



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

Appeal No. EA/2012/0148

BETWEEN:

IRENE MORRIS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

GUYS AND ST THOMAS' NHS FOUNDATION TRUST

Second Respondent

DECISION

The Tribunal allows the appeal in part and substitutes the following Decision Notice in place of the Decision Notice dated 20 June 2012.

**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal No: EA/2012/0148

SUBSTITUTED DECISION NOTICE

Date: 13 May 2013

Public authority: Guy's and St. Thomas' NHS Trust

Address of Public authority: Great Maze Road, London, SE1 9RT

Name of Complainant: Irene Morris

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Decision Notice dated 20 June 2012 is substituted by the following:

1. The Tribunal finds that the Trust failed to disclose all information held by it which fell within the scope of Mrs Morris' request dated 30 July 2011. As such there was a breach of section 1(1) of the Freedom of Information Act 2000.
2. The information held but not disclosed is:
 - a. Data previously not disclosed, regarding patients 4 and 12; and
 - b. Corrections as to previously disclosed data relating to certain of the listed patients regarding dates and mode of urine samples taken, antibiotics prescribed and dates of treatment.
3. As the Trust has disclosed the above information, no further steps are specified.

Dated this 13th day of May 2013

[Signed on the original]

Melanie Carter
Judge

REASONS FOR DECISION

Background

1. This appeal concerns a request for information by the Appellant, Mrs Morris with regard to patients infected by a particular bacterial organism pseudomonas, whilst inpatients at the Second Respondent NHS Trust hospital. On 30 July 2011 Mrs Morris wrote to Guy's and St. Thomas' NHS Foundation Trust ('the Trust') asking for the following information under the Freedom of Information Act 2000 ('the Act'):

"Pseudomonas Urinary Disease – 1 January 2010 to date

- 1. The number of patients who were known to have had the above disease whilst in St. Thomas' Hospital?*
 - 2. Of those listed above, how many of them contracted the disease as in-patients with the date of diagnosis for each?*
 - 3. How many of the patients listed at 2 above died whilst still infected with the disease whether or not the disease was listed as cause of death?*
 - 4. How many of those listed under 3 above died as a direct result of the disease?*
 - 5. A list of antibiotics prescribed for each of those patients who contracted the disease as in-patients?"*
2. Subsequently, this request was narrowed down by Mrs Morris to the above information with regard to Page Ward only, but covering the same period of time ('the request').

Disclosure by the Trust

3. The Trust, following an internal review, provided two tables of information relating to patients. The first showed the number of patients from whom the Trust was able to isolate pseudomonas species in urine samples and the date of the urine samples including information on whether the patient was symptomatic, whether the patient died with the bacteria still present and antibiotics prescribed. Throughout this decision, references to patient numbers refer to the patient

numbers in that table of information. The second table, a more detailed list of antibiotics prescribed was provided. For the purposes of these proceedings those two tables were combined into one.

Complaint to the Information Commissioner

4. Mrs Morris was concerned that this had not been full disclosure of the information held and complained to the Information Commissioner (“the Commissioner”).
5. During the course of the Commissioner investigation, the Trust identified further information which it had not yet disclosed. This was provided to Mrs Morris.
6. The Commissioner upheld the decision of the Trust in his Decision Notice dated 20 June 2012. Mrs Morris appealed this decision to the Tribunal
7. Whilst the particular circumstances of a person making a request are normally irrelevant, the background is important in this case as Mrs Morris has both considerable knowledge of the workings of the Trust systems and also relevant information which derives from her daughter’s medical records, her daughter having been treated in the hospital for a number of years and indeed died there in 2011.

Issues before the Tribunal

8. The essential issue for the Tribunal was to determine on consideration of all the evidence before it, whether, on the balance of probabilities, the Trust had held any further information (which fell within the scope of the request) at the time of responding to the request that remained undisclosed. Since the date of the Decision Notice the Trust has, on a number of occasions and spread throughout these proceedings, disclosed further information. The Tribunal has therefore attached to this decision, a Substituted Decision Notice as clearly the Decision Notice was wrong in law on account of this additional information being held but not, at the appropriate time, disclosed. As the information has already been disclosed no further steps are required of the Trust. This decision sets out the Tribunal’s reasoning and provides some of the background to how it was that the Trust failed to identify all the relevant information at the time of the request and how it subsequently came to light.
9. The Tribunal wished to point out, from the outset, that it realised that the Trust had been seeking to assist Mrs Morris in her understanding of what had

happened to her daughter (offering to meet to explain the medical information) and also to make full disclosure in accordance with the request.

