



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

EA/2014/0252

DR TERENCE McCLATCHEY

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

And

SOUTH GLOUCESTERSHIRE DISTRICT COUNCIL

Second Respondent

Hearing

Final hearing on 29 February 2016 at Residential Property Tribunal.
Before David Sivers, Pieter De Waal and Judge Claire Taylor.

Decision

The appeal is upheld in part for the reasons set out below. This decision is to be treated as a substituted Decision Notice. No steps are required to be taken. (*See in particular paragraphs 17, 26 to 28*).

Reasons

Background

1. This appeal is set within the context of the Government policy for protection of vulnerable adults. The Department of Health has issued 'No Secrets: Guidance on Developing and Implementing Multi-Agency Policies and Procedures to Protect Vulnerable Adults From Abuse' ('No Secrets'). No Secrets itself was issued in response to the recommendations of the 'Speaking Up for Justice Report', which recommended that a national policy should be developed for the protection of vulnerable adults.
2. No Secrets is statutory guidance such that local authorities are required to take account of it.¹ It provides:

'1.2 The aim should be to create a framework for action within which all responsible agencies work together to ensure a coherent policy for the protection of vulnerable adults at risk of abuse and a consistent and effective response to any circumstances giving ground for concern or formal complaints or expressions of anxiety. The agencies' primary aim should be to prevent abuse where possible but, if the preventive strategy fails, agencies should ensure that robust procedures are in place for dealing with incidents of abuse...'

'3.2 Local agencies should collaborate and work together within the overall framework of DH guidance on joint working. The lead agency with responsibility for co-ordinating such activity should be the lead Social Services Authority but all agencies should designate a lead officer.'

3. South Gloucestershire Council ('the Council') is the lead member of South Gloucestershire's Safeguarding Adults Board ('SAB'). This is a multi-agency partnership set up to promote the safeguarding of adults within the South Gloucestershire area. Other members include: NHS South Gloucestershire – Clinical Commissioning Group; Avon & Somerset Constabulary; Avon & Wiltshire Partnership Mental Health Trust; North Bristol NHS Trust; Avon & Somerset Probation; Department for Children, Young People and Families; Avon Fire & Rescue; Voluntary Service Providers; and Independent Sector Providers.
4. The SAB's role includes to commission and carry out Serious Case Reviews ('SCR' or 'SCRs') where a vulnerable adult dies or sustains a potentially life-threatening injury; abuse or neglect is suspected to be a factor; and the case gives rise to concerns about agency coordination.
5. The SCR is dealt with by a multi agency SCR panel under terms of reference agreed with the SAB. The Care Quality Commission is informed of any SCR that is taking place. The Chair of the SCR Panel, who will not necessarily be an officer of the Council, has on-going responsibility for the progress of the SCR and the formulation of an SCR report, which will be presented to the SAB. The SAB then converts the SCR report into an action plan to be endorsed at a senior level by each agency. The SAB also makes recommendations to the relevant agencies and monitors their implementation.
6. The SAB published an SCR report following its investigation into abuse of patients at Winterbourne View Hospital.

¹ It is issued under section 7 of the Local Authority Social Services Act 1990.

The Request

7. On 18 February 2013, the Appellant requested from the Council under the Freedom of Information Act 2000 ('FOIA')

'Copies of all material held by the Council in relation to the commissioning of, publication and discussion about the SCR report. This will include records of all communications whether formal or informal and whether held in handwritten, printed, electronic, analogue or any other format.' (Emphasis added)

8. On 15 May 2013, the Council issued a refusal notice relying on s.36(2)(b)(ii)(*prejudice to effective conduct of public affairs*); s.40(2) personal data; and s.41(1)(*information provided in confidence*) of FOIA as exempting it from providing the information.
9. It also asserted that the relevant information was not 'held' by the Council for the purposes of the FOIA because, whilst physically in its possession, it was held on behalf of the SAB within the meaning of s.3(2)(a) FOIA. It asserted that the SAB was the sole body responsible for commissioning SCRs and not a body subject to FOIA.
10. On 2 September 2013, the Appellant complained to the Information Commissioner (the 'Commissioner'). The Commissioner concluded that the information was physically in the possession of the Council, but held solely on behalf of the SAB. His reasoning included:
 - a. The Council had stated that it held information only on behalf of the SAB; it held it by virtue of its coordinating responsibilities, and the information was to be used for the SAB's own purposes.
 - b. True ownership of the information lay with the SAB, who was not listed as a public authority whether under Schedule 1 FOIA or by Ministerial order.
 - c. As he decided the Council did not hold the information, he did not need to consider any of the substantive exemptions that the authority had relied upon.²
11. The Appellant now appeals this decision.

