



**HM Courts
& Tribunals
Service**

**IN THE MATTER OF AN APPEAL TO
THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)
GENERAL REGULATORY CHAMBER**

Appeal No: EA/2010/0172

BETWEEN:

MR ORDE LEVINSON

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

THE DEPARTMENT OF HEALTH

Additional Party

Determined by: Alison McKenna, Tribunal Judge
Jacqueline Blake, Tribunal Member
Malcolm Clarke, Tribunal Member

On: 14 March 2011

At: Tribunals Service, Fox Court, London

Date of Preliminary Decision: 22 March 2011

Date of Final Decision: 29 June 2011

DECISION AND REASONS

DECISION

**This Appeal is allowed and the Decision Notice dated
20 September 2010 is hereby set aside.
The Tribunal does not make a substituted Decision Notice.**

REASONS

1. This Appeal relates to the Respondent's Decision Notice FS50292323 dated 20 September 2010, in which he concluded on the balance of probabilities that the public authority concerned, the Department of Health ("DoH") did not hold the requested information.
2. The information request made by the Appellant, under the Freedom of Information Act 2000 ("FOIA"), was addressed to DoH on 25 February 2009 and referred back to a request he had made in 2005. Both requests concerned information about standard operating procedures used in the NHS for the collection of urine samples.
3. Following receipt of the Decision Notice, the Appellant submitted a Notice of Appeal to the Tribunal in the grounds of which he argued both that the Respondent's decision on the substantive issue (whether DoH held the requested information) was wrong and also that the Respondent had misinterpreted his information request of 25 February 2009 and had consequently asked DoH the wrong questions in his investigation.
4. It was apparent to the Tribunal that there was a fundamental disagreement between the parties as to the scope of the information request dated 25 February 2009 and consequently as to the issues in the appeal. The Tribunal took the view that, if the Respondent had misinterpreted the scope of the information request dated 25 February 2009, that issue should be treated as a separate ground of appeal. The Tribunal decided that it should determine the scope of the information request as a preliminary issue, pursuant to rule 5 (3)(e) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the Rules") because that issue was one that inevitably affected the conduct of the final hearing. The Tribunal's view was that it was only once the scope of the information request had been determined by the Tribunal that it would be possible to hold a hearing on the main issue, which was whether it had been reasonable for the Respondent to have concluded on the balance of probabilities that the information requested (as determined by the Tribunal) was not held by DoH.

The Preliminary issue

5. The Preliminary Issue was formulated by the Tribunal as "*whether the Respondent misinterpreted the scope of the Appellant's request for information dated 25 February 2009 to be a request only for the information held by and referred to in correspondence by Professor Duerden, rather than a request for all the information held by the Additional Party*".
6. The Tribunal's directions provided for the filing of written submissions in relation to the Preliminary Issue. These were duly provided by the parties. The Appellant elected to attend to make oral submissions on the Preliminary Issue but the other parties chose not to attend to do so and

relied on written submissions to the Tribunal. The Tribunal was content with this arrangement and excused the Respondent and DoH from attending the hearing of the Preliminary Issue.

7. The Tribunal's directions also provided for an exchange of evidence between the parties and for the agreement of a bundle of papers to be used for both the preliminary and the main hearings. For the Preliminary Issue hearing on 14 March, the Tribunal was provided with a bundle that ran to over 150 pages, and even then the Tribunal was sent additional papers and a revised index by e mail on 10 March.

The Tribunal's Conclusions on the Preliminary Issue

8. On 22 March 2011 the Tribunal issued its ruling on the Preliminary Issue. Having considered the bundle of evidence very carefully, the Tribunal concluded that a letter sent to DoH by the Appellant on 28 June 2005 should reasonably have been treated by DoH as a clarification of his earlier request dated 15 June 2005 so that the request was then clarified to be one for the clinical papers held by DoH itself (on the subject of the effect on the detection of infection of a failure to comply with the standard operating procedures) rather than a request for papers held by Professor Duerden in his personal capacity. The Tribunal concluded that DoH's response in 2005 did not address the Appellant's subsequent clarification and that this error had been repeated in 2009 by referring the Appellant back to the earlier (inadequate) response.
9. The Tribunal's finding on the Preliminary Issue was that the Respondent had misdirected himself as to the scope of the information request in 2009 by relying on DoH's erroneous analysis of it. The Respondent in consequence had not made the inquiries that it would have been appropriate for him to have made before concluding that the requested information was not held.

Events subsequent to the Preliminary Issue Ruling

10. Following the Tribunal's ruling on the Preliminary Issue and by agreement with the parties, this appeal was stayed in order to allow DoH to consider the Appellant's information request as interpreted by the Tribunal.
11. On 5 May 2011, DoH responded to the Appellant (a) confirming that it did hold information falling within the scope of his request and (b) that it was relying on s. 12 FOIA to refuse to provide the information requested, because the cost of complying with the request would exceed the appropriate limit. DoH also advised the Appellant that it might be possible for him to make a narrower request which would not be caught by s.12, although it could not guarantee in advance whether any FOIA exemptions would be engaged.

12. The Tribunal notes that the Appellant has a new right of appeal to the Information Commissioner in respect of the DoH's reliance upon s. 12 FOIA, following which he would have a fresh right of appeal to the Tribunal if he considered that the subsequent Decision Notice was wrong.
13. The Tribunal has received various submissions from the parties as to the appropriate way forward in the present circumstances. The Appellant clearly recognises that there is now no further issue for the Tribunal to determine in this appeal, but seeks to broker an agreement with DoH in relation to the outcome of a prospective FOIA request. He is apparently unwilling to withdraw this appeal unless such an agreement is reached. The Tribunal observes that it can have no role in securing or approving such an agreement, which would exceed its remit. The Tribunal has suggested that a consent order pursuant to rule 37 of the Rules could be entered into by the parties but an agreement to do so has not been forthcoming.
14. The Respondent has invited the Tribunal to dispose of these proceedings in reliance upon rule 32(4) of the Rules, which provides that:

“...if the Tribunal holds a hearing to consider a preliminary issue, and following the disposal of that preliminary issue no further issue remains to be determined, the Tribunal may dispose of the proceedings without holding any further hearing”.

The Tribunal has concluded that it would now be appropriate to dispose of these proceedings in reliance upon rule 32 (4). This is because, following the determination of the Preliminary Issue to the effect that the Respondent had misunderstood the scope of the original request, and further following the acceptance of DoH by letter dated 5 May that it held the information requested, the two issues originally before the Tribunal in this appeal have been resolved in the Appellant's favour (notwithstanding the intervening exemption claimed in relation to s.12) and there are consequently no further issues remaining to be determined by the Tribunal in this appeal.
15. For the avoidance of doubt, the Tribunal wishes to make clear to the Appellant that he now has the options of (i) appealing to the Information Commissioner about the DoH's refusal of information based on s. 12 FOIA and/or (ii) proceeding to make a narrower information request which must be determined by DoH on its merits.
16. The Tribunal accordingly disposes of this appeal by making the decision recorded above.

Signed:

Alison McKenna
Tribunal Judge

Dated: 29 June 2011