10. The Trust had not, however, in the Tribunal's view carried out adequate searches. There had clearly been a lack of rigour in the Trust's approach to its searching for data it felt it could disclose, leading to the unfortunate necessity for Mrs Morris to have brought this appeal and to have tenaciously pursued her points, based on her own knowledge of matters.

Ground of appeal

Scope of searches carried out

11. The Tribunal heard evidence from Dr Helmsley, Dr Wade and Mr Williams. The Tribunal accepted the evidence of these witnesses that the following searches had been carried out:
 - i) A consultant in microbiology had performed a notes review which included looking at all drug charts in all patient notes available for the patients on Page Ward and searches through clinical results held in networked databases.
 - ii) Searches of electronic patient records (EPR)
 - iii) Review of microbiology results on the Trust laboratory system
 - iv) Searches to retrieve information from the JAC Pharmacy
 - v) A dataset was generated combining patient admission, discharge and death records for the relevant period.
12. Mrs Morris pointed out that the initial data search had been for patients with the presence of pseudomonas in the urine specimen within the parameters of 'admission, discharge and death' between the dates of 1 January 2010 to 1 September 2011. In doing so, they had excluded patients who may have been diagnosed with the disease before the 1 January 2010 and may have been treated during the stated period.
13. Prior to the hearing, the Trust had made what it called voluntary disclosure of details of 3 further cases, patients 18-20, which it was said fell outside of the relevant period, but featured during the period 3 months before. This took account of the fact that, having run the filter for Page ward only, it became

apparent that only those who had pseudomonas diagnosed whilst on the ward were listed.

14. The Trust and the Commissioner maintained that the narrower interpretation, based on an objective reading of the wording use, was the correct one. Thus the disclosure of the data relating to patients 18-20 should be treated as voluntary and not further to the Act. The Tribunal accepted this as Mrs Morris' interpretation gave no identifiable start date for the period of enquiry.
15. The only other material issue under this ground of appeal was whether the Trust should have considered autopsy reports to see whether pseudomonas were present at the time of death. The Trust argued that this would be to impose upon it a duty to consider every 'little scrap of information' and that this would be to go beyond an approach which asked on the 'balance of probabilities' whether information was held to one closer to requiring absolute certainty. Dr Helmsley evidence was that it could be relevant to take autopsy reports into account but this would not conclusively decide whether pseudomonas were present at time of death. This would be just one factor, one part of the jigsaw, in trying to determine cause of death. She argued that in post mortem micro biology terms it was very difficult to interpret the meaning of the presence of pseudomonas. The gut for instance would be full of bacteria and this would continue there once a patient had died. Equally it could have grown post mortem such that, in her professional judgement, one could not definitively say if present on death. In contrast, in relation to a bacteria that did not normally occur, eg tuberculosis, presence on autopsy would be an important indicator. Pseudomonas is a difficult organism to interpret as it occurs naturally in the human body. As such, Dr Helmsley preferred to rely upon the results of urine samples close to death.
16. In the case of one of the listed patients, as set out in paragraph 28 of the first witness statement of Dr Helmsley, there had been a urine sample taken three days before death. This had been clear of pseudomonas. The Tribunal considered autopsy evidence in relation to this patient in order to test whether the information already disclosed that this patient has not "died with pseudomonas present in urine" was incorrect. The Tribunal however accepted the evidence of Dr Helmsley that the autopsy evidence was not, in the circumstances, a sufficiently reliable indication of this and that the nearest urine sample to death was the more reliable source of information.

17. The Tribunal did not however accept the Trust's more general submission that it did not need to have searched for autopsy information in order to comply with the request. It seemed self-evidently the case that questions pertaining to cause of death may in certain cases be helped by looking at autopsy information.
18. As it happened, the autopsy information in relation to the particular patient mentioned above, given Dr Helmsley's professional judgement, did not make any difference to the correctness or otherwise of the information disclosed.

Missing information

19. The Appellant argued in her grounds of appeal that information requested was missing for 5 of the 17 patients treated for pseudomonas on Page Ward namely patients numbered 2, 4, 7, 10 and 12.

