



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

Appeal Reference: EA/2019/0280

**Wigan Magistrates Court
On 29 January 2020**

Before:

**JUDGE HOLMES
PAUL TAYLOR
JEAN NELSON**

Between:

MARTIN LINDSAY ADEDEJI

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

Appearances: -

Appellant: In Person

Respondent: Written Representations

DECISION

The Tribunal dismisses the appeal, save in respect of the failure of the public authority to provide the requested information that it was required to provide within 20 working days as required by s.10 of the FOIA. The Tribunal accordingly issues a substitute Decision Notice in these terms, by adding at Para. 4 to the Decision Notice FS50818705 dated 5 July 2019 the following:

“4. The Surgery failed to provide the requested information that it was required to provide within 20 working days in breach of s.10 of the FOIA.”

REASONS

1. In this appeal the Appellant, Mr Adedeji, appeals against a Decision Notice issued by the Information Commissioner on 5 July 2019, in which she determined that

the public authority, Drs Mullen, Gullick, Kinsey, Mason and Dongre, the partners in Parbold Surgery did not hold any further information falling within the scope of the Appellant's request of 23 May 2018.

2. The appellant appealed the Decision Notice by a Notice of Appeal dated 2 August 2019. The Appellant indicated that he required a decision after a hearing.

3. The Commissioner filed her response to the appeal on 10 September 2019. The Appellant filed a response to the Commissioner's response dated 26 September 2019.

4. Although the Appellant sought a Decision after a hearing, the Respondent was content to have a Decision without a hearing. Accordingly, the Tribunal has held a hearing, which the Appellant has attended and made his oral submissions, and the Respondent has relied upon her written submissions.

5. There was an open bundle, but, given the circumstances, no closed bundle. References to page numbers are to pages in the open bundle.

The Background and the Facts.

6. The Appellant, for reasons which are not entirely clear, but are not relevant to the disposal of this appeal, by a request dated 23 May 2018 sought from Parbold Surgery the following:

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

*I am requesting a copy of **all the requested information you hold** in all the contracts you had with the commissioners of the services you provided in: -*

1). 2009

2). 2013 "

The Appellant expressly referred to this being a Freedom of Information Request .

7. The request was acknowledged on 24 May 2018, and then, later that day the Practice Manager of the Surgery replied to the Appellant (page 28 of the bundle) that she did not have the contracts for 2009 and only the Enhanced Service Contract for 2013, which she purported to attached to this email. In fact, this attachment had to be re-sent on 31 May 2018 (page 30 of the bundle). This document, which is fully entitled "Agreement between Central Lancashire PCT and Parbold Surgery", and states on the front page "The contract variation is from 15/03/2013 to 31/03/2013", is at pages 83 to 110 of the bundle.

8. In the meantime the Appellant made a further FOIA request (a copy of which is not before the Tribunal) in which he apparently asked for four documents, The first two

related to the Surgery's complaints handling procedures, and the third to its records retention policy. The fourth related to contracts. Dr Mullen of the Surgery replied on 26 June 2018 ("Appendix A" to his Skelton Argument, not in the bundle, the Appellant provided this to the Tribunal in the course of the Appeal). He attached the complaints procedure leaflet, and the Records Retention Policy. This one (Appendix B to the Appellant's document) is headed "Records Retention Policy - England", and the relevant entry reads "Contracts - 6 years".

9. He went on to say, in relation to the contract issue, that this had already been answered by the Practice Manager, and how the Practice operated under a General Medical Services contract from NHS England, whom, he suggested the Appellant should approach for its details.

10. The Appellant wrote further to the Surgery on 30 July 2018 (page 31 of the bundle) stating that the Surgery had failed to send him the information fitting the criteria of his request, and that what he had been sent appeared to fall out of the date range of his FOI request, as it was the NHS Standard Contract for 2017/18 and 2018/19, which had first been published in January 2016. He asked that the surgery provide a copy of information that it held that was within the scope of his FOI request, and in particular he sought the "enhanced Service Contract for 2013" which had been referred to in the email of 24 May 2018 referred to above.

11. On 30 July 2018 the Practice Manager sent a further email to the Appellant, asking if this is what he required, but it is unclear what attachments were made to that email, but it seems likely that the 2013 Enhanced Service Contract document was then provided.

