IN THE FIRST-TIER TRIBUNAL **Case No. EA/2010/0194**

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

ON APPEAL FROM:

Information Commissioner's Decision Notice No: **FS50309685**

Dated: **29th November 2010**

Appellant: **Mrs June Short**

Respondent: **Information Commissioner**

Heard on the papers at: **Fox Court on** **21st March 2011**

Adjourned Hearing: **20th April 2011**

Date of decision: **23rd May 2011**

BEFORE:

Fiona Henderson (Judge)

Alasdair Warwood

And

Ivan Wilson

Subject matter:
FOIA - S 14 – whether request was vexatious request

Cases:

Berend v Information Commissioner and London Borough of Richmond Upon Thames EA/2006/0049 & 50

Caughey v Information Commissioner EA/2008/0012

Billings v The Information Commissioner EA/2007/0076

Gowers v the Information Commissioner and London Borough of Camden EA/2007/0114

Rigby v Information Commissioner and Blackpool, Flyde and Wyre Hospitals NHS Trust EA/2009/0103

Hossack v Information Commissioner and DWP EA/2007/0024

Welsh v Information Commissioner EA/2007/0088

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2010/0194**

GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal refuses the appeal and upholds the Decision Notice dated 29th November 2010 for the reasons set out in main body of the Decision.

Signed

Fiona Henderson (Judge)

REASONS FOR DECISION

Introduction

1. In September 1998 the Appellant registered as a patient at the Harvey Practice. In July 2000 she attended the Practice for the first time and saw a temporary Doctor. After the consultation she asked to see her medical record and upon viewing it discovered that on 4th August 1999 one of the Doctors at the Practice had accepted an unsolicited telephone call from another doctor and recorded certain remarks upon her medical record. From the endorsement on the medical record it appeared that Mrs Short had attended the Practice that day which was not the case. Mrs Short had not been told that this record had been made at the time and once she did see the comments considered them defamatory.

2. Since then Mrs Short has been in correspondence with the Practice and other organisations in an attempt to:

- Have the record amended to reflect her views,
- Prevent the Practice from keeping an archived electronic record of her historical notes.
- Establishing what records are held, how they were created, whether they comply with the Data Protection Act, and whether the Practice has permission to hold them electronically.

The request for information

3(i) On 24th October 2009 Mrs Short wrote:

> *"I have received a letter from Bournemouth and Poole Primary Care Trust in which they say they have no record of an application for consent to keep my NHS patient medical records in electronic format from the Harvey Practice.*
>
> *Please confirm that you submitted an application and send me a copy of the consent that you received."*

(ii) On 4th December 2009 the Practice did not send a copy but asserted *"please note that the Harvey Practice does have the appropriate approval to keep electronic records*."

(iii) On 10th December 2009 Mrs Short wrote:
Please send me a copy of the Harvey Practice's request to keep and transfer electronic patient records and a copy of the reply it received in response.

(iv) On 15th February 2010 the Practice provided a copy of "*our application to use computers i.e.; paper light application as well as the response requested"* [an email dated 10th January 2008].

(v) On 18th February 2010 Mrs Short requested:
"*Bournemouth and Poole PCT's email of 10th January 2008 confirms you have completed the first component of your application for paper light status and are now free to apply for the second component. Please send me a copy of your application for component 2 and provide details of the outcome"*.

(vi) Later the same day the Practice replied by email suggesting that she should contact the PCT in that regard.

(vii) On 19th February Mrs Short asked for an official refusal of request notice which referred to the relevant section of FOIA relied upon.

(viii) On 18th March 2010 the Practice refused the request on the grounds that they believed that the request was vexatious.

The complaint to the Information Commissioner

4. Mrs Short emailed the Commissioner as follows:
"I have copied below emails exchanged with the Harvey Practice. I have today received a letter from the Practice which says"[The Practice is] issuing a refusal on the basis that we believe your request to be vexatious.""
I would appreciate your advice.

