ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50581133

Dated: 18th. August, 2015

Appeal No. EA/2015/0186

Appellant: **William Stevenson ("WS")**

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

Second Respondent: **The Department of Health ("the DoH")**

Before

David Farrer Q.C.

Judge

Date of Decision: 30th. November, 2015

The Appellant appeared in person.

The ICO did not appear but made written submissions.

The DoH was represented by James Cornwell

Subject matter:

FOIA 2000 ss.1(1)(a) and 10(1)

(i) Whether the DoH held the requested information.

(ii) Whether it exceeded the time limit for responding to a request.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal finds that the DoH did not hold that information. It therefore dismisses the appeal arising from complaint (i). It finds that the DoH breached s.10(1) of FOIA in respect of the first three requests referred to in this decision and, to that extent, the appeal is allowed and that decision is substituted for the DN as to (ii). The DoH is not required to take any steps as a result of that substitution.

Dated this 30th. day of November, 2015

David Farrer Q.C.
Judge
[Signed on original]

Abbreviations

In addition to those indicated above, the following abbreviations are used in this ruling -

FOIA	**The Freedom of Information Act, 2000**
The MBI	**The Morecambe Bay Investigation chaired by Dr. Bill Kirkup.**
UHMB	**The University Hospitals Morecambe Bay Foundation Trust**
The DN	**The Decision Notice of the ICO**

REASONS FOR DECISION

The Request

1. This appeal was abandoned by WS as regards issue (i) above at the conclusion of the evidence for the DoH. Such abandonment was clearly demanded by the evidence and, indeed, overdue but the public and indeed the DoH have legitimate interests in the outcome and a brief judicial decision, explaining why the major part of this appeal failed, is necessary.

2. The MBI was established by the Secretary of State for Health in September, 2013. It was charged to investigate a series of maternal and neo - natal deaths at UHMB between 2004 and 2013. The MBI reported on the 3rd. March, 2015. The events leading to its establishment and the evidence that it did or did not receive have given rise to a number of previous requests, complaints and appeals by WS. None of them has any bearing on this appeal.

2. It was foreseen that, following publication of the report, some of the evidential material which it had received would be returned to the provider, some would be deleted or destroyed and a substantial amount, in electronic form, would be transferred to the DoH, the sponsoring department, for the public record. Some documents, for example, transcripts of interviews in private in respect of which an assurance of confidentiality had been given, would be transferred to the DoH but appropriately identified. MBI also undertook a number of significant tasks after 3rd. March, 2015, such as discussing the report with the affected families, talking to UHMB and discussing with NHS organisations which featured in the report the implications of its findings. It was therefore inevitable that there would be some delay in the transfer of the residual MBI records to the DoH. A practical consequence of the transfer to the DoH was that the records would thereafter be held by a public authority which, unlike MBI, was subject to the duty to provide information in accordance with FOIA.

3. WS made a series of requests for information on 27th. and 30th, March and 2nd. and 8th. April, 2015 to the DoH. In total, he requested copies of 28 transcripts of interviews of witnesses who had given evidence to MBI. No one request is distinguishable from any other. WS stated that he divided them up with an eye to claims that the whole might exceed the cost limits stipulated in s.12 of FOIA. Be that as it may, they can certainly be treated as a single request for the purposes of this appeal.

4. Each Email contained a perfectly clear request for the transcripts of named witnesses : "This FOI request is for the full transcripts of the interviews of: (X, Y and Z)". However, each also bore attachments, the purpose of which was not clear to me nor, it seems, to the DoH.

5. On 9th. April, 2015 the DoH replied, to all four requests and another Email which was not a FOIA request, stating that the DoH reasonably required clarification of the requests, pursuant to s.1(3) of FOIA and could not respond without it. It acknowledged that the only identifiable part of each request appeared to be the request for the full transcripts of interviews of the named witnesses.

6. On 11th. April, 2015, WS replied, stating firmly that it was indeed the specified transcripts and nothing else that he was requesting. On 1st. May, 2015, in the absence of a response, he complained to the ICO. It is agreed that twenty working days had elapsed in relation to the first three requests but not the fourth, given the intervention of a public holiday.

7. On 7th. May, 2015, the DoH responded, stating as to all the transcripts that it did not yet hold them. It maintained that position following an Internal Review. The ICO's investigation followed.

