



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

**Appeal No: EA/2013/0088**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50466499  
Dated: 25<sup>th</sup>. March, 2013**

**Appellant: James Titcombe**

**Respondent: The Information Commissioner ("the ICO")**

**Before  
David Farrer Q.C.  
Judge**

**and  
Jacqueline Blake  
and  
Darryl Stephenson**

**Tribunal Members**

**Date of Decision: 31<sup>st</sup>. July, 2013**

**Representation:**

This was a paper determination.

**Subject matter:**

FOIA s.1(1) – Whether information was held by the Public Authority

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

**Appeal No: EA/2013/0088**

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal dismisses the appeal.

Dated this 31<sup>st</sup> day of July, 2013

**David Farrer Q.C.**

Judge

[Signed on original]

## **REASONS FOR DECISION**

### The Background

- 1 On 21<sup>st</sup>. January, 2010 the Appellant made an FOI request to University Hospitals of Morecambe Bay NHS Foundation Trust (“UHMB”) asking, as to Furness General Hospital (“FGH”), for the numbers of babies delivered, still births, neo – natal deaths and maternal deaths from 2002 onwards and for details of related complaints, investigations, litigation and compensation made during the same period. He further requested “national average” statistics for the same events.
- 2 UHMB responded by providing, broadly, the information requested. It indicated that deaths recorded were those occurring within UHMB; hence a birth at FGH followed by death at a hospital outside NGMB to which the baby had been transferred would not be recorded by UHMB. The figures provided for FGH included three neo – natal deaths in 2007, two in 2008 and one in 2009.
- 3 The Appellant, alerted by a press report as to a possible discrepancy in these figures, asked whether they included all babies born at FGH, regardless of where they died. He was informed that they did not but that deaths were recorded by the hospital at which the baby died and reported to the Safeguarding Children`s Board local to that hospital.
- 4 Expressing his shock that the transfer of a baby to another hospital before death could apparently mask the true fatality rates for births at FGH, the Appellant

requested figures revealing the number of neo – natal deaths for babies born at FGH, regardless of where they died. He was informed that such information was not held by UHMB because of the system for recording deaths described above. A letter from the UHMB medical director dated 31<sup>st</sup>. March, 2010 made clear that, from whatever source, UHMB had learnt of two deaths outside UHMB of babies born at FGH. One was the Appellant`s son.

- 5 The tragic death of his son, born at FGH but transferred for treatment to another hospital impelled the Appellant to pursue a determined investigation as to how such deaths were recorded. The outcome of this appeal is not affected by such considerations but the Tribunal sadly acknowledges that his grieving concern as to these issues is entirely understandable, whether or not his son`s treatment at FGH had been in any respect deficient (a question quite outside the function of This Tribunal),

The request for information

- 6 On 20<sup>th</sup>. June, 2012 the Appellant made a fresh request in very similar terms. As to neo – natal deaths, however, he appended this express requirement

*“(Please note that item 2 (neo – natal deaths) must include the total number of babies born at FGH who died before they were 25 days old REGARDLESS of the eventual place of death. It is particularly important that the figures provided include babies who were born at FGH but were transferred to different hospitals before they died (for example any baby transferred because level 3 intensive care was required.)”*

It is this item of information alone which gives rise to this appeal.

- 7 UHMB sought clarification that the statistics requested were confined to FGH.

Providing some information by letter of 18<sup>th</sup>. July, 2012, it indicated that it would need about fourteen days more to provide the figures for neo – natal deaths and other specified events as it was drawing on “multiple sources of information”, which seems to imply a search beyond information which it already held.

8 On 1<sup>st</sup>. August, 2012, UHMB provided the following figures for neo – natal deaths on the prescribed basis –

2007 1,

2008 2,

2009 1.

It prefaced this provision with a statement that their accuracy could not be guaranteed because it was not certain that its data systems captured every death within the specification in the request. It referred to the limited circumstances in which its records would be updated to include deaths outside the Trust area.

9 The Appellant described these figures as “incomplete and misleading”, pointing out that the 2008 figure provided in 2010, which expressly did not include the two deaths occurring outside UHMB, was the same as the figure provided in 2012, which supposedly did. Following further exchanges, including vigorous criticism of UHMB`s record – keeping, UHMB confirmed that it had disclosed “(a) . . . *such information that (sic) it holds that is relevant to your request*” and (b). . . *that some of the information that you requested may not be held by the Trust.*”

#### The Complaint to the ICO

10 .By e mail dated 30<sup>th</sup>. September, 2012 the Appellant complained to the ICO, asserting that UHMB`s acknowledgement, in the letter of 31st. March, 2010 from its medical director, that it was aware of two deaths in 2008 outside UHMB of

babies born at FGH (including the Appellant's son), proved that it held information, which it had unlawfully failed to provide.