Patients 2 and 7

20. The Appellant argued that, with respect to patients 2 and 7, information within the scope of the request would definitely be held for the following reasons. The Trust had confirmed that two patients were diagnosed with pseudomonas and that drugs were dispensed. She argued that the missing drugs charts could not be raised without reference to the patients notes, which is where the results of the urine tests which would also have been noted and the relevant drugs written up in readiness for the drug chart to be prepared for the pharmacy to then dispense. Even if the drug chart was written up first, a note to that effect and what had been prescribed would need to have been made in the patient's files.
21. The Tribunal considered the evidence from Dr Helmsley in this regard. At the hearing giving oral evidence, she noted that just the day before, the Trust had found the notes for patients 2 and 7 – these were contained in scanned but archived electronic notes. These indicated that none of the antibiotics prescribed for these patients had been prescribed for pseudomonas.
22. Given that the Trust had, in relation to other patients, searched the EPR (albeit these were easier to search than the archived electronic records) and given that the records for patients 2 and 7 had now been found, it not having been argued that this latest search was unreasonable or disproportionate, the Tribunal concluded that the search carried out in relation to these two patients for the purposes of the request had been inadequate. The Tribunal noted that the

records had now been located and that the information already disclosed was not changed by the discovery of these records.

Patients 4 and 12

23. The notes relating to patients 4 and 12 "*were originally not available and were either: off-site being micro-fished or not accessible as they were with a patient in clinic*". The information requested for patients 4 and 12 was provided to the Appellant with the Trust's letter dated 25 September 2012.
24. The Commissioner submitted, contrary to the view taken in the Decision Notice, that a retrieval of this information could have been sought and was therefore still in the control of the Trust. The Commissioner maintained that therefore this information was still held by the Trust for the purposes of section 1 of the Act at the time of the request.
25. The Commissioner therefore invited the Tribunal to issue a Substituted Decision notice in relation to the information relating to patients 4 and 12, finding that the Trust did hold this information and should therefore have disclosed this information in response to the request. The Tribunal agreed with this analysis and this is reflected in the Substituted Decision notice. However, the Trust having now disclosed the information requested, the Trust was not required to carry out any further steps.

Patient 10

26. The Trust had advised the Commissioner during his investigation that the notes regarding antibiotics prescribed (for pseudomonas) for patient 10 were "*incomplete with paper elements missing*". The Commissioner in his Decision Notice had been satisfied that a reasonable search for the information requested had been carried out following the request and that therefore, on the balance of probabilities, the Trust did not hold any further information at the time of the request.
27. Further information relating to patient 10 was disclosed to the Appellant by the Trust in the letter dated 25 September 2012 which the Trust described as representing "*an interpretation of patient [10's] notes and is not information held by the Trust for the purposes of the Freedom of Information Act 2000*".

28. The Appellant however further argued in her Response that *“there is still a question mark over the antibiotic prescribed for patient 10”*. The Commissioner notes that the entry in table 1 for patient 10 relating to the antibiotics prescribed stated *“incomplete, not available”*, and the note to appendix 1 states that *“This patient’s paper drug chart is missing, but according to electronic records available, the patient had a procedure with antibiotic cover which, as per Trust guidelines, indicate would be Gentamicin”*.
29. Part 5 of the request asked for *“a list of antibiotics prescribed for each of those patients who contracted the disease as in-patients?”* The question for the Tribunal is therefore whether the Trust held, at the time of the request, and on the balance of probabilities, a list of antibiotics prescribed for patient 10. The Tribunal noted however that it was not within its jurisdiction to decide whether the Trust *should* hold this information.
30. Dr Helmsley, in her witness statement at paragraph 37 stated that, for this patient, *“I was unable to find the exact prescription but reference was made in the electronic and paper case notes to antibiotics given at the time of an intervention. Trust guidelines suggest this patient would have been prescribed the anti-pseudomonal antibiotic, gentamicin”*.
31. The Tribunal was satisfied that, in response to the request, the Trust had carried out a reasonable search for information held in relation to patient 10 (both paper and electronic records were considered) and that the Trust did not hold any further information in addition to that already provided to the Appellant with the letter of 28 October 2011.

