



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

Appeal No: EA/2016/0312

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50630573
Dated: 24 November 2016

Appellant: John McBrearty

Respondent: The Information Commissioner

Determined without a hearing

Before
HH Judge Shanks
and
Pieter de Waal and Mike Jones

Date of decision: 7 August 2017

Subject matter:

Freedom of Information Act 2000 (FOIA)

Section 1 (whether information held)

Section 40 (Personal information)

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal allows the appeal and issues the following substitute decision notice.

SUBSTITUTE DECISION NOTICE

Public Authority: **Lancashire Teaching Hospitals NHS Foundation Trust**

Complainant: **John McBrearty**

The Substitute Decision

For the reasons set out below the Public Authority did not deal with the Complainant's request for information dated 28 October 2015 in accordance with Part I of the FOIA in that:

- (1) they were not entitled to rely on section 14;
- (2) contrary to the position they maintained before the Information Commissioner they did hold information answering to requests [1], [2] and [6];
- (3) they should have disclosed the information which was subject of requests [1] and [6] and relied on section 40(2) of FOIA to withhold that which was subject of request [2].

Action Required

Since the Complainant has been supplied with a copy of the email dated 24 June 2015 appropriately redacted no further action is required.

HH Judge Shanks

7 August 2017

REASONS FOR DECISION

1. The Appellant, Mr McBrearty, is a theatre support worker with the Lancashire Teaching Hospitals NHS Foundation Trust.

2. On 11 and 12 March 2015 he was asked to change shifts at short notice. He understood that this entitled him to two “unforeseen change payments of £15” but the Trust disagreed and a dispute arose. In a letter from the Trust dated 29 June 2015 following a grievance by Mr McBrearty, he was informed that under the relevant provisions of the Agenda for Change Handbook an unforeseen change payment was only available where an NHS employer used a “prospective” staff payment system and that since the Trust used a “retrospective” system he was not entitled to the payments he sought. The letter referred to advice having been obtained at some stage between 22 and 29 June 2015 from the NHS Staff Council which had confirmed the Trust’s understanding of the relevant provisions.

3. On 28 October 2015 Mr McBrearty made a FOIA request to the Trust seeking the following information:

 - [1] paper or electronic copies of the advice sought and received from the NHS Staff Council**

 - [2] ... who contacted the NHS Staff Council**

 - [3] when the NHS Staff Council was contacted**

 - [4] a copy of that response**

 - [5] the name of the NHS Staff Council member ... contacted**

 - [6] the information received from the NHS Staff Council ... mentioned in [the Trust’s letter]**

4. The Trust responded on 23 November 2015. They said (a) that the advice had been sought and received in a telephone conversation and there was no documentary record of it (b) that the telephone conversation took place between a member of the Trust’s

HR team and NHS Staff Council on 24 June 2015 and (c) that under section 40(2) of FOIA the name of individual staff members of the NHS Staff Council could not be released without their consent. On review the Trust confirmed that it had supplied Mr McBrearty with all written information it held and that the information sought at [5] would be exempt under section 40(2) of FOIA. On Mr McBrearty asking for a further review the Trust invoked section 14 of FOIA saying that the request was vexatious and refusing to correspond with him further.

5. Mr McBrearty complained to the Information Commissioner. In a decision notice dated 24 November 2016 the Commissioner decided that the request could not be categorised as vexatious but accepted the Trust's position that it did not hold any of the information sought (including that sought at [5]) in recorded form.
6. Mr McBrearty appealed to this Tribunal against the decision notice. In the course of the appeal a copy of an internal Trust email came to light which has been supplied to Mr McBrearty. It read:

From: [redacted]

Sent: 24 June 2015 08:21

To: [redacted]

Subject: AFC. Section 2, Maintaining round the clock services

Hi

I have spoken to my contact on the NHS Staff Council and they agree that the £15 is only linked (sic) where prospective payment systems are in place and not retrospective payments systems. As long as we are confident that ours is a retrospective payment system then the £15 is not applicable.

7. It is readily apparent that this email contains a record of the information requested at [1], [2] and [6] (although it does confirm that there will be no recorded information answering to [4] (a copy of the Council's "response", which must be read to mean a written response) or [5] (the name of the NHS Staff Council member contacted)).

The position taken by the Trust before the Commissioner (namely that they did not hold any record of the requested information except the date of the telephone call) was therefore demonstrably false. As well as supplying Mr McBrearty with a copy of the email as redacted above the Trust have written him a fulsome letter of apology dated 20 July 2017.

8. Notwithstanding that development and the hopes of the Tribunal that it would bring about an amicable settlement of the appeal, Mr McBrearty and the Trust (with the implicit support of the Commissioner) remain at odds on one point. Mr McBrearty still wants to know the answer to request [2], ie who contacted the Council (inferentially the writer of the email), and the Trust maintain that that information is exempt under section 40(2) of FOIA.
9. There can be no doubt that the name of the writer of the email is his/her personal data. In those circumstances it was absolutely exempt information if its disclosure would contravene any of the data protection principles. Schedule 1 to the Data Protection Act 1998 provides that the first data protection principle requires that data shall not be disclosed unless at least one of the conditions in Schedule 2 is met. The only possible relevant condition in Schedule 2 is para 6(1) which requires that

[disclosure] is necessary for the purposes of legitimate interests pursued by the ... third party ... to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject

10. In order to meet the para 6(1) condition Mr McBrearty must first show that disclosure of the information he wanted was necessary for the purposes of some legitimate interest he was pursuing. There can be no doubt that his claim for the “unforeseen change payments” was a legitimate interest being pursued by him but we cannot see any basis for saying that the identity of the Trust staff member who contacted the Council for advice on the proper interpretation of the relevant provisions was necessary for the purpose of pursuing that legitimate interest: the issue is one of the the proper interpretation of the relevant provisions and no more. In some further

representations made on 28 July 2017 in response to the Trust Mr McBrearty says that the release of the name of the person concerned would show transparency and openness by the Trust and challenges their assertions that the member of staff in question was not senior and that the Trust normally only release the names of staff who are band 8 or above. In our view Mr McBrearty had no legitimate interest other than pursuing his claim for “unforeseen change payments” at the time of his request (which is the relevant time) and, in any event, his continuing desire to pursue the question of who spoke to the Council and to challenge the Trust’s policies on disclosure of names of staff is in the circumstance just not in our view the pursuit of a legitimate interest on his part.

11. We are therefore satisfied that disclosure of the answer to request [2] would have involved a breach of the first data protection principle and that the information was therefore absolutely exempt under section 40(2) and that the Trust were under no obligation to disclose it on those grounds.

12. For the all the reasons above we allow the appeal in part and issue the substitute decision notice set out. We record that we are satisfied that it is appropriate to resolve the appeal without a hearing and that our decision is unanimous.

HH Judge Shanks

7 August 2017