5. On 28th April the Commissioner allocated the complaint to a case worker. In the Decision Notice the Commissioner records that it was on 28th April that Mrs Short made her complaint to the Commissioner, Mrs Short asserts that this is a factual error and it was on 19th March 2010 that she contacted the

Commissioner. The Tribunal notes that this email was a request for advice rather than formal notice of a complaint. There is incomplete email correspondence in the bundle and Mrs Short's email to the Commissioner is provided undated but the Commissioner accepts Mrs Short's recollection that there was an email sent on 19th March. It is clear that the complaint was accepted by the Commissioner on 28th April and that in any event the date of the complaint is not material to this appeal.

Findings

6. The Commissioner issued a Decision Notice dated 29th November 2010 FS50309685 in which he found that the public authority correctly refused the request for information as vexatious under s14(1) of the Act. He also found that the public authority had breached s17(7) FOIA in that in their initial refusal they failed to explain whether they had complaint procedures in place or of the right to complain to the Commissioner.

7. Schedule 1 of FOIA outlines which bodies are covered by the Act. The Commissioner found that each GP is a separate legal person who falls within either or both of paragraphs 44 and 45 of Part III of Schedule 1 FOIA and therefore each GP constitutes a separate public authority for the purposes of FOIA. For the purposes of the Decision Notice the senior partner was named as the relevant public authority given that the Practice holds the information on his behalf, however, for ease of reading the Commissioner referred to "the Practice" in detailing the correspondence etc. This approach has not been challenged on appeal, and the Tribunal therefore adopts the same procedure for the sake of consistency.

The appeal to the Tribunal

8. The Appellant appealed to the Tribunal on 1st December 2010. At the telephone directions hearing of 21st January 2011 it was confirmed that the issues to be determined by the Tribunal are:

i) Whether the Commissioner based his decision on the wrong request for information.

ii) Whether the Commissioner failed to ensure that there had been an internal review by PCT/Practice, of the decision to refuse the request, prior to reaching his Decision.

iii) Whether the Commissioner erred in finding that the Appellant's request was vexatious.

9. As directed at the telephone hearing, the Appellant provided further and better particulars in relation to issue iii) and also detailing in what ways she alleges that the Decision Notice is wrong in fact or law, and her reasons for so stating these are dealt with in detail under the analysis of the case at paragraph 32 et seq and 59 et seq below.

10. The Appellant applied for the senior partner of the Harvey Practice to be joined to this appeal. The Tribunal refused this request on 21st January 2011 because: the doctor has already set out the case on behalf of the Practice in his correspondence with the Commissioner. Having seen the material it is clear that the senior partner has allowed his name to be used for administrative convenience but the response was provided on behalf of the partnership by the Practice Manager. The Tribunal further notes that this appeal turns upon the correspondence which is a matter of fact and insofar as it is relevant is before the Tribunal either in full or as a summary.

Evidence

11. The Tribunal is satisfied that it is not necessary to view the disputed information since the appeal turns on the nature and history of the request rather than the detail of the withheld information a description of which is contained within the papers.

12. Mrs Short and the Practice have been in correspondence for over 10 years. Neither the Commissioner nor the Tribunal have reviewed a complete set of this correspondence. The Practice provided to the Commissioner a "summary sheet of complaint to date" some 17 ½ pages which provides a chronology

and summarizes the correspondence. Mrs Short objects to the Commissioner having relied upon this summary and upon it being before the Tribunal.

13. Prior to the hearing (and before having seen the document) the Tribunal indicated in a ruling[1] setting out full reasons, that the document should be submitted as part of the case papers but not as an agreed document and its status highlighted as being contentious. The Tribunal has reviewed that ruling upon sight of the document and is satisfied that there is no basis for excluding it from the Documents before the Tribunal and that the Commissioner did not err in relying upon this document to make his findings of fact in the Decision Notice.

14. In reaching this conclusion the Tribunal reminds itself that s51 FOIA gives the Commissioner very wide powers to ask for information in support of his investigation of a complaint under s 50. Additionally *The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009* rule 15(2) provides that

The Tribunal may—

(a) admit evidence whether or not—

(i) the evidence would be admissible in a civil trial in [the United Kingdom]; or

(ii) the evidence was available to a previous decision maker; or

(b) exclude evidence that would otherwise be admissible where—

... (iii) it would otherwise be unfair to admit the evidence

15. Mrs Short's objections are dealt with in turn:

a) She was not given a fair opportunity to respond to the document before the Commissioner decided to use it as a basis for his decision.

