



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

Appeal Reference: EA/2018/0210 (V)

Heard remotely by CVP

On 19 January 2021

Representation:

Appellant: In person

First Respondent: Did not appeal

Second Respondent: In person (Mr. Fulford – Chief Operating Officer)

Before

**SOPHIE BUCKLEY
SUSAN WOLF
RAZ EDWARDS**

Between

PAUL FARRUGIA

and

THE INFORMATION COMMISSIONER

Appellant

First Respondent

WEST HAMPSHIRE CLINICAL COMMISSIONING GROUP

Second Respondent

MODE OF HEARING

This hearing was held by CVP (remote video hearing) which has been consented to by the parties. The form of remote hearing was 'V'. A face to face hearing was

not held because it was not practicable and all the issues could be determined in a remote hearing.

DECISION

1. For the reasons set out below the appeal is dismissed.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice FS50721441 of 4 September 2018 which held that West Hampshire Clinical Commissioning Group ('the CCG') correctly applied s 12 of the Freedom of Information Act 2000 (FOIA) and that the Council was in breach of its duty to provide advice and assistance under s 16 FOIA.
2. The Commissioner required the CCG to provide Mr. Farrugia with advice and assistance in accordance with its obligations under s 16 FOIA within 35 calendar days of the date of the decision notice.
3. The proceedings were stayed at the request of Mr. Farrugia from 9 October 2018 until 18 July 2020.
4. We have read and taken account of an open bundle of documents.

Background facts

5. Mr. Farrugia made an application for Continuing Healthcare (CHC) funding for his now late mother in December 2020. He appealed against that decision. In preparation for that appeal he made three requests of information on 12 April 2017, 11 September 2017 and 26 September 2017. The third request is the subject of this appeal.
6. Government funding for the care of the elderly is provided either by a Local Authority (means tested) or by the NHS (not means tested). Funding provided by the NHS is known as CHC funding. The decision as to whether the NHS will provide CHC funding is determined by guidance in the 'National Framework for NHS Continuing Healthcare and NHS-Funded Nursing Care (November 2012 (Revised))' ('the Framework document').
7. The process set out in the Framework document is, in brief, as follows:

1. The applicant completes the initial standard checklist which is screened to determine if s/he meets the minimum requirements for the application to be considered.
 2. A Multi-disciplinary Team ('MDT') assesses the applicant in a structured way, by completing a mandatory form called the Decision Support Tool ('DST'). The MDT make a recommendation about whether the MDT think the applicant is eligible for CHC funding.
 3. The DST is reviewed by the CGC who make a decision about whether the applicant is eligible for CHC funding. The CGC can either support the MDT recommendation without referring it a panel (referred to as 'out of panels' or OOPS); request further evidence or send to the CHC panel for a decision.
 4. If the decision of the CHC Panel is challenged an internal review procedure applies.
 5. If the conclusion of the internal review is challenged, the matter is passed to NHS England for an independent review.
 6. If the decision of the independent review is challenged the matter can be referred to the PHSO.
-
8. The request relates to information recorded by the MDT on the DST or recorded by the CHC Panel in their meeting notes.
 9. The DST requires the MDT to assess the level of needs of the individual in each of 11 different domains, one of which is domain 2 - cognition. The MDT have to circle the appropriate level in a list in each domain ranging from 'no needs' to 'priority'. Taking into account the range and levels of needs, the MDT has to make a recommendation on whether the individual has a primary health need, including consideration of the nature, intensity, complexity and unpredictability of an individual's needs.
 10. In the CCG in question, Mr. Farrugia's understanding is that a senior nurse/practitioner (known as the Hot Case Co-ordinator) reviews the DSTs and undertakes pre-panel screening. If she agrees with the recommendation the application is approved. If not, or has questions or doubts the file is passed to the CHC panel for review and decision.
 11. The CHC Panel considers between 5-10 cases at a time. The panel reviews the recommendations of the MDT and records their deliberations and decision in a document known as the CHC Panel Meeting Notes. The Meeting Notes record, for example, in relation to the individual's needs in each domain the MDT recommendation, the family view (if documented) and the Panel's discussion comments, including whether or not the panel concurs with the MDT recommendation and, if not, what level of needs the panel has agreed. The decision is then communicated to the applicant along with a copy of the CHC Panel Meeting Notes.

