First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FS50739294

Appeal Reference: EA/2018/0272

Heard at Field House, London
On 20 May 2019

Before

JUDGE CHRIS HUGHES

ALISON LOWTON & JOHN RANDALL

Between

CHRISTOPHER PRITCHARD

Appellant

and

INFORMATION COMMISSIONER

First Respondent

DEPARTMENT OF HEALTH AND SOCIAL CARE

Second Respondent

Appearances:-

Christopher Pritchard: in person
Information Commissioner: did not attend
Department of Health and Social Care: Eric Metcalfe

DECISION AND REASONS

1. The appeal is dismissed

2. In response to concerns about the effectiveness of the ambulance service in meeting escalating demands, in 2015 Sir Bruce Keogh (the National Medical Director for NHS England) commissioned the Ambulance Response Programme, an independently evaluated trial to test new ways of working. These were intended to move the service away from a fairly simple response time model to one where more detailed information was gathered from a telephone call and the response was appropriately prioritised by an evaluation of the clinical severity and urgency of the patient's condition. The trials were endorsed by expert professional groups and patients' associations and covered 14 million calls. In reporting the findings of the trial to the Secretary of State and recommending their adoption Sir Bruce on 13 July 2017 (bundle 2 page 14):-

   "… in summary this new system would
   Change the dispatch model of the ambulance service, giving staff slightly more time to identify patients' needs and allowing quicker identification of urgent conditions,
   Introduce new target response times which cover every single patient, not just those in immediate need. For the most urgent patients we will collect mean response time in addition to the 90th percentile, so every response is counted.
   Change the rules around "stops the clock" so targets can only be met by doing the right thing for the patient.
   …
   The results have been impressive. The trial has demonstrated that, should these changes be adopted nationally:
   Early recognition of life-threatening conditions, particularly cardiac arrest, will increase. Based on figures from London Ambulance Service, it is estimated that up to 250 additional lives could be saved in England every year.
   Up to 750,000 patients every year would receive an immediate ambulance response, rather than joining a queue.
   The difference in response times between patients living in rural areas and those in cities would be significantly reduced.
   …
   If these recommendations are accepted then we intend to fully implement these new standards by the beginning of winter 2017"

3. On 29 December 2017, the Appellant wrote to the Second Respondent ("the DHSC") and requested information in the following terms:

   "Would you be able to provide me the following under the freedom of information act:

   1) a full list of MPDS determinants and the categories that they map to under the ambulance response programme

2) a full list of NHS pathways outcomes that result in an ambulance attendance and the categories they map to under the ambulance response programme"

4. The DHSC responded on 29 January 2018 refusing the request relying on the exemption contained in s 38 FOIA which provides:-

   "***Health and safety***.
   (1)Information is exempt information if its disclosure under this Act would, or would be likely to –
   (a)endanger the physical or mental health of any individual, or
   (b)endanger the safety of any individual."

5. The DHSC maintained this position on review and the Appellant complained to the First Respondent ("the Commissioner"). During the course of her investigation DHSC confirmed that it held information within the scope of part 1 of the request, but not Part 2 which is owned and held by NHS Digital. It also noted that the MPDS code and determinant descriptors are owned by Priority Dispatch Corporation. Following consultation with this organisation DHSC also relied on s43(1) and (2):-

   " ***Commercial interests***.
   (1)Information is exempt information if it constitutes a trade secret.
   (2)Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

6. In her decision notice the Commissioner considered and accepted the DHSC's explanation that disclosure of the information would enable the manipulation of the priority of ambulance responses diverting resources away from high priority patients in favour of lower priority cases, putting at risk the lives of those high priority patients (dn paragraphs 13-15). DHSC confirmed to the Commissioner that while some information relating to the request was in the public domain : *"the withheld information is highly granular and would easily lead to manipulation that is less likely to be detected by ambulance services."* DHSC provided an illustration of how the manipulation could occur and so change the response time. Response times ranged up to 3 hours for lower priority calls (dn para 21):

   "It confirmed that the reality of these clinically-evidence response times is at odds with the public perception that ambulances are dispatched to them immediately upon calling 999, where this is true of only the most life-threatening issues. The DHSC commented that callers are often anxious or in pain, or acutely concerned about the person they are calling on behalf of. It is common for them to call multiple times over a number of hours to request a more prompt response"

7. DHSC drew the Commissioner's attention to the news coverage of the phenomenon of individuals who made multiple calls to ambulance services

including one who had called for an ambulance 3600 times in one year (dn paragraph 24):-

"It advised that ambulance services have a duty to determine appropriate responses to all 999 calls, including calls made by frequent callers. It is reasonable to assume that this cohort of callers would be motivated to understand and use this information to manipulate responses to their calls, and would subsequently be much more difficult for ambulance services to effectively manage."

