



IN THE FIRST-TIER TRIBUNAL

Case No.EA/2012/0124

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM:

Information Commissioner's Decision Notice No: FS50421679

Dated 21<sup>st</sup> May 2012

BETWEEN

MRS J BROOKS

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

Heard at Victory House on 5<sup>th</sup> October 2012

Representation: Mrs Brook – Represented herself

The Commissioner – Did not attend

Date of Decision 17<sup>th</sup> day of October 2012

BEFORE

Fiona Henderson (Judge)

Michael Jones

And

John Randall

Subject matter: FOIA s14 Vexatious Request

IN THE FIRST-TIER TRIBUNAL

Case No.EA/2012/0124

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below, the Tribunal refuses the appeal and upholds the Commissioner's Decision Notice FS50421679 dated 21<sup>st</sup> May 2012.

Dated this 17<sup>th</sup> day of October 2012

Signed

Fiona Henderson (Judge)

## REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision FS50421679 dated 21<sup>st</sup> May 2012 which found that s14 FOIA had been properly relied upon to withhold the disputed information. Mrs Brooks argues that the request was not vexatious in the context of the seriousness of the subject matter and in the context of the way that information had been provided in the past.
2. The Appellant has been in correspondence with Sheffield Teaching Hospitals NHS Foundation Trust in relation to the treatment that her late father received. From the information that she has received and her presence on the ward at the relevant time, she believes that her Father's morphine syringe driver was left empty causing him unnecessary suffering. On 11<sup>th</sup> January 2006 she called her Father's GP to ask her to intervene as her attempts to obtain additional pain relief from hospital staff had been refused. The information requests which are the subject of this appeal relate to his treatment on the palliative care ward.

Background

3. Following his death in January 2006 Mrs Brooks and her Mother asked for a copy of her Father's medical records. These were eventually supplied in mid April when they attended the Trust and were handed to them in person. They were not prepared in accordance with disclosure under the Access to Health Records Act 1990 and from information subsequently received by Mrs Brooks it would appear that the records were incomplete and certain documents were improperly completed. In particular:
  - a) There was an amendment to the timing that drugs were signed out of the Controlled Drug Register (CDA) on 10<sup>th</sup> January 2006.
  - b) The timing of the administration of morphine/syringe driver change in the medical records did not directly correspond to drugs being signed out in the CDA.

- c) The entry in the medical records did not state that it related to a change in syringe driver.
  - d) Additionally the register of names/grades and signatures of those who had written in the medical records was incomplete and it was not possible for Mrs Brooks to ascertain who it was that had signed the CDA and the medical records in relation to the 20:20 entry.
4. Although the hospital signed off her initial complaint (In March 2006 prior to the receipt of the medical records) this complaint did not address the syringe driver change and the CDA book because Mrs Brooks was not aware of these issues at that time. Mrs Brooks has complained to the Health Care Commission, the Parliamentary and Health Service Ombudsman and also the Nursing and Midwifery Council but these complaints largely focussed on her earlier complaint.
  5. On 20<sup>th</sup> August 2011 Mrs Brooks asked for the Trust for the following information:
    - i. *Was there any morphine syringe driver change administered on the 10<sup>th</sup> January 2006 (to my Father)?*
    - ii. *If so at what precise time (if any) did a morphine syringe driver change take place (on 10<sup>th</sup> January 2006 with regards to my Father)?*
    - iii. *Identification (by name) of the two signatures who signed on 10 January 2006 the admitted altered entry (in the controlled drug book)?*
    - iv. *Identification of the grade of the 2 signatures who have signed the admitted altered entry on the 10<sup>th</sup> January 2006 (in the controlled drug book)?*
  6. This Trust has received 17 separate information requests from Mrs Brooks since her Father's death and additionally Mrs Brooks' husband, MP and MEP corresponded on her behalf and also asked for information from the Trust<sup>1</sup>.
  7. The Trust refused the request on 25<sup>th</sup> August 2011 relying on s14(1) FOIA which provides that s1(1) does not oblige a public authority to comply with a request for information if the request is vexatious. The Act does not define what is meant by vexatious and this Tribunal is satisfied that it should be given its ordinary meaning namely a request that causes annoyance or frustration.
  8. The Tribunal has considered each request in turn and is satisfied that these requests revisit requests that have already been answered and their repetition is disproportionate in the context of the information already sought and the use to which the information could be put.