12. Mr. Farrugia's understanding of the data storage arrangements is that each individual application has a paper file, from which it is possible to retrieve the DST and the CHC Meeting Notes and extract data from them in a matter of seconds.
13. The Appellant made the following request, which is not the subject of this appeal, to the West Hampshire CHC team on 12 April 2017:

Please provide for me information about applications for NHS Continuing Healthcare that have been considered by the Continuing Healthcare Panel of the NHS Continuing Healthcare and Funded Nursing Care team since November 2012.

Please provide for me a list of decisions by each panel giving:

1. The date of the panel,
2. Whether each individual application was recommended for NHS Continuing Healthcare funding by a Multidisciplinary Team using the Decision Support Tool,
3. Whether each individual decision of the Multidisciplinary Team was subsequently approved by the Continuing Healthcare Panel,
4. Please also provide me with anonymous information concerning the origin of each individual application for Continuing Healthcare funding, simply whether the application was made by a Local Authority, by an independent organisation or by a private individual.

Please provide the information in the form:

Panel date	Applicant/Case	MDT decision	Panel decision	Source of Application
	<i>A</i>	<i>Approved</i>	<i>Not approved</i>	<i>Local Authority</i>
	<i>B</i>	<i>Approved</i>	<i>Approved</i>	<i>Independent Org.</i>
	<i>C</i>	<i>Not approved</i>	<i>Not approved</i>	<i>Private Individual</i>
	<i>D etc.</i>	<i>etc.</i>	<i>etc.</i>	<i>etc.</i>

If it is not possible to provide the information requested due to the information exceeding the cost of compliance limits identified in Section 12, please provide advice and assistance, under your Section 16 obligations, as to how I can modify my request to be included in the scope of the Act.

14. The CCG replied by letter dated 28 April 2017. It confirmed that it held some of the information requested. It withheld the information under s 12 on the basis that it would require a minimum of 3 months' work to extract the relevant data required to answer the specific questions asked.
15. Mr. Farrugia requested an internal review on 3 May 2017. The CCG upheld its initial decision on 2 August 2017 stating that the CCG have 5 different panels and on average 10-15 cases per week. Providing the information would require identifying individual files, recalling them from archive and interrogating approximately 1200 cases which in total would take approximately 3 months work. The CCG said that they could answer the request within the statutory time frame in relation to a specified nominated day of panel reviews.

16. Mr. Farrugia made the following request, also not the subject of this appeal, on 11 September 2017

Please provide me with information about applications for NHS Continuing Healthcare that have been received by the NHS Continuing Healthcare and Funded Nursing Care team at West Hampshire Clinical Commissioning Group for the period 1 July 2016 to 30 September 2016. Please provide details of applications where the Multi-Disciplinary Team (MDT) has recommended that the applicant receive funding for Continuing Healthcare following assessment using the Decision Support Tool (DST).

Please provide me for each month (July, August and September 2016):

1. The number of applications where the Multi-Disciplinary Team has recommended that the applicant receive funding for Continuous Healthcare following assessment using the Decision Support Tool,
2. The number of those applications where the initial verification process used by the NHS Continuing Healthcare and Funded Nursing Care team to ratify the recommendation of the Multi-Disciplinary Team disagrees with the recommendation of the Multi-Disciplinary Team, and the application has been referred to a Continuing Healthcare panel for a decision,
3. The number of those applications referred to the Continuing HealthCare panel that were subsequently approved by the Continuing Healthcare panel.
4. Please also provide me with any written guidance, if such written guidance exists, that West Hampshire Clinical Commissioning Group provides to assist its employees with the initial verification process, and the decision whether or not to refer a recommendation from a Multi-Disciplinary Team for review by the Continuing Healthcare panel.