The Task of the Tribunal

12. The Tribunal's remit is governed by section 58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or whether he should have exercised any discretion he had differently. The Tribunal is independent of the Commissioner, and considers afresh the Appellant's complaint. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

² The Commissioner followed his own reasoning in a previous decision, where he had decided that an SCR held by a local authority on behalf of the Safeguarding Children Board was not 'held' by the authority for FOIA purposes. (*Decision Notice FS50368110*).

13. We have received various bundles of documents and submissions, and further arguments in response to our further directions, all of which we have considered even if not specifically referred to below.

The Law

14. Under s.1(1) FOIA, a person making an information request to a public authority is entitled to be informed in writing whether the public authority holds the requested information and to have it communicated to him. However, it is exempt from providing the information under FOIA where it is 'exempt information'.

Events leading up to Final Hearing

15. A paper hearing was held on 30 April 2014. The panel were not satisfied that we had been given sufficient information to be able to make a decision at that stage and issued open and closed directions³. Some of the concerns addressed by the directions were:
- a. The Appellant's request appeared to be missing from the bundle such that the panel could not consider it. Submissions had not addressed what might be considered to be included in the scope of the request. Whilst the public authority's internal review indicated that the Appellant had modified his request, the Appellant did not agree and it seemed to the panel from the papers in the open bundle that he had not.
 - b. The unsatisfactory number of closed bundles – the hearing was held in the Tribunal's office premises in Leicester because the Council had only provided one (instead of four) bundles, such that the panel could not consider the material prior to that date or after it.
 - c. The unsatisfactory contents of the closed bundle, which did not seem to have been prepared specifically for the appeal and seemed clear to the panel did not disclose to the panel all information within the scope of the request.
 - d. Whilst the bundle contained more than 900 pages, the Council had made no closed submissions and had not identified which of the exemptions it relied on for which material within the closed bundle. It was certainly not possible for the panel to work this out or its role to do so.
 - e. The Council's reliance on the information not being 'held' by it. It seemed to the panel that where both Respondents sought to argue that the material was held by the SAB partnership and not the Council, it should have considered whether a partnership constituted a legal person for the purposes of s3(2) FOIA. If it did not, it seemed that it might be necessary to 'look through' the partnership and consider the material to be held by its members. Further, it seemed from a review of No Secrets that the Council could be considered to have had the leadership role in relation to the SAB. In acting as a partner in the SAB (particularly with a leadership role), it seemed to be doing so in its local authority capacity rather than primarily and exclusively as a SAB

³ Open Bundle: Tab 1 pages 6 to 14.

partner independent of the Council. ⁴ It was necessary to put these arguments to the parties and consider their submissions before coming to a decision on the point.

16. It became clear from the correspondence between the parties as a consequence of the directions that the case would benefit from a telephone case management hearing. This was held on 13 August 2015. The Appellant confirmed his willingness to narrow the scope of his request, (I having made clear that he was under no obligation to do so and should not feel pressured to do so, since it was his prerogative to have his full request considered). In brief, he conceded that (a) he was not seeking material to which s40 FOIA applied, and (b) in relying on information from the Council, he narrowed his request as set out in my directions of 14 August 2015. The Council conceded that it was no longer contesting that it held the information, and that it would not seek to rely on an exemption other than in relation to s.42 FOIA (*legal professional privilege*) for the narrowed request.⁵

17. As a consequence of the Council's concession on the question of 'held', the Commissioner conceded the appeal and elected not to participate further in proceedings. This was because his Decision Notice was wholly based on the finding that the Council did not hold the material for the purpose of the FOIA and that it was held solely on behalf of the SAB, and this was no longer being maintained by the Council as a matter of dispute between the parties.

