



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2014/0026

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FS50508784
Dated: 29 January 2014**

Appellant: Colin Parker

Respondent: The Information Commissioner

Heard on the papers: Field House, London

Date of Hearing: 2 June 2014

Before

Chris Hughes

Judge

and

Melanie Howard and Dave Sivers

Tribunal Members

Date of Decision: 29 June 2014

Date of Promulgation: 30 June 2014

Subject matter:

Freedom of Information Act 2000

REASONS FOR DECISION

Introduction

1. The Appellant in these proceedings (Mr Parker) has a long-standing concern about the termination of his unpaid or voluntary membership of a Research Ethics Committee which occurred in 2010. He has sought information about the decision-making process from various bodies. During the course of his requests he approached an organisation called NHS England which is the operating name of the NHS Commissioning Board. On 1 April 2013 it was vested with a range of functions under the Health and Social Care Act 2012. On 1 July 2013 he followed up his contact with two requests:-

To assist my understanding of the remit of NHS England may I ask you for a copy of the Act or document which sets out your powers, with the identified specific sections of it which you rely on to make your decision that you are unable to assist me

...

Given that NRES (NHS Research Ethics Service)/HRA (Health Research Authority) are a "separate legal entity" I am puzzled that NHS England approached them. What was the purpose of that?

2. NHS England replied promptly on 8 July 2013 (bundle page 34):-

*Thank you to your letter dated one July 2013 in which you requested a copy of the document which explains why we are unable to assist you with this matter. As previously stated, the National Research Ethics Service/Health Research Authority are a separate legal entity to NHS England and thus their functions and services are commissioned by them, not NHS England. The NHS complaints procedure is a two-step process which states that a person has the right to complain directly to the provider of the service they are unhappy with **or** the organisation that commissions that service and the NHS England does not provide or commission services provided by the NRES/HRA, this is why we are unable to investigate your complaint. NHS England commissions "Primary Care" services. These include services provided by GP surgeries, dentists, opticians and pharmacies.*

As per the NHS complaints procedure, if the person is still unhappy after going through this first stage of the process, then they can refer the matter to the Parliamentary and Health Service Ombudsman. If the PHSO have stated they are unable to help you further, you would need to contact them about this to request a further explanation. The PHSO are the sole designated body set up to independently review complaints relating to NHS organisations and as such, we are unable to advise on other independent bodies that would be able to take up your case.

for your information, I have enclosed a copy of the NHS Constitution which covers all NHS organisations and bodies. In addition to the information provided, the NHS website outlines the complaints process and I have attached a print of the relevant section of the website for assistance."

3. Following further correspondence NHS England wrote again to Mr Parker in a letter which he received on 7 August 2013. This gave further information - it specifically identified two pieces of legislation that highlight the separation between different NHS bodies as well as the complaints procedure: the 2012 Health and Social Care Act and the Local Authority Social Services and NHS Complaints (England) Regulations 2009. Due to the size of the documents it provided him with links to the two pieces of legislation. The letter stated

please note that we currently do not have the resources to devote to examine each piece of legislation in detail and are therefore unable to cite the exact sections or subsections you have requested.

4. Mr Parker complained to the Commissioner. In his investigation the Commissioner sought an explanation from NHS in England and reviewed the 3 documents which had been provided. He concluded that "*NHS England has provided the complainant with, or provide the means for the complainant to access, any documents which referred to NHS England is responsibilities and remit.*" With respect to the issue of contacting NRES/HRA the Commissioner was informed that the communication was a short telephone conversation and there was no written record of the communication. Accordingly there was no further information that NHS England could provide. In the light of these findings the Commissioner concluded that NHS England had complied with the requests for information.

5. In his appeal Mr Parker alleged that NHS England had consistently avoided giving him information. He stated that his reference to the remit of NHS England was to understand the task or area of activity officially assigned to them, whilst his request for information on their powers was seeking their justification for their actions. He then raised issues of an alleged bullying culture in the NHS. He claimed that the answers did not give the specificity of information which he sought. He suggested that the investigation was not adequate to the scope of the case. He criticised the Commissioner for not setting out the relevant statutory provisions of FOIA in full.
6. In considering the request for documents he stated (bundle page 17-18): “ *that Mr Parker's requested information is not in such documents, it emanates from NHS England understanding of such documents... the complainant has no experience of the Internet and therefore is unable reasonably to access the requested information. But more importantly the specific information requested is not disclosed through such a medium.*”
7. With respect to the issue of the contents of the telephone call he stated: “*it seems the Commissioner has not enquired sufficiently in the context and content of the alleged NHS England phone call, and whether requested and recorded information was available at the time to indicate the reason for the call. The Commissioner has not considered the administrative procedures inherent in one public authority contacting another, e.g. e-mail instructions to junior staff to identify senior staff in the other authority, and the development in time to reach the stage of sufficiently senior people discussing the matter on the telephone.*”

The questions for the Tribunal

8. The simple question for the tribunal is whether the decision notice is in accordance with the law and, in coming to a conclusion on that, the tribunal reviews the evidence available. While Mr Parker raises a large number of issues most of these are extraneous and do not go to the question of whether the Commissioner has erred in law.