If it is not possible to provide the information requested due to the provision of the information exceeding the cost of compliance limits identified in Section 12 of the Freedom of Information Act (2000), please provide advice and assistance, under your Section 16 obligations, as to how I can modify my request to be included in the scope of the Act.

...

If, however, the provision of the information requested does not exceed the cost of compliance limits identified in Section 12, please also provide the information requested in numbered paragraphs 1, 2 & 3 above for June 2016.

17. The CCG responded on 19 September 2017. It provided the information requested which showed that there were 222 relevant applications in total during that period.

Request and response

18. On 26 September 2017 Mr. Farrugia made the request which is the subject of this appeal:

Please provide me with information about applications for NHS Continuing Healthcare that have been received by the NHS Continuing Healthcare and Funded Nursing Care team at West Hampshire Clinical Commissioning Group for the period 1 July 2016 to 30 September 2016.

Please provide details of applications where the Multi-Disciplinary Team (MDT) has recommended that the applicant receive funding for Continuing Healthcare following assessment using the Decision Support Tool (DST).

Please provide a breakdown of the assessments the MDTs made in Domain 2 (Cognition) of the DST, giving the numbers of applicants who were categorised in each of the five "levels of need" ("No needs", "Low", "Moderate", "High" and "Severe")

Please provide me for each month (July, August and September 2016):

1. A breakdown of the "level of need" assessments in Domain 2 (Cognition) for the total number of applications in that month where the Multi-Disciplinary Team has recommended that the applicant receive funding for Continuing Healthcare following assessment using the Decision Support Tool
2. A breakdown of the "level of need" assessments in Domain 2 (Cognition) for the applications that month where the Multi-Disciplinary Team has recommended that the applicant receive funding for Continuing Healthcare following assessment using the Decision Support Tool, but where the initial verification process used by the NHS Continuing Healthcare and Funded Nursing Care team to ratify the recommendation of the Multi-Disciplinary Team disagrees with the recommendation of the Multi-Disciplinary Team, and the application has been referred to a Continuing HealthCare panel for a decision,
3. A breakdown of the "level of need" assessments in Domain 2 (Cognition) for the applications described in the above paragraph 2 that were then subsequently approved for funding by the Continuing Healthcare panel.

If it is not possible to provide the information requested due to the provision of the information exceeding the cost of compliance limits identified in Section 12 of the Freedom of Information Act (2000), please provide advice and assistance, under your Section 16 obligations, as to how I can modify my request to be included in the scope of the Act.

...

If, however, the provision of the information requested does not exceed the cost of compliance limits identified in Section 12, please also provide the information requested in numbered paragraphs 1, 2 & 3 above for June 2016.

19. The CCG replied on 13 October 2017 and confirmed that it held the requested information. It withheld the information under s 12 on the grounds that it estimated that it would require a minimum of 160 hours to respond to the request.
20. Mr. Farrugia applied for an internal review by letter dated 7 November 2017.
21. The Appellant complained to the Information Commissioner in January 2018.
22. The Council upheld its decision on internal review, the outcome of which appears to have been received by Mr. Farrugia in May 2018.

The Decision Notice

23. The Information Commissioner set out that the CCG has provided a detailed estimate that it would take 136 hours, based on the figure of 222 cases provided to Mr. Farrugia in response to a previous request. A sampling exercise had not been carried out.
24. The Information Commissioner considered the suggestions made by Mr. Farrugia and noted that the CCG has explained that a clinician review is required as an individual's need is not simply based on an individual's condition or disease and therefore a full review of the case is required.
25. The Commissioner noted that even if each file could be reviewed in half the estimated time it would still take over 55 hours.
26. Given the specific and detailed information requested, the Commissioner accepted that the CCG would take more than the 18 hour limited to respond to the request as phrased. She was therefore satisfied that s 12 applied.
27. In relation to s 16(1) the Commissioner found that the CCG had not provided Mr. Farrugia with specific advice and assistance on reducing or refining the scope of the request. The Commissioner was therefore not satisfied that the CCG complied with s 16.

