



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2018/0074

Heard at Belfast Tribunal Hearing Centre

On 1 October 2018

Representation:

Appellant: in person

Respondent: The Information Commissioner did not appear

Before

JUDGE BUCKLEY

DR MALCOLM CLARKE AND PAUL TAYLOR

Between

JOAN CROTHERS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION

1. For the reasons set out below the tribunal allows the appeal in part.
2. The Information Commissioner's Decision Notice dated 14 March 2018 is hereby set aside and substituted by the following Decision Notice.

SUBSTITUTE DECISION NOTICE

PUBLIC AUTHORITY Northern Health & Social Care Trust COMPLAINANT Ms Joan Crothers

The Substitute Decision

The Complainant's ten requests for information made on 21 October 2016 are referred to in this decision as R1-R10. For the reasons set out below the public authority was not entitled to refuse the Complainant's requests for information R1, R2, R3, R5, R6, R8 and R9. The tribunal finds:

1. The public authority did not hold any information within the scope of R4.
2. On the balance of probabilities, the public authority held information within the scope of R1, R2 and R8.
3. The public authority was not entitled to rely on s 42 of the Freedom of Information Act (FOIA) to refuse R9 because the public interest in disclosure outweighs the public interest in withholding the information.
4. The public authority's assertion under s 12 FOIA that it had spent 18 hours was unsupported by cogent evidence. The time spent identifying if any exemptions applied should not have been included. It is not entitled to rely on s 12 to refuse any of the requests including R3, R5 and R6.
5. The public authority failed to provide appropriate advice and assistance under s 16 FOIA.

Action required within 35 days of the date of this decision

1. The public authority must disclose any further information it holds within the scope of R3, R5 or R6 (as clarified) and/or serve a new notice under s 17 indicating what exemption it relies on, other than s 12.
2. The public authority must reconsider R1, R2 and R8 in the light of this decision and send the Appellant any relevant information it holds or serve a new notice under s 17 indicating what exemption it relies on.
3. The public authority must disclose any information it holds within the scope of R9 or serve a new notice under s 17 indicating what exemption it relies on, other than s 42.
4. In taking the above action, the public authority must provide appropriate advice and assistance to the Complainant in accordance with s 16 of FOIA.

REASONS

Factual background to the appeal

1. It is useful to set out a little of the factual background as we see it from the documents provided to us, but we do not make findings of fact as to what happened to the Appellant's mother in 2015, and our account is necessarily incomplete. The Appellant's mother died in March 2015. On 22 and 24 February 2015 two incidents took place at her home, when she fell while being

moved using a Sabina stand aid by two members of Home Care Independent Living staff. This incident ultimately led to a Serious Adverse Incident level 2 investigation (SAI) being conducted by the public authority ('The Trust'). The requests in this case arise out of the SAI investigation.

Procedure

2. Both parties had suggested in correspondence that it might be appropriate to join the public authority as a party. The Trust have been notified of the appeal but have not asked to be joined as a party. We have taken account of the information that they have provided in their response to the Appellant's request and in correspondence with the Information Commissioner. We considered whether or not to adjourn the proceedings and join the public authority. Taking into account the overriding objective we decided to proceed on the basis of the information before us.

The request

3. The Appellant made the following requests on 21 October 2016:

This is a request for all records held by the Trust in relation to this investigation of the Serious Adverse Incident Level 2 that was carried out by the Northern Trust from the 28th October until present, could you please supply the following information:

1. To include all minutes of meetings held in relation to this investigation with the exception of the meeting on the 29 the October and 18th December 2015 that were held with my family. (R1)
2. To include all handwritten notes of any meetings held with members of the Trust in relation to this SAI Level 2 Investigation. (R2)
3. To include all records of Questions and Responses that were asked of HCIL's Management by the Trust either by telephone, email or letter in relation to this SAI Level 2 Investigation. (R3)
4. To include all handwritten notes of Home Care Independent Livings staff/ Care Workers who were interviewed in January 2016. We were previously advised that these were provided by the Trust but in fact they were incomplete. (R4)
5. To include copies of the Draft Reports, numbers 3-4-5-6-7-8-9-11-12-13-14-15 and 16, that were conducted within the above time-period. (R5)
6. To include all Email records, sent or received in relation to this SAI Level 2 Investigation. (R6)
7. To include all Telephone records made in relation to this SAI Level 2 Investigation. (R7)
8. To include any unseen records by the family that was gathered by the Trust in relation to this SAI Investigation. (R8)
9. To include any legal advice received in relation to the SAI, in particular advice around interviewing HCIL staff. (R9)

