



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
On appeal from the Information Commissioner's
Decision notice FS50688955**

Appeal Reference: EA/2018/0035

**Heard at Norwich SSCS
On 27 July 2018**

Before

JUDGE

CHRIS HUGHES

TRIBUNAL MEMBERS

STEVE SHAW & DAVE SIVERS

Between

S. FRANCES GASKIN

Appellant

and

INFORMATION COMMISSIONER

Respondent

DECISION

1. The appeal is dismissed.

REASONS

The request for information

2. On 21 March 2017 the Appellant wrote to the Norwich Clinical Commissioning Group (CCG) in the following terms:-

"Please avail using your 18 hours time all data around what the CCG hitherto agrees, that it commissioned by Contract a team of staff to liaise with police from 2010 onwards to at least 2014 by which such staff would attend from a local Site for mentally unwell, five police centres Wymondham HQ, Kings Lynn, Gt Yarmouth and Norwich court being four is understood and there " assess persons as police detainees for supposed mental health ". Please individualise the response facts across all five centres e.g. Total persons assessed, referred on, and not referred on etc as to all data & as the CCG will have copy of the contract it generated. Plus copy of any means by which the CCG accounted for this matter such as Updates on Progress, sums paid out for this service and by which " reporting back for CCG Review was managed" (not least as the contract was ended so the rationale for both its start up and ending will be stated on CCG Records)"

3. By an exchange of emails on 6 April 2017 The CCG and the Appellant clarified the request as being:-

[1] Please provide all data relating to a contract(s) commissioned by the CCG to provide a team of staff to liaise with the police between the periods 2010 to 2014, that would be responsible for attending and conducting a mental health assessment for individuals detained by the police.

[2] Please provide the following information in relation to the following centres:

Wymondham Police HQ

Kings Lynn Police Station

Kings Lynn Magistrates Court

Great Yarmouth Police Station

Great Yarmouth and North Norfolk Magistrates Court

Norwich (Bethel Street) Police Station

Norwich Magistrates Court

for the periods 2010 to 2014:

Total number of individuals assessed;

Total number of individuals referred to NSF;

Total number of individuals not referred

[3] Please provide copies of performance reports for this service including contract value for the periods 2010 to 2014

[4] Please provide details of the CCG (former PCT)'s rationale for implementing the contract and rationale for why the contract ceased.

4. The CCG responded, the Appellant was dissatisfied and following the intervention of the Respondent the CCG provided a fuller response on 7 August. This explained that the CCG did not come into existence until 1 April 2013. Before that date contracting for services was the responsibility of a Primary Care Trust. The CCG did not hold information pre-dating this time, and had re-commenced a contract with Norfolk and Suffolk NHS Foundation Trust (NSFT) with effect from June 2014. It provided what information it had which appeared relevant (a service specification relating to 2013-2014). The CCG did not hold information within the scope of parts 2,3 and 4 and referred the Appellant to the Norfolk Constabulary which might hold the information:-

“although with the caveat that we cannot guarantee that the constabulary will hold all the requested data.”

The Information Commissioner’s Investigation and Decision Notice

5. The Appellant complained to the Respondent on 7 August 2017. The Respondent investigated. By a letter of 19 January 2018 (bundle pages 66-73) the CCG set out the detail of its handling of the request for information. It noted that this was the third occasion upon which the Appellant had made a version of the request and there had been previous internal reviews and referrals to the Respondent. It explained that (pages 71-73):-

“This request pre-dates the establishment of NHS Norwich CCG as a formal entity (on 1 April 2013) and as such the CCG would not hold information regarding a contract in place between 2010 and 2014. ...

The CCG’s Mental Health Commissioning Team reviewed the contract commissioned on 1 June 2014 to establish whether it referenced the provision of a team of staff to liaise with the police and responsible for attending and conducting a mental health assessment for individuals detained by the police. The search revealed that the contract did not make the above specific reference, and therefore in the interests of transparency details were provided of the Section 136 Assessment Suite commissioned at the time.

In addition the CCG carried out searches including, but not limited to, the following:

Service specification for the above contract – part of the service specification relates to the mental health outreach function for local courts and PICs;

Any data held relating to CRHT [Crisis Resolution Home Treatment Team] performance for 2013/4;

Whether NSFT holds any data relating to CRHT activity;

A related FOI request from Ms Gaskin to which the CCG responded in 2015, confirming that they did not hold the requested information...

