



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

**Appeal Reference: EA/2019/0284V**

**Heard via the Cloud Video Platform on 22 October 2020**

**Before**  
Judge Stephen Cragg Q.C.

**Between**

**William Stevenson**

Appellant

And

**The Information Commissioner**

Respondent

**DECISION AND REASONS**

The Appellant represented himself

The Commissioner was not represented

## DECISION

1. The appeal is allowed.

## MODE OF HEARING

2. The proceedings were held via the Cloud Video Platform. The Appellant joined remotely and then by telephone. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
3. The hearing was conducted by a Judge, sitting alone. The Tribunal was satisfied that it was appropriate to conduct the hearing in this way.
4. The Tribunal considered a number of documents – there were directions that a bundle should not be produced, for reasons explained below.

## BACKGROUND

5. The Appellant requested information relating to University Hospitals of Morecambe Bay NHS Trust. On 4 September 2018, the Appellant wrote to NHS Improvement (NHSI) and made a request for information under the FOIA. The information requested was, in part, clarification of a response to a previous request:-

- *the formal official date of any and all University Hospitals of Morecambe Bay NHS Trust application(s) to Monitor for authorisation as a Foundation Trust.*
- *the original letter referred to in the phrase “Monitor wrote to the Trust informing them that the assessment was postponed pending the outcome of the review” which is on the first extracted page. I also request any and all letter(s) sent by UHMB specifically requesting the postponement of the application and any/ all letters from Monitor to UHMB asking UHMB to apply for postponement of the application.*
- *the full unredacted version of the 2010 emails enclosed.*

6. A fuller version the Appellant's communication is attached as appendix 1 to this decision, and this provides some of the context to the request.
7. NHSI responded on 2 October 2018. It refused to disclose the unredacted email chain and cited sections 36 and 40 FOIA as its basis for doing so.
8. Following an internal review NHSI wrote to the Appellant on 30 October 2018 maintaining its position. The Appellant contacted the Commissioner on 7 November 2018 to complain about the way his request for information had been handled.
9. However, during the investigation of the complaint NHSI changed its position to rely on s14 FOIA on the basis that the request was vexatious. Reliance on s14 FOIA means in effect that the public authority does not have to comply with a request for an information at all. It is not the same as reliance on the exemptions from disclosure contained in the FOIA where the public authority normally deals with the request by stating that it holds the information, but claims an exemption from disclosure.
10. In its decision notice of 12 July 2019 the Commissioner considered arguments from NHSI that the Appellant was seeking to re-open issues which had been considered many times by NHSI and the Commissioner, and his requests constituted unrelenting persistence in pursuit of a matter which was no longer in the public interest. A previous decision of the Commissioner had provided the Appellant with all the information he needed. The conclusion of the Commissioner was as follows:-

32. The Commissioner considers that NHSI has provided her with sufficient evidence to indicate that the complainant is using the FOIA as a means to re-open and re-visit matters which have already been dealt with several times over a number of years.

33. It is difficult to see the 'overriding public interest' in this particular request. The Commissioner is happy to accept that the complainant himself has an interest, and that historically, the public interest was greater, she takes the view that this is now negligible and outweighed by the ongoing burden to NHSI in dealing with the requests.

34. The events surrounding Morecambe Bay took place several years ago and have been subjected to in-depth investigation and scrutiny resulting in a report published in 2015 and subsequently numerous articles in the media. The withheld information in this case is highly unlikely to add anything of significance or aid understanding of the events that occurred.

35. The Commissioner therefore concludes that initially, the complainant's earlier requests may not have been without merit, this is no longer the case. Consequently, the Commissioner has determined that this request is vexatious and NHSI is not obliged to comply with it.

#### THE APPEAL AND SUBSEQUENT EVENTS

11. The Appellant filed an appeal dated 9 August 2019. His essential argument is that he has been branded as vexatious (rather than his request) and that there continues to be value in the information he seeks.

12. Matters took an unusual turn at that point. The Commissioner's Response to the appeal dated 20 September 2019 states:-

The Commissioner has had the opportunity to review her decision notice for the purposes of responding to this appeal and is now of the view that she was incorrect to conclude that NHS Improvement was entitled to rely on section 14 to refuse to comply with that part of the Appellant's request of 4 September 2018 which sought the disclosure of the email for the following reasons.