The Appeal to the Tribunal

28. The grounds of appeal are, in summary:

Ground one: The Commissioner was wrong to conclude that answering the request would exceed the s 12 limit:

29. The request is limited to the level of need in a single domain ('cognition') specified on the DST and in the CHC Panel Meeting Notes. It does not require an assessment of the validity of the eligibility decision. It does not require a clinical review of the case.
30. The request is for information about applications between July and September 2016, prior to the introduction of the CCG database. This would be contained in individual paper files. Electronic files and databases do not need to be interrogated.
31. The ability of the FOI manager or the Commissioner to critically question the search strategy outlined by the CCG was inhibited because they did not understand the data flow of the information required. The strategies offered by the CCG were overly complex.

32. The CCG were wrong in the number of case records that would need to be interrogated. For two parts of the request for data, the population sizes were 58 and 32.

Ground Two: The Commissioner should have placed conditions on the CCG when complying with their s 16 obligations.

The Commissioner's response

Ground One

33. The Commissioner stands by her view that the estimate given is reasonable and she was entitled to rely upon the representations made to her during the course of her investigation.
34. The Commissioner considers that it is entirely reasonable that the CCG would need to deal with both electronic and manual filing systems.
35. As regards Mr. Farrugia's argument that it was not necessary to interrogate 222 files to comply with each element of the request, it is the Commissioner's understanding that the estimate was based on retrieving the information from 222 files in total. It was not argued that this task needed to be repeated for element (b) and (c) of the request.
36. The Commissioner considers that it would assist the Tribunal to understand more about why a clinician's review is required so that the CCG can comply with the request. The Commissioner notes that even if this element was excluded in its entirety s 12 would still apply.
37. It may assist the Tribunal if Mr. Farrugia sets out the particular steps or step or length of time set out in the estimate which he challenges and how this would bring it within the s 12 limit.

Ground Two

38. The Commissioner submits that this ground should be dismissed. Mr. Farrugia does not set out why he considers that the Commissioner should in law have placed this conditions on the CCG not why the Commissioner should have exercised her discretion to include conditions, nor what those conditions should be.
39. To the extent that Mr. Farrugia considers the Commissioner may stipulate how a public authority administratively deals with FOI requests, this ground of appeal should be dismissed. It is not for the Commissioner to preclude a public authority from selecting another organisation to respond to FOI requests on behalf of the public authority.

Evidence and submissions

Oral submissions from Mr. Farrugia

40. Mr. Farrugia set out the grounds for his appeal clearly and eloquently. In summary he stated that the CCG had overstated what he asked for and had therefore overestimated the time it would take to retrieve it. Secondly the retrieval methods described by the CCG were unnecessarily complex.
41. In relation to s 16 Mr. Farrugia stated that he would like to discuss an amended request directly with the CCG.
42. Mr. Farrugia set out the information which was in the scope of his request with reference to the example DST and panel notes contained in the bundle, explaining why no clinical review is required as it was simply an extraction of relevant information from the sections indicated by Mr Farrugia.
43. In relation to the sampling exercise set out at p A237 he submitted:
 - 1) This relates only to those which went to a panel. It would take less time to deal with those which did not go to panel.
 - 2) It might take longer to search PDF files. The estimate should be judged on the basis of the situation at the time of the request when all the files were paper files.
 - 3) In a meeting in relation to his mother he had seen a practitioner locate the two relevant documents in a paper file in approximately 30 seconds.

Written evidence from the CCG in support of the estimate

44. The CCG provided a breakdown of its estimate which is at p A227 of the bundle. It later carried out a sampling exercise the results of which appear at p A237. We have taken both of these into account, along with the oral evidence at the hearing.

