



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

Appeal Reference: EA/2019/0086

**Decided without a hearing
On 16 August 2019**

Before

**JUDGE HAZEL OLIVER
MRS JEAN NELSON
MR MIKE JONES**

Between

MR MARTIN L ADEDEJI

Appellant

and

INFORMATION COMMISSIONER

Respondent

DECISION

The appeal is upheld in part

SUBSTITUTE DECISION NOTICE

On the balance of probabilities, the Wrightington, Wigan and Leigh NHS Foundation Trust (the "Trust") holds additional information in relation to alleged racist incidents reported to it in 2010, because one incident for this year was listed in an email from the Trust to Mr Adedeji dated 17 May 2016. The Trust should provide this additional information to Mr Adedeji, or explain how this information has already been provided, or explain why this information is not held. The Trust should do so with reference to its email of 17 May 2016 and its initial response to the current request.

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 18 February 2019 (FS50667337, the “Decision Notice”). It concerns information sought from Wrightington, Wigan and Leigh NHS Foundation Trust (the “Trust”) regarding racist incidents reported to the Trust.

2. The parties opted for paper determination of the appeal (the appellant confirming this is an email to the Tribunal dated 6 June). The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. On 23 July 2019 the appellant made the following request for information (the “Request”):

“Dear Wrightington, Wigan and Leigh NHS Foundation Trust, This is a Freedom of Information Request. Please inform me whether or not you hold the information specified below. If you do hold the requested information please be so kind as to send me a copy.

Regarding all Racist Incidents reported to you please send me a copy of recorded information you hold showing:-

- 1. Date the racist incident is alleged to have occurred*
- 2. Alleged perpetrator’s professional status and job title*
- 3. Whether alleged victim was a patient or a member of your staff*
- 4. What support the alleged racist incident victim received*
- 5. Who investigated the alleged racist incident*
- 6. The outcome of your investigation into the alleged racist incident*
- 7. What other organisations you informed of the racist incident”*

4. The Trust responded on 18 August 2016. In relation to patients, it provided information in a table relating to parts 1, 2, 3, 5 and 6 of the Request (headed “from patients”). It stated that information was not held by the Trust relating to parts 4 and 7 of the Request. In relation to staff, it provided details of four cases (one grievance and three Employment Tribunal claims), including parts 4 and 7 of the Request where applicable (headed “from staff”).

5. The appellant asked for an internal review. The Trust responded on 18 November 2016 with a further explanation of the information already provided, and sent some additional information. The appellant complained to the Commissioner on 10 February 2017 about the way in which his request had been handled by the Trust.

6. The Commissioner issued her Decision Notice on 18 February 2019. She found that, on the balance of probabilities, the Trust did not hold any information within the scope of parts 4

and 7 of the Request, and so it had complied with section 1(1) FOIA. The Commissioner considered the searches performed by the Trust and found that they were adequate to identify the information that was held at the time of the Request.

The Appeal

7. The appellant appealed against the Commissioner's decision on 18 March 2019. The grounds are that he has evidence to show that the Trust has failed to provide all of the information which it holds within the scope of the Request. He provides the following examples:

- a. Information about grievances, employment tribunal claims and patient complaints provided in response to FOIA requests made in March and May 2016 – a 2010 incident has been omitted in the current response.
- b. Missing information about a complaint the appellant made about an incident in 2007.

8. The Commissioner's response maintains that, on the balance of probabilities, no further information was held by the Trust. The Commissioner obtained details during her investigation about how complaints are recorded on the Trust's Datix system. In relation to the 2007 incident, this was not discovered as a result of the Trust's searches, and given the passage of time it is more likely than not that details were no longer held by the Trust. In relation to the 2010 incident, other details about staff complaints were disclosed, and there was no evidence of an attempt to mislead or withhold information.

9. The appellant's response makes the following points:

- a. There is a Trust document titled "Workforce Race Equality Standard REPORTING TEMPLATE (Revised 2016)" which appears to contain a record of racist incidents among staff for the period 1 April 2015 to 31 March 2016. The Trust is likely to hold similar documents for other years.
- b. There is no reference in the Trust's responses to the 2010 incident, which the Trust had told the appellant about in their response to his previous FOIA request (on 17 May 2016).
- c. In relation to the 2007 incident, the appellant reported this to the GMC in 2012. An email from the GMC in March 2012 stated that a copy of the complaint had been passed to the employers of the doctor. A letter from the Trust to the appellant on 31 October 2013 also stated, "Your complaint has been recorded by the Trust's Patient Relations Department".
- d. The Commissioner's investigation was poor and failed to obtain the correct submissions from the Trust.

Applicable law

10. The relevant provisions of FOIA are as follows.

- 1 **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.*

.....

58 Determination of appeals

- (1) *If on an appeal under section 57 the Tribunal considers—*
- (a) *that the notice against which the appeal is brought is not in accordance with the law, or*
 - (b) *to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
- the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.*
- (2) *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

11. In determining whether or not information is held, the standard of proof is the balance of probabilities. It is rarely possible to be certain that information relevant to a FOIA request is not held somewhere in a large public authority's records. The Tribunal should look at all of the circumstances of the case, including evidence about the public authority's record-keeping systems and the searches that have been conducted for the information, in order to determine whether on the balance of probabilities further information is held by the public authority.

Evidence and submissions

12. We had an agreed bundle of open documents, all of which we have read. The appellant submitted a written skeleton argument. This repeats his previous points, and also refers to a reference in the Trust's Equality Delivery System Assessment 2015 scores that 9% of staff indicate they have experienced discrimination in the last 12 months.