The searches referenced above would have been conducted on the electronic network drives of both NHS Norwich CCG and NEL CSU [the CCG administrative services

provider] the latter of which may have held information on behalf of the CCG (for example, details of previous related FOI requests)....

The CCG relied on contract knowledge and historical information to try to address the queries raised by Ms Gaskin...

There was a national mandate for all Primary Care Trust (PCT) legacy information, i.e. information predating the formal establishment of CCGs in April 2013, to be transferred to the Department of Health's Ministerial Correspondence and Public Inquiries Unit. On that basis, the CCG has no relevant policy on the retention /deletion of records of this type, as the CCG would not have received this type of information....

There is no business purpose for the CCG to hold the information. This has previously been explained to Ms Gaskin..."

6. In her decision notice the Respondent noted that the CCG had confirmed that it did not hold information pre-dating its formation, that it did not receive and therefore did not hold activity data sought by part 2 of the request, and that during the period of its existence it did not receive or hold performance reports sought by Part 3 as it was not required for the commissioning of the service *"the value cost of the service is part of a wider block contract and cannot be separated out from the block contract to this level of detail."* With respect to Part 4 *"the CCG says it cannot comment on why the contract was implemented by the PCT because the contract predates the existence of the CCG. As the contract is still running, having been re-commenced in June 2014, the CCG considers there is no rationale on why the contract has ceased. Its position is that it therefore does not hold recorded information on these points."* She reviewed the various steps the CCG had taken to seek the information (reviewed above in paragraph 5). She noted the assurance given by the CCG that it had not at any time held recorded information relevant to the request as it had no business purpose or statutory requirement to hold the information. In all the circumstances the Respondent was satisfied on the balance of probabilities that no information within the scope of the request was held.

The appeal

7. The key issues arising from the Appellant's notice of appeal are:-
 - She was not seeking information on s136 suites but a different contract,
 - The date of creation of the CCG is irrelevant; the CCG should hold records regarding the contract which pre-dates its formation in order to manage existing contracts
 - Information previously made available by the CCG showed that further information was held.

8. In resisting the appeal the IC noted:-

- On a narrow reading of the request the 2014 information did not fall within the scope as it did not contain precisely the provisions of the type described, it was appropriate for the CCG to provide similar information to address the thrust of the request and there was no evidence to suggest that a further contract exactly in the terms of the request, was held.
- The Respondent considered the explanation that legacy information pre-dating the formation of the CCG was transferred to the Department of Health. With respect to the Appellant's view that the CCG should hold historic information about a contract its predecessor entered into which has now been commissioned; she concluded, on the balance of probabilities, that the information was not held.
- The Respondent had seen no documentary evidence or information from the Appellant which contradicted the CCG explanation of the information it held.

9. In written submissions the Appellant argued that the hearing bundle was defective. She submitted that the Secretary of State must have continued existing contracts in 2013 when CCGs came into existence. She drew attention to extracts from web searches of the contracts awards registers of Bexley CCG and Norwich CCG. The Bexley CCG information included the statement "Services commissioned prior to 1 April 2013 were inherited by NHS Bexley Clinical Commissioning Group under the legal transfer arrangements (transfer scheme) from Bexley Care Trust. A list of these contracts is available from the left-hand menu." The extract she supplied from Norwich CCG (undated) did not provide this information. She submitted extracts from a range of emails of limited relevance to the matters in question. The submissions included a statement:-

"Continuity and Likelihood. The trust whose staff are paid by the contract the copy of which is sought gave to the Appellant the staffing details and figures of it - that appear in the FOI. The CCG has that contract, so would the tribunal cut to the chase so as to speak and obtain it is the Appellant submission. "

10. In her oral submissions the Appellant stated that she had an email from an officer of NSFT in spring 2014 providing some information about the operation of the contract with respect to the police. The Norfolk police had arrested 22,000 people in 2014 and the involvement of the NSFT by the police custody team paperwork had been generated by which the custody file was affected meaning that about 200 people were more likely to be prosecuted. NSFT had "Class A files" relating to these people. These files had been produced as a result of "junior members of staff" seeing people in police custody. She was unable to accept that there was any real distinction between the PCT and CCG, noting that some individuals had been involved with both bodies.