9. The requests for information which the Commissioner had to consider with those set out in a letter to 1 July. They are self-explanatory. One request was for the “*the Act or document which sets out your powers*”. The public authority in this case has provided links to the Act of Parliament which sets out its powers, the NHS Constitution and the regulations covering NHS complaints procedure. These are the documents which set out its powers. The tribunal is satisfied that by providing links to the legislation Mr Parker has been assisted in obtaining the information. This is reasonably accessible to him in terms of section 21 FOIA which provides that information which is reasonably accessible to him by other means is exempt information and the public authority does not have to directly provide it to him. Although he argues that he does not have experience of the Internet, the Internet is widely available including in public libraries, where library assistants routinely assist people with access to it. The information is therefore reasonably accessible.
10. That request further asked for the public authority to identify “*specific sections of it which you rely on to make the decision that you are unable to assist me*”. In its reply the public authority explained the structure of the NHS within which it works and why this meant it did not have the powers to investigate complaints against NRES/HRA. The position of NHS England is that it does not hold the information, in this case a document or analysis of the Act which “*sets out your powers with the specific sections of it which you rely on to make your decision that you are unable to assist me*”.
11. The simple point is that at this stage Mr Parker has moved from requesting information to requesting an explanation. FOIA does not give a right to an explanation, only to information which is held. Although NHS England have said that they do not have the resources to carry out the analysis to answer Mr Parker’s question, they are under no obligation to do so – if they do not hold the document with that analysis then they have nothing to disclose. The Tribunal is satisfied on the evidence that they do not hold such a document. NHS England have indicated that they do not, and have explained the structure of the NHS which explains why they do not have responsibility for assisting Mr Parker with the underlying complaint. Given the clear structure they have explained to him there is no operational reason why NHS England should have a document of the nature Mr Parker is seeking – it would be a document setting out an absence of powers; public bodies produce documents which

set out the powers and duties they possess, not documents which set out the ones they do not have.

12. The other request concerned the action of NHS England in approaching NRES/HRA and Mr Parker asked:- “*what was the purpose of that?*” The Commissioner approached NHS England who responded (bundle page 60):-

This relates to a short telephone conversation that the case officer had with the NRES/HRA. In order to be as helpful as possible to Mr Parker and to confirm there were no other aspects of the complaints procedure that Mr Parker hadn't already exhausted, the case officer called the NRES/ HRA just to confirm that their complaints procedure was the same as NHS England and that of the other NHS bodies and organisations (in that after the local resolution stage, if the complainant remained dissatisfied then they would have to contact the Parliamentary and Health Service Ombudsman if t y wish to take their complaint further). The NRES/HRA confirmed that this was correct and this information was relayed to Mr Parker in our correspondence. Due to the short length of the conversation, a written record was not logged on our case management system.

13. The Tribunal noted that Mr Parker had been notified of the content of the call on the day that it was made and will have known the context of the call. In a letter to him dated 27 June 2013 NHS England wrote:-

“As per your telephone conversation with one of our case officers [name redacted], I can confirm that NHS England are not responsible for and would be unable to investigate complaints related to the NRES/HRA. The NRES/HRA are a separate legal entity to NHS England and have their own complaints procedure. Having contacted the HRA this morning, they have confirmed that any independent review of the complaint made to them can be requested from the Parliamentary and Health Service Ombudsman who I understand you have already contacted.

I am sorry that we are unable to assist you any further with this matter.

14. It seems to the tribunal that a full and sufficient account of the reason NHS England contacted HRA can be inferred from this document. It is clear that they were being helpful. However the reason can be inferred - it is not stated. Mr Parker already had the information from which the only possible inference which can be drawn was that NHS England were attempting to help him. The Commissioner in his decision notice

correctly concluded that no information was held because it was a brief telephone conversation. It was a telephone conversation simply seeking information and these calls are, of course, informal. The whole byzantine and bureaucratic model of behaviour which Mr Parker put forward in his notice of appeal (paragraph 7 above) is profoundly improbable.

Conclusion and remedy

15. For the reasons stated above the tribunal is satisfied that the Commissioner did not err in law in formulating his decision notice and the appeal must be dismissed. In coming to its conclusions the tribunal would draw to his attention his power under s.50(2)(c) FOIA.

16. Our decision is unanimous.

Judge Hughes

[Signed on original]

Date: 29 June 2014