



Appeal number: EA/2019/0138P

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

SHEILA SPOONER

Appellant

- and -

THE INFORMATION COMMISSIONER

Respondent

- and -

NHS ENFIELD CLINICAL COMMISSIONING GROUP

**Second
Respondent**

TRIBUNAL: JUDGE C GOODMAN

Determined on the papers, the Tribunal sitting in Chambers on 10 August 2020

© CROWN COPYRIGHT 2020

DECISION

1. The appeal is allowed.
2. Decision Notices FS50758483 and FS50758484 issued by the Commissioner on 5 March 2019 are not in accordance with the law.
3. I substitute the following:

NHS Enfield Clinical Commissioning Group (“the CCG”) failed to comply with its duty under section 1(1) FOIA. It held further information within scope of the Appellant’s request which it was under a duty to communicate to the Appellant.

The CCG breached section 10(1) of the Freedom of Information Act 2000 as it did not communicate to the Appellant all the information it held within 20 working days.

4. The CCG is not required to take further steps because it has already, following the Appellant’s appeal, informed the Appellant that it holds further information. It provided further information under cover of its letter dated 12 August 2019 and withheld other information in reliance on exemptions under the Freedom of Information Act 2000 (“FOIA”).
5. The Commissioner is directed to treat the Appellant’s letters to the Tribunal dated 3 September 2019, and subsequent emails of 29 September 2019, 9 November 2019 and 15 January 2020, as an application under section 50(1) FOIA for a decision whether the CCG has now, through its letter of 12 August 2019, dealt with the request for information in accordance with FOIA. The Commissioner should note that the Appellant queries whether she has received all the information which the CCG states that it has communicated.
6. When the Commissioner has made a further decision under section 50(2), both parties will have a further right of appeal to the Tribunal.

MODE OF HEARING

7. This determination was conducted by a Judge, sitting alone. I am satisfied that it is appropriate to compose the panel in this way, having regard to paragraph 6(a) of the Senior President’s Pilot Practice Direction dated 19 March 2020 and the desirability of determining all cases which are capable of determination by the most expeditious means possible during the Coronavirus pandemic.
8. The parties and the Tribunal agree that this matter is suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended.
9. The Tribunal considered an open core bundle of evidence comprising 144 pages, plus additional letter from the Appellant dated 15th January 2020 and attachment. I am satisfied that the information in the core bundle is sufficient for me to decide the appeal. References to page numbers in this Decision are to pages of that bundle.

REASONS

Background to Appeal

10. The CCG is responsible for commissioning healthcare services for the population of Enfield in north London. This appeal relates to its procurement of a single provider for “care closer to home services”. The contract, known as the “Enfield Single Offer” contract, was awarded to Enfield Cooperative Ltd.

11. The Appellant is a member of a group called “Defend Enfield NHS”. She is concerned that Enfield Cooperative Ltd is not a “true” cooperative, but a limited company with two directors, both of whom, she submits, were previously senior officers in the CCG. She is concerned that the Enfield Single Offer contract was awarded without competitive tendering and about the management of conflicts of interest.

12. The Appellant made two requests under FOIA to the CCG on 28 February 2018 via the *What do they know* website as follows:

“Decision making process regarding the procurement process for Enfield Single Offer – Locally Commissioned Services contract.

“Dear NHS Enfield Clinical Commissioning Group,

“I wish to make a request under the Freedom of Information Act (2000) regarding the Enfield Single Offer – Locally Commissioned Services contract, as awarded to Enfield Healthcare Cooperative Ltd.

“Please supply me with all information held relating to the decision making process to use a restricted procurement process with regard to this contract. I would expect that the CCG would hold recorded information relating to their decision to proceed on the basis of a restricted procurement process, and that this may be located in emails, minutes of meetings, memoranda, records of decision taken and other records.”

and

“Decision making process regarding the nature of the Enfield Single Offer contract.

“Dear NHS Enfield Clinical Commissioning Group,

“I wish to make a request under the Freedom of Information Act (2000) regarding the Enfield Single Offer contract, as awarded to Enfield Healthcare Cooperative Ltd.

Please supply me with all information held relating to the decision making process to have one provider (rather than more than one) to deliver this contract. I would expect that the CCG would hold recorded information relating to their decision to proceed on the basis of having one provider, and that this may be located in emails, minutes of meetings, memoranda, records of decision taken and other records.”

13. On 29 March 2018, the CCG responded to both requests saying that the information was exempt under section 21 FOIA as information accessible to the Appellant by other means.

14. The Appellant requested a review, emphasising that her requests related to the decision making process which resulted in the CCG using a restricted procurement process.

15. After a complaint by the Appellant to the Commissioner, the CCG reviewed its responses on 3 December 2018. The CCG continued to rely on s.21, but identified additional information which should have been provided to the Appellant.

16. The Commissioner continued her investigation. On 4 March 2019, the CCG wrote to the Commissioner saying that it had identified further documents which fell within scope of the request.

17. The Commissioner issued Decision Notices FS50758483 and FS50758484 on 5 March 2019. The Commissioner found that on the balance of probabilities the CCG held no further information falling within scope of the requests and had complied with section 1(1)(a) FOIA. The Commissioner required the CCG to provide to the Appellant the further documents identified in the CCG's letter of 4 March 2019. The CCG had breached section 10(1) by not communicating all the information held within 20 working days.