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<sup>1</sup> Pursuant to s8 FOIA a request for information does not have to be intended as such and need not be prefaced with a reference to the Act.

9. The Tribunal accepts that Mrs Brooks has at times been provided with apparently conflicting information and has found it difficult to build up a coherent factual picture of the position e.g.<sup>2</sup>
- She has been provided with 2 different shift rotas giving the grades of nurses for the 10<sup>th</sup> January 2006.
  - The Trust's Solicitors accepted the chronology as set out a letter from Mrs Brooks' Solicitor (which did not refer to a syringe driver change at 20:20 on 10.1.06).
  - The Trust compiled a list and supportive graph of when morphine was given to Mrs Brooks' Father in December 2009 which purported to show the morphine syringe driver change at 22:15
  - In their letter of 8<sup>th</sup> March 2010 the hospital did not accept that the 20:20 entry had been amended.
  - Despite her MP having received an unsigned letter purporting to be from the Trust (dated 14<sup>th</sup> August 2009) setting out the timings of medication, the Medical Director in a telephone conversation with Mrs Brooks refused to confirm that this was accurate.
  - The Nursing and Midwifery Council purported to have received information from the nurse who made the 20:20 amendment and stating that it should read 8.20. This was clarified by them as "when we said 8.20 we meant to say 20:20".
10. The Trust held a meeting with Mrs Brooks on 21<sup>st</sup> June 2010 in an attempt to resolve all outstanding issues between them. Either during or before this meeting the Trust conceded that<sup>3</sup>:
- The entry in the CDA which now reads 20:20 on 10<sup>th</sup> January had been overwritten.
  - The alteration had not been completed correctly, rather than overwriting the entry it should have been crossed out and initialled.
  - The signature sheet had not been fully completed and it should have been.
  - There was a discrepancy between the amounts withdrawn (CDA) and administered (Medical records) on 11<sup>th</sup> January 2006.

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<sup>2</sup> This does not purport to be a complete list but is restricted to information which is material to these information requests.

<sup>3</sup> This Decision does not purport to deal with all the issues between Mrs Brooks and the Trust and has confined itself to the facts that appear material to these information requests.

- SD had not been written next to the 20:20 entry when it would have been clearer that this was a syringe driver change if it had.

11. The meeting lasted 5 hours and was transcribed by an independent stenographer. Present were the Chief Executive of the Trust, the Medical Director of the Trust, The Deputy Chief Operating Officer, The Chief Nurse, Nurse Director, Consultant in charge of the Palliative ward at the relevant time and the ward manager.

#### Requests i and ii

12. Mrs Brooks had a meeting with the Trust on 26<sup>th</sup> January 2010 at which she was told that in relation to the 20:20 entry the administration of the syringe driver is recorded in the CDA book and that observations happen 4 hourly hence the entry at 22.15. This was confirmed in a letter dated 8<sup>th</sup> March 2010.

13. Additionally at the meeting on 21<sup>st</sup> June 2010 we note that the Consultant in charge of the Palliative ward at the relevant time went through the medical records and CDA with Mrs Brooks and stated that the syringe driver was changed on 10<sup>th</sup> and that this corresponded with the 20:20 entry (p65 of transcript)

14. We are satisfied that this was clearly understood (although not accepted) by Mrs Brooks as later in that meeting Mrs Brooks stated:

- *“You are telling me that that is a syringe driver. It does not say “SD” syringe driver, because indeed it was not..”* (p142 Transcript)
- *“If you are saying that a morphine syringe driver was set up at 20:20 on the 10<sup>th</sup>...”* (p157 transcript)

15. Although we note the response from the nursing and midwifery Council in July 2010 which post dated the Trust’s response at the meeting of 21.6.10 and which at one stage suggested that the entry related to 8.20am rather than 20.20 we note the following:

- a) This was not and has never been the Trust’s position.
- b) The Nursing and Midwifery Council had clarified their response prior to the information request<sup>4</sup>.
- c) The terms of the request did not seek any additional information beyond the information already given.
- d) The answer given by the Trust in the meeting had been clear, unequivocal and was “on the record” as evidenced by the transcript of the independent stenographer.