11. In reply to questions from the tribunal she was unable to identify what information the CCG had put in the public domain or identify documents which supported this claim. She stated that she felt that the CCG "as originator" of the contract should hold it. She was unable to explain why, if she had obtained some information from NSFT she should not seek further information from NSFT, she stated "*there is no reason why I would make a request to the NSFT*" or the Police (as suggested by the CCG) or the Department of Health which was identified as the holder of the PCT records and therefore all records prior to 2013. She argued that the "business model" of commissioning meant that the CCG must hold the information.

Consideration

12. It is clearly a matter of considerable public importance that individuals taken into police custody have access to healthcare which addresses their needs while they are in custody. On the Appellant's account 20,000 people are arrested in Norfolk each year; while she had no figure of the number receiving some sort of examination relating to their mental health, on her account approximately 200 of these were identified in a recent year as having some mental health issue by "junior members of staff" of NSFT. What the Appellant was seeking was:-

a contract(s) commissioned by the CCG to provide a team of staff to liaise with the police between the periods 2010 to 2014, that would be responsible for attending and conducting a mental health assessment for individuals detained by the police

13. The structure of the request for information assumes that a contract for a specific service of health service staff attending at police stations was entered into for period 2010 to 2014 and then a decision was made not to contract for it any further. It further assumes that during that period detailed performance management information was provided to the PCT and then the CCG (which the Appellant treated as the same body) of the numbers of individuals assessed at each site and the outcome of those assessments.
14. It is not in dispute that staff employed by NSFT visited people detained by the police and that they were paid for out of money paid to the NSFT under contracts between the various NHS commissioning bodies for the area (PCTs and then CCGs). However, despite detailed searches a contract matching the description of the request has not been found. The Appellant does not accept this; however she has been unable to suggest further searches which would be effective. Although the Appellant considers the service highly important, it is apparent from the figures she gave in her oral submission, taken with the evidence of the value of the entire service provided by NSFT to this CCG (set out in the extract from the CCG procurement register contained in her submissions handed up at the hearing which showed that the annual value of

that contract in 2015 was over 50 million pounds sterling), that this service is a very small part indeed of the mental health services provided to the residents of Norwich by NSFT and funded by the CCG. That overall contract was continued when the CCG replaced the PCT and in 2015 a new contract was entered into for 5 years.

15. The CCG in its response indicated that it relied on “*contract knowledge and historical information*” to guide its searches – including searching for services provided to Courts and the activities of the CRHT – clearly the team identified by the CCG as most likely to be involved in this activity. These searches were fruitless and neither disclosed a contract nor information on the level of activity carried out.
16. The tribunal sees no reason to doubt the information provided by the CCG. Although the Appellant considers that the “commissioning model” means that the CCG should have the detailed information she seeks the tribunal was unconvinced by her argument. A far more probable explanation is that the small scale of this activity compared with the scale of expenditure on mental health services generally would make it highly unlikely that the commissioning CCG would want the detailed information sought by Parts 2 and 3 of the request – it would have no business or legal need to collect and hold it. Given that the CCG and before it the PCT was contracting with the local mental health services NHS Trust to provide the majority of the mental health services its resident population needed it is entirely plausible that such fine-grained detail that Trust staff would on occasion attend at police stations to carry out assessments would not be spelt out or even mentioned. There would be no contractual requirement on NSFT to “*provide a team of staff to liaise with the police*”; that was an incidental duty of members of at least one team – the CRHT.
17. The CCG has explained that it and the PCT for the Norwich area are distinct bodies and it does not have the records for the PCT. This is clearly correct and the CCG would not hold records for the first 3 years covered by the request.
18. The tribunal is therefore satisfied that the Respondent’s decision notice is correct in law. The searches carried out by the CCG and the explanations it has provided for not holding the information requested, when considered in the context provided by the Appellant, are robust and convincing.
19. The appeal is dismissed.

Signed Chris Hughes

Judge of the First-tier Tribunal

Date: 3 August 2018

Promulgation Date: 7 August 2018