12. The Appellant accordingly on 15 August 2018 requested an internal review of the handling of his FOI request, stating that it had been handled contrary to FOIA, in that the response was outside the 20-working day time limit. He reiterated his request for all the recorded information that was held that fitted the criteria of his request, or a proper and valid refusal notice for not sending him a copy of all recorded information that fall within his request within 20 working days. He repeated the terms of his request of 23 May 2018, and went on to say that he was of the opinion that on the balance of probabilities the Surgery did hold further information falling within the criteria of his request which had not been provided to him. He went on to make reference to the Records Retention policy, where he had noted a retention period of six years. He therefore would expect to have received a copy of the 2013 contracts. He went on to say that he understood that there might have to be appropriate redaction to any such documents.

13. The Practice Manager replied on 16 August 2018 (page 34 of the bundle), apologising for the delay, and referring to an email of 30 July 2018 that had been sent to the Appellant. She went on to inform the Appellant of his right to complain to the Information Commissioner. She also went on to ask the reason why the appellant was

seeking this information from the Surgery, and was not contacting the CCG (Care Commissioning Group).

14. The Appellant replied on 16 August 2018 (page 35 of the bundle). He asked whether the email from the Surgery earlier that day was its final response to his request for an internal review, the terms of which he reiterated. He went on to say how that he could not see any of the six email attachments fell within the scope of his request, and went on to say that his request had been clear simple and specific and was compatible with the FOIA, to which the Surgery was required to adhere.

15. There appears to be no response to that further email, and on 19 September 2018 the Appellant sent a further email (page 36 of the bundle). After two holding emails on 19 September 2018, and a further one of 20 September 2018 explaining the reasons for the delay, on 28 September 2018 (page 40 of the bundle) the Practice Manager sent a further email to the Appellant informing him that a formal review had taken place opinion of the surgery it did send out the information that it had at the time. The email continued:

"We have no need to keep contracts as these are changed each year and sometimes during the year. As you say are retention policy had not been review (sic) as there had been no changes to it (as informed me by the CQC) as you will see now it has been reviewed as there has been a change in the review date."

The email continued to note the previous requests as to why the claimant was asking all these questions of this particular practice, and reference was made to the disruptive effect the Appellant's requests was having upon the smooth running of surgery.

16. On 11 October 2018 the Appellant sent a further email response (page 41 of the bundle), in which he referred to previous email of 16 August 2018, and to which he attached a copy of the Information Commissioner's explanation of how the FOIA works, and stated his intention now to send the matter to the Information Commissioner.

17. On 2 November 2018 the Practice Manager wrote further to the Appellant (page 43 of the bundle), saying that a further discussion would be held, and by a further email that day (page 45 of the bundle) the Practice Manager wrote further to the Appellant, in which reference is made to a discussion and review about his request, which had concluded that his request had been dealt with as soon as possible after various absences, the information that was held was sent, and that he had been provided with the address of the people whom he needed to get in touch to obtain any information that the Surgery did not hold.

18. On 1 February 2019 the Appellant made a complaint to the Information Commissioner (page 47 of the bundle), in which he referred to the failure to apply to his request within the 20-working day time limit, and the failure of the Surgery to confirm or deny whether it held all the information specified in his request, or to

provide him with copies of it, or a proper/valid refusal notice. He went on to say that he was of the opinion that on the balance of probabilities the surgery did hold further information fitting the criteria of his request of 23 May 2018.

The investigation by the Information Commissioner.

19. The Appellant's complaint was acknowledged on 12 February 2019, and the same day the Practice Manager of the Surgery was written to by the ICO and informed of the complaint.

20. On 30 May 2019 the ICO wrote further to the Appellant, and also to the Surgery. In this letter the ICO set out how it would investigate whether the requested information was held or not held, and in particular (page 57 of the bundle) number of questions were raised to assist the information Commissioner to decide on the civil standard of the balance of probabilities whether the information was or was not held. The ICO asked the following questions in this letter (there appears to be no question 1):

"2. In your internal review, you referred to contracts being changed regularly. Is the practice saying that, once a contract has been amended or superseded it will get rid of the previous version of the document?"

3. Has the Practice carried out any searches to confirm it that it does not hold any previous copies (e.g. were backup copies saved on staff computers?)

4. If yes, could you provide some details about how the searches were carried out (e.g. which paper files were searched, were keywords used to filter email/documents etc.

5. Are there any other explanations which the practice wishes to put forward as to why it does not or should not be expected to hold the requested information?"

