IN THE UPPER TRIBUNAL **Appeal No: GIA/465/2018**

ADMINISTRATIVE APPEALS CHAMBER

Before: Upper Tribunal Judge Wright

DECISION

The Upper Tribunal dismisses the appeal of the appellant.

The decision of the First-tier Tribunal of 7 August 2017 under reference EA/2017/0031 did not involve any error on a material point of law and is therefore not set aside.

Representation: Mr Adedeji represented himself.

Peter Lockley of counsel represented the Information Commissioner.

REASONS FOR DECISION

Introduction and background

1. In summary, this appeal concerns a request Mr Adedeji made to the Dicconson Group Practice in Wigan ("the Practice") under the Freedom of Information Act 2000 ("FOIA") on 16 April 2016. He was unhappy with the Practice's response to his request but his complaint about this was dismissed by the Information Commissioner ("the ICO"). Mr Adedeji appealed against the Information Commissioner's decision notice to the First-tier Tribunal ("the tribunal") but on 7 August 2017 it dismissed his appeal. Both the ICO and the tribunal concluded, in effect, that the information which had been requested was not held by the Practice and so could not be disclosed by it.

2. (Although it does not matter for the purposes of this decision, as I understand it the Practice was not the "public authority" for the purposes of FOIA. Each individual GP is a 'public authority', but in this case the Practice handled freedom of information requests on behalf of its GPs.)

3. To understand the background to the request I need do no more than set out what the tribunal said.

> "1. The appellant, Mr Adedeji, is a BME male. He suffers from a number of disabling mental health issues and experiences intense fears and severe anxiety. He was a patient of the Dicconson Group Practice in Wigan from August 1987 until 6 September 2011.
>
> 2. On 3 August 2009 Mr Adedeji and his support worker attended a consultation with a GP at the Practice. He was very unhappy with the way he was treated by the GP during the consultation and in particular with her reaction when he said he had been the victim of racial abuse. As a consequence he made a formal complaint to the Ashton Leigh and Wigan Primary Care Trust on 29 January 2010. On 16 June 2010 the GP in question wrote him a long letter of explanation and apology.
>
> 3. Mr Adedeji remains dissatisfied with the way he has been treated by the Dicconson Group Practice and with the way his complaint has been dealt with."

4. The request Mr Adedeji made to the Practice on 16 April 2016 was as follows.

> "Please inform me whether or not you hold the following information:
>
> 1. What are the ways a GP should respond when their patient informs them that they have been harmed as a result of being racially abused.
>
> 2. What are the signs and symptoms that mean the patient might be likely to have been harmed as a result of being racially abused.
>
> 3. What environment is best suited for a patient to be asked relevant questions to help them disclose their past or current experiences of racial abuse to their GP.
>
> 4. What steps can the whole GP practice team (clinical and non-clinical) take to make it easier for patients to disclose that they have been a victim of racial abuse.

> If you hold the requested information please be so kind as to send me a copy."

5. As the First-tier Tribunal noted, the Practice responded to the request, on 12 May 2016, by saying it did not hold the "policies to cover these specific requests". Mr Adedeji responded to this the next day by telling the Practice he had not sought 'policies' but 'recorded information'. The Practice further responded, on 18 May 2016, saying it did not hold any of the information "as per your request". The ICO, in her decision notice of 26 January 2017 on Mr Adedeji's complaint about the Practice's response to his request, held, on the balance of probabilities, in summary that the Practice did not hold the information that had been requested by Mr Adedeji. A central consideration was, and is, what was the scope of Mr Adedeji's request.

