



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2018/0182**

**Heard at Bolton Magistrates' Court  
On 24 April 2019**

**Before**

**JUDGE MELANIE CARTER  
TRIBUNAL MEMBERS  
MALCOLM CLARKE & JEAN NELSON**

**Between**

**MARTIN L ADEDEJI**

Appellant

**And**

**INFORMATION COMMISSIONER**

Respondent

**DECISION**

**Introduction**

1. This is an appeal by the Appellant, Mr Adedeji in relation to a request made under the Freedom of Information Act ("FOIA") for information from various doctors at the Dicconson Group Practice ("the GP practice") in Wigan. Mr Adedeji emailed his request to the GP practice on 12 March 2018.

2. The background to this matter is that until 2011, Mr Adedeji was registered as a patient at the GP practice. On 3 August 2009 there was an appointment between Mr Adedeji and a doctor at the GP practice, about which Mr. Adedeji subsequently made a formal complaint. On 12 March 2018 he wrote to the GP practice making the following request:

*"...Please inform me whether or not you hold the information specified below, and if you do please send me a copy of all the recorded information you hold fitting the criteria of my requests.*

1) *. I am requesting a copy of all information, that you first processed between 01/08/09 and 28/01/10, regarding the; 'suggestion of racism within our organisation.' comment that Dr [Redacted], in her 16/06/10 letter, claimed was made during a 03/08/09 surgery Appointment.*

2) *. I am requesting a copy of all information, that you first processed between 01/08/09 and 28/01/10, regarding the; 'suggestion that a person's ethnicity may impact on the health care they receive ' comment that [a particular doctor], in her 16/06/10 letter, claimed was made during a 03/08/09 surgery appointment.*

*To assist you the 16/06/10 letter (which I have attached to this email) I refer to above was a letter written, by [a particular doctor], in response to a 2010 BME service user complaint.*

3) *. Please inform me whether or not you hold the following information and if you do please send me a copy.*

*I am requesting information regarding the practice meeting minutes you were ordered to provide by a 2016 decision of the FIRST-TIER TRIBUNAL Appeal No: [number redacted] GENERAL REGULATORY CHAMBER (INFORMATION RIGHTS).*

*In respect of the minutes you provided to the appellant please send information of how long it took you to redact the practice meeting minutes:-*

a) *Of each year for the period 2009 to 1 September 2015.*

b) *For all the years in total for the period 2009 to 1 September 2015."* On 24 April 2018, the GP practice replied that in relation to parts 1 and 2 of the request, the 'response was prepared following a review of the consultation notes held within your medical records'. As regards part 3, the GP practice responded that it did not keep a record of the time taken to process the documents following receipt of the 2016 Tribunal decision.

3. On 7 May 2018 Mr Adedeji complained to the Information Commissioner (the Commissioner). The Commissioner in brief concluded that on the balance of probabilities, the GP practice did not hold any information falling within the scope of the request. Mr Adedeji complained to the Commissioner on the basis that there was information held that was not being disclosed.
4. By a Decision Notice dated 27 July 2018, the ICO found that on the balance of probabilities, the GP practice had disclosed all information it held that fell within the scope of Mr Adedeji's request and that it did not hold any further information.
5. Mr Adedeji has appealed the Decision Notice to this Tribunal. His grounds of appeal are first, that the Commissioner was wrong to find that the GP practice had provided all the information it held about parts 1 and 2 because, in brief, the GP practice was not to be believed and, in particular, the requested information was processed as part of a 2010 formal complaint to the GP practice, and because it's own policy specified a

record retention period of 10 years in respect of complaint information'; second, it had no 'valid reason' for not saying whether it does or does not hold information relevant to parts 1 and 2, and they should now do so; and thirdly, that the Commissioner was wrong to find that the GP practice had provided all the information it held about part 3, the amount of time taken to make redactions to minutes to be provided to him further to the 2016 Tribunal. In support of this latter assertion, the Appellant provided a copy of an email dated 18 March 2016 to the Tribunal and an email of 28 July 2016 to 'Medical Leeds'. These emails were not provided to the Commissioner until these proceedings.