The DN

8. The ICO found that, on a balance of probabilities, the requested information had not been transferred to the DoH at the time of his investigation. The post - report work had taken longer than foreseen. WS had been informed that he would be notified when the information had been transferred. The DN does not refer to the question whether the DoH had breached s.10(1) through delaying its response.

The evidence

9. WS adduced a wealth of documentary evidence, much of it predating the conclusion of the MBI inquiry. I do not regard errors in the initial designation of MBI as a public authority subject to FOIA as in any way relevant to the primary issue for determination, which is simply whether the DoH held the transcripts when hey were requested. The same goes for allegations as to DoH access to MBI material before its transfer and the temporary employment of departmental staff by MBI.

10. William Vineall, Director of Quality at the DoH, gave evidence as to the establishment of MBI, including its financing by the DoH, and the arrangements for electronic transfer of evidence received by MBI after the publication of its report. The terms of establishment and the relationship between MBI and the DoH took on a transient significance when WS, for the first time at the hearing, rather faintly raised the issue whether the MBI held the transcripts “on behalf of” the DoH, pursuant to s.3(2) of FOIA.

11. Mr. Vineall had been personally involved in setting up MBI and was able to describe the complete independence from the DoH, which it enjoyed. Dr. Kirkup decided its procedures and what evidence it would require, in consultation with his colleagues. The inquiry staff operated in Preston and had only such contact with the DoH as was necessary for MBI to function efficiently. The DoH was one of a number of authorities which faced the possibility of criticism in the report’s findings.

12. As to transfer of information, he dealt with the tasks required before MBI was finally closed down and the slippage in the timetable for closure. He confirmed, as did the documents, that WS had been notified in October, 2015 that transfer had now taken place.

13. Notwithstanding the nature of his case, WS appeared reluctant to confront Mr. Vineall in cross examination with the inevitable challenge as to the date of the transfer and the consequent assertion that the letter notifying him of transfer in October, 2015 must be a sham. WS finally acknowledged that he did not challenge the truthfulness of Mr. Vineall's evidence.

14. The second DoH witness was Gary Tempest, Head of the Freedom of Information team. He gave evidence of the background to the relevant requests, since the DoH submitted that those requests had to be interpreted by reference to what had gone before and what accompanied them. He referred to the attachments to the requests, which, he said, obfuscated their superficial clarity and justified the request for clarification.

The reasons for my decision

(a) Did the DoH hold the requested information at the relevant dates ?

15. I deal first with WS' alternative submission on issue (i) - that the DoH, if not directly, then indirectly, by MBI as its agent, held the requested information at the times of the requests. Section 3(2)(b) provides that *"information is held by a public authority if . . . . . (b) it is held by another person on behalf of that authority."*

16. This submission never took flight. The uncontested and unsurprising evidence of Mr, Vineall was that MBI was established, as it had to be, as a body entirely independent of its sponsoring department which provided the funds. The DoH had no access to, let alone control over the information that it assembled for its report, including the contents of the requested interview transcripts. There was no evidence to support this alternative and belated hypothesis and it fails.

17. As to the primary question, - did the DoH hold the requested information directly at the dates of the requests ? - it is significant that the requests themselves did not expect that it did but assumed transfer within a short period. However, it is not necessary to decide this issue on this relatively slender point.

18. The date of transfer was a matter of fact. It was wholly understandable that it took place later than foreseen. The DoH had no reason to lie about the date of transfer. If it really intended to suppress the evidence, it is surprising that it stated an intention to publish whatever it properly could and that it promised to notify WS when it had the transcripts (as it evidently did).

19. I found Mr. Vineall an entirely reliable witness, as apparently did WS. There was not a shred of evidence to support the abandoned claim that the DoH had received the transcripts in electronic form at some unspecified earlier date which it had then concealed. It was a hopeless submission that should never have been made.

(b) Did the DoH's response breach FOIA s.10(1)

20. Section 10(1), in the context of this appeal, requires a public authority to inform the requester whether it holds the requested information promptly and in any event not later than twenty working days after receipt of the request. The obligation to inform (s.1(1)(a)) is subject to s.1(3) which provides -

"Where a public authority

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

21. As I indicated at the hearing, if there was a breach, it was of the most trivial kind since WS knew by 5th. May, 2015 that the DoH denied holding any of the transcripts. However, the Tribunal is required to adjudicate on this issue and will do so.