21. The reply of the Surgery appears to have been made by email on 3 June 2019 (page 60 of the bundle). Whilst the author is not apparent, it seems likely that this was sent by the Practice Manager, who attached all the emails and responses that had passed between the Surgery and the Appellant. She said that the Surgery had sent him everything that it had, and that if he asked for something that it did not have, as was the case, he was informed where he would possibly get a copy. She went on to say that the surgery did not always get full copies of contracts, and that if something was going to stay the same over the New Year than they would use the previous year's contract copy, which she had tried to explain. She went on to say that not only had she emailed the Appellant but so had the senior doctor.

22. On 13 June 2019 a phone call took place between (the Tribunal assumes) the ICO caseworker, and the Practice Manager. A note of that phone call is at page 64 the bundle, and records how an explanation was given that the contract was updated regularly and that new copies were not normally provided, only updates were. There was a new contract provided in 2015 and 2019, so older copies were no longer held as they served no purpose. The note continues that the caseworker had confirmed with the Surgery that it had nevertheless searched for older copies of the contract without success. It had been suggested by the Surgery that it may be possible to contact other surgeries to obtain these documents, but the caseworker had advised that this was not necessary.

23. On 3 July 2019 the Appellant wrote further (page 65 of the bundle) to the ICO, responding apparently to an email from the ICO on 30 May 2019, which does not appear to be in the bundle and the contents of which are unknown to the Tribunal. In this email the Appellant sets out his responses in five starred sections. In the first he simply reiterates breach of the 20-working day response rule. In the second and third he records the email exchange and the various documents that he received in this process. In the fourth he reiterated the terms of his FOI request, and how this had covered not just the information in blank contracts but also in contracts that had been processed, i.e. been filled in with relevant information, but that the Surgery had failed to provide a copy of all this within the scope of his request, or to issue a refusal notice. In his fifth point he referred to the Records Retention policy, and how non-NHS contracts would fall within the scope of his request.

24. He went on to say this:

“Other reasons I do not have full confidence that Parbold Surgery have provided me with the information they held, fitting scope of my FOI, so due to some of Parbold Surgery comments in their emails - which give the impression they were unaware of their FOIA obligations, in respect of my FOI, and also that they they (sic) did not have the confidence to properly deal with an FOI for example their 18/08/18 email documents do not, so it appears, scope of FOI namely-

*Records Retention.doc
Complaints procedure.doc
COMPLAINTS LEAFLET 2018.doc
Blame free culture.doc
Being Open Policy.doc
2009 – 2013 information.docx*

The Appellant concluded by apologising delay in responding to the ICO sooner. The six documents that the appellant refers to in this document appear to be included in the bundle as follows:

Records Retention.doc	pages 73 – 75,76 – 79,80 - 82
Complaints procedure.doc	pages 216 - 219
COMPLAINTS LEAFLET 2018.doc	pages 215 - 215
Blame free culture.doc	pages 212 - 213
Being Open Policy.doc	pages 206 – 211

In relation the “2009 – 2013 information.docx” referred to, the Tribunal was unclear precisely when and how this has been obtained, but nothing turns upon this.

25. The Information Commissioner then on 5 July 2019 sent both parties the Decision Notice (pages 67 and 68 of the bundle).

The Submissions - written.

26. In the response of the Information Commissioner reference is made to the test to be applied by a Tribunal in determining whether a public authority at the time of the relevant request held the requested information. Caselaw is cited in support of the contention that this issue is to be determined on the balance of probabilities (*Bromley v I C and the Environment Agency EA/2006/0072*). Further the Commissioner relies upon other decisions in support of the contention that she was entitled to accept at face value the response of the relevant public authority, particularly when there was no apparent motive to withhold the requested information, and nothing to suggest that there was any attempt to mislead the requester or the Commissioner. Further the submission is made that the issue for the Commissioner, and hence the Tribunal, is not what information should have been recorded and retained, but what actually was. Reference is made to the Decision of the FTT in *Councillor Jeremy Clyne v IC and London Borough of Lambeth EA/2011/0190* to that effect.

27. Whilst the suggestion was made in the Decision Notice that the Appellant's belief that further information was indeed held may have been based on his interpretation of the Record Retention policy, this is in fact not pursued in the response to the appeal, in which ultimately the Commissioner invites this Tribunal to hold that she came to a perfectly reasonable and lawful conclusion that this Tribunal should not overturn. If, however the Tribunal were minded allowing the appeal, the Commissioner invites the tribunal to specify what steps the surgery should be required to take as the basis for a substituted Decision Notice.

