IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2012/0175**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No:
FS50420495

Dated: **1st. August, 2012**

Appellant: **Matthew Davis**

First Respondent: **The Information Commissioner**

Second Respondent: **The Health and Social Care Information Centre**

Hearing: **18th. December, 2012**

Before

David Farrer Q.C.

Judge

and

Alison Lowton

and

Jean Nelson

Tribunal Members

Date of Decision: 24th. January, 2013

Representation:

The Appellant acted in person:

For the First Respondent: Robin Hopkins

For the Second Respondent : Jason Coppel

Subject matter:

FOIA SS. 19, 20 AND 21

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal and substitutes the following Decision Notice.

"The requested information was held by HSCIC at the time of the request but was exempt from disclosure by reason of section 21 of FOIA."

Dated this 24th. day of January, 2013

David Farrer Q.C.
Judge
[Signed on original]

REASONS FOR DECISION

Introduction

1 The Appellant is a journalist with an interest, among others, in health service statistics. The Second Respondent ("HSCIC") collates and analyses such statistics for the Department of Health and provides a public service for other parties, either free, via its website, or for fees which depend on the nature of the information required and which are regularly published.

2 HSCIC maintains an approved publication scheme in accordance with the provisions of FOIA s.19(1) – (4) and s.20. That scheme provides details of fees charged in addition to other information regarding the information that it will publish. It is able to analyse data in a wide range of formats.

The request for information

3 On 19th. July, 2011, the Appellant made two sets of requests for information in close sequence. They have throughout been treated as a single request. They were in the following terms –

> "In a response to a Parliamentary Written Answer [Ref:272786 – 15 May 2009 : Column 1078W] you provided data on the numbers of babies suffering from neonatal withdrawal symptoms from maternal drug use. Please could you provide me with updated figures for both 2008/09 and 2009/10 showing the total finished consultant birth episodes? In relation to 2009/10 could you also provide a breakdown by PCT area for the numbers occurring in each area.
>
> "In a response to a Parliamentary Written Answer [Ref:195452 – 3 Apr 2008 : Column 1294W] you provided data on the count of deliveries by drug dependent mothers. Could you provide the same data but updated to include 2006/07, 2007/08, 2008/09 and 2009/10. Please ensure that you break down the totals by the type of drug used as pe the Parliamentary Written Answer."

You have previously provided information in the form of a Parliamentary Written Answer [Ref:13830 – 4 Oct 2010 Column 1327W] on the number of surgical procedures carried out on people who had a primary diagnosis of obesity. Could you provide me with updated figures on that inquiry to include 2009-10 financial year.

You have previously provided information in the form of a Parliamentary Written Answer [Ref:14783 – 15 Sept 2010 : Column 1119W] on the number of children having obesity surgery. Could you please provide me with updated information to include the 2009/10 financial year."

4 HSCIC responded on 1st. August, 2011, invoking the absolute exemption provided by FOIA s.21 which reads -

"21.— Information accessible to applicant by other means.

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)—

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment,

. . . . . .

(3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme."

It maintained that position on review. The Appellant complained to the ICO.

The Decision Notice.

5 The ICO, having considered the operations necessary to provide the requested information, ruled that HSCIC did not hold that information for the purposes of FOIA s.1(1)(a) so that HSCIC could not rely on s.21 nor could the Appellant have The requested information communicated to him. His complaint therefore failed.

The ICO did not order the HSCIC to take any steps in relation to the request.

6 This was a surprising conclusion, as the ICO later acknowledged, given that HSCIC was willing to supply this information to the Appellant for a fee. Less surprisingly, the Appellant appealed. The Tribunal directed that HSCIC be joined as a respondent, since it could provide detailed information as to its own workings and costs that were unavailable elsewhere.

7 In his submission to the Tribunal the ICO abandoned the contention that HSCIC did not hold the requested information, a contention that he had indicated earlier that he was prepared to review in the face of further evidence. He now upheld the HSCIC claim to invoke the s.21 exemption. We wish to make it clear that, so far from criticising this change of stance by the ICO, we regard it as his plain duty to state quite frankly, if he changes his view of the complaint, that that is the case. He has, quite rightly, said just that.

8 To commend such a declaration does not, however, ignore the problems that such a change of stance caused to the Appellant, who, quite understandably, contacted the Tribunal to ask whether he now had to meet alternative cases or simply s.21. He was advised to prepare for both cases and evidently did so, judging by the quality of his argument on s.21.

The appeal to the Tribunal

9 The Appellant advanced a number of grounds of appeal and developed them in skeleton argument and oral submission at the hearing. Certain grounds related inevitably to the question whether the HSCIC held the information. A significant element in the ICO`s Response dealt likewise with arguments as to the correct test where the authority needed to conduct various operations with available data to

produce the requested facts. All parties having agreed by the time of the hearing that HSCIC held the information, we did not entertain argument on the point nor do we refer to it further in this Decision.