Whilst Mrs Short did not have sight of the summary prior to the issue of the Decision Notice, the Commissioner did provide the basis for his findings of facts in a letter dated 9th August 2010 which meant that Mrs Short had the opportunity to respond prior to the issue of the Decision Notice.

[1] dated 28th February 2011

b) She argues that in his letter to the Practice of 17th June 2010 the Commissioner asked for "*a copy of any requests made by Mrs Short which may be particularly relevant*" and not a summary which is what he in fact relied upon. The Tribunal notes that he also added:

"*... if the volume of requests makes this impractical, the ICO will first consider your arguments and then request any specific past requests which it might require"* and that the matter was discussed in a telephone call with the Practice. The Tribunal is satisfied that a summary is a pragmatic approach to a 10 year history of correspondence.

c) Mrs Short argues that the document has not been "authenticated" by the public authority. It is not clear what is meant by this but the Tribunal notes that the summary is not disputed factually by Mrs Short and has come from the Practice. The Tribunal has to be satisfied on a balance of probabilities and does not find that there is any reason to doubt the authenticity of the document.

d) In her email dated 24th February 2011 Mrs Short argues that the summary sheet is not relevant, because it relates to the failure of the data controller to delete certain data from his database, rather than her Freedom of Information Request. The Commissioner argued that this document sets out the background and context of the course of dealings the public authority relied upon by them to argue that s14 FOIA applied. The Tribunal remains satisfied that in deciding whether a public authority is correct to rely upon s14 FOIA:

"...it is not only the request itself that must be examined, but also its context and history" (*Gowers v the London Borough of Camden EA/2007/0114*, at paragraph 29) and this document fulfils that purpose.

e) Mrs Short relies upon the provisions of Article 8 of the European Convention on Human Rights in that she argues that the schedule fails to respect her private and family life, home and correspondence. The Tribunal is satisfied that if Article 8 were engaged the caveat set out in Article 8(2) would apply in that disclosure to the Commissioner was in accordance with the law and necessary for *"... the protection of the rights and freedoms of others"*. The Practice is entitled to rely upon s14 FOIA if they can establish that the request

was vexatious. Additionally they are entitled to be protected from any harassment, expense and disruption ensuing from a vexatious request.

f) The Tribunal repeats the arguments above in response to Mrs Short's reliance upon "The General Medical Council's advice that - *doctors must not disclose personal information to a third party such as a solicitor, police officer or officer of the court without the patient's express consent"* in support of her contention that the schedule is inadmissible. This is because the GMC advice in full provides the caveat:"*.. unless it is required by law or can be justified in the public interest."*

16. Additionally the Tribunal notes an element of inconsistency to Mrs Short's arguments because whilst she objects to reliance upon the summary document before the Commissioner and the Tribunal, in her further and better particulars she argued that in order to determine if the request if obsessive:
"the practice must provide a chronological schedule of events providing details of the requests and the outcome"
This would appear to be exactly the exercise done in the disputed summary.

Legal submissions and analysis

Whether the Commissioner based his decision on the wrong request for information.

17. On 15th August 2009 Mrs Short wrote to the PCT in a letter entitled:
NHS (General Medical Services) Amendment (No 4) Regulations 2000. As follows:
"The above Regulations, which came into force on 1 October 2000, state that approval from the PCT is necessary if an electronic record is the only record maintained (sic) and that the computer system must be accredited to RFA99 standards...
In her letter of 8th January 2008 to my Solicitor... MDU Medico-legal Adviser stated that when the record was made (in August 1999) "the computer system raised a default statement".

Please confirm whether or not [... the PCT] has approved the continuing storage of this record by the Harvey Practice and, if so, send me a copy of such approval."

18. Bournemouth and Poole PCT responded on 23rd October 2008 stating inter alia:

"The Harvey Practice is using an accredited clinical system which was previously accredited to RFA99 and now to Connecting for Health Accreditation standards.
The electronic record approval process is undertaken by the IT Registration Department linked to the PCT. This only requires a practice to write to seek approval if they intend to keep electronic records and destroy paper records.
The PCT does not have a record of an application from the Harvey Practice although the changes in respect to this regulation go back to 2000 and pre date the organisation and so it is not possible to say with any certainty as to whether an application was originally made.

