



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

Appeal Reference: EA/2018/0160

**Heard at Bolton Magistrates' Court
On 24 April 2019**

Before

**JUDGE MELANIE CARTER
TRIBUNAL MEMBERS
MALCOLM CLARKE & JEAN NELSON**

Between

MARTIN L ADEDEJI

Appellant

And

INFORMATION COMMISSIONER

Respondent

DECISION

Introduction

1. This is an appeal by the Appellant, Mr Adedeji in relation to a request made under the Freedom of Information Act ("FOIA") for information from Wigan Borough Clinical Commissioning Group (WBCCG). Mr Adedeji emailed his request to WBCCG on 24 March 2017.

2. This request concerned the handling of a complaint made some years earlier in May 2014. The background to this matter is that until 2011, Mr Adedeji was registered as a patient at Dicconson Group Practice (“DGP”) in Wigan. In 2010 he complained about a consultation with his GP in 2009. This complaint was made to Ashton, Leigh and Wigan Primary Care Trust (“ALWPCT”). The Appellant was removed from DGP’s practice list in September 2011. Mr Adedeji is, amongst other things, very concerned at the circumstances of that removal and has made a number of information requests to DGP, to ALWPCT and to ALWPCT’s main successor organisation, WBCCG, since that date.
3. Mr Adedeji has a long history of mental health issues. Mr Adedeji told the Tribunal that in May 2013 he was diagnosed by a psychiatrist as having Post Traumatic Stress Syndrome (“PTSD”). In May 2014, the Appellant made his formal complaint to the WBCCG to ‘*establish why the NHS had failed to diagnose [me] with PTSD*’. He states that the CCG refused to investigate.
4. The FOIA request that is the subject of this appeal was made on 24 March 2017 states:

“Please inform me whether or not you hold the information specified below. If you do hold the requested information please send me a copy.

 - 1) *All information in all the paper and electronic documentation/forms that you use to record your handling of any service users formal complaint, that was first submitted to you in May 2014, that you decided not to investigate.*
 - 2) *All information you hold which states what records you should and must make in respect of any service users formal complaint, that was first submitted to you in May 2014, that you decided not to investigate.*
 - 3) *All information you hold which states all you should and must do with any service user’s formal complaint, that was first submitted to you in 2014, that you decided not to investigate.*
 - 4) *Copy of all information you hold regarding a service user’s formal complaint first emailed to you in May 2014 and included complaint issues about a [named Doctor] who was working for 5 Boroughs Partnership NHS organisation.”*
5. The Greater Manchester Commissioning Support Unit (“GMCSU”) responded on behalf of WBCCG on 17 May 2017. They responded with a blank form, a statement that “Our complaints policy and procedure is publicly available on our website” and 13 documents. On internal review, GMCSU upheld the previous decision but cited section 21 of FOIA (information reasonably available by other means) and provided a link to it’s website for the complaints policy and procedure. Mr Adedeji downloaded via this link, a copy of the WBCCG’s’ complaints policy and procedure 2017.pdf.’ (included in the bundle before the Tribunal).
6. Mr Adedeji complained to the Information Commissioner (ICO) on the basis that there was information held that was not being disclosed.

7. By Decision Notice dated 10 July 2018, the ICO found that, on the balance of probabilities, the WBCCG had disclosed all information it held that fell within the scope of Mr Adedeji's request and that it did not hold any further information.

The Applicable Law

8. The role of this Tribunal is to consider whether the Decision Notice is in accordance with law or whether the ICO ought to have exercised her discretion differently in finding that the WBCCG did not hold the information requested - see section 58 of FOIA.
9. When determining whether or not information is held, the ICO and the Tribunal apply the normal civil standard of proof, on the balance of probabilities. This position was supported in the Tribunal case of *Linda Bromley v the Information Commissioner and the Environment Agency* EA/2006/0072 and the Tribunal has repeatedly confirmed that this is the appropriate test: see, for example, *Malcolm v Information Commissioner* EA/2008/0072 at [24]; *Dudley v Information Commissioner* EA/2008/0089, at [31].

The Appeal

10. By a Notice of Appeal dated 6 August 2018, Mr Adedeji appealed to the Tribunal against the ICO Decision Notice. His grounds of appeal were, in brief, that:

- a) A further version of the complaints document must be held since the one accessible via the link provided included the following:

'Supercedes Complaints Policy and Procedure - 2013' 'Review 2018' and 'Date Placed on the Intranet/SharePoint: 10/01/17'

Mr Adedeji argued that the above date of '10/01/17' along with the fact that '2017' is in the title of the document, 'complaints policy and procedure 2017.pdf,' indicates that this is a 2017 publication and therefore not available at the time of the May 2014 complaint. As such, the purported compliance with this head of request was inappropriate. He argued that WBCCG, on the balance of probabilities, will hold a relevant complaints policy and procedure at the time they received the complaint in May 2014. This is said to be particularly so in light of the Local Authority Social Services & National Health Services Complaints (England) Regulations 2009 ("The Complaints Regulations") which provide:

'Publicity

16. Each responsible body must make information available to the public as to—

- (a) arrangements for dealing with complaints; and*
- (b) how further information about those arrangements may be obtained.'*

Further in support of this assertion that a previous version of the policy must be held, he cites from the 2017 complaints policy and procedure:

‘2. Purpose 2.1. The purpose of this document is to outline the CCG’s policy to ensure that it meets its obligations under the Local Authority Social Services and National Health Service Complaints (England) Regulations 2009 ‘

As the Complaints Regulations will have been in force in May 2014 when he made his complaint it is more likely than not, given the expressed purpose in the 2017 policy, that a pre-existing one would similarly have been in existence and publicised.