6. The First-tier Tribunal set out its 'Conclusions' on Mr Adedeji's appeal as follows.

> "8. We have seen nothing that causes us to doubt the [ICO's] conclusion that the Practice did not hold any information coming within the request.
>
> 9. We agree with the [ICO] that it was entirely reasonable, given its terms, for the Practice to interpret the request as one seeking general policies (or protocols or written guidance) and to state they did not hold any "policies" covering the request in their initial reply. Although Mr Adedeji referred us to public policies covering, for example, how doctors should deal with victims of domestic abuse, he was not able to point to any public policy which covered victims of racial abuse or required GP practices to develop such policies. Nor was he able to persuade us that his own experience must have given rise to internal recorded information covering the matters set out in the request.
>
> 10. In the circumstances, we unanimously uphold the [ICO's] conclusion and dismiss the appeal."

7. Having held a hearing in Manchester at which Mr Adedeji attended but the ICO did not, I gave him permission to appeal on the following grounds.

> "1. I give permission to appeal because in my judgment it is arguable with a realistic prospect of success that the First-tier Tribunal

erred in law in failing to give adequate reasons for its decision, including making findings of fact on the evidence before it in respect of the issues raised by the appeal.

2. The reasoning of the First-tier Tribunal is short and arguably does not show the analysis the First-tier Tribunal took of the evidence before it on the issues arising on the appeal. In particular, as Mr Adedeji focused his arguments on at the oral hearing before me on 25 June 2018, it is arguable that the First-tier Tribunal's reasoning and fact-finding does not satisfactorily address whether the public authority may have held information, as opposed to policies, as to the "signs and symptoms that mean [a] patient might be likely to have been harmed as a result of being racially abused".

3. Mr Adedeji's request for information under section 1 of the Freedom of Information Act 2000 ("FOIA") was made in an email to the Disconsin Group Practice ("DGP") on 16 April 2016 (see pages 300-301 of the First-tier Tribunal appeal bundle). A response was made by DGP on 12 May 2016 (page 300 of the FtT appeal bundle) in which it said that it did "not hold policies to cover these specific requests". However, in a further email, dated 13 May 2016, Mr Adedeji arguably sought to clarify his request by saying he was seeking recorded information and not policies (page 302). In its email reply of 18 May 2016, the DGP said it did not hold information as per Mr Adedeji's request (page 302). That arguably meant DGP was saying it did not hold either policies or any other recorded information within the scope of Mr Adedeji's request.

4. The Information Commissioner's *Decision Notice* of 26 January 2017 appears to have proceeded on the basis that the information request covered both policies and any other recorded information: see in particular paragraph 19 of that *Decision Notice*.

5. An argument then arose on the appeal to the First-tier Tribunal as to whether the request was for policies only. Detailed written submissions were made by both parties to the First-tier Tribunal on this issue. There may also have been an issue as to whether the *Decision Notice* had proceeded for the purposes of section 1 of FOIA on the basis that the request was only (or had reasonably been construed by DGP as only being) for policies.

6. It is arguable that the First-tier Tribunal's reasoning (including fact-finding) on this area of dispute before it was inadequate. Agreeing with the Information Commissioner that it was reasonable for the DGP to interpret the request as one seeking general policies (only), arguably is no more than a statement of conclusion and arguably fails to address (a) Mr Adedeji's arguments to the contrary in his written grounds of appeal, (b) the DGP's email of 18 May 2016, and (c) whether the *Decision Notice* proceeded on such a basis.

7. Further and in the alternative, the First-tier Tribunal arguably appears to have gone on to consider, in its final sentence in paragraph 9 of its reasoning, whether other recorded information was held by the DGP falling within the scope of Mr Adedeji's request. However, insofar as it has done so it is arguable that the reasoning on this issue does not

> provide any adequate explanation for why the First-tier Tribunal concluded on the evidence before it that the DGP did not in fact hold such recorded information. Again, the reasoning here is arguably little more than a statement of the tribunal's conclusion on this issue."

8. I then held an oral hearing of the appeal at which the representation was as set out above. I apologise for the lengthy time it has taken me to commit my decision to writing since that hearing.