10. Details of any new procedures instigated or commenced by the Trust on the back of any recommendations and learning in our SAI process. (R10)
4. A telephone call took place with the Appellant during which she was asked to clarify some of her requests. There is a dispute as to the contents of this call. The Appellant's evidence on the contents of this call was clear, detailed and convincing. She explained that she was driving and pulled over to have a very short telephone conversation. We accept her version of events on the balance of probabilities. We do not accept, contrary to the Trust's assertion in their letter of 3 October 2017 to the ICO that the effect of s 12 of the Freedom of Information Act 2000 (FOIA) was explained to her in this telephone call. The Appellant was clear that this was not explained to her in this short call.
5. We find that the Trust was in breach of s 16 FOIA in not explaining the effect of s 12 and thus not giving the Appellant the opportunity to narrow her requests in the light of this explanation.
6. We find that she clarified the requests as follows (additions in bold):

R6 To include all Email records, sent or received by **[three named individuals]** in relation to this SAI Level 2 Investigation.
7. We accept, on the balance of probabilities, the Appellant's evidence that in relation to R8 she was asked what she was talking about and she gave 'handwritten minutes of meetings taken by [the lay member of the investigation panel] in connection with HCIL staff she had interviewed' as an example rather than limiting that request to handwritten notes from the lay member. As well as finding the Appellant's evidence convincing it seems unlikely that she would have restricted this request to only cover a particular document that was already covered by her other requests. We find that it was not reasonable for the Trust to treat R8 as narrowed in scope.

The Trust's response to the request

8. The Trust responded on 20 January 2017 in summary as follows:

R1 Information not held.

R2 Information not held.

R3 No search undertaken. Relying on s 12 FOIA.

R4 The Appellant should contact HCIL directly for any handwritten notes they hold.

R5 Disclosed any draft reports attached to emails located in the search under R6. Relying on s 12 in relation to any further drafts.

R6 Any email correspondence located after a search of up to 18 hours. Relying on s 12 in relation to any further correspondence.

R7 [The Appellant confirmed that R7 is not in issue in this appeal]

R8 Information not held.

R9. No information disclosed. Relying on s 42 FOIA.

R10 [Not in issue in this appeal.]

9. The Trust upheld its decision on internal review.

The Information Commissioner's Decision Notice

10. The Appellant complained to the Information Commissioner. The Information Commissioner issued Decision Notice FS50672400 on 14 March 2018, confirming that the Trust had correctly applied the FOIA to the request and requiring no steps to be taken. The Commissioner concluded on the balance of probabilities that no further relevant information was held by the Trust; that the Trust's estimate of cost of compliance under s 12 was cogent and reasonable; that the Trust had complied with s 16 by asking the Appellant to refine and clarify her request and that under s 42 the balance of public interest favoured non-disclosure.

The Appeal to the Tribunal

11. The Appellant's submissions are set out in the Notice of Appeal, her reply and her oral submissions to the tribunal. We set out the detail of those submissions, where relevant, within our reasons below.

Legal framework

S 12 Cost of Compliance

12. Under s 12(1) a public authority is not obliged to comply with a request for information where:
 - the authority estimates that the costs of complying with the request would exceed the appropriate limit.
13. The relevant appropriate limit, prescribed by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations') is £450 (18 hours of one person's work). In making its estimate, a public authority may only take account the costs it reasonably expects to incur in relation to the request in–
 - (a) determining whether it holds the information,
 - (b) locating it, or a document which may contain the information,
 - (c) retrieving it, or a document which may contain the information, and
 - (d) extracting it from a document containing it. (See regulation 3).
14. The estimate must be sensible, realistic and supported by cogent evidence (McInnery v IC and Department for Education [2015] UKUT 0047 (AAT) para 39-41).