Appeal to the Tribunal

18. The Appellant's Notice of Appeal dated 16 April 2019 identified 19 documents or categories of documents which she submitted came within scope of her request but had not been disclosed.

19. On 24 June 2019, the Commissioner emailed the Tribunal saying that "*the evidence provided by the Appellant may cast some doubt on the veracity of the thoroughness of the searches conducted by the [CCG]*" (page 22). A Registrar issued Case Management Directions on 9 July 2019 (page 19) which joined the CCG as a party and directed it to respond to questions raised by the Commissioner.

20. In response, the CCG wrote to the Tribunal on 12 August 2019 stating that it had identified further information within scope of the Appellant's request which should have been supplied to the Appellant (paragraph 11, page 25). The CCG provided further information (this was not in the core bundle before me). Some of this information was redacted. Other information was withheld in reliance on exemptions in section 43 FOIA (commercial interests) and section 40 FOIA (personal information). The CCG also submitted that section 12 (cost of compliance exceeds appropriate limit) applied, although it did not seek to rely on this.

21. As a result, the Appellant was invited by the Tribunal to withdraw her appeal or agree a Consent Order. The Appellant declined on 3 September 2019 (page 44). She did not accept that all the information in scope of her request had now been released by the CCG and challenged the exemptions now relied on by the CCG. The Appellant set out further arguments in emails dated 29 September 2019 (page 50), 9 November 2019 (page 55) and 15 January 2020 (in further evidence).

The Law

22. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

“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.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

23. In *Information Commissioner v Malnick and the Advisory Committee on Business Appointments* [2018] UKUT 71 (AAC) a three-judge panel of the Upper Tribunal analysed the nature and scope of the statutory powers at the various stages of the decision-making process under FOIA.

24. The Upper Tribunal explained that the first decision maker is the public authority, in this case the CCG. The public authority has a duty under FOIA to confirm or deny whether requested information is held and to communicate that information unless a relevant exemption applies. Where it refuses to confirm or deny or, as in this case, to communicate information, it must issue a refusal notice in accordance with section 17 FOIA, setting out the exemptions claimed and why they apply.

25. The next stage is for the applicant to apply to the Commissioner under section 50(1) for a decision whether the request for information has been dealt with by the public authority in accordance with FOIA. On receiving an application, the Commissioner must make a decision, unless certain exceptions apply, and serve notice of her decision on the complainant and the public authority.

26. The final stage is appeal to the Tribunal. Section 57(1) provides that where a decision notice has been served by the Commissioner, the complainant or the public authority may then appeal to the Tribunal against that notice. The Tribunal must consider whether the Commissioner’s decision notice is in accordance with the law. The Tribunal decides independently and afresh whether the request for information has been dealt with by the public authority in accordance with FOIA. As noted above, the Tribunal can review any finding of fact on which the decision notice is based.

Conclusion

27. I find that the Decision Notices are not in accordance with the law. It is now clear, and the CCG accepts, that it does hold further information falling within scope of the

Appellant's requests which it had a duty to communicate to her. When the Decision Notices were issued, the CCG had not complied with section 1(1)(a) FOIA.

28. I therefore allow the appeal and substitute the decision notice at paragraph 3 above.

29. I have not directed the CCG to communicate the information which it has now identified to the Appellant as its position is that it has now done so, under cover of its letter of 12 August 2019.

30. I have also not considered whether the CCG has now complied with its duty under section 1(1)(a). The letter of 12 August 2019 amounts to a communication of information under section 1(1) and a refusal to communicate other information under section 17. The Appellant has not applied to the Commissioner for a decision as to whether through the letter of 12 August, the CCG has now dealt with her request in accordance with FOIA. The Commissioner has not yet made a decision about this. This means that the second stage in the statutory decision-making process identified by the Upper Tribunal in *Malnick* has not yet been completed in respect of the letter of 12 August 2019. No further appeal can be made to the Tribunal about the CCG's response to the Appellant's request for information until the Commissioner has decided whether the CCG has now dealt with the request in accordance with FOIA.

31. I have directed the Commissioner to treat the Appellant's letters to the Tribunal as an application under section 50(1) FOIA (see paragraph 5 above). When the Commissioner has made a further decision under section 50(2), both parties will have a further right of appeal to the Tribunal.

32. For the avoidance of doubt, I am not remitting this appeal to the Commissioner in the way in which the First-tier Tribunal did in *Malnick* and which the Upper Tribunal found was an error of law. I have allowed this appeal, against Decision Notices FS50758483 and FS50758484, and substituted a new Decision Notice.

33. I appreciate that this outcome will be frustrating for the Appellant, in particular given the time which has passed since her request for information. However, the statutory process must be followed. If I were to consider now whether the CCG has complied with section 1(1) FOIA through its letter of 12 August 2019 and either party disagreed with my decision about that, their only recourse would be by way of appeal to the Upper Tribunal and only if I made an error of law. The three stage decision making process under FOIA provides important safeguards for both parties to have the CCG's response considered twice, independently and afresh, first by the Commissioner and then by the Tribunal.

(Signed)

JUDGE CL GOODMAN

DATE of Decision: 10 August 2020

DATE Promulgated: 13 August 2020