8. The Commissioner considered these points and concluded that s38 was engaged, individuals would be put at risk. She accepted the DHSC position first that concerned patients and friends would expect a quicker service than was available and would seek to secure it (dn paragraph 26) and that in addition there were a large number of calls which abused the system (dn paragraph 27) as a result of which other patients were put at risk. While accepting that there was a public interest in disclosure she concluded that disclosing the information would disrupt the ambulance service and put patients at risk. She upheld the DHSC reliance on s38(1). She did not consider s43.

9. In his grounds of appeal dated 9 December 2018 the Appellant relying on the evaluation published in July 2017 (see above) argued that since the evaluation had not been conclusive on all aspects of the changes the specifics of the changes should be disclosed to assist in accountability. There was greater public interest in disclosure because of the pressures under which the ambulance service was working to enable the public to compare current with past performance. He provided information from the National Archives about a previous system and argued that disclosure was not more likely than not to harm health and safety as there was no evidence that information already available had led to manipulation, and that the public interest favoured disclosure so that the public could compare current with previous services in the light of the substantial changes.

10. In resisting the appeal the Commissioner relied upon her decision notice. She argued that an individual with the requested information could use the information to generate a quicker response even if they did not have the relevant symptoms. This would impact on the waiting time for an ambulance and delay the response to individuals in greater clinical need clearly endangering the health and safety of those individuals. The issue was therefore the likelihood of such a thing occurring. If even one person were endangered that would be sufficient to engage the exemption, the number endangered would go to the balancing exercise of competing public interests. Related evidence released by other public bodies had been carefully considered and designed to avoid the risks anticipated from disclosure of the requested information. The previous information from 2006/7 was different from and less detailed than the requested information. It would be hard to

provide definitive evidence of endangerment from previous disclosures and in considering the harm which could flow it was necessary to extrapolate from available evidence to consider what was likely to happen. Expert advice and publicly available news reports indicated that some individuals abused the system deliberately or inadvertently and concerned individuals, who had access to this information would use it. The exemption was engaged. Furthermore the public interest in transparency and the debate about the change to the ambulance service did not need the requested information. The risk of such misuse of the information outweighed the public interest in disclosure.

11. DHSC supported the Commissioner and opposed the appeal. In addition it argued that the information was exempt under s43 as it had informed the Commissioner :-

"MPDS is a proprietary protocol system which constitutes a trade secret as it is not generally known or reasonably ascertainable by others, and its confidentiality provides an economic advantage over competitors"

12. In evidence Hulya Mustafa a Deputy Director of DHSC responsible for oversight of the performance of the ambulance service gave details of the changes in ambulance service procedures and the role of the requested information in enabling staff to make prioritisation decisions. She confirmed that the publication of the information would not assist in public understanding of the issues, given the considerable extent of information about the changes which had already been published, but would endanger public safety by enabling manipulation. She confirmed that the material put in the public domain in 2005/7 was distinctly different from the current information and that it related to a different method of operating the ambulance service, under current arrangements there was a greater incentive to manipulate the system. She confirmed that the proprietors of the information (PDC) viewed and protected the information as a trade secret through specific contractual provisions with their staff and customers. If it were disclosed it would prejudice PDC's commercial interests. Furthermore release of information properly regarded as a trade secret could harm the reputations of the ambulance services and DHSC as reliable commercial partners.

13. In cross examination she confirmed that the review carried of the pilot of new arrangements between 2015-17 was independent. Call handlers did not challenge the veracity of those seeking help via a 999 call and the fact that manipulation was difficult to detect strengthened the case against disclosure.

14. In oral argument the Appellant emphasised the importance of the changes and the scale of the ambulance service. He argued that the public could not know exactly what changes had been made and the withholding of the information

meant that they could not know the detail of the clinical conditions which justified a shorter response time. There was a public interest in a better understanding of ambulance service performance.