S 42 – Legal Professional Privilege.

15. Section 42(1) provides:

Information in respect of which a claim to legal professional privilege... could be maintained in legal proceedings is exempt information.

16. For our purposes, information is exempt where (a) it satisfies the exemption in s.42(1) FOIA; and (b) “in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”. (See s.2(2)(b) FOIA - referred to here as the ‘public interest test’).
17. Legal professional privilege comprises two limbs, legal advice privilege and ‘litigation privilege’. We are concerned in this appeal with legal advice privilege: confidential communications between lawyer and client for the purpose of giving or receiving legal advice or assistance.
18. This is a qualified exemption, so that the public interest test has to be applied. It is recognised that there is a significant ‘in-built’ interest in the maintenance of legal professional privilege (*DBERR v O’Brien and Information Commissioner* [2009] EWHC 164), due to the importance in principle of safeguarding openness in communications between a legal adviser and a client, to ensure that there can be access to full and frank legal advice, which is fundamental to the administration of justice. The tribunal recognises that “although a heavy weight is to be accorded to the exemption, it must not be so heavy that it is in effect elevated into an absolute exemption” (*DCLG v IC and WR* [2012] AACR 43 at [44]) and the weight will vary according to the specific facts of each case.
19. We adopt the approach as set out in *DBERR v O’Brien and Information Commissioner* [2009] EWHC 164:
...the proper approach for the tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least.

Section 16 – Advice and Assistance

20. Section 16 provides:
‘(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

The Task of the Tribunal

21. The tribunal’s remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner’s decision involved exercising

discretion, whether she should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

Evidence and submissions

22. We have read and were referred to a bundle of documents and submissions from the parties. We heard oral argument and evidence from the Appellant. The Appellant produced a number of additional documents on the day of the hearing, copies of which were subsequently sent to the Commissioner. Given the limited relevance of these additional documents to our decision we did not find it necessary to give the Commissioner further opportunity to make submissions on the basis of these documents.

Discussion and Conclusions

Findings of fact on information held by the Trust.

23. In making these findings we have relied on the Appellant's minutes of a meeting on 31 January 2017 which start at p46 of the bundle. In doing so we note that these minutes were sent to the Chief Executive of the Trust, who made some specific points about certain sections of the notes in a letter dated 17 February 2017. He did not object to any of the parts relied on by the tribunal below.
24. We find, on the balance of probabilities, that other meetings took place within the scope of R1 and that these meetings would have been minuted. It is not feasible that an investigation of this level of seriousness would have taken place without any other minuted meetings.
25. In particular we find that there was a Safety Panel meeting on 12 October 2016 (referred to in an email from the Chair of the Trust's Investigation Panel, AL, dated 23 November 2016). We find it is also probable that there was a meeting at which the final report was discussed and approved by the full Trust board and that such a meeting would also be within the scope of R1.
26. It is unclear whether or not the Trust accepts that the Safety Panel meeting was 'held in relation to this investigation', but we find that any meeting at which the investigation or the draft report was discussed falls within the scope of R1, whether or not that was the sole or main purpose of the meeting.
27. Further, we find on the balance of probabilities that minuted meetings must have been held between the Trust and HCIL as part of this investigation, given the scope, content and level of the investigation. These would also fall within the scope of R1.

28. Further we find that, on the balance of probabilities, the Trust holds minutes of the meeting which took place in or about 23 March 2016 at which the lay member of the Trust's investigation panel interviewed staff/care workers about the incident. This meeting is referred to in the following documents:

- 1) In an email dated 21 March 2016 from the lay member to AL, the chair of the investigation panel. This email refers to a list of suggested questions to be finalised and states 'I will see [name redacted] yourself @ around 9.30am on Wed before interviews begin'.
- 2) In an email dated 21 March 2016 from the lay member to AL, the lay member confirms that she has forwarded a copy of the question plan to [name redacted].
- 3) In the Appellant's minutes of the meeting on 31 January 2017 at p 49, she records the following exchange (LM = the Lay Member):
JC - (to LM) you interviewed the staff? So where are the notes? We have requested the notes - what questions were asked and what responses they made and we have never received them. The statements in January conflict with the interviews in March. When did you interview them?
LM - March. All the notes were submitted. I sent them to AL.