### **The Applicable Law**

6. The role of this Tribunal is to consider whether the Decision Notice is in accordance with law or whether the Commissioner ought to have exercised her discretion differently in finding that the GP practice did not hold the information requested - see section 58 of FOIA.
7. When determining whether or not information is held, the Commissioner and the Tribunal apply the normal civil standard of proof, on the balance of probabilities. This position was supported in the Tribunal case of *Linda Bromley v the Information Commissioner and the Environment Agency* EA/2006/0072 and the Tribunal has repeatedly confirmed that this is the appropriate test: see, for example, *Malcolm v Information Commissioner* EA/2008/0072 at [24]; *Dudley v Information Commissioner* EA/2008/0089, at [31].

### **Decision**

8. The Tribunal paid close attention to the letter from the GP in response to Mr Adedeji's original complaint to the GP practice, dated 16 June 2010. The request for information which is the subject of this appeal, focussed on two statements in the letter which, Mr Adedeji was clearly seeking to understand better. The request required the GP practice to disclose any information giving rise to the statements made in the letter with regard to the suggestion of racism within the organisation and the impact ethnicity may have on healthcare. The Tribunal could understand why Mr Adedeji would wish to see this information under parts 1 and 2 of the request, but in summary, could see no reason not to believe the evidence of the GP in question and the GP practice itself that there was no further information held.
9. The retention policy was for information to be held for 10 years and the request was approximately 8 years after the complaint had been made. Thus, if information had been recorded in relation to racism within the organisation or the impact ethnicity might have on healthcare, and it was not held 8 years after creation, that would indeed be a breach of the GP practice's own policy. However, even if contrary to its own retention policy any such information had been deleted and not retained, a breach did not necessarily mean that as a matter of fact, further information was held. The real question, it appeared, was whether the existence of the policy meant that the GP

practice was not to be believed in stating there was no underlying information held relating to the statements in the letter. Mr Adedeji prayed in aid the fact that he had been told that his complaint had been discussed at a meeting, but in relation to which there were no minutes. He also relied upon the BMJ Guidance provided to the Tribunal which in essence said, if something has not been recorded it did not happen. Mr Adedeji further relied upon the 24 April 2018 response to the Commissioner which stated that the letter had been put together after “consultation notes” had been reviewed. Mr Adedeji had in fact seen those consultation notes further to a subject access request under the Data Protection Act 1998 and confirmed that there was nothing there relating to the two statements in the letter of 16 July 2010. Indeed, at the hearing, Mr Adedeji confirmed that if he had had the disclosure further to the subject access request prior to this particular Decision Notice, he would not have appealed.

10. Regardless of this, the Tribunal set out to satisfy itself whether the Commissioner had erred in concluding that no further information was held. It noted that the 24 April response referred to the 16 June letter as “following a review” of, not that it was “based on” the consultation notes. In any event, the request for information in relation to potential racism within the organisation and the impact of ethnicity related to a period that pre-dated his complaint on 29 January 2010 (hence a review of the consultation notes for the purposes of the 16 June letter was only part of the story) – he was enquiring what information the GP practice held, in effect, in relation to the subject matters of the two statements from as far back as 1 August 2009 (two days before the original appointment with the GP).
11. Mr Adedeji’s suggestion that the GP practice was not to be believed was in part based on its prior failures to comply with FOIA (2016 Tribunal decision) and since then oddities with regard to the practice minutes. Mr Adedeji had subsequently discovered that minutes from 2013/4 had been deleted, those being years that he was particularly interested in. Further to the subject access request he had seen minutes for 15 July 2014, which he had been told had been deleted. Mr Adedeji, in these circumstances, was concerned to see how long the redacting had in fact taken (see below), as a piece of the jigsaw which would help him understand whether there were in fact further minutes in existence which had not been disclosed.
12. There was however, in the Tribunal’s view, no persuasive evidence that the GP practice was not telling the truth or was mistaken in stating that there was no further information held in relation to parts 1 and 2 of the request. The previous failures in compliance with FOIA and seeming patchwork of practice minutes were in the Tribunal’s view, more likely a reflection of disorganisation and possibly a lack of understanding of obligations, than a deliberate defiance of the law or an attempted cover up.
13. In relation to the second ground of appeal, Mr Adedeji had argued that the GP practice should now confirm or deny if information was held for parts 1 and 2 of the request. As he was, however, aware that the GP practice was stating it held no further information, the Tribunal declined to hold that the Commissioner should have ordered the GP practice so to deny. This would not achieve anything in the circumstances and the

