



Appeal No. EA/2011/0248

**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL
(INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF
INFORMATION ACT 2000**

Dated: 28 February 2012

BETWEEN:

Appellant: Andrew Bousfield

Respondent: The Information Commissioner

Decision by: **David Marks QC
(Tribunal Judge)**

RULING

On application to strike out the Appellant's grounds of appeal pursuant to rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (The Tribunal Rules).

DECISION

The Tribunal strikes out the Appellant's appeal against the Information Commissioner's (the Commissioner) Decision Notice, reference FS50380662 dated 5 October 2011

REASONS FOR DECISION

Background

1. The Appellant made a written request dated 5 February 2010 to the Oxford Health NHS Foundation Trust (the Trust). The request was in the following terms, namely:

"Please provide copies of all compromise agreements you have entered into with doctors of any grade. Please also provide a list of exploratory or illustratory(sic) issues covered by the compromise agreements (i.e. the reasons why the compromise agreements were entered into)."
2. The Appellant subsequently said that the names and dates of the agreements could be redacted.
3. The Trust formally contended by emails dated 24 March 2010 it held no such information as that requested. Subsequently, following upon the Appellant's complaint to the Commissioner, the Trust informed the Commissioner that the estimate of time that the Trust would take in order to determine whether it held information and thereafter for locating, retrieving and extracting the said information, would exceed the appropriate limit as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, sometimes called the Appropriate Limit, thereby entailing the application of section 12 of the Freedom of Information Act 2000 (FOIA).

The Decision Notice

4. The Decision Notice is dated 5 October 2011 and bears the reference FS50380662. At paragraph 9 of the Notice, the Commissioner confirms that on 8 July 2011, the Trust explained to the Commissioner that senior officers of the relevant Foundation Trust, i.e. the Chief Executive, the Director of Human Resources and the Medical Director, confirmed that there had been no compromise agreements with any doctors over the requested period. The Trust therefore explained that such officers had worked in those positions for years and would have direct knowledge of any agreed compromise agreements entered into with doctors. The same had been verbally confirmed with other senior officers within the Clinical Governance and Human Resources departments.
5. The Trust also confirmed that with regard to the request, it had made enquiries of its solicitors and those solicitors did not hold any such agreements relating to doctors on the Trust's behalf. Likewise, it had confirmed with its Finance Department that the said Department did not hold any information which recorded the existence of any compromise agreements.
6. As indicated above, if a search of the Trust's manual records were undertaken to confirm the view expressed in the preceding paragraphs, i.e. that the Trust did not hold the requested information, then the same would exceed the time for compliance as contained within FOIA. Section 12 of FOIA states that the public authority does not have to comply with a request if the estimate regarding the cost is that the cost of complying with the request would exceed the appropriate limit.
7. In the reasons for his decision, the Commissioner noted that the request covered compromise agreements for a ten year period. The Trust had explained that personal files of staff were held as paper files and that any compromise agreements would therefore be held in such files within the archive of the Trust. The Trust claimed that it retained

the personal file for at least six years after the individual had left the organisation. It confirmed that no records of staff leaving prior to 2005 had been destroyed.

8. The Tribunal does not think it appropriate or necessary to set out the terms of the remaining sections of the Decision Notice. The paragraphs in question are numbered from 18 to 33 inclusive and in the said paragraphs, the Commissioner sets out in great detail the calculations provided by the Trust in support of its contention that the cost limit would be exceeded. It is enough in the Tribunal's view to refer to paragraph 33 where the Commissioner notes that from what he has seen and has previously set out in the Decision Notice, it is apparent that out of an approximate total of 584 files relating to doctors, the Trust might be able to potentially search 360 files, namely 62% of the total. Even if it took two minutes to search each file, the said exercise would only enable 540 of the said files to be checked, being 92% of the total. The Commissioner therefore determined that he did not consider it "proportionate" to require the Trust to prepare a list of the names of doctors who had left over the past ten years, or the years 2000 to 2008. The Commissioner noted that this would enable a targeted search but it was apparent that even this would not be possible to complete within the remaining time. In addition, the Commissioner noted that he was mindful that the Trust was "adamant" that its senior staff had no knowledge of any compromise agreements with any doctor over the past ten years.

Grounds of Appeal

9. The grounds of appeal are set out in the letter which the Appellant sent to the Tribunal enclosing its Notice of Appeal dated 25 October 2011.
10. The letter deals with eight of the Commissioner's Decision Notices concerning requests for the same information in this case but relating to other NHS Trusts. The exemption relied on by the public authority in six out of the eight requests is section 40.

11. In the words of the Commissioner's written Response, the above letter "appears to be a generic letter setting out grounds of appeal with respect to all late appeals."
12. The Tribunal respectfully agrees with the Commissioner. The said letter contains largely background to the requests and the only ground of appeal that can be identified from the Appellant's letter, in particular from the paragraph at the top of page 2 of his letter, appears to relate to the reliance by NHS Trusts in relation to six of the other requests upon the exemption set out in section 40 of FOIA.
13. The Commissioner has, however, seen an email dated 26 January 2012 sent by the Appellant both to the Tribunal and to the Commissioner. The Appellant suggests in the said email that the application to strike out made by the Commissioner is "misconceived". In effect, the Appellant contends that when a Trust decides to part with the services of a medical doctor, this is usually "a big event" relating to complete breakdown of trust and confidence. He therefore says that he "fails to understand how any public body can argue that they are unable to locate the information". He therefore, in particular, to see "a complete breakdown of estimated cost for providing the information on compromise agreements together with the texts of any gag clauses".
14. He then goes on to say that in assertion of the Public Accounts Committee in January 2012, the Permanent Secretary of the Department of Health had been informed by a member of parliament that it was "entirely unacceptable to use public money" to silence doctors under compromise agreements. He therefore urges the Tribunal to "proceed with utmost caution in order not to accept reasons for failing to provide the information which do not stand up to scrutiny ..."

Conclusion

15. With all respect to the Appellant, what he says is not an answer in law to the contentions made by the Commissioner. The Tribunal has no reason to impugn the approach of the Commissioner whose independent statutory function it is to examine any exemptions relied upon by a public authority, including but not limited to contentions made with regard to section 12 of FOIA. Although the Tribunal is sensitive to the concern expressed by the Appellant, what he says is simply of no relevance to the issues which arise before the Tribunal. There is simply here no suggestion that the Commissioner has done anything other than fulfil his statutory obligations and determined on the balance of probabilities that the costs limit would be exceeded in this case based on the evidence he has considered.
16. For all the above reasons, the Tribunal strikes out the said appeal under the Tribunal Rules, in particular, rule 8(3)(c).

DAVID MARKS QC

**Tribunal Judge
Dated: 28 February 2012**