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<sup>4</sup> Mrs Brooks argued that this information from NMC led her to seek clarification of the Trust’s response from the meeting of 21.6.10. We reject this contention because Mrs Brooks accepted that from her own inspection of the document 20:20 had been written over whatever was originally written there. Whilst she contended that the NMC’s clarification made no sense and meant that “20:20 was written over 20:20” we note that her MEP in his correspondence on her behalf with the Trust had adopted what we consider to be the clear meaning of the clarification namely that their response amounts to an assertion that 8.20 had been overwritten by 20:20.

- e) Mrs Brooks could not articulate of what further use the information would be (in light of the information she already had) save that maybe they would change their mind.
- f) The information given in the meeting was reasoned and based on the source documents.

16. We are satisfied that Mrs Brooks has had a response to her question and that persisting in seeking this information under FOIA represents a failure to accept the answer that she has been given and that these requests are therefore vexatious.

#### Request iii and iv

17. On 1<sup>st</sup> February 2010 Mrs Brooks requested amongst other items from the Trust:

*“Clarification of the signature and “witness” signature to the medication given at 20:20pm 10mgs 10<sup>th</sup> January 2006”*

This was refused in a letter dated 1<sup>st</sup> March 2010 where the Trust relied upon s 40 FOIA.

18. In her letter of clarification dated 2<sup>nd</sup> February 2010 to the Trust Mrs Brooks added:

*“.. the “given by” dose 20:20pm 10mgs has an unclear name written against it and so the name, initial, signature and grade of this person is required.”*

In their letter of 1<sup>st</sup> March 2010 the Trust confirmed that there is no other “staff signature list” beyond that already disclosed and in relation to the rest of the points made in the clarification they repeated their reliance on s40 FOIA.

19. Additionally Mrs Brooks’ MEP requested on her behalf information in relation to 22 dates and times, including the names of the nurse who set up the infusion, the nurse who made the entry in the controlled drugs book and the nurse who witnessed the entry into the controlled drugs book in relation to 20:20 and 22:15 entries on 10<sup>th</sup> January 2006. This was refused by the Trust in a letter dated 31<sup>st</sup> January 2011 stating that Mrs Brooks has previously requested this information and that this had been refused under sections 40(2) and 40(3)(a)(1) FOIA<sup>5</sup>. They relied upon this exemption again.

20. Mrs Brooks believes that the Trust have not provided the names and grades relevant to the 20:20 entry because she believes that the staff concerned did not have sufficient seniority to be allowed to make entries in the CDR. We note that Mrs Brooks has been supplied with the duty rotas for the relevant date and already had sufficient information to be able to complain on this basis to the relevant regulatory and investigatory authorities.

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<sup>5</sup> Personal data

21. At the end of the refusal letters dated 1<sup>st</sup> March 2010 and 31<sup>st</sup> January 2011 Mrs Brooks, and the MEP who was requesting information upon her behalf, were told of the rights to an internal review and then of the right to apply to the Commissioner. The Tribunal reminds itself that it is not the information requests of February 2010 and January 2011 and the Trust's responses to those requests that are before it. The Trust have responded under FOIA and Mrs Brooks has chosen not to progress the matter in accordance with the provisions of FOIA. The issue for the Tribunal is whether repeating the request *ab initio* to the Trust, who have already provided an answer under FOIA, is vexatious. The Tribunal notes the context of a history of repeated repetitive requests, made directly and through an MP and MEP under FOIA, and the holding of lengthy high level meetings. We are satisfied that the request is vexatious and therefore refuse the appeal and uphold the Commissioner's decision.

Dated this 17<sup>th</sup> day of October 2012

Fiona Henderson  
Tribunal Judge