13. Essentially the Commissioner has reviewed NHSI's submissions and concluded that in fact:-

30...the Appellant made one request to Monitor in December 2012 and pursued his right to seek an internal review and complaint to the Commissioner who, largely, found in his favour. The Appellant did not then seek the email again for nearly six years and until his request of 4 September 2018 whereupon he again pursued his right to seek an internal review and complaint to the Commissioner.

31. Thus, although NHS Improvement has suggested that the Appellant "requested" to see the withheld information on five occasions; this does not refer to five separate information requests submitted at different times. Instead, it appears to refer to two requests and the Appellant's requests for internal reviews and/or complaints to the Commissioner.

32. Further, the Commissioner does not now consider that the submission of two requests separated by a period of nearly six years and whereby the Appellant was largely successful in obtaining the disclosure of the information he requested by way of complaining to the Commissioner in 2013 is indicative of an "*...unrelenting persistence...without merit and unreasonable...*" (§24 DN) as NHS Improvement has argued.

14. The Commissioner explained what she believed should happen as a result of the change in her position, saying that she did not oppose the appeal on the s14 FOIA issue, and would contact NHSI to inform it of this:-

41. If NHS Improvement does not intend to challenge the Commissioner's new position; this matter may be capable of being concluded by way of a Consent Order. This would include the steps being substituted as follows:

*"...NHS Improvement is to issue a fresh response to the request of 4 September 2018 (insofar as it seeks the disclosure of the second paragraph from the email of 6 January 2010 sent at 17:11) which does not seek to rely on section 14..."*

42. NHS Improvement would then be able to consider whether it wishes to rely on sections 36 and/or 40 as it did seek to rely on those exemptions as part of its initial response to the request. If the Appellant wished to challenge the application of this/these

exemptions; then it would be open to him to make a fresh complaint to the Commissioner's Office with its accompanying rights of appeal to this Tribunal.

15. However, the Appellant was not content to proceed by way of a consent order. On 5 November 2020 he sent an email in which he expressed his unhappiness with the way NHSI and the Commissioner had dealt with the request, asking that there be an oral hearing and that NHSI be joined to the appeal as a party.

16. Directions from the Registrar were made on 14 January 2020 in which it was noted that NHSI had been notified by the Commissioner of her change of position but had not applied to join the appeal. The Registrar made directions for the following documents to be sent to the Tribunal for the hearing (four hard copies of anything else to be sent to the Tribunal by any party seeking to rely on further material):-

- (a) Decision notice;
- (b) Notice of Appeal;
- (c) Information Commissioner's response;
- (d) Mr Stevenson's email sent on 05 November 2019 at 13:00;
- (e) Case Management Directions dated 25 October 2019;
- (f) These Case Management Directions.

17. On 6 May 2020 the Registrar directed that submissions made by NHSI Improvements, should not be added to the appeal bundle. However, she also stated that she considered it appropriate that the parties and the Tribunal know that the public authority's position is to accept that the decision notice was wrong to find that the Appellant's request was vexatious. She further expressed the view that:-

'...the Panel's decision is most likely to be that the current decision notice be substituted with one which says:

7.1 The request was not vexatious;

7.2 The public authority must either provide the information or provide Mr Stevenson with a letter explaining on what exemption(s) it relies to withhold the information.

8. Mr Stevenson and the Information Commissioner's representative will, at the eventual hearing, be able to make representations and submissions about their positions in the appeal; there is therefore no need for me to make provision at this time about such submissions.

18. The Appellant asked for the directions to be considered by a Tribunal Judge who agreed, on 4 June 2020, with the directions made.

#### THE HEARING

19. At the hearing before me only the Appellant attended. As a result of the directions made, I only had the documents listed above in paragraph 16 and the various directions made. I do not know the basis upon which NHSI has agreed to the appeal being allowed, but I do know that that is its position. I have the Response from the Commissioner, but no provision was made for further submissions to the Tribunal.

20. The Appellant informed me that he had sent lengthy documents by email to the Tribunal and the Commissioner the day before the hearing. I had access to those documents but as I understood it from the Appellant they addressed the history of the request and linked subject matter, and examined the correspondence between the Commissioner and NHSI, rather than the issue as to whether I should allow the appeal. As that was the case, and given (a) the directions made about submissions by the Registrar; and (b) the fact that that the Commissioner would need to be given time to respond to the documents if they were admitted, I declined

to allow the Appellant to rely on these documents and I have not read them. As the issue before me is straightforward it would not be in the interests of justice or the overriding objective to sanction further delay in this matter.