10 As to s.21, the Appellant`s case was clear and straightforward. He had been informed by the HSCIC that the fee for the requested information would be £1550. That, he asserted did not make the information "reasonably accessible" for a person of ordinary means. He cited other cases where the ICO had regarded the level of fees as resulting in the information not being reasonably accessible ; indeed, in one case they were "prohibitive". He argued that HSCIC was in no different position from other government departments as regards the volumes of data handled and the complexity of requests received. He cited the examples of the Office of National Statistics, the Department of Work and Pensions and the Ministry of Justice, two of which did not use s.21 to refuse requests, the third (the DWP) enabling requesters to obtain information through wide access to its website. In oral argument he fairly conceded that HSCIC published a significant amount of material free of charge on its website. He went on to assert, however, that public authorities such as HSCIC could too easily gain the ICVO`s approval of their charges, that this was a means of circumventing the cost provisions of s. 12 of FOIA and that the type of data sought here should not be "within s.21". His answer to the question : how should private request management be funded ? – was to say, very candidly, "that`s not my problem". He adduced in support of his case a wealth of documents including previous Decision Notices of the ICO, to which we have referred and Responses to Parliamentary Questions, which, as their text shows, were linked to his requests. In essence, the Appellant, politely but firmly, accused HSCIC of evading its responsibilities under FOIA.

11 The factual case for the s.21 exemption was advanced by HSCIC, for which two witnesses gave evidence.

12 Dawn Foster is the Head of Information Governance at the HSCIC and gave evidence about the publication scheme, negotiations with the ICO to ensure compliance with FOIA and the Data Protection Act, 1998 and the adoption of the ICO`s new Model publication Scheme in an updated form in September, 2009, which was exhibited. This was the scheme in force at the date of the Appellant`s

requests, which like a number of similar requests, fell within the Health Episode Statistics ("the HES") Extract Service She described the process whereby agreement was reached with the ICO as to cost recovery for requests for information from the 1939 National Register, resulting in the establishment of the 1939 Register Cost Recovery Service and subsequently the HES Extract Service as a cost recovery service, to which the ICO agreed that s.21 should apply. The adopted new Model Publication Scheme makes clear that the HES Extract Service charges for the provision of "tailor – made" information and refers inquirers to the HSCIC website for details.

13 Chris Roebuck is the HES Programme Manager. He stated that HSCIC is England's national source of information on health and social care. HES is a dataset covering official statistics for NHS inpatient, outpatient, maternity and A and E treatment and receives data submitted by all care providers in England. HES makes available such data in conformity with agreed standards so as to permit a wide range of analyses. Such data are used by the Department of Health ("DH"), by numerous bodies within the NHS, by regulators, by academic bodies and by private sector businesses, such as insurers. He enumerated the many purposes for which data were required.

14 He explained the funding of this service. Core funding is provided by the DH, by Grant in Aid. That is intended to provide for DH uses of the service, answering Parliamentary Questions ("PQs") and providing to the public as much aggregated, hence anonymised information as possible online. Bespoke requests, such as those from the Appellant, are not covered by core funding but are chargeable to the customer according to the nature of the request. At the time of the request this service was contracted out to a private sector company. The dataset involves over a billion patient records. Analysis and interrogation of the database require considerable skill and an understanding of patient codes which identify such features as nature of injury, age, gender, nature of treatment etc.. He described the stages of analysis, building the query to run on the system and checking through which such requests must be processed in the interests of accuracy, culminating in the despatch of a password – protected disk to the requester. Charges were based on the time required to produce the report. They were intended but failed to cover

the costs of provision of the service. The service was therefore brought back in – house and higher charges were introduced in 2012. A very full description of the new regime, service and charges was posted on the website and exhibited. An estimate of the time required to answer the Appellant's requests produced a figure of 38 hours. Codes had changed since the PQs were answered and this was not simply a case of updating an earlier statistic.

The question for the Tribunal

15 A single issue confronts us : Is the information requested by the Appellant reasonably accessible to the public ? Inevitably, the answer will apply to most, if not all requests to the HSCIC which require a tailor – made answer from the HES Extract Service, although we are concerned, strictly speaking, only with those in this case.

16 Both Respondents now ask the Tribunal to rule that that issue is not for the Tribunal; it has already been determined by the ICO, when he approved the HSCIC new Model Scheme under FOIA s.20(1), which , by virtue of s.21(3), had the effect that information made available in accordance with the scheme was "to be regarded as reasonably accessible to the applicant".

17 FOIA ss. 19 and 20, so far as relevant, provide –

19.— Publication schemes.

