



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

**Appeal No: EA/2015/0249**

**BETWEEN**

**DILYS LOWNSBOROUGH**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**Respondent**

**Tribunal**

**Brian Kennedy QC**

**Mike Jones**

**Michael Hake**

Hearing: 19 May 2016.

Location: Field House, 15, Bream's Buildings, London.

Decision: **Appeal Refused.**

Date of Decision: 20 June 2016

Date of Promulgation: 22 June 2016

Subject Matter: Disclosure of information under Section 1(1) of the Freedom of Information Act 2000 ("FOIA") and reliance by the Public Authority, the Walsall Council ("the Council"), on the fact that they do not hold the specific requested information.

**Introduction**

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA"). The appeal is against the background of a number of decisions of the Information Commissioner ("the Commissioner") contained in three Decision Notices dated 23 March 2015 (reference FS50553682), 5 October 2015 (reference FER0589796) and 7 October 2015 (reference FS50553674), which are matters of public record. This appeal is against the Decision Notice reference FER0589796 dated 5 October 2015 and is brought under s57(1) of FOIA as modified by Regulation 18 Environmental Information Regulations ("EIR").

2. The Tribunal Judge and lay members sat to consider this case on the 19 May 2016 and had before them an open bundle of papers (“OB”) marked pages 1 – 206.

### **Factual Background to this Appeal:**

3. Full details of the background to this appeal, Ms Lownsborough’s (“the Appellant”) request for information and the Commissioner’s decision are set out in the Decision Notice and not repeated here, other than to state that, in brief, the appeal concerns the question of whether on the balance of probabilities Hampshire County Council (“the Council”) holds any information, other than that previously disclosed, regarding tests of individuals for Legionnaires disease at specific named care homes. A further issue arose as to the application of the s40 (2) personal information exemption to a request for dates of death and transfer between care homes.

### **History and Chronology:**

2 <sup>nd</sup> March 2014	Request A to the Council in 11 parts for information regarding tests for Legionnaires disease
21 <sup>st</sup> March 2014	Request B to Council in 8 parts for data on deaths, councilors’ financial interests and confirmation of testing of individuals for Legionnaires disease.
28 <sup>th</sup> March 2014	Council’s response to Request A, disclosing some information, applying s36(2)(c) for some and stating no information held for some.
7 <sup>th</sup> April 2014	Appellant requests an internal review re Request A and Request C for test documents for Legionnaires bacterium
17 <sup>th</sup> April 2014	Council’s response to Request B, citing s40(2) for death and transfer data, provided a link to the current register of interests and stated it held no information on medical testing of individuals
24 <sup>th</sup> April 2014	Appellant requests an internal review re Request B
25 <sup>th</sup> April 2014	Council’s response to review for Request B
28 <sup>th</sup> April 2014	Request A - Council provides redacted copies of test documents but maintains unredacted copies are subject to s36(2)(c) exemption

- 6<sup>th</sup> May 2014 Council confirms one test on 10 Feb and provides re-  
dacted results confirming dates and sample loca-  
tions but refused disclosure under s36(2)(c)  
***NB subsequently provided test documents after  
FS50553899***
- 30<sup>th</sup> July 2014 Complaint to the Commissioner regarding all requests

**Relevant Law:**

**4. FOIA s1 General right of access to information held by public authorities.**

- (1) Any person making a request for information to a public authority is entitled –
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
  - (b) if that is the case, to have that information communicated to him.

**s40 Personal information**

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if –
  - (a) it constitutes personal data which do not fall within subsection (1), and
  - (b) either the first or the second condition below is satisfied.
- (3) The first condition is –
  - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the M1Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene –
    - (i) any of the data protection principles, or
    - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
  - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the M2 Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

- (4) The second condition is that by virtue of any provision of Part IV of the M3 Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

***EIR R5 - Duty to make available environmental information on request:***

5.—(1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.

(2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.

(3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.

(4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.