18. An oral hearing was held on 30 October 2015 where it became clear from submissions that the agreed wording of the Appellant's narrowing of the timescale for his request had been based on inaccurate information that he had relied upon. (See *paragraph 16 above*.) The representatives appearing on behalf of the Council had changed such that we were unable to hear from the representative who had participated at the telephone hearing. Based on the true intentions of the Appellant at the telephone hearing, the Tribunal ruled that the scope of the narrowed request was to be construed as:

- a. *'the discussion about the SCR report, by the local authority and/or SAB to the extent that there was discussion upon receipt of any part of the first draft of the SCR overview author's report in any form. This will include records of all communications whether formal or informal and whether held in handwritten, printed, electronic analogue or any other format.'*
(*Emphasis added. This is referred to here as the 'first narrowed request'.*)

19. Consequently, the material contained in the revised Closed Bundle did not represent the narrowed request, and the panel agreed to an adjournment.⁶

20. The final oral hearing was held on 29 February 2016, with the Council seeking to rely on a number of exemptions. It provided a new Closed Bundle based on the first narrowed request which it confirmed contained all material that could possibly fall within the first narrowed request, based on the principle set out in the directions that if in doubt it was to be included.

21. In his of submissions of 1 January 2016, the Appellant stated:

⁴ See No Secrets and paragraph 2 above.

⁵ See directions in Open Bundle: Tab 1 pages 15 to 17.

⁶ See directions in Open Bundle: Tab 1 pages 18 to 23.

‘The central question to which I have long sought an answer may be summarised as what has the Council (and/or the SAB) done about three specific areas of abuse identified in the SCR report – those being:

- a. Inappropriate conversions of voluntary hospital patients to formal detention under the Mental Health Act (MHA 1983)*
- b. Inappropriate use of Section 37 of MHA 1983*
- c. Inappropriate prescribing of medications*

...

While the closed bundle appears to have expanded from a few paragraphs as indicated by [the public authority] to almost 400 pages; I invite the Tribunal to review those pages not seen by the appellant in the light of the central issue as set out at para.s 3 and 4 above. If all or any part of that material does not add to or set in context in any way what the Council has done (or decided purposefully not to do) with regard to the three identified topics; then I confirm that I have no need or wish to see that material.’

(Paragraphs 3, 5 of submission. Emphasis added.)

22. At the hearing, the Appellant confirmed that he was narrowing his request further and stated that he was additionally interested in any draft chapters of the SCR report to the extent that they contradicted the final SCR report conclusions in relation to what he had termed the central question. He was also interested in knowing what had happened or not happened as a result of the SCR report. This narrowed request is referred to here as the ‘second narrowed request’.
23. It was made clear to the Appellant that the panel could only consider what material the Council held in relation to his second narrowed request so far as it related to the material contained in the Closed Bundle provided under the first narrowed request.
24. Accordingly, the first issue for the Tribunal to determine was whether the information within the second narrowed request was held by the Council, so far as it was contained in the Closed Bundle.
25. In closed session, the Tribunal panel went through in some detail with the Council all material that the panel and/or the Council had considered could conceivably have any potential connection with the Appellant’s second narrowed request. We reviewed all material within the Closed Bundle - notwithstanding that the Council maintained that some might be outside the scope of the appeal. The Council argued that none of the material shed light on the matters that the Appellant had stated he was interested in, and the panel probed this fully.

Our Findings

26. Having reviewed the Closed Bundle in some detail, the panel found no material that it considered fell within the scope of the Appellant’s second narrowed request. Accordingly, the Tribunal unanimously found that the requested material was not held by the Council. This was because, based on the remit of the material before us (as per paragraph 23 above), we found no information of relevance.
27. As was made clear on the day of the hearing, in view of the panel having found that the material within the narrowed scope was not held, there was no need to consider the various exemptions that the Council were seeking to rely on.
28. In conclusion, we found that the material was not held by the Council, for reasons that differ from those set out in the Commissioner’s Decision Notice.

Other

29. Originally, the Council sought to rely on the argument that it did not hold the information on the basis that it was held on behalf of the SAB, which in turn was not subject to FOIA. This seemed incongruous to the panel given that the SAB itself was set up as a multi-agency partnership to promote the safeguarding of adults pursuant to a policy entitled 'No Secrets', and that the requested information concerned a subject matter that was extremely important and of significant public interest and concern.

Judge C Taylor

28 March 2016

Promulgated 12th April 2016