19. The Tribunal considers this letter to inform Mrs Short of 3 matters:

- The accreditation system has changed.
- If an application was made originally, the PCT cannot find a copy.
- The reasons why this might be.

20. Mrs Short made an information request to the Harvey Practice on 24th October stating:

"I have received a letter from Bournemouth and Poole Primary Care Trust in which they say they have no record of an application for consent to keep my NHS patient medical records in electronic format from the Harvey Practice.
Please confirm that you submitted an application and send me a copy of the consent that you received."

The letters of 15th August and 23rd October were not attached although the Practice was sent a copy of them on 4th November 2009 which was prior to their substantive response.

21. With her grounds of appeal the Appellant attached 3 blank/pro forma documents the completed versions of which she believes she should have received in response to her information request namely:

- A letter enclosing an application form relating to an "*application to keep electronic patient records in accordance with the NHS Executive circular PC-01/10/00"*.
- An application form which references RFA99, NHS (General Medical Services) Amendment (No.4) Regulation 2000 – SI 2383 and refers to "Good Practice for General Practice Electronic Patient Records".
- A standard letter acknowledging receipt of the application and giving consent to the application.

22. The Tribunal is satisfied that these documents relate to the original accreditation system which has been updated as alluded to in the letter of 23rd October. This is because the Good Practice Guidelines referenced in the application form have not been updated to the version current at the time of the information request (namely v 3(1). From her reliance upon these forms it would now appear that Mrs Short may have been asking for the application and permission that would have existed under the original system when the record was first retained and not as at the present date.

23. The Tribunal is satisfied that the response that Mrs Short received from the Harvey Practice reflected the current position as at the date of the information request and relates to the revised and updated system (in light of the date of their application 17th October 2007) and the version of the Good Practice Guidelines referenced (v3.1)).

24. In determining the way an information request by a public authority should be viewed, this Tribunal adopts the approach set out in *Berend v Information Commissioner and London Borough of Richmond Upon Thames EA/2006/0049 & 50* which found (as summarised at paragraph 86) that:

    - *the request should be read objectively by the public authority,*

- *there is no requirement to go behind what appears to be a clear request,*

- *the Tribunal is tasked to consider the request in the terms in which it was phrased ... (in the absence of clarification under section 1(3) or amplification under section 16 FOIA and the section 45 Code) ...*

25. This Tribunal is satisfied that on an objective reading of the information request of 23rd October, the Harvey Practice were correct to provide the paper-light application that it did.[2] This is because:

- Mrs Short did not provide the copies of the pro formas with her request,
- Mrs Short did not specifically state that she was asking for the earliest application or all the applications if there was more than one.
- In the letter of 4th November 2009 (in which she enclosed the letter of 23rd October 2009) she specifically referenced an updated version of the Good Practice guidelines (version 3) which would place her request in the context of the current situation rather than a historical situation.

26. In deciding whether the Commissioner was considering the "correct" request, the Tribunal has considered the email of 18th February 2010 to the Harvey Practice from Mrs Short which stated:
"Bournemouth and Poole PCT's email of 10th January 2008 confirms you have completed the first component of your application for paper light status and are now free to apply for the second component. Please send me a copy of your application for component 2 and provide details of the outcome."

27. The Tribunal adjourned the case on 20th April 2011 in order to seek additional information from the parties as the correspondence provided by both sides was incomplete and from the terms of the letter set out above it appeared that

[2] The Tribunal has heard no evidence as to whether there were previous applications by the Harvey Practice or if this was the only one.

rather than making a fresh request, Mrs Short might be highlighting incomplete compliance with her original request of 23rd October 2009.