## DISCUSSION

21. I do not know why the Commissioner accepted NHSI's initial submissions about s14 FOIA in the decision notice, nor the process by which she discovered that NHSI had made assertions about the Appellant's request history which did not reflect the reality. I can see there has been a waste of time and resources when in fact the Commissioner should have rejected NHSI's submissions in July 2019.
22. However, although I understand his frustration, the Appellant was given an opportunity as early as September 2019 to agree a consent order which would lead to a reconsideration of his request. The Appellant also persisted with this appeal - by way of oral hearing- despite the strong hint given by the Registrar in May 2020 as to what the result was likely to be.
23. As discussed with the Appellant at the hearing I have limited powers under FOIA to allow the appeal and substitute a decision notice if the Commissioner has erred in law. I have considered the decision notice and the Response to the appeal and I agree with the Commissioner that the Appellant's request is not vexatious in the light of his request history (see paragraph 13 above). I do not need to go into further details as I know that both the Appellant and NHSI do not demur from this conclusion.
24. On that basis this appeal is allowed. As predicted by the Registrar I direct that the current decision notice be substituted with one which says:

(a) The request was not vexatious;



(b) NHSI must either provide the information or provide the Appellant with a letter explaining on what exemption(s) it relies to withhold the information.

25. I also direct that the information or the letter of explanation be provided to the Appellant by 30 November 2020.

**Stephen Cragg QC**

Judge of the First-tier Tribunal

Date: 23 October 2020.

Date Promulgated. 26 October 2020.

On 4 September 2018, the Appellant contacted NHS Improvement seeking the following information:

“...I am obliged to resort to this appellation as the ‘attached decision letter’ was unsigned. I am thus denied the proffered option to try “to resolve this informally with the person who dealt with your request”, so it has to be done formally.

1. I suspect there are a number of errors in your ‘FOI’ spreadsheet, but only a couple of points are obviously questionable. All the dates of application and decision are given as the 1st of the month in your spreadsheet. **Is it really the case that the official application date for University Hospitals of Morecambe Bay NHS Trust UHMB was 1st February 2009**, implying that the trust received DoH/ SoSH support some time in January 2009. However, the Morecambe Bay Investigation Report dated March 2015 confidently states, from documents and other information provided by DoH, the date of SoSH support as 5.2.09. Was the UHMB application date retrospectively listed as 4 days earlier as soon as a breathless up-to-the-minute phone call from DoH was received and an equally urgent request to UHMB for pre-dated documents sent out, or was the Monitor assessment process with application documents previously received from UHMB begun on 1st February in anticipation of the SoSH approval? It does appear that there was a sense of urgency throughout: UHMB was on the verge of authorisation on 1.6.09 before the application was summarily halted in late May by the persistent lobbying of James Titcombe, so February/ March to May would have been a surprisingly rapid authorisation (in the fastest 10%!) for a trust which was originally announced as a ‘Wave 1A’ applicant in October 2003 but had been diagnosed with numerous problems subsequently. I am taking the spreadsheet as an official NHSI declaration that UHMB was not assessed by Monitor prior to 2009 because it had not successfully negotiated the preceding stages of approval which allowed Monitor to begin assessment.

In the case of **Lincolnshire Community Health Services NHS Trust**, you will note that the **Decision Date comes before the Application Date- is this just a simple transposition or is one or both ‘year’ incorrectly stated?** These are my only questions directly concerning this spreadsheet. I will **not** be troubling NHSI with demands for the ‘unknown’ and ‘N/A’ dates.

2. In the case that I do not receive a straight answer to a straight question, and because the information provided by NHSI so far has proved unreliable, I am

obliged to state this as a formal FoI request: **I request the formal official date of any and all University Hospitals of Morecambe Bay NHS Trust application(s) to Monitor for authorisation as a Foundation Trust.**

### 3. You state:

Morecambe Bay applied to become a foundation trust in February 2009. It never withdrew from this process, nor was its application rejected. However, its application was deferred, which means that there were outstanding issues that we believed the trust could resolve within a reasonable period of time. This was part of the process for many trusts and was not particular to just Morecambe Bay. Deferred trusts are not required to restart the application process and so Morecambe Bay is only on the list once.