Oral evidence and submissions from the CCG

45. We heard evidence from Mike Fulford (Chief Operating Officer), Michaela Dyer, (Deputy Director of Performance and Delivery) and Rakhee Jethwa (Associate Director, NHS Continuing Healthcare and Placements).
46. Mr. Fulford, on behalf of the CCG stated that the CCG wanted to provide information to Mr. Farrugia, without taking up a disproportionate amount of its resources. Mr. Fulford conceded that communication with Mr. Farrugia has not been as good as the CCG would have like it to be. He committed to the CCG communicating directly with Mr. Farrugia to discuss the option of providing the requested information from a sample of cases within the 18 hour time limit. He stated that the change in systems to a PDF based record would not be used to justify a greater time estimate for retrieving the requested information than would have

applied at the date of the request, and Ms Jethwa stated that it might have reduced the time taken.

47. In terms of the appeal the CCG conceded that a clinical review would not be required in order to retrieve the requested information. The sampling exercise at p A237 had not included a clinical review. The CCG accepted that the column on p A237 which recorded whether dementia was noted as a health factor in the rationale might not fall within the scope of the request, but stated that it would not significantly reduce the time needed if that were omitted. The CCG stated that the sampling exercise was carried out by staff of varying capabilities which affected the average time to locate a file. There were other elements of data in the sampling exercise that were not required to answer the request such as 'source organisation'.

The relevant law

48. Under s 12(1) a public authority is not obliged to comply with a request for information where:

..the authority estimates that the costs of complying with the request would exceed the appropriate limit.

49. The relevant appropriate limit, prescribed by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations') is £450.
50. In making its estimate, a public authority may only take account the costs it reasonably expects to incur in relation to the request in-
 - (a) determining whether it holds the information,
 - (b) locating it, or a document which may contain the information,
 - (c) retrieving it, or a document which may contain the information, and
 - (d) extracting it from a document containing it. (See regulation 3).
51. The Regulations specify that where costs are attributable to the time which persons are expected to spend on the above activities the costs are to be estimated at a rate of £25 per person per hour.
52. The estimate must be sensible, realistic and supported by cogent evidence (McInnery v IC and Department for Education [2015] UKUT 0047 (AAT) para 39-41).
53. The test is not a purely objective one of what costs it would be reasonable to incur or reasonable to expect to incur. It is a test that is subjective to the authority but qualified by an objective element. It allows the Commissioner and the tribunal to remove from the estimate any amount that the authority could not reasonably expect to incur either on account of the nature of the activity to which the cost

relates or its amount. (see paragraph 20) (Reuben Kirkham v Information Commissioner [2018] UKUT 126 (AAC)).

Section 16 – Advice and Assistance

54. Section 16 provides:

(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

The Task of the Tribunal

55. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Discussion and Conclusions

The estimate provided by the CCG

56. In the hearing, the Judge took the respondent's witnesses through the estimates at p A227 and A237 in the light of the points made by Mr. Farrugia. We have to determine whether the estimate is reasonable, taking into account the subjective and objective elements of the test.

57. On the basis of the respondent's responses, and taking into account Mr. Farrugia's submissions, we make the following findings in relation to whether or not the CCG could be reasonably expected to incur costs relating to the following times set out in the estimate at pA227 and A228:

- 1) 2 hours to review paper files, electronic files and databases to produce a list of the 220 people made eligible. Although the files were paper based at that stage, we accept that some of the information about the files was on electronic records or databases. 1200 files would need to be reviewed to discover if they were within the window of dates for the request. We accept that **2 hours** this is a reasonable estimate of the amount of time it would take to produce the list.
- 2) 7.5 hours for (i) making a list of where the DST is archived, where it is on the database and where it is in an electronic file and (ii) reviewing the list of archived files to determine which box number the file is in. The respondent's witness was asked why (i) was necessary if all the files were papers files and stated that it was 'mainly' in relation to (ii). On this basis we think (i) is not supported and we find that the respondent would

reasonably be required to spend about 1 minute per file rather than 2 minutes reviewing the list and determining which box the file was in. Excluding the time which we do not think the respondent would reasonably be required to spend leaves a reasonable estimate of **3 hours 40 minutes** (220 minutes) of the amount of time it would take to review the list to determine the box number for each file.