28. The email from Bournemouth and Poole PCT to the Harvey Practice dated 10th January 2008 shows that contrary to the position asserted in Mrs Short's letter of 18th February 2010 it is not the **first component of paper light status** that has been completed, the application has been granted and is now in place:

"I am delighted to inform you that your application for paper light status ***has been approved*** *and you are now free to apply for component 2 of the* ***IM and T DES***[3] *e.g. data accreditation..."*[4]

29. From the check list provided in the email of 10th January 2008 (which lists *"your approved paper light application"*) the Tribunal is satisfied that paper light status is a discrete objective in its own right. It is a necessary step in a process which the Tribunal understands will enable them to join the NHS Care record service and share its patient summaries[5]. Consequently the information requested on 18th February 2010 was not included in the earlier request and constitutes a fresh request. Additionally the Tribunal notes that:
    a) The Commissioner was not provided with a copy of the letter of 24th October at the time that complaint was made to him,
    b) In his letter to Mrs Short dated 16th June he identified the information request as that made on 18th February 2010,
    c) This letter was acknowledged and not challenged by Mrs Short in her email to the Commissioner of 16th June 2010.

Whether the Commissioner failed to ensure that there had been an internal review by PCT/Practice, of the decision to refuse the request, prior to reaching his Decision.

[3] Information management and Technology Directed Enhanced Service

[4] Emphasis added

[5] www.connectingforhealth.nhs.uk/engagement/clinical/publications/dataaccred.pdf

30. The Commissioner in his reply had understood this to be a suggestion that the Commissioner should require a public body to investigate a complaint made on matters outside the Act e.g. whether the Practice had the appropriate paper light authority from the PCT for holding NHS electronic medical records. However, it is now accepted that this ground refers to the fact that there was no internal review of the refusal before the Appellant was advised to complain to the Commissioner.

31. It is not in dispute that the Practice had no internal review procedure and that no internal review was conducted of their refusal of Mrs Short's request. Additionally in his Decision Notice the Commissioner found that the Practice had failed to provide the Appellant with details of whether it had a complaint procedure in its initial response to the request, a breach of s17(7)(a). S 17(7)(a) provides:

(7)A [refusal] notice under subsection (1), (3) or (5) must—

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information ***or state that the authority does not provide such a procedure****,..*[6].

From this it is clear that FOIA does not require an internal review to be carried out by the public authority, consequently the Commissioner has no power to "ensure" that there is an internal review prior to reaching his Decision. The Tribunal is satisfied that there is no error in law in the Decision Notice in this respect and this ground of appeal must therefore fail.

The Commissioner erred in finding that the Appellant's request was vexatious

32. S14 FOIA provides:

(1)Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

....

There is no definition of vexatious within FOIA however, in *Rigby v Information Commissioner and Blackpool, Flyde and Wyre Hospitals NHS*

[6] Emphasis added

Trust EA/2009/0103 following a review of existing case law vexatious was held to be defined as an activity that *"is likely to cause distress or irritation, literally to vex a person to whom it is directed*". In *Hossack v Information Commissioner and DWP EA/2007/0024* it was noted that the consequenes of a finding that an information request is vexatious is much less serious than a finding of vexatious conduct in other contexts and therefore the threshold for a request need not be set too high.

33. *Rigby* noted that the Commissioner's awareness Guidance 22 sets out a checklist of considerations to help determine whether a request is vexatious or not and found that whilst not binding *"the considerations it identifies are a useful guide to public authorities when navigating the concept of a "vexatious" request*" whilst noting that every case must be viewed on its own facts. Not every factor needs to apply but there should be strong arguments under one or more headings. These headings were used by the Commissioner to analyse the request and this approach is not challenged by Mrs Short. The Tribunal adopts this approach and has marshalled the arguments in terms of the headings identified by the Commissioner. Occasionally a matter relied upon by Mrs Short in relation to one head has been analysed by the Tribunal in relation to another heading where the Tribunal deems this appropriate.

Could the Request fairly be seen as obsessive?

34. In their arguments to the Commissioner the Practice recounted a history of a long running dispute with Mrs Short where when they respond to correspondence from her such that there is never an end to the matter:

- She takes a different tack,
- She changes her mind as to the requirements,
- She tries to open different avenues of correspondence with many bodies to gain support for her case.
- She is reluctant to accept decisions by the Practice and other national bodies,
- Tenaciously continues with her changing demands.

In support of this argument they compiled a 17 ½ page summary of the correspondence that they had had with her since 1998.