Discussion and Conclusions

13. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision. Our role does not involve addressing detailed criticisms of the Commissioner's investigation. We may or may not agree with the Commissioner's conclusions.

14. The Trust provided an explanation on how it searched for the requested information in its letter to the Commissioner of 25 September 2017.

- a. The Trust has a Datix system which records events relating to patients. It provided a table of incidents in response to the Request, based on searches of the Datix system. Prior to 2010 there was no specific code on this system for "racist incidents". From April 2010 "racial" was recognised as an adverse event, and from April 2014 sub-categories of racial abuse were recorded under the category of "violence, aggression or abuse". Searches were carried out using category and sub-category searching criteria, and using a free text incident description search for information prior to April 2010. In relation to requests (4) and (7), the Trust says that this

information is not captured by the system, and it would require intellectual analysis and creation of new information to answer these requests.

- b. In relation to incidents relating to staff, the Trust provided a list of four cases together with the requested information about each case where available. Three of these cases are Employment Tribunal claims in 2011, 2013 and 2014. The other case is a two-part issue involving a grievance in 2011 and a subsequent Employment Tribunal claim. This information has been provided from a review of information held within the HR casefiles.

15. The appellant says that the Trust has not disclosed information about a complaint he submitted to the Trust himself, which relates to an incident in 2007.

- a. We note that information on Datix was not categorised by race/racist incident prior to April 2010, so any information held by the Trust about an incident in 2007 which was reported at that time would not have been identified by a category search and may not have been picked up by their free text search.
- b. We have seen a copy of a letter from the General Medical Council dated 2 March 2012, which relates to this complaint. This letter states, "*Also a copy of the complaint has been passed to the employers of the doctor who can then conduct their own investigations*". This indicates that the Trust does hold information about this complaint.
- c. We have also seen a letter from the Trust dated 31 October 2013, which provides information in response to a set of concerns from the appellant about the same incident. This letter provides a response to all of the items that are listed in the current Request, apart from request 7 (what other organisations you informed of the racist incident). The Trust has stated that it does not capture information in relation to the request 7 issue.

16. We therefore find that the appellant has already been provided with the response to his Request in relation to his own complaint, as set out in the letter of 31 October 2013 from the Trust. This does not answer request number 7, but we accept that the Trust does not record this information. It would have been helpful if the Trust had explained to the appellant that they were not providing information in relation to his own complaint in response to the current Request, because they had already provided this information in their earlier letter. However, we are satisfied on the balance of probabilities that the appellant has already had this information from the Trust and no further information is held on this point.

17. The appellant says that the Trust has failed to disclose information about a 2010 complaint, which was listed in response to a previous FOIA request.

- a. We have seen a FOIA request from the appellant dated 3 March 2016, in which he asks for information held on racist incidents perpetrated or alleged to have been perpetrated by the Trust's healthcare professionals. The response from the Trust dated 6 April 2016 states there was one grievance by a staff member relating to other staff, three Employment Tribunal claims, and three complaints by patients against staff which alleged racist behaviour.

- b. The appellant then asked for the number of racist incidents for each specific year. An email from the Trust to the appellant dated 17 May 2016 provides a list of incidents by year. This shows one incident for each of 2009, 2010, 2013 and 2014, and two incidents in 2011. A later email from the Trust dated 6 June 2016 clarifies that a total of six rather than seven incidents are listed because two entries provided previously related to the same event.
- c. The response to the current Request in relation to staff lists four cases, as explained above. None of these cases relate to 2009 or 2010. In his appeal, the appellant lists incident number 63361 from the “from patients” table provided by the Trust. This is an incident from 2009 involving a staff nurse. It therefore appears that the 2009 incident is included in the “from patients” table. However, this table does not include any incidents involving staff from 2010.

18. There is a mismatch between the information provided by the Trust in 2016 as compared to the information provided in response to this Request. The Trust previously stated there was one incident recorded in 2010. No information about staff incidents in 2010 has been disclosed in response to the Request in the “from staff” document, or in the “from patients” document. On the evidence we have it appears that not all held information has been provided. We therefore find on the balance of probabilities that the Trust does hold additional information about staff complaints in 2010. The Trust should provide this additional information to the appellant, or explain how this information has already been provided, or explain why this information is not held. The Trust should do so with reference to its email of 17 May 2016 and its initial response to the Request.

19. The appellant has referred to the Trust’s document “Workforce Race Equality Standard REPORTING TEMPLATE (Revised 2016)”, and the Equality Delivery System Assessment 2015. He says that both of these documents refer to racist incidents reported by staff. However, having viewed these documents, it is clear that they are reporting the response to questions asked to staff about whether they had experienced discrimination at work. It is common for staff to report experiences in a survey which have not been raised with their employer. The fact that staff have reported experiencing discrimination at work does not mean that they have provided any further details to the Trust. We therefore find on the balance of probabilities that the Trust does not hold any further information about the issues reported in these documents which could be provided in response to the Request.

20. The appellant has also complained about the Commissioner’s investigation. This is not a matter that we can deal with in this appeal. As explained above, we have made our own decision on the evidence.

21. We uphold the appeal in part in relation to the incident in 2010 listed by the Trust on 17 May 2016, as explained above.

Signed: Hazel Oliver
Judge of the First-tier Tribunal

Date: 20 August 2019
Promulgation date: 16 September 2019