9. The ICO concedes in respect of the first ground of appeal – on the adequacy of the First-tier Tribunal's reasoning on whether the relevant request was for 'policies' - that the First-tier Tribunal's reasoning was brief, as it was. However, she argues that seen in context "it was adequate to the task before the [First-tier Tribunal]", which was to determine the scope of the Request, explain itself in enough detail that (1), the Appellant understood why he lost and (2) the appellate court could assess whether the determination was sustainable – see [*Re F (Children)* [2016] EWCA Civ 546; at paragraph [22]]. The important context here is the ICO's decision notice and her submissions responding to Mr Adedeji's appeal to the First-tier Tribunal. In effect, the ICO's case is that the First-tier Tribunal's reasons have to be read with the ICO's case before it, with which it agreed, and when so read the tribunal's reasons were adequate.

10. With some reluctance, I agree. My reluctance stems from the fact that in my judgment the First-tier Tribunal could, and probably should, have done more to show that it had addressed all the arguments and evidence before it (see, for example, albeit in a different context *CP v The Information Commissioner* [2016] UKUT 0427 (AAC)) and set out more clearly (and in or detail) than it did its conclusions and findings as to the nature of the request made by Mr Adedeji. The danger of a First-tier Tribunal decision founded on a statement such as "We do not disagree with the Information Commissioner's decision" is that it may give rise to a perception of rubber-stamping, rather than testing, of the ICO's decision by the First-tier Tribunal. However, I am

persuaded by Mr Lockley's arguments on behalf of the ICO that that was not the case here.

11. The ICO argues in relation to the second ground of appeal – concerning the final sentence in paragraph 9 of the First-tier Tribunal's decision – that the First-tier Tribunal was not in that sentence contemplating an alternative in interpretation of the 16 April 2016 request as being for information instead of, or in addition to, policies. I agree.

12. Lastly, the ICO argues that in any event the 16 April 2016 request on any objective assessment as to its scope or meaning was one for policies only. She argues from this that even if the First-tier Tribunal's reasoning on this issue was inadequate and on that ground its decision merited being set aside, the Upper Tribunal should redecide the first instance appeal to the same effect. Its seems to me that the force of this argument can go equally, or even more so, to the issue of whether the First-tier Tribunal committed a material error of law in arriving at the decision which it did.

Relevant law

13. Section 1(1) and (5) of FOIA provide as follows:

> "**General right of access to information held by public authorities.**
>
> 1(1)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.
>
> (5)A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b)."
> (the underlining is mine and has been added for emphasis)

14. The time within which a request for information is to be dealt with by a public authority is addressed in section 10(1) of FOIA. It is in the following terms.

> "**Time for compliance with request**.
>
> 10(1)Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

15. Sections 1 and 10 appear in Part I of FOIA. Complaints about the discharge by a public authority of its functions under Part I of FOIA and the ICO's duties on such complaints are covered by section 50 of FOIA, which is in the following terms:

> "**Application for decision by Commissioner**.
>
> 50(1)Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.
>
> (2)On receiving an application under this section, the Commissioner shall make a decision unless it appears to him—
>
> (a)that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45,
> (b)that there has been undue delay in making the application,
> (c)that the application is frivolous or vexatious, or
> (d)that the application has been withdrawn or abandoned.
>
> (3)Where the Commissioner has received an application under this section, he shall either—
>
> (a)notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or
> (b)serve notice of his decision (in this Act referred to as a "decision notice") on the complainant and the public authority.
>
> (4)Where the Commissioner decides that a public authority—
>
> (a)has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or
> (b)has failed to comply with any of the requirements of sections 11 and 17,

> the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.
>
> (5)A decision notice must contain particulars of the right of appeal conferred by section 57.
>
> (6)Where a decision notice requires steps to be taken by the public authority within a specified period, the time specified in the notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, no step which is affected by the appeal need be taken pending the determination or withdrawal of the appeal.
>
> (7)This section has effect subject to section 53"
>
> (Section 53 has no relevance to this appeal.)