(1) It shall be the duty of every public authority—
(a) to adopt and maintain a scheme which relates to the publication of information by the authority and is approved by the Commissioner (in this Act referred to as a "publication scheme"),
(b) to publish information in accordance with its publication scheme, and
(c) from time to time to review its publication scheme.
(2) A publication scheme must—
(a) specify classes of information which the public authority publishes or intends to publish,
(b) specify the manner in which information of each class is, or is intended to be, published, and

(c) specify whether the material is, or is intended to be, available to the public free of charge or on payment.

(3) In adopting or reviewing a publication scheme, a public authority shall have regard to the public interest—

(a) in allowing public access to information held by the authority, and

(b) in the publication of reasons for decisions made by the authority.

. . . . . .

20.— Model publication schemes.

(1) The Commissioner may from time to time approve, in relation to public authorities falling within particular classes, model publication schemes prepared by him or by other persons.

(2) Where a public authority falling within the class to which an approved model scheme relates adopts such a scheme without modification, no further approval of the Commissioner is required so long as the model scheme remains approved; and where such an authority adopts such a scheme with modifications, the approval of the Commissioner is required only in relation to the modifications.

. . . . .

S. 21 is set out at paragraph 4 above.

18 The ICO, supported by HSCIC, argues that Parliament created a system designed to provide clarity and finality as to whether access was reasonable.

(i) Public authorities must establish publication schemes and keep them under review (s.19(1)(a) and (c);

(ii) A scheme is not a publication scheme unless approved by the ICO (s 19(1));

(iii) The authority must state in the scheme what information it will publish and what will be chargeable (s.19(2)(a) – (c)) ;

(iv) Model schemes may be prepared for a particular class of authority, whether or not by the ICO, which the ICO may approve (s.20(1);

(v) Adoption by an authority, without modification, of an approved model scheme confers ICO approval on the authority`s scheme so long as the model scheme remains approved (s.20(2)).

(vi) If , by the route indicated, the authority`s publication scheme has the ICO`s approval and any payment required is stated in the scheme or can be determined by means stated in the scheme, information specified in the scheme is to be regarded as reasonably accessible (s.21(3)).

For the sake of completeness, it is apparent that an authority may seek the ICO`s approval for its bespoke scheme and such approval will then bring the published information from that authority likewise within s.20(3). That is not this case, however.

Our Decision

19 The Tribunal `s task is to decide first whether the decision as to what access is reasonable is determined by the ICO`s approval of the model scheme. If it is, this appeal fails. If that is not the correct interpretation of s. 21(3), then it must determine for itself whether the scheme with the prevailing charges provides reasonable access to the requested information.

20 The Tribunal had some initial misgivings about this interpretation of these important provisions.

22 Taking the narrowest point first, the use of “merely” in s.21(3) (see paragraph 4) might imply that the fulfilment of the “unless” condition empowered the ICO or the Tribunal to regard access as reasonable rather than requiring either to do so.

23 Secondly, it removed from the Tribunal, which is the forum of first instance for the interpretation of FOIA, jurisdiction to interpret FOIA in such a case as this or to apply its interpretation to the facts.

24 Thirdly, it left a requester, who disagreed with the ICO`s approval with no available remedy save judicial review. He might attempt to persuade the ICO to

terminate approval of a model or bespoke scheme or, if appropriate, to issue an Enforcement Notice but that is not an enforceable remedy.

25 To counter these arguments, we were reminded that there is an obvious policy argument favouring an ascertainable status for a publication scheme without the need to test the position in relation to individual requests by complaint to the ICO and then before the Tribunal. Approval is not indefinite. There is a requirement for the authority to review its scheme and a power for the ICO to revoke his approval on notice. It is to be assumed that he will remain vigilant to ensure that charges do not unreasonably deter requests, just as the authority must be guided by that concern (s.19(3)(a).

26 We are finally persuaded that the Respondents` interpretation is correct. Whilst the wording of s.21(3) is not unambiguous, it is hard to see why Parliament should enact such a detailed system for approval of publication schemes and such specific requirements as to notification of charges if compliance simply made the authority`s published information eligible for an assessment as to whether it was reasonably accessible.

27 Furthermore, we see force in the point that the ICO is the right authority to determine whether access is reasonable and his approval provides a relatively simple kite mark , which can be revoked, if necessary. The general scheme of ss. 19 – 21 supports the Respondents` contention.

28 If we are wrong, so that it is for the Tribunal to determine whether the information is reasonably accessible, we are of the view that, on the facts of this appeal, the answer is clearly “yes”.

29 A decision that the customer rather than the taxpayer should meet the non – core funding of HES, is clearly well within the bounds of reasonable policy – making.

30 The evidence clearly establishes that HSCIC publishes whatever it reasonably can without charge and that its tailor – made service involves charges that are moderate in relation to the work, skill and time involved

Conclusion

31 For these reasons we dismiss this appeal but for reasons other than those specified in the Decision Notice.

32 Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge

24th. January, 2013

29th January 2013: amendments made to paragraphs 10, 13 and 14 under Rule 40 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.