



IN THE FIRST-TIER TRIBUNAL

Case No. **Appeal No. EA/2013/0260**

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice No: FS50504557

Dated 30th September 2013

BETWEEN

Mr Narinder Singh Chadha

Appellant

And

The Information Commissioner

Respondent

Determined on 10th June 2014 at Willesden County Court

Date of Decision 11th July 2014

BEFORE

Fiona Henderson (Judge)

Melanie Howard

And

Rosalind Tatam

Subject matter: FOIA– s14(1) (Vexatious request) and

s 12(1) of FOIA (Appropriate costs limit)

s 16 (1) (Duty to provide advice and assistance)

Case Law: Information commissioner v Devon CC and Dransfield [2012] UKUT 440 (AAC)

Decision: The Appeal is allowed

IN THE FIRST-TIER TRIBUNAL

Case No. Appeal No. EA/2013/0260

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

SUBSTITUTED DECISION NOTICE

Dated: 11th July 2014

Public authority: Hillingdon Hospitals NHS Foundation Trust

Address of Public Authority: Corporate Governance Department, Hillingdon Hospital,
Pield Heath Road, Uxbridge, Middlesex UB8 9XF.

Name of Complainant: Mr Narinder Singh Chadha

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 30 September 2014.

Action Required

The requested information should be supplied to the Appellant, subject to any relevant statutory exemptions, within 31 days of notice of this substituted Decision Notice.

Fiona Henderson
Tribunal Judge

REASONS FOR DECISION

Introduction

1. Mr Chadha's wife has been a patient at Hillingdon Hospital and Mr Chadha has significant concerns relating to the care that she received there. As a result of this experience he told the Tribunal that he has become concerned about the level of care being given to all patients at the Hospital. He wrote to Hillingdon Hospitals NHS Foundation Trust (the Trust) on 18th October 2012 asking for information about complaints made to the Trust in relation to Emergency Care treatment and General medicine including the names, numbers and outcomes of any cases in the Courts, Tribunals, GMC or before the Health Ombudsman and for a comparison in relation to the national average reported by NHS from 2008 onwards. This was the 13th supplementary piece of correspondence from the Appellant to the Trust in a series dating back to an original information request dated 5th May 2012. The Trust categorised this as the 9th information request in 6 months. Additionally the Appellant had been in correspondence with the Complaints Manager, Claims and Litigation Manager and Assistant Director Corporate Governance in relation to his wife's care.
2. On 29th October 2012, the Trust refused to comply with the request citing the exemption under s14 FOIA (vexatious request). Following the involvement of the ICO the Trust completed an internal review which upheld the original position.¹
3. Mr Chadha complained to the Commissioner. Following an investigation the Commissioner issued a decision notice dated 30th September 2013 which concluded that the Trust had applied s14(1) FOIA correctly. Mr Chadha appealed to the Tribunal on 27.11.13 setting out some background to his request and arguing that:
 - a) his requests were not obsessive as of the previous communications only 2 of these were information requests, the rest were chasers, and that "vexation by drift" was not therefore made out.
 - b) Any burden or disruption to the Trust was caused by the Trust's failure to deal with the requests appropriately and that the Commissioner was not in a position to say whether compliance would cause a significant burden.
 - c) There was a serious purpose behind the requests.
4. The Trust did not apply to join and the case was listed for an oral hearing to enable Mr Chadha to put forward his arguments in person, the Commissioner relied upon his decision notice and reply to the Grounds of Appeal and did not attend the oral hearing. The Tribunal had regard to an agreed open bundle of documents comprising some 99 pages. Mr Chadha also submitted some additional documentation at the hearing relating to his formal complaint with the Trust in relation to his wife's care to refute the suggestion that he had refused to make a formal complaint.

The Law

¹Dated 27th June 2013.