16. Appeals are dealt with in sections 57 and 58 of FOIA. The relevant parts of those sections are as follows:

> "**Appeal against notices served under Part IV**.
>
> 57(1)Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.
>
> (2)A public authority on which an information notice or an enforcement notice has been served by the Commissioner may appeal to the Tribunal against the notice.....
>
> **Determination of appeals**.
>
> 58(1)If on an appeal under section 57 the Tribunal considers—
>
> (a)that the notice against which the appeal is brought is not in accordance with the law, or
> (b)to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
>
> the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
>
> (2)On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

Ground 1 – reasoning on scope of request

17. At the core of Mr Adedeji's critique of the First-tier Tribunal's decision was that it failed to address, or address sufficiently, whether the Practice held information, as opposed to *policies*, falling under any of the heads in his request of 16 April 2016. However, as the ICO correctly argued, the logically prior issue is the correct interpretation of the scope of the request that Mr Adedeji made on 16 April 2016. This follows from the words I underlined above in section 1(1)(a) of FOIA – "information *of the description* specified in the request" (my emphasis again). If the request of 16 April 2016 was correctly interpreted by the First-tier Tribunal as being for 'policies' only (and not 'information') covering the four areas identified by Mr Adedeji in that request then the issue of what information the Practice held (as opposed to policies) did not arise before that tribunal and it could not therefore be criticised for failing to address in its fact-finding and reasoning a matter that was not in issue before it. Allied to this is then the issue of whether the First-tier Tribunal adequately reasoned out its conclusion on the scope of the request.

18. The ICO's argument was that First-tier Tribunal had been to correct to hold that the scope of the 16 April 2016 request was for policies only and, thereafter, had been entitled to conclude on the evidence before it that the Practice did not hold any policies covering any of the matters that Mr Adedeji had requested on 16 April 2016. Accordingly, per section 58(1)(a) of FOIA, the ICO's decision notice of 26 January 2017 was 'in accordance with the law' because, per section 1 of FOIA, the public authority had correctly interpreted and addressed Mr Adedeji's request of 16 April 2016.

19. There can be no doubt that the correct scope of the request was a matter which was in issue before the First-tier Tribunal. This is evident from paragraph 26 of the ICO's response of 28 March 2017 to Mr Adedeji's grounds of appeal to the First-tier Tribunal, where, in short, the ICO said that "the Request can only be understood as a request

for policies". It arose as an issue in any event because the Practice had told the ICO in the course of her investigation on Mr Adedeji's complaint that it had construed the 16 April 2016 request as being for "all recorded policies held by [the Practice] concerning how a GP or nurse is to respond to a patient complaining of racial abuse". Moreover, both Mr Adedeji's response to the Practice of 13 May 2016 (see paragraph 5 above) and his reply of 11 April 2017 to the ICO's response on his appeal to the First-tier Tribunal contested that the 16 April 2016 request was to be correctly construed as for policies only.

20. As can been seen from paragraph six above, the First-tier Tribunal concluded, in agreement with the ICO, that the 16 April 2016 request was for policies. It then went on to decide, in effect, that the Practice did not hold any information falling within the scope of that request (i.e. policies addressing the matters Mr Adedeji had asked about on 16 April 2016). And as the ICO has pointed out, Mr Adedeji does not have permission to argue before the Upper Tribunal that the First-tier Tribunal had been wrong to hold that the Practice did not hold such information. Was the First-tier Tribunal's reasoning adequate, however, on why neither the ICO nor the Practice had erred in construing the request to be for policies? In my view, I am (just) persuaded that, in context it, was adequate. The context was as follows.

