



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/91
Information Commissioner's Ref: FS50082764

Considered in Chambers

Decision Promulgated
18 May 2009

BEFORE

CHAIRMAN
Mr H Forrest
and
LAY MEMBERS

MR IVAN WILSON
MR JOHN RANDALL

Between

MRS B FRANCIS

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

SOUTH ESSEX PARTNERSHIP FOUNDATION NHS TRUST

Additional Party

Respondent

Second Decision

Following our earlier decision promulgated on 21 July 2008, The Tribunal decides that the information referred to in point 1 of Mrs Francis' request for information of 26 March 2005 falls within paragraph 1 of the Substituted Decision Notice we previously issued, which was:

1. Information, included in Mrs Francis' request, was held by the Trust, and therefore within the scope of the Freedom of Information Act; but it had not been found, and further steps would not be ordered as the Trust had already exceeded the time required of them under section 12 of the Act.

No further action is required.

Reasons for Decision

Introduction

1. This second decision follows an earlier decision of the Tribunal, promulgated on 21 July 2008. This decision should be read in conjunction with our earlier decision, which sets out the background to the request for information and our findings in relation to the bulk of the request. Our earlier decision, reached after a two day hearing, left open for further consideration one point which both respondents to the appeal, the Information Commissioner (the IC) and the South Essex Partnership NHS Trust (the Trust), agreed that they had misunderstood, and therefore had never properly considered. This decision sets out our findings on that one point, and concludes our earlier findings and this appeal.
2. Rather than simply overturn the IC's Decision Notice on this point, the Tribunal agreed to adjourn consideration of it, so as to give all parties a further opportunity to consider the request fully, and to give the Trust an opportunity to search for, and, if appropriate, to disclose the documents requested. Directions for that process were discussed and agreed with the parties, and formally issued on 21 July 2008. Subsequently, some deadlines were extended. This decision is issued after considering the further submissions from the parties made as part of that process, and after all parties had indicated their agreement to the Tribunal considering the matter further on the papers, without the need to convene a further full hearing.

The outstanding point

3. In Mrs Francis' original request for information, made on 26 March 2005, the first point requested (of seven separate points) was:

"All documents previously withheld under legally privileged".
4. Read in context, as all parties now accept, this refers to lengthy previous correspondence between Mrs Francis and the Trust which had resulted in various documents being disclosed to her. Some of these documents had had pages deliberately removed as legal professional privilege was claimed in relation to them. It is these missing pages, previously withheld, that Mrs Francis requested.
5. When this emerged, during the course of the hearing, the Trust indicated that it believed that it had, in fact, either now disclosed all the missing papers, one way or another, or that they could all now be disclosed, save for redaction of one name, (withheld as personal information under section 40, personal data). However, it wanted time to check and if necessary, do a further search.
6. That process resulted in all the pages from the missing documents which the Trust say they have been able to locate being disclosed to Mrs Francis. Legal professional privilege, if it applied, has now been waived, and none, of the papers that have been found, are now withheld. However, Mrs Francis believes that there

are still further missing pages to be disclosed. She has done her best to identify these for the Trust so that they may search and find them.

7. The Trust explain their inability to locate any further missing papers by explaining that the missing pages were removed from complaint files, first disclosed in 2001, and that those complaint files are not now in the same state they were then: apart from any intervening access there may have been, and any changes arising from the changes in the organisations responsible (the various changes of NHS Trust, for example), the files have been through a digitisation process, which may have altered them. Moreover, some of the missing pages which cannot now be found are themselves inadequately identified, without a date for correspondence, for example.
8. The Trust maintain that in addition to the time spent in dealing originally with other points in the request, which the Tribunal have already found (in paragraphs 18, 20 and 48 of our previous decision) substantially exceeded the limit set by section 12 of the Freedom of Information Act, they have now spent "all day" on the 4 July and "many hours" subsequently locating the missing pages which could be found, and have now been disclosed. They argue that this additional time was voluntarily spent by them in an attempt, in good faith, to comply with the spirit of the Act and to disclose as many of the missing papers as could be found; but having done all that they could be asked to do and more, they cannot now be asked to consider the request further since they have substantially exceeded the time allowed for compliance in section 12.

The Information Commissioner

9. The Information Commissioner, following the steps set out in the Tribunal's Directions, considered the correspondence and steps taken by the parties, and has prepared a draft Decision Notice for the parties and our consideration, dealing with the subject matter of point 1 of the original request. It reads:

Draft Decision Notice

Information, included in point 1 of Mrs Francis' request for information dated 26 March 2005, was held by the Trust at the time of the request.

The Trust has supplied some of the information to Mrs Francis. Some of the information identified by Mrs Francis cannot be found and further steps are not ordered as the Trust has already exceeded the time required of them under section 12 of the Freedom of Information Act 2000.

Action Required

No further steps are required.

Conclusion

10. The Trust is content to accept that draft Decision Notice as it stands. Mrs Francis is not. She does not accept that the Trust cannot find the remaining missing pages, or understand how they can say that they cannot now be found. She feels it is unfair

to apply the limit in section 12 to the outstanding point in her request given that the Trust have agreed that they did not originally deal with it properly.

11. We can understand Mrs Francis' frustration that the limit set by section 12 should remove the need for the Trust to make further attempts to locate documents, but that is not a matter for us to take into account. The limit was set by Parliament and the Trust are fully entitled to rely on it. They have in any case substantially exceeded the limit and as a public body they have other demands on their resources. That they did not initially comprehend the request, and therefore did not address it properly, does not prevent them relying on the limit now. To the extent that time may have been expended fruitlessly in the first instance, that time is more than compensated for by the time spent subsequently in searching for documents in excess of the section 12 limit. The limit in section 12 applies to the request as a whole, not separately to its constituent parts. As a result of the Trust's further searches, Mrs Francis has received some further documents.
12. We endorse the IC's draft Decision Notice. The first point of the request falls within the first paragraph of the Substituted Decision Notice we previously issued.
13. Our decision is unanimous.

Signed:

Humphrey Forrest

Deputy Chairman

Date: 18 May 2009