15. The Appellant relied on information already in the public domain including the 2005 Department of Heath call categorisation data set 2005 and a dataset released by the State of Victoria in Australia in 2016 detailing the arrangements for its ambulance service. He argued that the s38 ground was not established and he further argued that the information did not meet the definition of a trade secret contained in The Trade Secrets (Enforcement, etc.) Regulations 2018 no. 597. These provide (by Regulation 2, Interpretation):-

    ""trade secret" means information which –
    (a)is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among, or readily accessible to, persons within the circles that normally deal with the kind of information in question,
    (b)has commercial value because it is secret, and
    (c)has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret;"

16. In resisting the appeal Mr Metcalfe noted the genesis of the Trade Secrets Regulations (as implementing a 2016 EU Directive) and that they post-dated FOIA and argued that as EU law was not engaged by these proceedings the definition was not applicable; however there were no grounds for believing that the requested material was not a trade secret within the statutory definition.

Consideration

17. In these proceedings two exemptions are claimed by DHSC, the Commissioner supports the s38 exemption and did not express a view on the second.

18. The s38 exemption is engaged if disclosure would or would be likely to endanger the physical or mental health of any individual. The question for the tribunal is therefore if this material were put into the public domain how would it be used, how would it change behaviour. It seems to the tribunal that in arguing that the exemption is not engaged the Appellant is facing a very considerable challenge.

19. While the information is detailed and somewhat obscure it is comprehensible. While a person who is ill, injured or anxious might have difficulty using and applying the information rapidly an individual with them could examine the information and work out what information might be requested by a call-handler and what responses to give which would raise the priority of that call for an ambulance. Furthermore the information as well as being disseminated in its current form could be used to construct an App to assist individuals in

raising their priority, such an App could be widely known and easily accessible.

20. Although some related information has been available in the past or in other places the Appellant's reliance on this to argue that there is therefore no significant risk is unsatisfactory for several reasons. It must be noted that there is no evidence that it has not been used by individuals to raise their priority; damage could have flowed from the availability of this information. The considered evidence of Ms Mustafa was that she had no record of how the 2005 information came to be publicly available, but that she doubted the wisdom of that decision at the time it was made. Since then the changes to ambulance procedure have meant sharper prioritisation and a greater incentive to manipulate priority and there is now a greater availability of technology to facilitate that manipulation.

21. Expert advice from those delivering the service is that disclosure would harm the functioning of the service.

22. The evidence is that many people repeatedly call, on that rare occasion when they need an ambulance, for the very understandable desire to get to treatment as quickly as possible. If the information was available a proportion of them would use it.

23. Furthermore there is a small but significant group which, for a variety of reasons make many calls over the course of a year which are entirely unjustified. An individual making a call in such circumstances might well wish to use such information to produce a more rapid and dramatic response to the call.

24. The tribunal is satisfied that the disclosure of the information would lead to misprioritisation of a significant number of calls.

25. The resources of the ambulance service are constrained – a vehicle going to a miscategorised lower priority call or worse a malicious call is one not available for a higher priority call. Sir Bruce Keogh (paragraph 2 above) suggests that the improved efficiency of the service could directly save 250 lives per year as well as producing less dramatic improvements. It is clearly in the public interest to prevent any reduction in that improved efficiency which it is considered is saving lives and preventing harm to seriously ill patients.

26. Given the scale of ambulance operations the tribunal is satisfied that disclosure of the information would lead to some use of the information to misprioritise calls and result in harm to the physical or mental health of a significant number of patients. Even one such harmed patient is sufficient to engage the exemption and the tribunal is satisfied that harm would result to considerably more than one.

27. The disclosure of the information would not significantly further understanding or debate about the ambulance services which is already well-informed by such documents as the National Audit Office report NHS Ambulance Services (January 2017).

28. The tribunal is therefore satisfied that the Commissioner correctly struck the balance and the public interest overwhelmingly lies in favour of non-disclosure.

29. The tribunal is also satisfied that the s43 exemption is engaged. Given the information already available (see para. 27 above) the public interest in disclosing this technical information is minimal. Against this, the breach of a trade secret that would be inherent in disclosure would damage the public interest in PDC and other suppliers having confidence in their dealings with the DHSC and the ambulance service. There is also a strong public interest in not damaging the legitimate commercial interests of the supplier of a critical service to the NHS. The tribunal is satisfied that the public interest in maintaining this exemption is greater than in disclosing the requested material.

Signed Hughes

Judge of the First-tier Tribunal
Date: 29 May 2019
Promulgation date: 30 May 2019