21. First, as already noted, the First-tier Tribunal expressly agreed with the ICO's view that the request was for 'policies'. That view was set out in the ICO's submission to the First-tier Tribunal as well as her decision notice on Mr Adedeji's complaint. Both of these documents of the ICO contained reasoning explaining why the 16 April 2016 request was properly construed by the Practice as being for <u>policies</u> it held relevant to the four areas identified in the request. By agreeing with the ICO the First-tier Tribunal was in my view also agreeing with and adopting the ICO's reasoning. One aspect of that reasoning was the following:

> "….the Commissioner considers that the Request can only be understood as a request for policies. Each of the four limbs of the request refers to information what would give guidance to GPs and other staff in relation to certain generic issues: limbs (1) and (4) do so explicitly, while limb (2) implies that GPs should look out for the signs and symptoms mentioned, and (3) that they should create the sort of environment mentioned. Guidance on how to act in certain circumstances is the definition of what a 'policy' is. In other words, if there were any information answering the terms of the Request, it would have the status of a policy. It was therefore reasonable to limit the search to one for policies and protocols." (paragraph 26 of the ICO's response to Mr Adedeji's appeal to the First-tier Tribunal)

22. Second, although Mr Adedeji in his reply email to the Practice of 13 May 2016 said that his request of 16 April 2016 was not for policies but was for recorded information, beyond that assertion he did not then, nor has he really at any stage since (including at both hearings before me), provided any argument about why the 16 April 2016 request could not reasonably be construed as one seeking policies. (At the hearings before me he founded mainly on seeking to argue that the Practice must have held information falling within his request, whatever its breadth.)

23. The closest Mr Adedeji came to making such an argument was in his complaint to the ICO. In the course of that complaint the ICO's official, in a letter dated 18 August 2016 to Mr Adedeji, said that "[f]rom the information you have provided, the information you are seeking is the type of information you would expect to see in a policy document the public authority might produce as a guideline for staff to refer to in particular circumstances". In an email response to this by Mr Adedeji of 25 August 2016 he said that it was "important to point out that [the 16 April 2016] information I requested is to be seen in various types and not solely in a policy document [the Practice] *might produce as a guideline for staff to refer to in particular circumstances* as your 18/08/16 [letter] states". Mr Adedeji said he knew this because since the ICO's 18 August 2016 response to his complaint he had done some searching on the internet and had identified a "wealth of information published for NHS [GPs] [to] use on a whole range of topics, including abuse, by such organisations as the Royal College of General Practitioners…..". I agree

with the ICO that, although Mr Adedeji was here drawing a distinction between policies produced by the Practice and information produced by other bodies, this does not undermine the perspective that what the request was seeking was policies/guidance produced by someone on the four areas raised in the request, and which the Practice held. Nothing in Mr Adedeji's email of 25 August 2016 provides an argument that the request was not reasonably to be construed as one for policies held by the Practice.

24. Moreover, on analysis there was no argument in Mr Adedeji's grounds of appeal to the First-tier Tribunal as to why the scope of the request had been wrongly construed by the Practice. The appeal grounds asserted that the request was for information instead of policies but beyond this assertion did not advance any argument contesting the argument of the ICO about the scope of the request set out in paragraph 21 above. The First-tier Tribunal's very pithy statement that it had "seen nothing" to lead it to doubt the ICO's conclusion was therefore in my judgment both correct and, in this context, an adequate explanation for why it had found on this point against Mr Adedeji.

25. I note that at points in his grounds of appeal to the First-tier Tribunal Mr Adedeji referred to records of, and correspondence relating to, his experiences held by the Practice whilst he was one of its patients. That does not affect the first ground of appeal. If the point Mr Adedeji was seeking to make by reference to this evidence is that it was information held falling within the request, it does not address the scope of the request as properly construed and does not go to adequacy of the First-tier Tribunal's reasons on that scope issue. Nor is it evident how such individualised and personal information came within 'policies' the Practice had construed his request as seeking. And insofar as Mr Adedeji's argument was that his experiences ought to have led the Practice to formulate policies, that was addressed and

rejected by the First-tier Tribunal in the final sentence of paragraph 9 in its decision.

