedings to succeed the Tribunal's Substituted Decision Notice must have been expressed in clear, certain, and unambiguous language. He submits that the instant Notice was too uncertain and ambiguous in its terms for it to be realistically

demonstrable on the criminal standard that Norwich CCG are in contempt by failing to comply.

28. The applicable legal principles that can be drawn from the authorities in relation to construction of Court Orders and findings of contempt in relation to breach of an Order, are as follows:

    (i) The terms in which an Order was made are to be restrictively construed (see Federal Bank of the Middle East v Hadkinson [2000] 1 WLR 1695).
    (ii) The words of the Order are to be given their natural and ordinary meaning and are to be construed in their context, including their historical context and with regard to the object of the Order (Hadkinson) and the reasons given by the Court for making the Order at the time that it was made (Sans Souci Limited v VRL Services Limited [2013] UKPC 6).

29. In my conclusion, having applied the principles identified above, there is nothing even remotely ambiguous or unclear about the Tribunal's Substituted Decision Notice. The Tribunal had before it 10 versions of the PHB cost calculation spreadsheet. It directed Norwich CCG to provide the first and last dates of use for each of these 10 versions. The only issue that could possibly be argued to be unclear is whether, in seeking to comply with the Substituted Decision Notice, Norwich CCG were required to do anything *"other than use the evidence on the face of the completed PHBs"* in order to ascertain the first and last dates of the 10 versions of the cost calculation spreadsheet. I will return to this matter briefly below.

30. I now turn to the question of whether Norwich CCG complied with the terms of the Tribunal's Substituted Decision Notice.

31. It is plain from Judge Henderson's robust response to Norwich CCG's letter to the Tribunal of 19 August 2019, that the judge did not consider the information provided within the letter of the 12 August 2019 complied with the terms of the Tribunal's Substituted Decision Notice. Nevertheless, I must consider the position for myself.

32. As can be seen from the correspondence set out above, Norwich CCG did not claim, either in its initial letter to the applicant of 12 August 2019 or in its letter to the Tribunal of 19 August 2019, to have relied upon evidence other than that contained on the face of PHB cost calculation spreadsheets relating to 10 randomly selected patients, despite having 82 PHB cost calculation spreadsheets, from the records of 44 patients, available to it. Explanation for the checking of only 10 out of the 44 available patient records, is provided in the letter to the Tribunal of the 19 August 2019 i.e. that to do otherwise would mean spending *"a significant amount of time and resource in dealing with the request."*

33. Of significance, in my view, is that the evidence drawn from these 10 patient records did not enable data for the first and last dates of use to be provided for PHB cost calculation spreadsheet versions 1, 3a, 3b, 5 or 9 i.e. half of the 10 versions referred to by the Tribunal in its Substituted Decision Notice. Insofar as information was provided for the remaining five versions of the spreadsheet, it was vague, with a two-year date

range being provided for four of the remaining five PHB spreadsheet versions, and a three-year date range for version 6.

34. It is useful at this stage to draw a comparison with the final spreadsheet sent by NWCCG on 12 February 2021, which in my conclusion provides the information required by the Substituted Decision Notice. At paragraph 69 of her witness statement of 22 April 2021, Catherine Byford – the Chief Nurse at NWCCG who *'has been involved in [the applicant's] case since January 2020'* describes the process by which the information on the final spreadsheet was derived:

> "In order to comply with the exact wording of the Substituted Decision Notice, we carried out a detailed review of the spreadsheets for each individual case to work out the dates that each cost calculation was first and last applied for these patients. This exercise took more than one hundred hours as the information was not readily available."

35. I draw from this passage, and from reading Ms Byford's statement more generally, that the information used to provide the response of 12 February 2021 was information that would have been available to Norwich CCG in August 2019 and that it was information that was available from the face of the 82 completed PHB cost calculation spreadsheets in the aforementioned 44 patient records.

36. This is of importance because it demonstrates that had Norwich CCG considered the records of the entirety of the 44 patients, rather than 10 randomly selected patient records, it would have (i) been able to provide the information required by the Substituted Decision Notice in relation to versions of the spreadsheet about which it provided no information in its letter of 12 August 2019 and (ii) it would have been able to provide more precise information in relation to the remaining five versions of the spreadsheet.

37. What is also unexplained, despite being a matter highlighted by the applicant many months ago, is that the information recorded for patients 1 to 10 in the initial spreadsheet of 12 August is not consistent with any of information provided for the patients in the final spreadsheet. For example, in the initial spreadsheet it is said for 'Patient 1' that the cost calculations were conducted in August 2012, February 2015 and July 2015, using versions 2 and 6 of the spreadsheet. However, there are no patients amongst the 44 patients identified in the final spreadsheet that have such characteristics.