29. We find it inconceivable that the Lay Member would not have taken notes of her interviews with the staff/care workers, and the notes of the meeting of 31 January 2017 support this. We find therefore on the balance of probabilities that notes did exist of this meeting in March 2016. We also find, on the balance of probabilities that these notes were sent to the chair of the Trusts' investigation panel in March 2016, partly because this is inherently likely and partly because there is evidence to support this in the Appellant's minutes of the meeting on 31 January 2017. Again, it is inconceivable that, having received these notes, they would not have been kept by the Trust. We find therefore on the balance of probabilities that the Trust has notes, whether handwritten, typed or both, of the meeting between the Lay Member and the staff/care workers which took place in March 2016. These notes fall within the scope of a number of the requests including R1 and R8. We find on the balance of probabilities, based the content of the emails set out above, that a member of the Trust also attended these meetings, so the notes also fall within the scope of R2.

30. Further we find, on the balance of probabilities, that the Trust holds notes referred to at p 50 of the bundle in the Appellant's minutes of the meeting held on 31 January 2017 which would fall within in the scope of a number of requests. The minutes suggest that the notes are held, but that the Trust is unclear if it is allowed to release them:

TS we need to be careful about what was agreed with the staff. Notes are confidential and we need to find out 1. What were staff told and 2. Whether it is appropriate to release them.

31. The Appellant also referred to a meeting which took place after the request for information on 9 January 2017, but this does not fall within the scope of the request.
32. We note that in the Information Commissioner's response she asserts that the Appellant's assertions are based on speculation. For the reasons set out above, including the Appellant's reference to documentation in support of her argument, we disagree.

R4 – information not held.

33. The Appellant asserted at the hearing that the notes of the interviews in March 2016 also fell within the scope of R4. We disagree. R4 refers specifically to handwritten notes of interviews carried out in January 2016, which were carried out by HCIL. We accept the Trust's position that it does not hold any handwritten notes of the interviews carried out by HCIL in January 2016.

R3, R5 and R6 – s 12 FOIA

34. We accept that it is permissible to aggregate the requests for the purposes of s 12 because they relate to the same or similar information.
35. Under section 12(1) a public authority is not obliged to comply with a request for information if the authority estimate that the cost of complying with the request would exceed the appropriate limit. If s 12 is engaged the public authority does not need to provide any information. For the purposes of this case this equates to 18 hours of the Trust's time.
36. Rather than provide an estimate, the Trust instead began searching and then stopped when they reached 18 hours, providing any information they had found before they reached that limit. As the Information Commissioner's guidance makes clear, this has the effect of depriving the requestor of the opportunity of refining their request to the information they would most like to receive.
37. In the Trust's response to the request they state:

'...the search for email correspondence under section 6 was stopped once it reached 18 hours of staff time to search, locate and retrieve information.'
38. This is expanded upon in the letter from the Trust to the Information Commissioner dated 3 October 2017. The Trust states:

'...the search was completed for Questions 2-9. After the clarification the Governance Department identified approximately 370 pages of correspondence which took 16 hours to search and retrieve and print the emails requested. The Governance Department then asked the Information Governance Team for advice

as there was further work required to cross-reference to existing printed documents to avoid duplication and identify any third party issues.

On the basis of this correspondence, the Trust asked the Governance Risk Manager to stop searching for this information when the 18 hours of staff time had been reached (this was via email and manual searches but did not take into account any travel time between the Trust sites connected to this retrieval). After a comprehensive search within the 18 hours, no correspondence or information was located in response to Question 3, only some draft reports were identified for Question 5 and all the emails were found in response to Question 6.

In respect of the SAI reports (Question 6 [**We assume this should say Question 5**]) the Governance Department updated drafts of the SAI report, so some versions were not saved. Many of these drafts were sent by email between the Governance Department and the named individuals, so they were identified during the email search for the other questions.'