- 11 In a series of five questions the ICO inquired of UHMB what investigations had been undertaken in response to the Appellant's 2012 request. UHMB replied by letter of 9<sup>th</sup>. February, 2013, referring to two data systems checked by its analyst, the "maternity" system and the patient administration system ("PAS"). It acknowledged, following further scrutiny of the records, that a recorded stillbirth in 2008 might have been a neo – natal death, raising the 2008 figure to 3. It could not find data producing a total of 4. The letter provided a quite extensive account of the procedures followed in response to the ICO's questions as to what had been done, including resort to manual records not previously consulted.
- 12 They ICO, by a Decision Notice dated 25<sup>th</sup>. March, 2013, concluded that, on a balance of probabilities, UHMB held no further information and dismissed the complaint.

### The Appeal to the Tribunal

- 13 The Appellant submitted carefully argued grounds of appeal dated 24<sup>th</sup>. April, 2013 and a Reply to the ICO's Response dated 31<sup>st</sup>. May, 2013. In essence he relies on the apparent contradiction contained in the provision of the same 2008 neo – natal deaths figure in two answers based on different criteria, which were known to produce different results in this case. He further cites the reduction, from 3 to 1, of deaths in 2007. He appears to submit that information gleaned

from approaches made to other authorities, which seem to be implied by the letter of 31<sup>st</sup>. March, 2010, is information held by the requested authority for the purposes of s.1(1) of FOIA. The conclusion to be drawn, he says, is that UHMB held information, in 2010 at any rate, which it failed to disclose either then or in response to the present request.

### Our Decision

14 Section 1(1) of FOIA requires a public authority to state whether it holds requested information and, if it does, subject to reliance on an exemption provided by FOIA, to provide it. The requester is entitled, as here, to challenge a claim that the authority does not hold the information. It is then for the ICO, or on appeal, this Tribunal, to determine, on a balance of probabilities, whether it does hold it.

15 The first question for decision here is what is meant by “holding” information. We judge that information is “held” only where it forms part of the data recorded and retained, in whatever form, by the authority, for the continuing purpose of discharging its functions. Obtaining information from another authority to satisfy a request does not involve the holding of information. Nor does the fact that a senior officer learns facts as a result of personal contact or by reading a newspaper report. Information submitted unsolicited to an authority, which has no regard to it and does not use it, may well not be held. There is no contradiction in a response which says –

*“We do not hold the requested information but we have consulted a neighbouring authority which holds records indicating that the answer to your request is . . . “*



- 16 We are fortified in this interpretation by the views expressed in the Second Edition of “Information Rights” by Philip Coppel and other contributors at 9 – 008. We agree that what is in issue is whether the authority “owns” or controls the information concerned. If such restrictions are not applicable, then the answer to the question; “Do you hold this information?” may depend on who is chosen to provide an answer and what steps they take to answer it. FOIA clearly envisages a recognisable body of data within an authority to which any diligent officer can turn and give the same unequivocal response. The references in s.1(4) to the “amendment” or “deletion” of information held by the authority may give some further support to the concept of an identifiable corpus of information held on a continuing basis for its various purposes.
- 17 We do not therefore treat information which may have come to the medical director or subsequently other officers making external inquiries as to deaths outside UHMB as information held by UHMB.
- 18 Moreover, the test is; what information was held when the request was received? The authority is not obliged to make inquiries elsewhere to satisfy the request. Indeed, if it does so, it is going beyond its statutory duty in s.1 and information obtained will not be responsive to the request which provoked its obtaining.
- 19 As the ICO rightly observes in the Decision Notice, we are not concerned with the accuracy or adequacy of the records held by UHMB or any other Trust. It may be that Trust records ought routinely to link a neo – natal death to the hospital at which the birth took place. That is, however, a matter for those administering those

Trusts, guided by central government and subject to review by the High Court. It is not for us or the ICO.

- 20 As regards the fact that the 2010 and 2012 requests elicited the same figure for deaths in 2008, that may simply mean that records had not been amended after 2010 to reflect the two external deaths acknowledged in the letter of 31st. March, 2010. It is, however, unclear to the Tribunal why these apparent inconsistencies have emerged.
- 21 Whilst having every sympathy with the frustration felt by the Appellant in his particularly sad circumstances, we do not discern any obvious motive for UHMB to conceal information, which it really held, especially as to 2008, where it finally acknowledged four relevant deaths in response to the 2010 request.
- 22 Like the ICO, we accept as more probable than not the assertion that the only information held is the information disclosed, subject to the further revelation of a third neo – natal death in 2008. The tenor of the UHMB response to the ICO`s questions strongly reinforces the impression that it undertook a proper investigation of its records, acknowledged mistakes where it found them and provided the information, right or wrong, that it had. Whether it or its officers or medical staff were guilty of other potentially graver failings is not a matter for us to consider.

### Conclusion

- 23 We therefore dismiss this appeal.

24 Our decision is unanimous.

[Signed on original]

**David Farrer Q.C.**

Tribunal Judge

31<sup>st</sup> July, 2013