



Neutral Citation Number

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2018/0242**
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50735928

Dated: 17 October 2018

Appellant: John Peters

Respondent: Information Commissioner

Determined on the papers

Date of decision: 21 April 2019

Before

Angus Hamilton

Judge

Subject matter: Freedom of Information Act (FOIA) 2000 s 1(1)(a)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal for the reasons given below and the decision in this judgment stands as the substituted Decision Notice.

REASONS FOR DECISION

1. I hope that the parties in this matter – the Information Commissioner (IC) and Mr Peters – will understand if I deal with this matter fairly briefly. That I can do so arises from the high level of agreement between the parties as to the appropriate outcome of this appeal. Where there is still a disagreement between the parties I have highlighted this, and have considered the disputed issues in more detail. I can deal with this matter as a Judge sitting alone following the Practice Direction issued by the Senior President of Tribunals in February 2015.
2. There is no dispute that the IC has correctly set out the chronology in this matter and I have therefore adopted that chronology.
3. On 23 February 2018 the Appellant wrote to Kings College London (KCL) and requested information in the following terms:

"...Please provide the following patient-level data for baseline, 12-week, 24-week and 52-week assessments, where available.

1. *EuroQOL (EQ-5D) scores.*
2. *Hospital Anxiety and Depression Scale scores in both anxiety and depression sub-scales.*
3. *Work and Social Adjustment scale scores.*
4. *Borg Scale scores*
5. *Physical Health Questionnaire 15 items (PHQ15) scores.*
6. *Self-paced step test of physical fitness results*

7. *Client Service Receipt Inventory scores. (Please also include the 6-months-prior assessment.)*
8. *Jenkins Sleep Scale scores.*
9. *Self- Scale scores efficacy.*

I am happy to receive this information in electronic format."

4. KCL responded on 23 February 2018. It denied holding the requested information. KCL said it considered this to be the case because, even though it employs one of the named investigators of the PACE (the relevant clinicals) trial, that person had informed KCL that they do not perform data analysis and, as such, do not have intimate knowledge of the data requested.
5. KCL said that to be able to conduct the necessary data analysis, to provide the Appellant with the requested information, would require it to employ someone specifically to do this. KCL said it has no current staff member employed with the technical expertise required to carry out analysis of this data. KCL referred the Appellant to the Commissioner's decisions in FS50673373 and FSS0557646.
6. The Appellant requested an internal review on 26 February 2018. He argued that KCL employs staff/teaches students who have the technical knowledge/ability to be able to retrieve the information he has requested.
7. KCL provided an internal review on 26 March 2018. It advised that one staff member has not been employed to work on the trial in question for several years and that another had never worked on the trial. KCL maintained its position that it does not hold the information the Appellant requested.

8. The Appellant contacted the Commissioner on 3 April 2018 to complain about the way his request for information had been handled. He told the Commissioner that he considers that KCL employs statisticians with the relevant knowledge of the trial and the statistical ability to extract the information he has requested.
9. KCL's response to the complaint to the IC was that it could not be said to hold the requested information. If the Commissioner found that it did hold the information, KCL said it would in any event be exempt from disclosure under section 40(2) FOIA (third person personal data) and section 22A (research).
10. Section 1(1) of FOIA sets out the basic right of the freedom of information regime:

Any person making a request for information to a public authority is entitled-

 - (a) *to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
 - (b) *if that is the case, to have that information communicated to him.*
11. It follows that the requester is not entitled to information which the public authority does not hold. If the public authority does not hold the information, that is an end of the matter.
12. The IC in its investigation focussed on the initial question as to whether KCL held the requested information and concluded in the relevant Decision Notice dated 17 October 2018 that it did not. Because of this decision the IC did not go on to consider whether the other claimed exemptions were engaged.

13. Mr Peters then submitted an appeal to the Information Rights Tribunal asserting, in brief, that KCL did hold the requested information. Mr Peters set out detailed reasons for this assertion but I do not need to repeat them here as there is no longer any dispute between the IC and Mr Peters on this issue.

14. In the IC's Response to Mr Peter's appeal dated 9 January 2019 (and presumably because of the detailed arguments set out by Mr Peters) the IC indicated that it now agreed that KCL did in fact hold the requested information. The IC submitted that the appeal should be allowed but that KCL (who are not a party to the appeal) should be given an opportunity either to disclose the requested information or to state whether it relied on any other exemptions within FOIA. In particular, the IC felt that that the 'costs limit' exemption in s.12 FOIA might be relied on. Rather oddly (in my view) the IC in its Response makes no mention of the two unconsidered exemptions that were actually relied on by KCL. The IC believes that the s.12 FOIA exemption may well be relevant because KCL has throughout this matter effectively relied on the impracticability of extracting the requested information and the IC believes that this may prove to be an expensive process.

15. Mr Peters objects to KCL being given an opportunity to state whether it relies on s.12 and to provide an estimate of the costs that would be involved in extracting and supplying the requested information. His principle reasons for doing so are that KCL has never sought to rely on the s.12 exemption - and surely would have done if it was potentially applicable – and there is no evidence that providing the requested information would involve exceptional costs. If I have understood Mr Peters submissions correctly, he does not appear to object to KCL raising again at this stage the other exemptions they relied on from the outset - namely those under s. 40(2) and 22A FOIA. Rather he objects to KCL being given the opportunity to embrace an exemption that has only been raised at this late stage by the IC.

16. I have a considerable amount of sympathy for Mr Peters' objections. Following the decision in what is commonly known as *Malnick* it is arguably incumbent on a public authority to carefully consider and set out all the FOIA exemptions they might rely on and on the IC to consider all those exemptions (and not just a single 'successful' one) in a DN. All parties would then have an opportunity to argue to pros and cons of all exemptions and this Tribunal could make a final decision on all the possible exemptions.

17. Theoretically, I could make decisions on both the issue as to whether KCL held the requested information and on the s.12 exemption in this judgment. However, I would be doing so without allowing KCL the opportunity to make submissions on the s.12 exemption and if my decisions were adverse to KCL it is likely that this would result in an immediate appeal or judicial review. I am very conscious of the fact that the current position has only arisen because the IC has had a change of heart during the course of the appeal proceedings and has shifted from supporting KCL's argument that it did not hold the requested information to rejecting it.

18. There is a further practical difficulty in that as a judge sitting alone I cannot reach decisions on the s. 40(2) and 22A exemptions as these must be considered by a full panel of three. Thus, even if I were to reach conclusions on the 'holding' issue and the s.12 exemption I could not direct KCL to disclose the requested information – I could only direct that they respond to the disclosure request anew thus giving KCL an opportunity to rely on the s. 40(2) and 22A exemptions in a further response.

19. Thus although, as I say, I am sympathetic to Mr Peters' objections I think that the only course I can properly adopt here is to allow Mr Peters' appeal on the issue of whether KCL held the requested information, as this is no longer in dispute, and direct that KCL respond anew to Mr

Peters FOIA request within 28 days of the date of receiving this judgement and without relying on any assertion that KCL does not hold the requested information.

Signed:

Angus Hamilton DJ(MC)

Tribunal Judge

Date: 21 April 2019

Promulgation date: 25 April 2019