38. Looking at all the evidence before me, I conclude that the applicant has demonstrated beyond reasonable doubt that Norwich CCG did not substantively comply with the terms of the Tribunal's Substituted Decision Notice in EA/2018/0015. In summary, the information provided on the 12 August 2019 was substantially incomplete, vague and inaccurate, a position that was not improved upon until after Norwich CCG ceased to exist as a legal entity. Whilst I depart from Judge Henderson's analysis of Norwich CCG's letter of 19 Augus 2019t i.e. that in its response Norwich CCG *"acknowledge that this is not what was ordered"*, I nevertheless conclude that Norwich CCG did not comply with the Tribunal's Substituted Decision Notice.

39. Does such a failure constitute a contempt of court? I conclude that it does. Civil contempt does not require an intention to interfere with the administration of justice, it is enough that the alleged contemnor was aware of the order, that the terms of the order bound the contemnor and that the contemnor disobeyed those terms. All those features are present in the instant case.

40. I observe that where the Tribunal concludes that the party in contempt has acted on the basis of an interpretation of the Order which was not reasonably arguable, it is not necessary for an applicant to also show that the breach of the Order was committed with actual knowledge (see Masri v Consolidated Contractors [2011] EWHC 1024 at [155]). In my view this is the most favourable position that Norwich CCG could potentially seek refuge in in the instant matter, but even if such circumstances did prevail I would have found that the failure to comply with the Substituted Decision Notice amounted to a contempt of court. In my conclusion, however, this is not a place of refuge that Norwich CCG can remain. Having read the decision in EA/2018/0015 as a whole, and in particular noting the clear and unambiguous terms of the Substituted Decision Notice, the letters from Norwich CCG of 12 August and 19 August 2019, Judge Henderson's response to the latter, and the response from NWCCG of 12 February 2021, I find Norwich CCG were aware that they had not complied with the Tribunal's Substituted Decision Notice at the time of writing the letter of 12 August 2019 and, if not, then they certainly should have been aware of this after receiving Judge Henderson's response to the 'application to set aside'.

41. In all the circumstances, I conclude that the applicant has demonstrated beyond reasonable doubt that the requirements of section 61(3) of FOIA have been met.

42. The Tribunal has a discretion to certify a contempt to the Upper Tribunal if the requirements of section 61(3) have been met (See section 61(4)). In the instant case, there are a number of features which play a significant role in my consideration of whether to exercise such discretion although, ultimately, I have reached my conclusion having considered the entirety of the information before me.

43. In my view the failure to comply with the terms of the Tribunal's Substituted Decision Notice was deliberate, and based in resource and cost considerations. This, and the prolonged nature of the failure by Norwich CCG to comply with the terms of the Substituted Decision Notice, clearly weighs heavily in support of exercising discretion to certify the offence to the Upper Tribunal. The fact that the applicant, albeit belatedly and at the hands of NWCCG not Norwich CCG, has been provided with the information that the Substituted Decision Notice directed is also relevant, but only to a limited extent given the important public interest in protecting the administration of justice, which includes the need for compliance with the orders of the Tribunal. Absent the unusual feature of this case identified in the following paragraph, I would have exercised my discretion to certify an offence of contempt to the Upper Tribunal.

44. The unusual feature of this case, referred to above, is that Norwich CCG no longer exist as a legal entity. This I find to be of significance and a factor which very weighs heavily in my consideration of whether to exercise my discretion to certify an offence by Norwich CCG to the Upper Tribunal. Although there is a strong public interest in

the Tribunal ensuring that its orders are complied with, there is also a public interest in ensuring that the Tribunal's resources are used appropriately. The resources that would be expended by the Upper Tribunal should it be required to consider this matter will be considerable and, in my view, the benefit to the public interest even if Norwich CCG are ultimately found to be in contempt, including deterring others from breaching the Tribunal's orders, would be limited given that Norwich CCG is no longer in existence as a legal entity. I have also taken account of the fact that this is not a case in which Norwich CCG have deliberately ceased being a legal entity in order to avoid complying with the Tribunal's order or to avoid punishment, it was as a consequence of matters wholly unrelated to litigation in the Tribunal.

45. Looking at all the circumstances of the case, with particular weight being given to those features I have identified above, I have decided not to exercise my discretion to certify an offence by Norwich CCG to the Upper Tribunal despite my earlier conclusion that the requirements of section 61(3) have been met.