35. Mrs Short denies that this is a fair assessment arguing rather that she has had to persist and open up correspondence with other organizations because she has been shunted between different bodies. The Tribunal finds some support for this e.g.:

    a) the initial response from the Harvey Practice to her information request of 18th February 2010 was *"You should contact the PCT in this regard"* even though it is information that emanated from the Practice or would have been received by them.

    b) On 10 February 2009 the Commissioner said:

    "Whilst we could assess that the lawful processing requirements of the DPA had been contravened by virtue of another law being broken, we could only make that assessment under the DPA where the body responsible for enforcing that other law determined that it had been contravened."

    Mrs Short argues that implicit in this is a suggestion that attempts should be made to obtain the determination that the Commissioner requires in order to make an assessment.

36. The Tribunal acknowledges that Mrs Short can point to examples where she has been directed to other organizations but does not find that this accounts for the quantity and direction of the correspondence.

37. Mrs Short also argues that she has been provided with conflicting advice and occasionally inaccurate information and that this has increased the level of correspondence necessary. She relies in particular upon the Practice's letter of 20th May 2010 as an example of this, where they said *"no data is being processed with regard to your health record"* notwithstanding the fact that it is not disputed that they continue to store the information (the interpretative provisions of s1(1) DPA 1998 define processing as including "holding" information).

38. In light of the volume of communication that is relied upon by the Practice the Tribunal does not consider it necessary to determine whether specific incidences of information turning upon construction of regulations constitute misleading information, but does acknowledge that the number of regulations in this field which are constantly being updated (e.g. paragraph 22 above) can lead to misunderstandings arising and that the nature and length of the dispute will necessarily affect the quantity of correspondence arising.

39. Mrs Short argues that much of the correspondence relied upon is irrelevant as it relates to requests for her own personal data and that this is contrary to the Commissioner's own guidance which provides:
'You need to take care to distinguish between FOI requests and requests for the individual's own personal data'.

40. The Tribunal disagrees, because:
    a. The correspondence does not relate exclusively to personal data requests.
    b. From reviewing the summary of the protracted correspondence between Mrs Short and the Practice the Tribunal is satisfied that the correspondence all has its genesis in the making of and keeping of the record since 1999. Whilst Mrs Short has approached the issue from different angles e.g. data requests, records management, compliance with GP terms of service, all the correspondence is rooted in this single issue.
    c. The correspondence (whether it relates to personal data requests or not) forms the context into which the information request is made, and the history of the case can show obsession even if there have been no previous information requests. *Gowers v the London Borough of Camden EA/2007/0114*, at paragraph 29).

41. Mrs Short seeks to distinguish *Gowers* on the basis that in her case there is an ongoing personal relationship with the public authority as it is continuing to store sensitive personal data about her, they are "joined at the hip" whereas in *Gowers* no such relationship exists. The Tribunal disagrees since in *Gowers*

the Tribunal is developing the principle to be applied to the facts of the case and it does not arise out of the facts of the case. Any ongoing relationship between the parties is part of the context to be taken into consideration but does not make the principle inapplicable.

42. Mrs Short has involved:

- The Healthcare Commission,
- Parliamentary Commissioner for Administration
- the Primary Care Trust,
- the Information Commissioner ,
- the FHSA,
- the Strategic Health Authority
- and the General Medical Council.

The Tribunal does not suggest that any of this correspondence taken on its own is improper but is satisfied that the cumulative effect of Mrs Short's continued attempts to try to find avenues to address the same issue from different angles is obsessive. Mrs Short has had her records annotated and amended, issued County Court proceedings against the Practice in 2002 which appear to have been struck out and had aspects of her case reviewed by the bodies listed above. The Tribunal adopts the approach set out in *Welsh v Information Commissioner EA/2007/0088* where the Tribunal found that persistence of the complaints, "*in the teeth of the findings of independent and external investigations, that makes this request, against that background and context, vexatious"* para 25.

Is the request harassing the authority or causing distress to staff?

43. The Commissioner found that the effect of the correspondence was undoubtedly harassing and that the Practice Manager had been inundated with requests and arguments to the point of distress (Para 32 DN). The Tribunal agrees with this assessment.