Commissioner was entitled to decide within her discretion not to order any steps to be taken.

14. With regard to part 3 of the request, the GP practice had advised the Commissioner that one individual redacted the minutes in question and that person had not recorded how long this took. As noted it had previously been ordered by the Tribunal in 2016 to produce redacted minutes of the practices' meetings. Once the Tribunal had issued its decision in July 2016 requiring the minutes to be disclosed in redacted form, the Commissioner argued that there would appear to be no business reason to record how long redaction actually took, particularly as recording such information would be likely to increase the amount of resource devoted to the task.
15. The first of the two emails produced by Mr Adedeji, dated 18 March 2016, and obtained by Mr Adedeji as a result of the previous Tribunal's decision, was from the GP practice to the Commissioner providing an estimate of how long it would take to carry out the redactions in relation to the 6 years of GP practice minutes required to be produced. The estimate, it was calculated would lead to an overall figure of approximately 231 hours.
16. The second email, dated 28 July 2016, which Mr Adedeji had also been given further to the previous Tribunal's decision, was the GP practice stating that it had taken 4.5 hours, to process the minutes for 2009 and 2010. This did not, the Commissioner argued, fall within the scope of part 3 of the request. She argued that it did not provide the requested information or show that the information about how long redaction was taken was being recorded (much less that it was retained). The Commissioner could *"envisage a situation in which the author of the email was describing something which she had been doing at that time and was fresh in her mind. It does not necessarily follow that the information requested by the Appellant was recorded or, even if it was, that it has been retained"*.
17. The Tribunal was of the view however that this email was technically information the GP practice should have disclosed further to this request. On the basis of 4.5 hours to redact minutes for two years, it appeared that the GP practice may have been estimating a materially inflated amount of time in the first email mentioned above, to carry out the required redactions. The estimate in the first email was however no more than that - an estimate - and did not, in the Tribunal's view, indicate anything more than that their estimate may have been incorrect. Moreover an estimate of time taken did not fall within the scope of part 3 of the request.
18. The Tribunal did not moreover consider the inconsistency between these two emails, even taken with the oddities in relation to the deletion of minutes, led to a conclusion that the GP practice were not to be believed. As noted above, this was more likely to be a situation in which the GP practice had not been rigorous in its estimation of the time redaction would take. It did however have this one email which, in the Tribunal's view, fell within the scope of part 3 of the request as it did record the time taken for part

of the redaction process. This should have been disclosed (whilst noting that the Commissioner could not have known about this email until the course of the proceedings and after the Decision Notice had been issued).

19. It did appear that the GP practice had failed on more than one occasion to comply with its FOIA obligations and that this had been pointed out by the Commissioner, a previous Tribunal and now this Tribunal. Mr Adedeji was entitled to have his rights under FOIA taken seriously and complied with in accordance with the law.
20. As such, this appeal was upheld in relation to this one aspect, that is, that the Decision Notice is amended to reflect that the email of 26 July 2016 should have been disclosed. The Tribunal did not however order the GP practice to take any steps as Mr Adedeji had this information already.
21. This is the unanimous decision of the Tribunal.

**Signed**

**Judge Carter**

**Promulgation date: 22 May 2019**