This is incorrect. According to all the contemporaneous documents available to the public, such as the second enclosed document above, the UHMB application was 'postponed' not 'deferred'. Curiously, the Morecambe Bay Investigation chaired by Dr Bill Kirkup, was equally misinformed: there are 13 occurrences of 'defer', 'deferred' or 'deferral' referring to the application in the Kirkup Report, 5 instances of 'suspend' or 'suspended', 2 of 'delay' and none at all to the correct status 'postponed', so it's not as if he considered the 2 defined states 'postponed' and 'deferred' to be pretty much the same thing. In summary, everyone was firmly 'on message' in avoiding the word 'postpone', even in the interview transcripts where it doesn't feature at all despite it being a word in common use for the situation. Conversely, the 2010 UHMB assessment documents presented to the Monitor Board include **no** instances of 'defer', 'suspend', delay etc. applying to the application but there are several 'postpone's. You have also distinguished the 2 states in the FT spreadsheet provided, and the 2008 Monitor 'Guide for Applicants' does not consider 'deferred' and 'postponed' to be the same thing either. The first enclosed document above consists of 3 pages extracted from the Monitor assessment document of UHMB prepared for the Monitor Board- you will note the repeated references to the UHMB application having previously been 'postponed'. Bearing in mind that this letter and the documents arising from it, will appear in legal cases for years to come, and not solely at the Information Tribunal, this is an opportunity for NHSI to comment upon how this incorrect information not only came to be accepted by the hardly insignificant Morecambe Bay Investigation but was also peddled years later to me in the extract above. If there is no such comment, I will simply state that 'NHSI declined to comment..'

4. The 2nd extracted page includes the following, which indicates Monitor's view of UHMB's Board at the time of authorisation, and a catastrophically unwarranted view it was:

Chief Executive (clinical background, previously led a successful FT application[Clatterbridge]) is highly regarded by staff as a visible and accessible presence while Chair (clinical background and significant experience within NHS at senior level) has driven more external focus in particular building and sustaining relationships. EDs include Director of Service & Commercial

Development, a qualified accountant who has previously held Turnaround posts. Director of Nursing praised by CQC and SHA as innovative and focused on driving real improvement.

Chief Executive Halsall was removed by Monitor (formally, by Monitor's parachuted-in Chairman Henshaw, who was NW SHA Chairman when UHMB passed the SHA stage of FT authorisation) 17 months later, with a £ ¼ million payoff declared (we don't know about the likely pension-stuffing and other dodges) and secondment to the NHS Confederation- later placements unknown. Chairman Kane was removed by Monitor directly only 15 months after this eulogy- the 2nd to go after Chief Operating Officer Vaughan, who only lasted 14 months after authorisation. Nursing Director Holt was very likely paid off, although the details are not known to me, and she occasioned an undignified scrap when UHMB announced her secondment to Warrington Hospitals which promptly revoked the arrangement when the public found out her destination- she no doubt ended up somewhere but the authorities had learned their lesson and secrecy was heightened. Monitor/ NHS / DoH (it is often difficult for the public to ascertain who actually arranges these things, but it's usually Monitor/ NHSI, as it was with Lyn Simpson and CE Cuthel from Liverpool Community Health) didn't give up on the Warrington placements though- UHMB's HR Director Wilson later turned up in the same position there and only 'resigned' after I strenuously harassed CQC over its studied and sustained reticence in applying the Fit and Proper Persons Test.

**5. This formal FoI request is for the original letter referred to in the phrase "Monitor wrote to the Trust informing them that the assessment was postponed pending the outcome of the review" which is on the first extracted page. I also request any and all letter(s) sent by UHMB specifically requesting the postponement of the application and any/ all letters from Monitor to UHMB asking UHMB to apply for postponement of the application. I do not, of course, request copies of letters or documents merely relating to the postponement, which could be quite numerous.**

**I request the original letter as first sent to UHMB soon after the Monitor May 2009 Board meeting, not any version which was later edited because someone decided it would have been more appropriate if a different letter was recorded as having been sent. I stipulate this in the light of the third document enclosed: the January 2010 email exchange describing the undeclared editing of the minutes of the May 2009 Monitor Board meeting, which had previously been approved and placed on the website as the official record of the meeting. The editing was discovered by me, and the disclosure of the emails was forced upon Monitor by the Information Commissioner after the Monitor refusal for the usual 'safe spaces' etc. reasons.**

**6. I now request the full unredacted version of the 2010 emails enclosed. The justifications for the redactions no longer apply, even if they ever did. The poor**

relationship between Monitor and CQC at the time has since become common knowledge. It is now 8 years 8 months since the emails were sent...”