44. The evidence from the Practice is that the correspondence is dealt with by the Practice Manager and time taken has caused pressure of work in other directions. She told the Commissioner that:

- She believes Mrs Short is unreasonable and refuses to understand anything she is told.
- If Mrs Short loses a case or an answer does not suit her requirements she goes down another avenue.
- The correspondence is time consuming, each time a further piece of correspondence is received this involves consultation with other agencies.
- At one stage she was receiving 4-5 bits of correspondence in one day, to try to put some space in between the response the Manager has asked for hard copy letters rather than accepting emails.
- She has tried to ignore the requests, she has written letters and emails ... nothing seems to work.

45. Mrs Short has not addressed the substance of these points in her arguments. She denies that the Practice Manager is harassed by this correspondence because in her experience the doctor in charge of a patient not administrative staff becomes involved with patients' complaints. From the material before us we are satisfied that it is the Practice Manager who has fielded Mrs Short's requests, and this argument has no practical application on the facts of this case.

46. She does not dispute that at times there have been 4-5 bits of correspondence in one day but argues that the Practice is under "no obligation to reply on the same day" and that it takes two to correspond. The Tribunal is satisfied that this is a misstatement of the position and draws a parallel with ***Welsh*** where the Appellant had suggested that a doctor employ temporary workers to lift any burden, the Tribunal noted that *"Simply to shrug off the burden placed on the doctors shows no awareness of the real burden placed on them from the cumulative effects of persistent demands, and the potential distraction from their ability to perform their normal duties"*. In this case the Practice Manager is under an obligation to respond, it is not a voluntary

"correspondence" as suggested by Mrs Short and whether the letters are spaced out or not it still represents a substantial volume of administration and creates pressure upon the individual who has to deal with the correspondence. It also suggests that whatever the response, that is never an end to the matter.

47. The Tribunal is satisfied that Mrs Short has no awareness of the effect that her correspondence has had. We have reviewed the summary of the level and nature of the correspondence and whilst it is not personal or hostile we are satisfied that it is harassing to the public authority.

Would complying with the request impose a significant burden in terms of expense and distraction?

48. Mrs Short argues that complying with the request amounts to providing two sheets of A4 paper and that this would not impose a significant burden. The Tribunal accepts that Mrs Short may have believed that she would receive the completed pro forma documents which accompanied the Grounds of Appeal whereas in fact the public authority have stated that the second component of the IM&T application includes 17 protocols all of which have been approved by the PCT.

49. Even if all 17 protocols were disclosed it is not suggested that this information would exceed the appropriate fees limit and s12 FOIA is not relied upon. The Tribunal notes the comment in *Gowers* that the appropriate safeguard for whether the requests impose a significant burden is s12, but considers that whilst it should not be the only factor it is material to the context of the case and the effect of the request.

50. The Practice does not suggest that the response to this information request in isolation would impose a significant burden. However, history suggests that this would lead to "endless" correspondence picking apart these protocols. This is because despite the letter and enclosures of 15th February 2010 meeting the terms of her information request (see para 25 above) this has started a hare

running and Mrs Short now wants to pursue the second component of the IM& T.

51. In *Gowers* the Tribunal said *"the number of previous request and the demands they place on the public authority's time and resources may be a relevant factor"* para 70. The Tribunal is satisfied in this case that the volume, and range of the correspondence (including the involvement of outside agencies who routinely ask for detailed information of the history of the case from the Practice Manager) has involved it in an increased workload which has diverted resources from its core functions.

52. The Practice Manager told the Commissioner that it was impossible to calculate the number of man hours taken up in dealing with Mrs Short's correspondence. She states that the intricacies are hard to grasp. When someone new becomes involved (e.g. a complaint is made to an associated agency) the history has to be repeated for them to understand. This takes time, finance and patience. During the 10 years of correspondence the senior partner of the Practice and the original advisor at the Practice's defence organisation have retired and there has been a new complaints officer at PCT, each replacement has had to be updated .

Is the request designed to cause disruption or annoyance?

53. The Commissioner did not conclude that this element was made out and the Tribunal does not consider it further here.

Does the request lack any serious purpose or value?

54. In *Welsh v Information Commissioner EA/2007/0088* the Tribunal held that in assessing whether the request is vexatious: *"... Identity and purpose can be very relevant in determining whether a request is vexatious"* para 21. It is accepted that the request holds significance for Mrs Short who argues that as

a patient's medical record is classed as a Public Record [7] her request has a serious purpose and value and it is therefore important that it is accurate and created, authenticated and stored correctly. However, the fact that an applicant feels strongly about a matter does not give them the right to continue to pursue a matter under FOIA long after this is reasonable.