39. The original response states that it took 18 hours simply to search, locate and retrieve information under R6. This is contradicted by the more detailed information provided above which states that (a) the search related not just to R6 but to R2-R9, (b) it took 16 not 18 hours to search, retrieve and print 370 pages of relevant correspondence and (c) the 18 hours of staff time also included 'email and manual searches'.
40. In relation to the initial 16 hours, there is very little information to help the tribunal understand how it took 16 hours to search, locate and retrieve the information. It is not clear if this search related only to R6 or extended to other requests. There is no information on the Trust's search strategy, for example the search terms used to identify relevant emails. It is unclear if those 370 pages were simply emails from or to the named individuals, or if they also contained search terms relevant to the request. There is no indication of how many pages were reviewed and how long it took to review those pages to identify which were relevant. The average amount of time taken to review each potentially relevant email is not given. If the overall time is divided per page, this amounts to over 2.5 minutes per page. If this is the amount of time taken by the Trust to review each email, that seems a surprisingly large amount of time. On the information before it, the tribunal finds that it should have been possible to search for, locate and retrieve the relevant information well within the 18 hour limit.
41. There is no information on the 'email and manual' searches carried out which seem to have taken an additional two hours, save that the estimate does not include travel time between Trust sites. We do not know which requests these additional searches related to. There is no information on the search strategy adopted, for example which departments or members of staff were contacted; the search terms used for the email searches; how the information was stored (in paper or electronic files); how many files/boxes/documents or records had

to be reviewed; the size of the relevant files and how long it took, on average, to review each file.

42. Additionally it is unclear to us whether the Trust relies on the time that was/would be taken to 'cross-reference to existing printed documents to avoid duplication and identify any third party issues', which cannot be included under s 12.
43. All the requested information relates to a single investigation. In the absence of any evidence to the contrary from the Trust we assume that this information, other than email correspondence, would have been kept on 'a file'. This should not have taken a long time to access. In terms of the email searches, we cannot understand how a search for emails to and from three named individuals referring to a one specific investigation could have taken 16 or 18 hours to locate.
44. In conclusion on this issue we do not accept that there is cogent or reasonable evidence to support the Trust's assertion that the searches would have taken over 18 hours, and we find that the aggregated requests could have been responded to without exceeding that limit. We find that the Trust was not entitled to rely on s 12.
45. We note that the Trust asserts that it did not keep earlier drafts of the SAI report and we accept that this is likely to be the case, and the Appellant should be aware that other drafts may not therefore be found even if the search is continued.

S 42 – Legal Professional Privilege

46. The Trust identified the following factors in favour of maintaining the exemption:
 - 46.1 Presumption that legal advice given to the Trust is subject to professional privilege and won't be disclosed.
 - 46.2 Prohibits the ability to seek legal advice on complex issues.
 - 46.3 Trust staff must be able to seek legal advice without fear of loss of confidentiality.
 - 46.4 Limits the Trust's ability to have free and frank exchange of information with legal professionals.
47. The Commissioner identified the following additional factors:
 - 47.1 The advice was still relevant at the time of the request.
 - 47.2 There is significant public interest in public authorities acting lawfully and therefore in being able to be fully informed as to their legal position.
48. The Trust identified the following factors in favour of disclosure:

48.1 There is a public interest in knowing that any legal advice given to the Trust has been followed and all issues properly considered.

48.2 The Public can scrutinise the actions of Trust staff and how they make decisions.

48.3 Accountability of public money being spent.

48.4 Transparency in use of resources and that decisions taken are lawful.

49. The Commissioner identified the following additional factors in favour of disclosure:

49.1 Disclosure would assist the public in understanding more closely how the specific decision in this case was made, but would not assist in any wider public understanding of how the Trust makes decisions in general, as the information is specific to this particular case.

50. The Appellant argues that the public interest favours disclosure because:

50.1 This is not advice restricted to this particular incident. The Trust have stated that they are not able to directly interview HCIL staff when carrying out an SAI. HCIL manage 10% of domiciliary care to people in Northern Ireland. At the time of the incident there were 1800 service users on their books. There is a clear public interest in disclosure if the Trust are maintaining that they cannot interview care workers employed by HCIL when carrying out an SAI. HCIL are a private company who would themselves be under scrutiny if actions by their care workers were being investigated. They would not be in a position to carry out an independent investigation.