5. S14 -(1) provides that “*Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious*”.
6. The meaning of vexatious is not defined within the statute, however, it has recently been considered by the Upper Tribunal in *Information Commissioner v Devon CC and Dransfield [2012] UKUT 440 (AAC)*. In that case the Judge agreed that “vexatious” carries its “*ordinary, natural meaning within the particular statutory context of FOIA*.”². He adopts a purposive approach and stated that:
“...whether the request is likely to cause distress, disruption or irritation without any proper or justified cause” provides a useful starting point, so long as the emphasis is on the issue of justification (or not).³
- He recommends a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and especially where there is a previous course of dealings, the lack of proportionality that typically characterises vexatious requests. We adopt this approach.
7. In Dransfield the Judge identified four broad issues or themes⁴ to assist in assessing whether a request was vexatious. These are not a checklist and are not applied as such by us but are used as a framework for weighing the evidence. The headings are:
 - i) The burden (on the public authority and its staff).
 - ii) Breadth.
 - iii) The motive (of the requester).
 - iv) The value or serious purpose (of the request).
8. When assessing these factors the Tribunal has kept in mind s12(1) of FOIA which provides:
Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

and s 16(1) of FOIA which provides:

It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

The Facts

9. The Tribunal agrees with the Commissioner that it is appropriate to consider previous dealings between Mr Chadha and the Trust and has had regard to the chain of correspondence between the Trust and Mr Chadha starting on 3.5.12 and concluding with the information request that is the subject of the appeal. From this we are satisfied that the Trust has not treated the request objectively and has made unjustified assumptions in its interpretation of the original information request. The initial request was:
“ We want information relating to complaint⁵ against the Hillingdon Hospital from January 2008 to date in relation to A and E, the rest of the Hospital and all head injury complaints.”

² Paragraph 24 the emphasis appears in the judgment.

³ Paragraph 26

⁴ paragraph 28 et seq

There was no definition of what he meant by the term “information” from Mr Chadha. This was interpreted by the hospital as meaning numbers, they did not seek clarification under s1(3) FOIA⁶ and Mr Chadha was supplied with the numbers of complaints from A and E and the rest of the hospital but was told “*the system used to record complaints does not include a field for head injuries and therefore we are unable to extract this specific information*”⁷.

10. This approach was also evident in other responses from the Trust (e.g. 20.7.12 and their letter of 14.8.12 where they reworded the request to include the assertion that he was asking “how many” complaints were logged when that was not an accurate representation of his request). We find that treating this request as a request for the number of complaints only was an assumption which unduly limited the response which, as became explicit in later correspondence (e.g letters 3 and 8), was a request for more detailed information.
11. Similarly the Trust has presumed that Mr Chadha is only interested in head injury or condition specific data when the terms of his correspondence are not so limited e.g. Mr Chadha in his 3rd letter asks:
“Please let us know how we can access these⁸ complaints.”
The Trust responded stating that under FOIA they are not expected to create information in response to requests and “*complaints are not recorded by condition and therefore it is impossible to provide data on specific condition – related requests*”.
The Trust ought to have clarified which complaints Mr Chadha was asking to access. We infer from their response that the Trust have proceeded on the basis that Mr Chadha’s third letter is limited to asking about access to head injury complaints when as is apparent from the chain of correspondence and made explicit in his subsequent letter he was asking for access to all complaints that came under the heading Clinical Treatment.
12. We are satisfied that the Trust has not sought clarification under s1(3) FOIA or offered assistance in keeping with its duty under s16(1) FOIA when it would have been reasonable to do so. For example Mr Chadha’s second letter asked: “*Please let us know how you classify these complaints.*” We are satisfied that this is a request for guidance to assist in refining the original request and not a true request for information. To us it is clear that the headings of classification were not the information required of itself but an attempt by Mr Chadha to identify how to frame his information request to obtain the information that he required. The duty of a public authority to offer advice and assistance is crucial in a case such as this because they know what information they hold, how it is recorded and how it can be retrieved. In the absence of this information Mr Chadha is having to guess at the internal filing system of the public authority in the hopes of stumbling across the right form of words to unlock the information he seeks.
13. The Trust has provided limited and incomplete information in response to the requests. The Trust’s answer to this second letter stated that they classified complaints: “*by subject, staff group, location and complexity. The Trust does not record specific conditions or injuries for instance, head injury would come under Clinical treatment*”.

