



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FS50681495**

Appeal Reference: EA/2018/0151

**Heard at Wigan Magistrates' Court
On 22 January 2019**

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

MALCOLM CLARKE & JEAN NELSON

Between

MARTIN L ADEDEJI

Appellant

and

INFORMATION COMMISSIONER

First Respondent

NHS ENGLAND

Second Respondent

Appearances:-

Mr Adedeji:	in person
Information Commissioner:	no attendance
NHS England:	Mr Latham (Capsticks)

Case

Commissioner of Police for the Metropolis v Information Commissioner and Mackenzie [2014] UKUT 479 (AAC):

DECISION AND REASONS

Introduction

1. The Appellant in these proceedings was removed from the list of patients of a GP practice in 2011. There had been a heated discussion between the Appellant and a GP during a consultation in 2009 which contributed to a breakdown in relations. Since the removal he has not been registered with a GP practice. Over the years he has raised concerns about these and related issues by a variety of means including litigation and complaints. He has also made a number of subject access requests under the Data Protection Act and requests for information under the Freedom of Information Act (FOIA). The Second Respondent (NHS England) came into existence under the provisions of the Health and Social Care Act 2012. On March 6 2015 the Appellant complained to NHS England about the decision to remove him from the list and the alleged failure of the practice to assist in finding him a new practice. Following some communications between them NHS England responded on 2 June 2016. He was dissatisfied with the response of NHS England and on 9 January 2017 he made an information request through the "whatdotheyknow" site:-

*"This is a Freedom of Information Request.
Please inform me whether or not you hold the information specified below.
If you do hold the requested information please send me a copy.*

REQUEST No. 1.

Copy of all recorded information you hold in respect of the following complaint issue (number 5) of the 2016 formal complaint you received about Dicconson Group Practice (DGP), Wigan. In particular I wish to receive a copy of all recorded information on which you based your decision that the; 'issue has been dealt with previously under the NHS complaints regulations.,' this comment was made in your 02 June 2016 dated letter your Complaint Reference; C-062141.

To assist you;

** Issue number 5 of the 2016 formal complaint about DGP began with the following;
5) DGP (page number 295) state that; 'We feel we have no choice but to remove this patient but are mindful we need to ensure he has access to primary care services and would value your help and support in this matter.'*

** The 2016 formal complaint about DGP was first emailed to you on the 6 March 2016 and your complaint response was in your 02 June 2016 dated letter your Complaint Reference; C-062141*

REQUEST No. 2.

Copy of all recorded information you hold on which you based your decision that; ' NHS England cannot accept your reasons for not attending medical practices offered to you as reasonable.,' this comment was made in your 02 June 2016 dated letter your Complaint Reference; C-062141"

2. The two part request was therefore for "all recorded information on which you based your decision" with respect to two statements, the first that an "issue has been dealt with previously under the NHS complaints regulations", and the second that "NHS England cannot accept your reasons for not attending medical practices offered to you as reasonable."
3. On 23 January 2017 NHS England responded refusing to provide the information requested relying on s40(1) of FOIA:-

*"Personal information.
(1)Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."*
4. In its response NHS England indicated that if he wished to request the information which NHS England held which was about him he should make a subject access request under the Data Protection Act.
5. In requesting an internal review the Appellant, stating that he relied upon the Information Commissioner's guidance, asserted that NHS England had failed to comply with FOIA by not providing the information or a valid refusal notice.
6. On 13 March 2017 NHS England responded to this request upholding its position and confirming that "a response that invokes an exemption still constitutes a valid response."
7. The Appellant complained to the Information Commissioner who investigated. NHS England provided a summary history of the Appellant's relations with NHS England and other health bodies and confirmed that to provide the information requested would result in the Appellant being identifiable. The Information Commissioner probed the position seeking to understand the sorts of information which would typically be taken into account in responding to such complaints.
8. In its response (bundle page 88-90) to these points NHS England explained that under the Local Authority Social Services and National Health Services Complaints Regulations 2009 ("the Complaints Regulations") a complaint had to be made within 12 months of the event complained of, or 12 months of the complainant becoming aware of the subject of complaint.

“The applicant states that he became aware of these matters upon receipt of the Department of Health’s response to his Subject Access request, which was received in 2015. However, the “matter which is the subject of complaint” is the removal, which the applicant was aware of in 2011.