46. This though is not the end of my considerations because the applicant further submits that NWCCG (the interested party) took over the burden imposed by the Substituted Decision Notice and that, as a consequence, NWCCG should be made the first respondent to the instant application and be the subject of certification for contempt to the Upper Tribunal. This submission is supported by evidence sent to the Tribunal on 16 July 2021 i.e. after the completion of the hearing. The aforementioned evidence is in the form of an email from NHS England to the applicant, in response to a Freedom of Information Request made by the applicant on 22 June 2021, which reads as follows:

> "Dear Kirsty Read,
> Thank you for your communication dated 22 June 2021.
>
> NHS England has assessed your communication as a request under the Freedom of Information (FOI) Act 2000. As such, your request is being dealt with under the terms of the FOI Act and has been allocated the following reference number: FOI-2106-1488118.
> Your exact request was:
>
> *"NHS Norfolk and Waveney Clinical Commissioning Group (CCG) was launched on 1 April 2020. It was formed following the merger of the NHS CCGs for Norwich, North Norfolk, South Norfolk, West Norfolk, and Great Yarmouth and Waveney. Please can you confirm: Where does all financial and / or legal liability for decisions or actions of Norwich CCG prior to 1 April now reside?"*
>
> NHS England holds information in relation to your request.
>
> All financial and / or legal liabilities relating to decisions or actions of the former Norwich CCG transferred to NHS Norfolk and Waveney Clinical Commissioning Group on its inception (1 April)."

47. In a response of 22 July 2021, NWCCG submit that (i) the applicant's assertions do not amount to an application to add NWCCG as a respondent under rule 9 of the 2009 Rules, (ii) the admission of the late evidence after the hearing would be contrary to the overriding objective and (iii) the FOIA response has little if any probative value. Ms

Read replied on the same date stating, *inter alia*, that she had intended for her email of 16 July to constitute an application under rule 9(3) of the 2009 Rules, that the FOIA response was clear, and that there should be no further delay in this matter to allow NWCCG to make further submissions.

48. I refuse the applicant's application to add NWCCG as a respondent to these proceedings.

49. Judge Henderson treated the applicant's correspondence of 14 August 2019 as an application for the Tribunal to enforce its decision i.e. as an application for certification of an offence and, of course, Norwich CCG were the subject of the Tribunal's Decision Notice and at that time were in existence as a legal entity. That status ceased to exist as long ago as 1 April 2020. The applicant has had ample opportunity since that date to make an application for NWCCG to be added as a respondent to the instant proceedings, or to lodge a further application naming NWCCG as a respondent. I observe in particular that on 25 November 2020 the applicant lodged a formal notice with the Tribunal requesting certification of an offence by Norwich CCG. NWCCG were not named in that application.

50. It is important that procedural rigour is maintained in contempt proceedings, a point recently reenforced by Upper Tribunal Judge Wikeley in Conway (GIA/215/2021), when he reminded us that there is *"extensive case law in the courts to the effect that procedural requirements in relation to allegations of contempt must be interpreted strictly and applied with great attention to detail, given the potentially serious consequences of a finding of contempt. The type of procedural informality which may be acceptable in other tribunal contexts has no place in relation to the law of contempt."* The delay in Ms Read making the application for NWCCG to be the subject of certification to the Upper Tribunal for an Offence is considerable. There is little by way of an explanation for the delay other than the inference that Ms Read was ignorant as to formal transfer of legal obligations to NWCCG and as to the procedural requirements of the Tribunal. I do observe that for a time NWCCG referred to itself as a respondent in these proceedings (for example see its response of the 8 March 2021) - nevertheless, the issue of the role of NWCGG in these proceedings was explored at a hearing on the 22 March 2021 on which date NWCCG were added as an interested party.

51. I also accept NWCCG's submission that, despite the information provided in the FOIA response sent to the Tribunal by the applicant on 16 July, fairness dictates that there would need to be further exploration of the issue of whether the obligations imposed by, and/or the consequences of a failure to comply with, the Tribunal's Substituted Decision Notice in EA/2018/0015 could be said to have 'transferred' to NWCCG on 1 April 2020. This would inevitably delay the outcome of these proceedings and add to the costs incurred in relation to them.

52. Looking at the circumstances as a whole, I conclude that it would not be just and fair to add NWCCG as a respondent to these proceedings at this late stage.

53. Had I acceded to the application to add NWCCG as a respondent I would, in any event, have declined to certify an offence by NWCCG to the Upper Tribunal. As a

matter of logic, in my view it cannot be said that NWCGG did something or failed to do something in relation to the proceedings in EA/2018/0015, prior to it coming into existence on 1 April 2020. I find that after 1 April 2020 NWCCG have at all times acted in good faith and were hampered in its attempts to respond to the applicant's request by the onset of the Covid-19 pandemic. That NWCCG has assisted the applicant to the extent it has, given the circumstances that have pertained since April 2020, is a testament to its willingness to ensure compliance with the Tribunal's order.

Decision

The applicant's application to certify an offence to the Upper Tribunal is REFUSED

Signed
M O'Connor
Upper Tribunal Judge O'Connor

Date of Decision: 26 July 2021
Date Promulgated: 30 July 2021