⁵ sic

⁶ Where a public authority reasonably requires further information to identify and locate the information requested.

⁷ Letter dated 30.5.12

⁸ Emphasis added

The Tribunal has had regard to the Trust's response dated 9.8.12 to Mr Chadha's 9th letter in which it is apparent that the Trust's letter of 13.6.12 is incomplete as there are further classifications of:

- 5 staff groups
- 4 locations and
- 3 complexity indicators.

Even this response (of 9.8.12) is inadequate as from their response to his 11th letter of 22.8.12 it becomes apparent that there are 4 further classifications in relation to one of the 4 Locations.

14. Mr Chadha's 8th letter states that he wishes to view these complaints. We are satisfied that this is not a new element to the request but a restatement of the request of his first and third letters that was not fully answered by the Trust. The Trust's response that this was not possible because of Data protection, does not give any advice and assistance under s16 FOIA on what could be provided within the terms of the Act, or indicate whether they have considered redaction.
15. Although Mr Chadha's 10th and 11th letters (14.8.12 and 22.08.12) raise a fresh issue (asking for the name of the holders of various positions and their work addresses), the Tribunal considers this justified and to have arise out of the way that the Trust conducts itself. It is apparent from correspondence that the Trust has a policy of signing emails by title and not by name. It is not clear therefore who has written the letter and whether this is an individual that has already had some involvement or even whether it is the same correspondent. Mr Chadha told the Tribunal that he had letters returned as they had been sent to the wrong place and he was not sure who was responding to his letters. By way of example⁹ he stated that he could not tell from the internal review whether the person who completed it on behalf of the Trust really had had no prior involvement in his request because he did not know who the individual was. We consider this policy to lack transparency and to add an unnecessary layer of complexity to communications with the Trust. From the Trust's letter of 14.8.12 it is apparent that the Trust's assignment of responsibility is not easy for a lay person to follow e.g. the data protection officer is the "Assistant Director corporate Governance" who is "the Trust lead for Corporate Governance which includes Data Protection".

Analysis

The burden on the public authority and its staff.

16. The Trust argued before the Commissioner that 8 supplementary requests in 6 months related to the same subject was obsessive and argue that each response led to a further request in support of this. The Commissioner argued that the Trust has complied with all of the preceding requests up until the request of 18th October. This is material to the Tribunal's consideration of to what extent (if any) these requests were a burden (on the public authority and its staff). From the Tribunal's analysis of the correspondence as set out above the Tribunal is not satisfied that the Trust did answer the previous requests adequately and is satisfied that the Trust bears substantial responsibility for the level of correspondence. They did not provide advice and assistance under s16 when it would have been reasonable for them to have done so to enable Mr Chadha to formulate the request appropriately. They provided

⁹ Postdating the requests but illustrative of the problem and evident from the papers before us.

unhelpful and incomplete answers, made assumptions about the information being requested without reading the requests objectively or seeking clarification under s 1(3) FOIA. We are satisfied that this is the type of case envisaged in Dransfield “*if the public authority in question has consistently failed to deal appropriately with earlier requests, that may well militate against such a finding that the new request is vexatious*”.

17. The Commissioner argues that continuing to answer these requests would impose a significant burden on the public authority in terms of expense and distraction. The Trust have not quantified the work already done, the Tribunal has had regard to the amount and type of information supplied thus far and the internal review schedule of activity and does not accept that it is likely that the limited information provided thus far created a great deal of work being largely statistics and classifications and having come in the main from a single department. Although the Trust states that the information in the disputed request is not recorded centrally the Tribunal observes that some of the information would be expected to be reported back to the Trust from the complaints department or the legal department. The Trust have made this assertion as to the work required without being clear exactly what it is that the Appellant is seeking (p64 of the bundle). In our view it would be reasonable for the public authority to provide advice or guidance on how to narrow the request (s16(1) FOIA); failing which the costs limit under s12 FOIA might be invoked if applicable. We repeat our findings as set out above that much of that work was self created by their failure to deal with the request adequately in the first instance.