28. In his reply dated 26 September 2019 the Appellant focuses upon the reference in the Decision Notice to the Records Retention policy, and the reference in it to non-NHS contracts. He submits that they would fall within the scope of his request in any event, points out that the Commissioner does not state whether the surgery has explained why they did not hold non-NHS contracts in their records as the retention policy would require.

The Submissions - in the hearing.

29. Only the Appellant took part in the oral hearing. He produced a Skeleton Argument dated 29 January 2020 in which he set out his arguments. He took the Tribunal through this document, and the pages in the bundle referred to, and reiterated his arguments.

30. In particular, the Appellant makes much of the "Records Retention.doc" document which had been provided to the Appellant on 26 June 2018 as an attachment to an email of that date, which the Appellant has produced as "Appendix A". That document is generic, in that it expressly states that the policy applies to "England", and specifies that "Contracts" shall be retained for 6 years. He compares this with the Records Retention document at pages 80 to 82 of the bundle, which is headed "The Surgery 4 The Green Parbold Wigan WN8 7DN", in which (at page 81 of the bundle) the entry refers to "Contracts (non- NHS)", and provides a period of 6 years.

31. The Appellant goes on to refer to the note of a telephone call in the course of the investigation by the ICO on 13 June 2019 (page 64 of the bundle), in which the representative of the Surgery explained to the ICO that the contract in question was updated regularly, and new copies were not normally provided, only updates were. The last contract had been in 2015, and older copies were not retained.

32. When asked specifically by the Judge whether he was contending that the Surgery was deliberately concealing the requested information for some improper motive, he candidly replied that he was not making such an assertion. He went on to say that the information that was provided was very good, and he was not saying that there was any motive for the Surgery not providing the information requested.

Discussion and Findings.

33. The central issue, is, of course, whether the Commissioner was entitled to find that the assertion by the Surgery that it did not hold the requested information was, on the balance of probabilities, correct. We consider that she was. The explanation given as to the reasons why contracts would not be retained is a plausible one, and the Appellant has produced no evidence or argument to suggest why this is not so. Further we also consider that on the basis of the caselaw cited in the response (Councillor Jeremy Clyne v IC and London Borough of Lambeth EA/2011/0190 and Oates v Information Commissioner and Architects Registration Board EA/2011/0138) the Commissioner was entitled to rely upon at face value the response of the public authority. The Appellant has not suggested any motive on the part of the surgery to withhold this information, and if anything has rather questioned its competence, rather than its good faith.

34. In relation to the Records Retention policy, this has become something of a red herring. Its potential relevance would be to suggest that a public authority would be likely to retain information that its retention policies required. In the Councillor Jeremy Clyne case cited, the Tribunal did go on to consider the absence of any explanation from the public authority that satisfied it that no recorded information was generated, nor as to why, if it was, it was not retained (para. 38 of the Decision). That, however, is not the case here. An explanation has been given to the ICO, in the telephone discussion at page 64 of the bundle.

35. The Appellant has made the point that non-NHS contracts under this policy should be retained for a period of six years. Whilst his reply to the Commissioner's response says that non-NHS contracts would fall within the scope of his request, that is clearly not the case. His request of 23 May 2018. Information in relation to all the contracts that the surgery had with "the commissioners of the services" that it provided. The commissioning of services would be in the view of the Tribunal an NHS matter, consequently that would be an NHS contract. NHS contracts are not covered by Records Retention policy.

36. These findings in essence dispose of this appeal, but there remains one issue upon which the Tribunal is required to give further consideration. The Decision Notice should in any event make reference to what appears to be an undisputed fact that the public authority did not respond to the request within the specified period of 20 working days. It tried to do so, but the 2013 enhanced Service Contract document, which fell within the Appellant's request, and which the Surgery purported to send as an attachment to its email of 24 May 2018, was not actually attached to it, and was only actually sent to the Appellant on 30 July 2018 (pages 31 to 32 of the bundle). This is not dealt with in the Decision Notice at all, and the question therefore arises as to whether this Tribunal should in its Decision, to this limited extent, substitute a Decision Notice that reflects this default. The Tribunal's view is that it should.

Signed:

A handwritten signature in black ink, appearing to be 'R. M. B.', written in a cursive style.

Judge of the First-tier Tribunal

Dated: 20 March 2020

Promulgated Date: 25 March 2020