26. As for the Practice's email of 18 May 2016, I would now accept, on reflection and having heard argument about it, that the most natural reading of it is that it was simply confirming the Practice's earlier answer of 12 May 2016 that it held no relevant policies. The email in full read:

> "Dear Mr Adedeji,
>
> I am replying to your email of 13 May 2016 with reference to my response dated 12 May 2016.
>
> I confirm we do not hold information as per your request and am also aware we are not obliged to provide additional information but we felt this would be useful to you in order to put the response in context.
>
> Kind regards
>
> [The Practice]" (the underlining is mine and has been added for emphasis)

The closing words in this email refer to further information the Practice provided to Mr Adedeji in its 12 May 2016 email about a GP listening to concerns raised by any patient. Those words do not affect the issue I am here addressing. However, the words I have underlined in the Practice's email of 18 May 2016 are words of confirmation about the prior request and, although the word 'information' is used that has to be read with the words which follow it "as per your request". The wording does not show that the Practice had reread the 12 May 2016 request as being for information other than policies or that on an objective reading the request was for information other than policies.

27. Lastly under ground one, I am satisfied that read properly in context the ICO's decision notice which had rejected Mr Adedeji's complaint did not proceed on the basis that the 16 April 2016 request was wider than a request for policies. To start with, it is plain from paragraphs

thirteen to sixteen of the decision notice that the ICO found the Practice had met its FOIA duties in respect of the request made to it by Mr Adedeji because that request was for policies relating to the four areas identified in the request and such policies were not held by the Practice. The paragraph 19 of the decision notice that troubled me when giving permission to appeal, although elliptically and perhaps unfortunately worded, was dealing with the separate and different matter of whether the Practice had been in breach of section 10 of FOIA when it responded to the request on 12 May 2016. In context, I accept that the (somewhat confusing) language used in paragraph nineteen of the decision notice was seeking to explain that the request made on 16 April 2016 had been answered **in full** by the Practice on 12 May 2016, and thus section 10 had been complied with. The reference in paragraph nineteen of the ICO's decision notice to the Practice's email of 18 May 2016 confirming its 12 May response underscores this reading.

28. It is possible that more could have been done at the time of the 16 April 2016 request to clarify its scope, but whether the Practice breached section 16 of FOIA is not an issue on this appeal.

<u>Ground 2 – whether First-tier Tribunal also considered whether information other than policies held – final sentence in paragraph 9 of decision</u>

29. Given my views on the first ground of appeal, and read in the context of the tribunal's reasoning as a whole, I now accept that this ground of appeal was based on a flawed premise that the last sentence in paragraph nine of the decision shows the Fist-tier Tribunal was adjudicating upon whether information *other* than policies was held by the Practice. The important context, to which I perhaps did not have sufficient regard when giving permission to appeal, is that the First-tier Tribunal had clearly decided that the request was only for policies. (Ground 1 is not a dispute about the fact or soundness of that decision or its rationality but the adequacy the reasoning explaining it.) In that circumstance, it could have made no sense for the First-

tier Tribunal to go on to consider whether the Practice held information which it had not been requested to disclose.

30. The better and contextually more appropriate reading of the final sentence in paragraph nine is (see paragraph 25 above) that the First-tier Tribunal had not been persuaded by Mr Adedeji that his own experiences had led the Practice to draw up "internal recorded information covering the matters set out in the request", which given its finding as to the scope of the request can only have meant recorded *policies*. I readily concede, however, that the First-tier Tribunal could have done a better job to explain this.

31. Given my conclusions under the two grounds of appeal for which permission to appeal has been granted, I do not need to address the ICO's alternative argument set out in paragraph 12 above. Had I set aside the First-tier Tribunal's decision for want of adequate reasons, I merely record that I can see considerable force in the ICO's argument that the request only admitted of one meaning as to its scope.

Conclusion

32. For the reasons given above this appeal by Mr Adedeji is dismissed and the First-tier Tribunals decision upholding the ICO's decision notice of 26 January 2017 is upheld.

Signed (on the original) Stewart Wright
Judge of the Upper Tribunal

Dated 10th October 2019