- b) The Appellant builds on this to argue that the CCG *should* hold the wider requested information relating to his formal complaint of May 2014 and that it had failed to provide valid explanations as to the reasons why it could not investigate. This was, he argued, further supported by the requirements on the WBCCG under the Complaints Regulations. He referred to the guidance contained in the Parliament and Health Service Ombudsman’s (“PHSO”) document, ‘Principles of Good Complaint Handling’ which states:

‘Public bodies should do the following: • Create and maintain reliable and usable records as evidence of their activities. These records should include the evidence considered and the reasons for decisions.’

- c) Mr Adedeji further argues that WBCCG is more likely than not to hold undisclosed information further to his request on account of assertions by WBCCG in this case and others that were either not correct or misleading and which added up to it generally not being believable/credible in its account of matters to the ICO.

Decision

11. The Tribunal noted at the outset and as previous Tribunal hearings involved in these matters had attested, Mr Adedeji’s request to understand what documents existed and were held by which entities had been tortuous and rendered over the years more complex by reorganisation of the relevant NHS bodies. Compliance by those bodies with their FOIA obligations had in turn been variable. It was by now difficult, given the number of complaints and Tribunal hearings to stand back and see the picture as a whole. This appeal however is inevitably and necessarily focused in on one narrow aspect – the FOIA request of 24 March 2017 - that is the sole remit of this Tribunal.
12. In response to the ICO, WBCCG has given an explanation of how complaints were recorded in 2014 and where such details would be held. WBCCG said that such complaints were recorded on a database and allocated a reference number if they were investigated; if not investigated, the WBCCG stated that no record was made but responses were issued and securely held electronically. WBCCG told the ICO the process changed in 2016/2017 and after that all complaints were logged and referenced whether they were investigated or not. Since his complaint of 2014 was not

investigated, it was not logged. The WBCCG only holds a copy of the complaint and a response as to why it would not be investigated (which was sent to Mr Adedeji). WBCCG told the ICO that it had explained to Mr Adedeji that his complaint of May 2014 related to issues prior to the WBCCG being established and that it had directed him to the other organisations.

13. The Tribunal understood Mr Adedeji to be arguing that WBCCG were not to be believed in their account of these matters. By way of example supporting this assertion he cited:
 - a) an email response from WBCCG dated 3 June 2014 which stated, "I have been told that your allegations have previously been investigated by 5 Boroughs Partnership NHS Foundation Trust" which was not correct as he had not made a complaint to 5 Boroughs.
 - b) emails from WBCCG dated 23 March and 11 May 2018 to the Commissioner, stating that they "directed" Mr Adedeji to NHS England to have his May 2014 complaint investigated by them. Mr Adedeji pointed out that none of the contemporaneous documentation contained any mention of his being "directed" to NHS England by WBCCG in order to have his complaint investigated.

In relation to both these matters, the Tribunal took the view that even taken at their highest this would not amount to a basis to conclude that WBCCG's account of their complaints record keeping to this Tribunal was likely to be false. The Tribunal noted that it appeared just as likely that the authors of the emails had, if this was the case, made mistakes, which in the context of the paucity of record keeping which was a feature of these matters, would not be wholly unsurprising.

14. The Tribunal took the view moreover that even if WBCCG had been in breach of the Complaints Regulations and the PHSO Guidance (on which it made no finding), this would not and did not mean, further to the narrow test being applied by the Tribunal that it should necessarily find that further documentation was held. Failures in record keeping were just that, and not an indication that documents were being withheld. Thus, by way of example, Mr Adedeji had argued that the fact that WBCCG had noted a discussion of his complaint during their weekly complaints review meeting and yet were later stating that they had made no record of this discussion, was evidence that they were not to be believed. The Tribunal however considered that a more likely interpretation of this (even taken with other points like those above), was that this was a product of poor or partial record keeping or it could have been that it was their practice not to fully note such matters at that time. Either way, this was credible in the Tribunal's view and did not lead to a conclusion that WBCCG was lying on this point. The Tribunal accepted WBCCG's and the ICO's account that, other than in relation to the matter below, no further information was held.
15. The Tribunal were concerned however that the complaints policy provided to Mr Adedeji by way of a link and forming the basis of the reliance on section 21 FOIA, was entitled 2017 and stated that it was replacing a 2013 version – with an operative date for the seeming uploading of January 2017. On this basis, the Tribunal found that it was on the

balance of probabilities (or differently put more likely than not) that there was a 2013 version in place in May 2014, and that version, which had clearly been asked for by Mr Adedeji, is held by the WBCCG and should have been provided to Mr Adedeji. It followed that in the Tribunal's view, this information is held and that the ICO had been wrong to accept the assertion of WBCCG that section 21 FOIA applied. In this way, the Decision Notice contains an error of law.

Conclusion

16. The Tribunal dismisses this appeal other than in relation to the complaints policy and procedure in relation to which it makes a substituted Decision Notice. It finds that the Decision Notice should be amended to the effect that the public authority holds information consisting of the complaints policy and procedure in force as at May 2014 and that this should be provided to Mr Adedeji within 28 days of this decision.
17. This is the unanimous decision of the Tribunal.

Signed

Judge Carter

Date: 15 May 2019

Promulgation date: 21 May 2019