**Respondent's Decision – the DN:**

**6. Request A**

The Appellant believes that information on testing of individuals must be held by the council, as she learned of certain health decisions taken regarding her mother-in-law that would give rise to the suspicion of Legionnaire's disease. The Council confirmed that it does not test people, only buildings, and it tests for the presence of legionella bacteria, not Legionnaires disease. The NHS conducts testing of individuals for the disease and so the Council does not hold any information regarding tests conducted. The Commissioner is satisfied that there is no statutory need for the Council to hold the information and that the Council has no motive to conceal the information, so determined on the balance of probabilities that it does not hold the information.

**Request B**

The Council informed the Commissioner that the data could be cross-referenced with other information already in the public domain, such as newspaper death notices or death certificates in order to identify the deceased individual and their relatives. This

information risks not only the deceased but is also personal information regarding their living relatives. DPA protections only relate to the living, but the Commissioner is satisfied that the relatives of the deceased persons could fairly easily be identified from the released information. They would have a reasonable expectation that they would not be identified from the information, and disclosure and identification would probably cause them some distress. There is not sufficient public interest in disclosure to outweigh these concerns, and s40(2) was correctly applied.

The Council confirmed that the register of interests provided to the Appellant was current at the time of the request, and has thus complied with the request.

The Council also confirmed that, as with Request A, it does not hold any test records for Legionnaires disease. It confirmed that it had a report of a service-user developing symptoms and ultimately being treated for an unrelated infection, but that the records it holds would only be daily case notes, medication and record sheets (MAR). It confirmed to the Appellant and the Commissioner that no residents in the specific care homes, including the Appellant's mother-in-law, have been tested for legionnaires disease. As such, the Commissioner is satisfied that the Council does not hold the requested information.

### ***Request C***

The Council confirmed that it held information relating to interim notifications of re-testing for legionella in February 2014 that was not disclosed to the Appellant. The Commissioner considered these notifications to be test documents within the intention and meaning of the Appellant's request, and so found the Council to be in breach of r5(1) and (2) for failing to make the information available within 20 working days. The Commissioner found no evidence to dispute the Council's position that no further tests took place after 10 February 2014 and as such there is no evidence of a breach of r5 in respect of that information.

### **Appellant's Notice of Appeal:**

7. The Appellant believes that her mother-in-law as resident of Bulmer House care home was exposed to legionnaires bacteria for at least 10 days prior to her being moved, and perhaps longer. She disputes the Council's assertion that the tests for legionella need to take 10 days, as she is aware of a test that provides 'on the spot'

indications. She disputes that those performing tests would “sit on” information showing a potential risk to life for ten days.

8. She states that the families of residents were not informed by the council that the home had tested positive for legionella, but rather learned of it through the local press on 12<sup>th</sup> February 2014. When she challenged the Council on this, she states that a representative from Adult Services explained that they didn't want to worry the families. She suggests that the Council wishes to withhold information as it may expose it to suggestions of negligence.

9. Her request stemmed from a desire to know whether legionella had been found in her mother-in-law's room, shower or washbasin. She was told by a manager that it had been, but she wants to see test information that relates to specific sites within the home and clarification of when the Council first learned of the presence of legionella within the home. She therefore wishes to see all correspondence between the Council and the testing labs to determine whether the Council were warned about Legionnaires bacteria before receiving the final report.

**Commissioner's Response:**

10. The Commissioner accepts that the information is environmental and so EIR applies. There is no issue here and this Tribunal agrees EIR are engaged.

11. The Appellant's underlying grievances with the Council, according to the Commissioner, are clearly beyond the scope of the appeal. Whether or not the Council holds more information is a question of fact. The Commissioner made a number of inquiries with the Council regarding specific items of information, and ordered disclosure of discovered documents. The Appellant has submitted no evidence that the Council holds further information, and as such he is satisfied on the balance of probabilities that the Council does not hold any further information. In essence this tribunal accepts this factual matrix and adopt this reasoning.