Breadth.

18. The Commissioner argues that it is highly likely that compliance with the material request would lead to further requests. In assessing the breadth of the requests we repeat our finding that this was a case where the public authority ought to have provided advice or guidance on how to narrow or clarify the request. The Tribunal does not consider it fair to categorise this correspondence as individual and supplementary information requests but rather an attempt by Mr Chadha to identify how to frame his information request to obtain the information that he required in the absence of assistance from the Trust. The fact that Mr Chadha also asked for information on a second topic (namely the names and contact addresses Trust officials) does not in our judgment constitute an unacceptable breadth, being again a clearly defined topic which arose out of the Trust’s use of titles rather than names in correspondence.
19. When looking at the pattern and timing of requests, we acknowledge that some of the correspondence takes place by return (however, the same can also be said at times for the Trust’s response). We do not consider that this comes into the category of bombardment of emails envisaged in Dransfield: 11 letters from Mr Chadha in relation to the FOIA request in 6 months (including clarifications and chasers) in the context of misinterpretation of his requests and incomplete information from the Trust, in our view is neither excessive nor inappropriate.

The motive of the requester.

20. From the content of the correspondence we are satisfied that his motive was to obtain the information he was seeking and not to cause disruption or harassment to the Trust. The Commissioner argued that this correspondence was “vexatiousness by drift” where an original and entirely reasonable request leads on to a series of further requests on allied topics, where such subsequent requests become increasingly distant from the requestors starting point. We

disagree. Dransfield acknowledges that there will be cases where disclosures are unclear or raise further questions that the requestor could not have foreseen. We are satisfied that this is the position in this case.

The value or serious purpose of the request.

21. This is an objective public interest. The Trust has amended its position and accepts Mr Chadha has a genuine concern about the care received by his wife and this is likely to have been a catalyst for the requests. The Commissioner accepts that the requests serve the serious purpose of promoting transparency and accountability in relation to complaints data pertaining to the operation of a public authority which is ultimately responsible for the care of ill and vulnerable individuals. However, the Tribunal must consider the question of timing (a serious purpose may diminish over time) and whether the matter has already been exhaustively considered. In his reply the Commissioner argues that the request of 18th October 2012 represents the tipping point where the serious purpose no longer outweighs the significant burden. We reject this submission and are satisfied that Mr Chadha is still trying to find an acceptable formula to trigger disclosure of the information that he seeks.
22. Neither do we accept that the serious purpose of this request is diminished by Mr Chadha's contact with the Trust in relation to his wife's care. The Commissioner relies upon the Trust's assertion that Mr Chadha "*had not acted upon any of the advice he has been given, e.g. he was advised to make a formal written complaint so that an investigation could be carried out, but to date he has declined to do so.*" We are satisfied that at the relevant date the matter had not already been exhaustively considered. These requests may have their genesis in Mr Chadha's concerns relating to his wife's care but their scope is wider and aimed at the general picture of the Trust's level of complaints. We are not satisfied therefore that Mr Chadha's prior dealings with the Trust that specifically relate to his wife are material to our consideration of this case. In any event we are satisfied from the correspondence provided at the Tribunal hearing, that contrary to the information provided at p95 of the bundle, Mr Chadha had attempted to complain to the hospital prior to the majority of these information requests¹⁰ in May 2012 and had been told this was no longer possible as he was out of time¹¹. (A position which proved to be wrong as the Trust did in fact open an investigation which was concluded in December 2013¹²).

Conclusion and Remedy

23. The Tribunal therefore finds that the decision of the ICO is not in accordance with the law and substitutes this decision.
24. Our decision is unanimous.

Dated this 11th day of July 2014

Fiona Henderson
Tribunal Judge

¹⁰ Letter of 4.5.12

¹¹ Letter of 9.5.12 from Complaints Manager

¹² Letter of 3.12.13 from Trust's Chief Executive setting out the results of the Trust's investigation.