50.2 The Appellant has been told by the Trust that the legal advice tells the Trust that they cannot interview staff employed by HCIL. This is why she is trying to raise awareness that this is the position and trying to get changes made for the benefit of future investigations. She has since been told by the Ombudsman that the legal advice does not tell the trust not to interview HCIL staff. She thinks that she has been misled, and that it is in the public interest for the advice to be disclosed so that the position is clear.

51. The Appellant's notes of the meeting on 31 January 2017, taking place after the request, reflect what the Trust has consistently told the Appellant about the content of the legal advice:

JC - we have asked why the Trust could not interview staff and were told there was legal advice to say they couldn't. Why is that?

TS - that is my understanding - we can interview Trust staff but not a company as we do not manage the staff directly.

...

TS - it is my understanding that the Trust cannot interview HCIL staff as we do not directly manage them...

...

SP - we had legal advice that was clear on two occasions that we do not manage them and therefore cannot interview them

52. We note that the Trust has never suggested that the information given to the Trust as to the content of the legal advice is confidential.
53. We accept that there is a strong public interest in encouraging full and frank communication between the Trust and its lawyers, and that this is fundamental to the administration of justice. There is a significant public interest in public authorities being fully informed and therefore acting lawfully.
54. The Commissioner relies on the fact that the advice was still relevant at the time of the request. We accept that the final report of the SAI had not been submitted at the time of the request, and that the Appellant continued to criticise the Trust's refusal to directly interview HCIL staff. This factor does therefore carry some weight. However, the issue of whether HCIL staff should be interviewed by the Trust for this particular SAI was no longer a live issue. The Trust's investigation team *had* interviewed the relevant HCIL staff in March 2016, through their lay member. There was no suggestion by the Appellant that further interviews should be carried out at this late stage.
55. We acknowledge that there is a strong inherent public interest in maintaining legal professional privilege and we find that the advice was, to the extent set out above, still relevant, but we find that this is one of the rare cases where the public interest favours disclosure for the following reasons.
56. Firstly the advice has wide public impact. The Trust has described the advice as being 'clear', that the Trust cannot interview HCIL staff when carrying out an SAI because they do not directly manage them. There is nothing in the description of this advice which is limited to the Appellant's individual situation. Having seen the advice, it is not limited to the Appellant's individual situation. We find that this has huge importance for the public. In 2015 700 HCIL staff in Northern Ireland were providing domiciliary care to approximately 1800 service users. There is a clear public interest in the question of whether or not the Trust is allowed to directly interview any of these 700 staff when carrying out an SAI into the treatment of any of these 1800 users.
57. Secondly, having read the advice, we think that the Trust's description of the content of the legal advice to the Appellant misrepresents the advice that was given. We think it is misleading to say that the advice was *clear* that the Trust *could not* interview them because it did not manage them. The Trust has informed the Appellant of the content of the advice without any restrictions on its use or any indication that it remained confidential. This misleading information could therefore be passed on to the public at large. We think there is consequently a strong public interest in disclosing the advice.

58. In conclusion, we find that these amount to strong, clear, compelling and specific justifications which outweigh the strong public interest in maintaining disclosure.
59. If we are wrong in this, we find in the alternative that in the meeting of 31 January 2017 the unrestricted disclosure of the content and the reasoning behind the legal advice without any stated confidentiality or restriction on how that information could be used amounts to disclosure to the world at large. Thus, the advice could no longer be considered confidential by the time of the internal review on 10 March 2017 and was no longer protected by privilege.

R8

60. For the reasons set out above we find that it was not reasonable for the Trust to have taken the Appellant to have narrowed this request. The Trust therefore still needs to respond to this request. We agree with the Information Commissioner's interpretation of the scope of this request i.e. that it was a request for any documents created or produced as part of the SAI investigation which had not previously been seen by the Appellant.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 24 October 2018