With respect to the second issue it stated:-

The applicant told NHS England that he would not attend any medical practice where a white person was present. We consider this to be patently unacceptable (as well as being impossible to comply with). He was informed of this in the response to a previous complaint that he had raised, and as he raised the same complaint again, we were satisfied that no further judgement or consideration was necessary as the issue had already been responded to.”

9. In her decision notice (paragraph 30) the Information Commissioner:-

“Having considered the request in this case, and the information provided by NHS England, the Commissioner is satisfied that the complainant is the data subject of all of the requested information. This is because the information he has requested relates to the basis of a decision NHS England made about a complaint he submitted to it, and a decision NHS England made to not accept his reason for not attending any of the medical practices offered to him. The information the complainant has requested is therefore linked to him and meets the criteria for personal data, set out in paragraphs 25 and 26, above.

10. The Information Commissioner upheld the position of NHS England.

The Appeal

11. The Appellant recapitulated much of the history of his concerns about his health difficulties and his need for access to healthcare. He then dealt extensively with a SAR he had submitted to NHS England on 3 July 2016 and his view that it had not been properly complied with. He then questioned how NHS England handled his complaint. He argued that *“NHS England’s processing of any formal complaint will ensure creation of records that contain not only personal data but also information that is releasable under the FOIA”* and drew attention to the Complaints Regulations. He asserted that NHS England had been *“wholly misleading, untruthful and deceitful”* in responding to his complaint and in responding to the Information Commissioner’s investigation and that there was information other than his personal data which ought to have been disclosed.

12. In maintaining the correctness of her decision notice the Information Commissioner confirmed that the information sought related to the Appellant, was his personal information and that he would be identifiable from it, not least by the many NHS and DoH former employees who were familiar with his cases. She confirmed that she had examined a large amount of sample

material during the course of her investigation and the only parts of the sample information within the scope of the request *"are records of letters and emails (including attachments) either with the Appellant or about his cases."*

13. NHS England supported the position of the Information Commissioner. The Appellant had sought information which was about him and his complaint and was therefore personal data. NHS England had properly considered the request as for his personal information. While in his appeal the Appellant had stated that:- *"...decision would be based on, and informed, by my personal data, but also by, FOIA releasable information such as what are the relevant NHS bodies obligations, established practice etc. in such situations as stated in my correspondence to NHS England.... And the subject of my FOI request also fall under such matters as their equalities duties which gain would ensure information, on the balance of probabilities, fitting the scope of my FOI would be available."* NHS England commented that if the Appellant was interested in more general information about NHS procedures this was readily available; however the request as properly interpreted was for personal information.

The hearing – preliminary issues

14. At the hearing the tribunal was assisted by skeleton arguments from the Appellant and NHS England. In addition the Appellant submitted two bundles containing e-mail chains passing between the Appellant and NHS England, a document from NHS England on race equality, policy material from the Parliamentary and Health Service Ombudsman, a response to a FOIA request from another NHS body, material relating to the Appellant's health issues between 2005 and 2011 and a letter from 3 NHS bodies agreeing to co-operate in responding to the Appellant.
15. In addition to an open bundle the tribunal had a "closed bundle" of material relating to complaints made by the Appellant. This was made available to the Appellant. The tribunal ruled that it should remain closed material since it consisted of personal data of the Appellant and others.

The hearing – substantive arguments

16. In his skeleton and argument before the tribunal the Appellant was focussed on the underlying issues of his health needs, racism and criticism of various NHS bodies for the service he had received. He drew attention to previous decisions of the tribunal which had been critical of confusion between NHS bodies as to which was responsible for responding to his requests and complaints (one of these decisions recommended the letter referred in paragraph 14 above). He felt that he could not trust the various NHS bodies with which he had to deal. He rejected NHS England's response to the second complaint *"this is about difficulties I have dealing with white doctors...it nullifies 20 years of my experience and their own evidence."* The tribunal repeatedly reminded

the Appellant of the very limited scope of its jurisdiction, which was focussed on whether the Information Commissioner's decision was lawful in concluding that the information which NHS England held which was within the scope of these particular requests was personal data and so exempt from disclosure by reason of s40(1) FOIA. He relied on a guidance note from the Information Commissioner which suggested that not all the information in a complaints file would necessarily be personal information.

17. Mr Latham reminded the tribunal that the request related to the Appellant's own complaint. NHS England had explained to the Information Commissioner how it had handled the complaint and accordingly the complaints file was information about the Appellant.