## **Appellant's Response:**

12. The Appellant disputes that between 27<sup>th</sup> January 2014 when the test samples were taken and 5<sup>th</sup> February when the results were received that there was no communication between the Council and the testing labs. She states that she witnessed the fact that several residents were ill with "chest problems" and there were deaths in the months prior to the January testing. Indeed an employee of the care home informed her in the week prior to the 5<sup>th</sup> February that the Day Centre was due to close owing to the discovery of Legionnaires bacterium. The manager of Bulmer House later informed her after 12<sup>th</sup> February that the bacterium had been found in the shower used by her mother-in-law. According to the Appellant, he further stated that for "several weeks" the residents had been received "strip down washes" as the home was being run down prior to closure; the Appellant therefore questions why this decision was taken, and wants to know exactly when the Council first learned of the presence of the bacteria and whether or not her mother-in-law was exposed to the bacteria.

13. She again makes the suggestion that the Council prefer that the information not be made public, and her evidence of that is that they claim not to possess the evidence and told her not to make any further enquiries as they could be considered vexatious. She accepts that she can provide no documents to evidence that the council actually possess further information (our emphasis), but notes that neither the Council nor the Commissioner has produced any evidence to show that the Council does not have any further information. She wishes the information provided in a format similar to "Test results confirm that legionella bacteria were/were not found in your mother-in-law's bathroom/bedroom and here are the details...etc.". Sample locations should not be provided in code as that renders them meaningless. The Appellant highlights Health and Safety Executive Guidelines, which state that duty holders should review the assessment regularly and any risk identified and communicated to the management to allow them to prioritise remedial action. A 9-day gap between test and result surely does not amount to communication with management and prioritisation of remedial action. She further notes the repeated impetus in the guidelines on the need for written schemes of control measures, and

keeping all records for at least two years with inspection and monitoring records being kept for at least five years.

14. The Appellant also gives further details of the on-the-spot legionella tests.

**Conclusions:**

15. The Tribunal have considered the issues in the appeal and note the careful reasoning in the DN and the Respondents response, in particular at page 51 of the OB before us where we note at paragraph 25 that *“The Commissioner did not merely accept the Council’s word that it holds no further information within the scope of the request and required the Council to disclose the interim notifications to the appellant.*

16. We accept and adopt the Commissioners’ conclusions at Paragraph 28 and 29 of his Response (page 52 OB) wherein he contends the Appellant has disclosed no error of fact or Law in the DN.

17. In any event we accept that on the facts before us the Council has established, on the balance of probabilities, that it held no further information within the scope of the request.

18. The Tribunal has studied the papers within the OB before us carefully and make the following observations in coming to the conclusions at 11. above.

(a) At page 167 the Appellants suspicions were initiated by a telephone conversation with a Manager at the care home on or about 4 February 2014 but they do not establish any evidence of the existence of any information within the scope of the request being with the Council.

(b) At page 193 of the OB before us is a detailed letter to the Commissioner from Janice Austin, a solicitor working for and on behalf of the council with a detailed response of the Councils’ position in relation to the request. In the fourth paragraph from the end of this letter (See page 193 OB) Ms. Austin states in relation to the Hampshire Scientific Service (“HSS”), as follows: *“ In this instance, it was providing a contractual service to the Council’s Adult Services Department. We have asked HSS*



to confirm that the documents that they previously passed to us and that we released to Mrs. L (the appellant herein) were the only documents relevant to her request. They confirm that this is the case, and that no other reports exist.” We find this supports the DN in so far as it demonstrates credible evidence that on balance there are no further documents within the scope of the request within the possession of the Council.

19. We are of the opinion that the Council gave a detailed response providing what information they could and we find that the Appellant does not reach the threshold where we would regard it necessary to join the Council because of any evidence or other indication that suggests there is information of the nature requested within their possession.

20. Accordingly we accept the Commissioners DN in that regard. We too find that the Appellant has failed to provide any evidence to the contrary and in all the circumstances failed to persuade us that the Commissioner erred in Law or otherwise was wrong in the conclusion in his DN, and we dismiss this appeal.

Brian Kennedy QC

20th June 2016.