55. The Commissioner identified "in isolation" a serious purpose of ensuring that a Practice is moving towards "paper light" status within the regulations. The Tribunal has determined (para 28 above) that the paper light status has already been achieved and that any serious purpose must therefore be ensuring that the Practice is moving towards joining the NHS Care record service and sharing its patient summaries[8]. The Tribunal does not view the request in isolation, it is part of a stream of linked correspondence and by looking at the way that the correspondence has evolved, the Tribunal does not find that it was Mrs Short's purpose to establish whetherthe Practice was moving towards joining the NHS Care record service.

56. The Practice argued before the Commissioner that:

a) the Request is an endeavour to engage the Practice in further correspondence and argument for correspondence and arguments sake and therefore does not have any serious purpose or value.

b) The Practice has followed the law on record storage, the Government has a detailed policy on record storage and persisting with this information request will not alter that policy.

57. Mrs Short does not accept that the Practice has followed the law on record storage, but the Commissioner noted that the PCT was satisfied with the computerised recording keeping by the Practice and has not raised any concerns over the policies at the Practice (DN 50). Additionally the Tribunal

[7] The Tribunal presumes she is referring to the fact that medical records are held by GPs who constitute public authorities under FOIA.

[8] www.connectingforhealth.nhs.uk/engagement/clinical/publications/dataaccred.pdf

notes that there was no penalty for failure to register prior to going paper-light under the old scheme [9].

58. The Tribunal is therefore satisfied that this request does not serve any useful value or purpose as the underlying complaint has already been addressed on numerous occasions.

Other Matters

59. In her Further and Better Particulars dated 27th January 2011 Mrs Short argued that the Decision Notice was wrong in fact because it :

- omitted details of the Commissioner's consideration in 2006 as to whether the Practice had breached the DPA.[10]
- Did not refer to each piece of correspondence either to or from the Commissioner or the Practice or provide full details and dates.
- Misquoted the date when Mrs Short contacted the Commissioner to complain about the fact that her request for information had been refused as vexatious.
- Failed to refer to correspondence with the PCT concerning a different complaint from Mrs Short sent to him on 22 July 2010.

60. The Tribunal understands this to be an argument that the history and presentation of the case is misleading or incomplete. This Tribunal has considered the role of the chronology in the case of *Caughey v IC EA/2008/0012* in which there was a dispute relating to the accuracy of the chronology. This Tribunal adopts the reasoning and approach set out in that case where it was noted at paragraph 37 that:

"...whether paragraph 6 and/or 7 of the Second Decision Notice contained factual errors is irrelevant. It has already been noted above that ***the Tribunal in exercising its appellate functions should deal with the substance of any Decision Notice before it.*** *... [whether s42 applied] is not affected in any way*

[9] IM & T Guidance para 8.2 para 4
[10] The Commissioner found that it was unlikely that there had been any breach of the retention provisions of the DPA

whatsoever by the date or dates on which an internal review confirming the original decision may or may not have been carried out. This ground too therefore is rejected."

61. The purpose of summarising the history of a complaint is to provide context and to enable it be read by someone unfamiliar with the case. The history does not constitute a finding of fact neither is it the Decision. This Tribunal agrees with the approach identified in *Billings v The Information Commissioner EA/2007/0076* where the Tribunal concluded that:

"*The Appeal process is not intended to develop into a joint drafting session, but only to provide relief if the Decision Notice is found not to be in accordance with the law.*

If an error in the history has become material to the decision (because it informs an erroneous finding of fact or has led to an erroneous decision being made that is wrong in law) then that would constitute a ground of appeal. That is not the case here. The fact that the Appellant would rather that the chronology was recorded differently is not a matter for this Tribunal because it is not material to a finding of fact in relation to the disputed information.

Conclusion and remedy

62. For the reasons set out above, the Tribunal upholds the Commissioner's Decision Notice dated 29th November 2010 and rejects the appeal.

Dated this 23rd day of May 2011
Fiona Henderson
Judge