Consideration

18. The Tribunal recognised, as a previous Tribunal had done, that, because the period of the Appellant's concerns and complaints had coincided with a major NHS reorganisation, there had been some confusion and contradiction in the way the various successor NHS bodies to the former PCT had responded to him. This was regrettable but did not alter the requirement of this Tribunal to focus solely on the particular requests before it, and the response of the Information Commissioner to those.
19. The tribunal bore in mind the dictum of Wikeley J in *Commissioner of Police for the Metropolis v Information Commissioner and Mackenzie* [2014] UKUT 479 (AAC) (paragraph 37): "FOIA is not a means of reviewing a public authority's record-keeping and in some way testing it against best practice".
20. With regard to the first request, the Tribunal accepts that The Appellant feels that his complaints, both in relation to his removal from the DGP list, and their alleged failure to provide assistance to ensure continuity of NHS care, have not been properly addressed. Whatever the merits or otherwise of his view on this, the Tribunal reminded itself that, as specified in para 2 above, the information request we are considering relates to recorded information on whether the complaints he raised in 2016 had been previously dealt with under the complaints regulations, not on whether the outcome was correct.
21. We feel that not only has the Appellant widened the scope of the request in his voluminous submissions, but so too has the Commissioner when she says in the DN (Para 30) that " *the information he has requested relates to the basis of a decision NHS England made about a complaint he submitted to it*"
22. The first request relates to issue number 5 of 2016, the decision of the Dicconson Group Practice on 6 September 2011 to remove him from their list .2011. From documents provided by the Appellant (pages 77-83 of the

Appellant's bundle at page 82) it is clear that in 25 October 2012 he was seeking advice from the NHS Confederation on that issue:-

"I am close to compiling my response to the Ombudsman's assessment refusal and I am hoping to finish it over the weekend.

May I just ask for your advice on the following;

06th Sept 2011 my GPs removed me from their practice.

I am currently taking legal action against GPs under the Equality Act.

Due to my ongoing legal action I am not allowed to correspond directly with GP's or the PCT.

Therefore, when I made a complaint about the GP's removing me I sent my complaint to the SHA asking them to forward it to the appropriate people.

Unfortunately the SHA could not assist (see emails below).

Are you able to advise me about who I should forward my complaint to.

Also I am concerned about the 12mth deadline.

Would the fact that I sent my complaint to the SHA before the 12mth deadline make my complaint in time."

23. That email in turn forwarded the text of his email to the North West Strategic Health Authority of 4 September 2012 about the removal from the GP patient list which had sought to raise this complaint and which stated:-

"Due to issues regarding ongoing court action I do not wish ALWPCT or the GP's to manage my complaint.

Would you please acknowledge receipt of this formal complaint."

The SHA had replied:-

"As part of the complaints process the Strategic Health Authority do not investigate complaints regarding local services. Ashton, Leigh and Wigan Primary Care Trust are presently the commissioners of health services for your area and as such you need to contact them."

24. On 3 June 2014 he made a formal complaint to NHS-England arising from material contained in the GPs' defence to litigation which the Appellant had brought. He again raised issues (closed bundle page 21) asserting that the defence he had received on 4 June 2013 had caused *"much distress, offence and frustration"*.
25. On 19 June 2014 NHS England responded stating on two grounds that the complaint could not be accepted – that it arose out of court proceedings and that it was more than 12 months old and *"I do not consider that it is fair or reasonable to investigate this matter as part of your complaint. It is unlikely that a satisfactory outcome or resolution would be achieved due to the passage of time.*
26. The Complaints Regulations provide for a 12 month time limit from the date on which the matter which is the subject of the complaint occurred unless the

responsible body is satisfied that the complainant had good reason for not making the complaint within the time limit and notwithstanding the delay it is still possible to investigate the complaint effectively and fairly.

27. From the above, including the Appellant's own evidence, it is clear that his complaint about the Group practice had been dealt with under the NHS regulations, even though he feels aggrieved at the outcome.
28. The Tribunal takes the view that any recorded information held by NHS England on this point must, of necessity, be the Appellant's personal data and therefore covered by section 40(2) of the Act. A generic complaint file may, as suggested by IC in the guidance note cited by the Appellant, contain more general material on complaint procedures, but any such material would not come within the scope of the first request, which relates to information on his specific complaint.
29. In respect of the second request, the appellant already has the written response from NHS England to the effect that his requirement for his new GP practice not to include white people was unacceptable.
30. The tribunal upholds the decision of the Information Commissioner dismisses the appeal.

Signed Chris Hughes

Judge of the First-tier Tribunal

Date: 28 February 2019

Promulgated: 6 March 2019