Inaccuracies in data disclosed

32. During the oral hearing, it had been unclear which, if any, of the patients referred to (albeit anonymously) represented Mrs Morris’ daughter. The Trust had however indicated that information with regard to the daughter was included. In turn, Mrs Morris argued that if so, it had to be incorrect – illustrating her submission that more information hitherto undisclosed must be held. Her submission that the data had to be incorrect if it included her daughter’s medical information was, it was argued, supported by documents provided to Mrs Morris by the Trust itself. These were in the bundle of documents provided to the Tribunal on an open basis. Thus, Mrs Morris had medical evidence as to the

drugs prescribed to her daughter and invited the Tribunal to compare this to the antibiotics prescribed in the various versions of the table disclosed to her.

33. In addition, Mrs Morris had medical information which called into question the accuracy of further other aspects of the disclosed data eg: the mode of urine samples taken.
34. It was also subsequently realised by the Trust that only the last date of urine samples had been disclosed and indeed, Dr Helmsley had only been provided with this information when asked to provide her professional opinion.
35. The Tribunal carefully compared the data provided by Mrs Morris and that disclosed. It was apparent that there were certain anomalies and called for a further witness statement from Dr Helmsley to explain these. This led to a correction of certain of the data and also further disclosure by the Trust.

Number of deaths

36. The Appellant, in her Response, referring to the letter from the Trust dated 28 October 2011 which stated that one patient (patient 4) had died with the presence of the disease in their urine, argued that it had not been made clear by the Trust who the other four patients identified in the Trust's initial response to the Appellant's request (who died still infected with the disease) are. The Commissioner submitted, and the Tribunal agreed, that as the names of the patients were not requested by the Appellant, this information fell outside of the scope of this appeal. Mrs Morris accepted this at the hearing.
37. In response to the questions regarding the five patients that had died, Dr Helmsley stated that one patient had died more than a year after a urine sample free of pseudomonas had been taken. In her professional view, which the Tribunal accepted, there was no reliable evidence to suggest that the patient was still infected on death. The disclosed table stated that no further samples were taken and no antibiotics given. In addition, Dr Helmsley confirmed that 3 of the 5 patients identified in the Trust's response dated 26 September 2011 had had clear urine samples received by the laboratory prior to their deaths, and that for one patient, the only urine sample where pseudomonas was cultured was taken 14 months prior to death.

Conclusion

38. The Tribunal was aware that as late as 8 March 2013, the Trust had written to Mrs Morris saying that it “became apparent that the Trust had demonstrated poor health records management” and supplying a number of encrypted discs on which there was a large number of documents, electronically held. The Trust told the Tribunal that this was disclosure outside of the Act and had no bearing on this case.
39. However, whilst strictly outside of its jurisdiction, the Tribunal could not help but note that had the Trust handled information sharing prior to the request with Mrs Morris differently (perhaps under the Access to Health Records Act) she might not have felt driven to pursue this appeal. Whilst of course, the Freedom of Information Act was intended for disclosure to the public, and is largely determined without reference to the motive of the requester, in this case it was impossible to ignore Mrs Morris’ personal involvement with the public authority. It appeared that the request, subsequent Commissioner investigation and the Tribunal proceedings could most likely have been avoided had a different approach been taken prior to the request being made.
40. During the course of the proceedings, the somewhat anomalous situation arose whereby the Trust was seeking not to share evidence that had been asked for by the Tribunal with Mrs Morris, on grounds of confidentiality owed to the deceased daughter, despite Mrs Morris, a personal representative, consenting to its disclosure. Clearly there were difficult legal issues surrounding the correct test to apply in relation to when information may be withheld from a party in Freedom of Information Act proceedings, including the extent to which evidence shared with the parties during the proceedings would have been disclosure just to the parties or to the public at large, whether a personal representative could in these circumstances render an alleged breach of confidentiality effectively unenforceable and the relevance of this. In the event, it did not become necessary to rule upon these issues, as the Trust withdrew most of the withheld evidence.
41. In conclusion then, the Tribunal decided that certain information was held by the Trust at the date of request, which it failed to disclose. Thus, the Decision Notice was wrong in law and the Tribunal ordered that there be a Substituted Decision Notice (as set out at the beginning of this decision). As all the further information

has now been disclosed, the Tribunal did not order that the Trust take any further steps.

[Signed on the original]

Melanie Carter

Judge

13 May 2013

Correction made to page 1 of the decision on 15 May 2013 under Rule 40 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009