22. The first question relates to the Tribunal's jurisdiction to entertain an appeal on this point.

23. FOIA s.57(1) confers a right of appeal on complainant or public authority, *"against the (decision) notice . "*

24. So far as material, s.58(1) of FOIA requires and empowers the Tribunal to allow or dismiss an appeal or substitute another notice, if it considers -

"*(a) that the notice against which the appeal is brought is not in accordance with law"*

25. As indicated in paragraph 8, the DN contains no finding as to s.10(1) nor any reference to this issue being raised by WS. His grounds of appeal, however, begin with a denunciation of the DoH for failing to comply with *"the legal response time on four separate occasions"* The questions therefore arise - (i) can there be an appeal <u>against</u> a non - existent ruling ? and (ii) can a DN be wrong in law in relation to a matter to which it has not referred ?

26. Section 50 provides for applications by a complainant for a decision whether,

> *<u>"in any specified respect,</u> a request for information by the complainant to a public authority has been dealt with in accordance with the requirements of Part 1."*

The starting point therefore involves an examination of the complaint to see whether this alleged breach was specified in the complaint. If it was not, then, in my opinion, there was no obligation on the ICO to consider the point in the DN and his failure to do so cannot give rise to a right of appeal.

27. There is no doubt that WS complained of such breaches; in each complaint dated 5th. May, 2015 he ticked the box "The organisation did not respond to my request". Indeed, he could have no other complaint; on 5th. May he had not received the DoH response (of 7th. May) saying that it did not hold the information.

28. Section 50 is, in my opinion, a clear pointer to a requester's right to a finding in respect of each specified complaint and, by necessary implication, to appeal a DN which ignores such a complaint.

29. The next, closely related question is, therefore - can a DN be "not in accordance with law" if it simply fails to address a breach of a requirement in Part 1 of FOIA, of which the appellant has complained to the ICO ? In my judgement, the answer is "Yes". If that were not so, the DN could simply ignore part of a complaint, leaving the complainant with no right of appeal. The absence of a finding on a matter which the ICO has been asked to investigate is no different from an erroneous finding. Any other interpretation would contradict my finding that the requester has a right of appeal where the DN fails to deal with an aspect of his complaint.

30. That being so, I turn to the merits of this aspect of the appeal.

31. The first request was dated 27th. March, 2015. WS' confirmation that he wanted only the transcripts was dated 11th. April, 2015, a Saturday. According to my calculation, only nine days of the twenty provided for in s.10(1) had passed. Given that the DoH knew all the time that it did not yet have the transcripts, it seems that such a response could still have been given within the prescribed time, once the clarification had been received. I do not consider, therefore, that s.1(3) could provide an answer to this complaint.

32. In any case, the requests were quite clear, in my opinion, even though there was a history and they were accompanied by unnecessary and irrelevant material. A reasonable response, even before the clarification, would have been the simple statement that the

transcripts were not held, accompanied, if need be, by an invitation to specify if any other information was included within the requests.

33. Regardless of the chronology and my conclusion in paragraph 30, I find that the DoH, though entirely well - intentioned in responding as it did on 9th. April, 2015, did not reasonably require clarification before responding that it did not hold the requested information.

34. Having seen and heard Mr. Tempest give evidence on these matters, I have no doubt that his FOIA team acted in good faith throughout and had no intention of delaying or suppressing the provision of relevant information. I find that the response of 7th. May, 2015 could have been provided earlier within the prescribed period but that the DoH's handling of the response involved simply a very minor misjudgement in the context of this appeal.

35. For these reasons I dismiss this appeal as regards the DN finding that the DoH did not hold the requested information but allow it in so far as it relates to the breaches of FOIA s.10. I make no consequential order.

36. I observe with regret the persistent and wholly unfounded accusations of bad faith and dishonesty which characterised too much of WS's correspondence and submissions. They contrasted sharply with his tone at the hearing when confronted with those allegedly responsible for such misconduct. Unjustified invective and exaggeration, especially where they involves express or implied attacks on the personal integrity of named or unidentified parties, cut no ice with judges and are not excused by the unquestionable sincerity and commitment with which a requester pursues an entirely legitimate campaign.

David Farrer Q.C.

Tribunal Judge

30th. November, 2015