



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2014/0267

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS 50555976
Dated: 6 October 2014**

Appellant: PATTI FENDER

1st Respondent: INFORMATION COMMISSIONER

2nd Respondent: NHS ENGLAND

Heard at: CHELTENHAM MAGISTRATES' COURT

Date of hearing: 13 FEBRUARY 2015

Date of decision: 16 MARCH 2015

Before

ROBIN CALLENDER SMITH
Judge

and

SUZANNE COSGRAVE and JEAN NELSON
Tribunal Members

Attendances and written submissions:

For the Appellant: Ms P Fender in person.

For the 1st Respondent: Written submission from Ms H Wrighton on behalf of the Information Commissioner.

For the 2nd Respondent: Mr C Whitehall on behalf of NHS England.

Subject matter: FOIA

Absolute exemptions

- Personal data s.40

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 6 October 2014.

SUBSTITUTED DECISION NOTICE

Dated 16 MARCH 2015

Public authority: NHS ENGLAND

Name of Complainant: Ms P Fender

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 6 October 2014.

Action Required

NHS England is to review all the information it holds in terms of correspondence relating to the Appellant's healthcare construed in its broadest sense – in the context of FOIA rather than the limited terms it has adopted in terms of the personal data of the Appellant - and disclose to the Appellant, within 31 days, any additional material that is not covered by section 40 (1). An example of this would be any documents similar to an email from NHS England dated 16 August 2013 (Document A at page 14 in the Appeal Bundle).

Robin Callender Smith

Judge

16 March 2015

REASONS FOR DECISION

Background

1. Ms P Fender (the Appellant) asked NHS England (the Second Respondent) on 14 January 2014 for copies of

 ...the *entire* correspondence relating to my healthcare between yourself, NHS England, Arden, Herefordshire, and Worcestershire and the GP practice at (name redacted) Hereford to include records of any telephone conversations [emphasis added].
2. Subsequently, the Information Commissioner on 2 June 2014 (FS 50540516) had required NHS England to issue the Appellant with a response to this request under the provisions of section 10 (1) FOIA because no response had been forthcoming at all.
3. When it did issue her with a response, NHS England applied section 40 (1) FOIA to refuse to disclose the information because it believed that what it held was personal data in relation to the Appellant.

4. It had, however, treated the request for information “relating to your health care” under the Data Protection Act 1998 and provided the Appellant with all the information it believed that it held in respect of that.
5. As the Appellant points out in the document lodging her appeal (at page 9 in the Appeal bundle) she was seeking copies of “*all* the correspondence I had requested. Only a limited amount has been provided” [emphasis added].
6. The Information Commissioner upheld the approach adopted by NHS England.

The appeal to the Tribunal

7. In her 3-page Grounds of Appeal – and at the oral hearing of the appeal Cheltenham Magistrates’ Court on 16 February 2015 – the Appellant set out carefully the chronology of the request, the responses to it and the reasons why she felt that not all the information that she was seeking had been correctly assessed and provided by NHS England or, in terms of confirmation of its decision, by the Information Commissioner.
8. She explained that early in January 2013 she had learned that residents in Herefordshire, England, registered with the GP practice in Wales had lost their rights within the NHS Constitution England as a result of the devolved Welsh health service. There had been no consultation or community involvement in respect of that change.
9. She believed NHS England had a responsibility to provide healthcare to residents in England and that the Area Team had a duty to ensure that every Herefordshire resident could access primary medical care within the country.
10. On 26 April 2013, as she was resident in Herefordshire, she withdrew her registration from the GP practice in Wales so that she could receive

healthcare in Herefordshire. She corresponded with the Director of Commissioning for Arden, Herefordshire and Worcestershire (Mrs Sue Price).

11. The Appellant was told that she could register with the GP practice in Herefordshire but when she spoke to the GP practice manager she was told she could not register because she lived too far outside the catchment area. She found herself locked in an *impasse* on this point.
12. The Appellant, in several emails, asked Mrs Price for clarification of the information that she had been given including the meaning of “allocation”. To try to find out the true situation she made her Freedom of Information request for copies of correspondence between Mrs Price, her team and the GP practice.
13. She believed she had applied under the correct legislation because no personal information was required to be disclosed in order to seek a GP practice with whom to register and that had been confirmed in an email from Mrs Price to the GP practice manager requesting that “a resident in Herefordshire” could register.
14. There was nothing in that email (dated 16 August 2013) which identified her because it could equally apply to any other female resident in Welsh Newton
15. On 5 September 2013 – after much correspondence about the failure of NHS England to provide primary medical care for all residents in Herefordshire – the Appellant had made a formal complaint to Mrs. Price. That complaint was eventually logged on 1 April 2014.
16. Although she had not requested it she was then provided with the complaint file.

17. There was no further correspondence in the complaint file from the GP practice, nor from NHS England to state that an agreement had been reached to enable residents in Welsh Newton to register with the GP practice in Herefordshire.

18. She believed there must have been more correspondence between those parties so that a decision could be made. In that case there had to be additional correspondence “in relation to her healthcare” generally which had not been disclosed to her under FOIA and which was not necessarily personal data subject to section 40 (1).

The question for the Tribunal

19. The issue before the Tribunal is, in effect, whether NHS England and the Information Commissioner have construed too narrowly the effect of responding to a request for “copies of the entire correspondence relating to my healthcare....” and seen it only as a request for her personal medical records rather than all the information that related to her attempt to clarify her position in terms of registering with a GP practice that was not in Wales.

The Hearing

20. We heard oral submissions from Mr Chris Whitehall who attended the appeal hearing on behalf of NHS England.

21. In essence his position was that the information request was, in accordance with their general approach, perceived by NHS England in the context of any request relating to “healthcare” was equivalent to the Appellant’s “medical records”.

Conclusion and remedy

22. The Tribunal finds that both NHS England and the Information Commissioner unnecessarily limited the scope of the Appellant's information request.
23. By treating her request of 14 January 2014 as a limited request only for her medical records it ignored the context of what she was, and clearly had been, seeking, namely *all* the correspondence. The Appellant's letter of 4 July 2014 comprising her request for an Internal Review stated that her request was "for copies of correspondence on GP registration" thus drawing a clear distinction between the scope of the actual request and the NHS England interpretation that the request was for personal information.
24. As she not unreasonably points out, when her complaint file arrived out of the blue, she expected to see within that file further correspondence from the GP practice and from NHS England about how the position of people like her was being resolved and indicating how an agreement was to be reached to enable residents in Welsh Newton to register with the GP practice in Herefordshire.
25. We find that her belief that there must have been more correspondence between those parties so that a decision could be made is both rational and reasonable.
26. In that case there is likely to be additional correspondence "in relation to her healthcare" generally which had not been disclosed to her under FOIA and which was not necessarily personal data subject to section 40 (1).
27. The Tribunal – and we hope the Appellant – takes some comfort from the presence of Mr Whitehall on behalf of NHS England at the oral appeal. He made it clear that he would revisit the issue at the conclusion of the appeal to see whether, in terms of a much broader interpretation of "healthcare"

there was the kind of further documentation that should have been disclosed to the Appellant.

28. If that has not occurred then, as a result of this Substituted Decision Notice, NHS England must revisit the issue and search beyond the narrow confines of the Appellant's purely personal data.

29. Our decision is unanimous.

30. There is no order as to costs.

Robin Callender Smith
Judge
16 March 2015