- 3) 30 minutes to recall the files from the archive. We accept that **30 minutes** is a reasonable estimate of the amount of time it would take to recall the files.

58. Mr. Farrugia made a general point that the search strategy identified by the respondent appears to be overcomplex. We agree that it appears complex. However the CCG knows its filing systems better than the tribunal and no other strategy was suggested. On this basis we accept that the steps set out above would be necessary to locate the files. We have to assess the estimate in the light of the CCG's storage systems.

59. In relation to the remaining boxes on p A 228 we find, on the basis of the respondent's evidence and Mr. Farrugia's submissions that the estimate in these boxes is more accurately reflected in the sampling exercise on p A 237, which did not include a clinician review.

60. We have considered the sampling exercise and reached the following conclusions:

- 1) The sampling exercise is based on searching for the information in PDF versions of paper files rather than in paper files. Although the files were paper based rather than PDF at the relevant time, we think that the amount of time needed to search for the focussed information requested would be broadly similar. Further, as stated above, the sampling exercise produces a more accurate estimate than that set out on p A227, because it does not include a clinician review.
- 2) We take note of Mr. Farrugia's evidence as to the short amount of time it took to locate the required documents in the meeting regarding his mother. However, we note that this was a practitioner who was familiar with the file in question. In order to respond to his request, staff would be dealing with files with which they were not familiar, and it would take longer. We do however take account of Mr. Farrugia's evidence of the straightforward nature of extracting most of the information he has requested.
- 3) The columns labelled 'source of application' and 'is dementia noted as a health factor in the rationale' are not necessary to respond to the request. We note the respondent's evidence that this would not significantly reduce the time needed. However, given that reading the rationale is

likely to take significantly more time than simply extracting a recorded conclusion, we find that the estimate of the time it would reasonably take needs to be reduced to take account of this. There are five columns in total, and the time taken to assess whether dementia is noted in the rationale is likely to be more than that taken for the other columns. The evidence of Mr. Farrugia persuades us that it should be relatively easy to extract the required information.

- 4) The higher figures in the sampling exercise were explained by the respondent's witnesses as the time taken for less experienced individuals to find the relevant information.
61. Taking all the above into account, we find that some of the time spent during the sampling exercise would not reasonably be needed to respond to the request. A portion of the time spent reviewing the samples was spent looking for information that was not requested. Some time was wasted because the member of staff was not experienced – we think that the higher figures should be disregarded for that reason.
62. Taking all this into account, we have disregarded a portion of the time estimate because the authority could not reasonably be expected to spend responding to the request. We think the authority could reasonably expect to spend about 10 minutes extracting the relevant information where the file was referred to an appeal panel, and about 8 minutes where the files was not referred to an appeal panel.
63. During the relevant period 58 files went to the panel and 164 did not. A reasonable estimate of the total time would therefore be 580 minutes + 1312 minutes = 1892 minutes = **31 hours 32 minutes**
64. In conclusion, we find that the estimate provided by the respondent contained time that the authority could not reasonably be expected to spend responding to the request. The portion of estimate that is reasonable and supported by cogent evidence is that set out in bold above, which comes to a total of **37 hours 42 minutes**.
65. Accordingly, although we have accepted many of Mr. Farrugia's points, we conclude that the CCG was correct to assert that responding to the request would have exceeded the relevant limit and the appeal is dismissed.
66. The Commissioner found that the CCG was in breach of s 16. This finding has not been challenged. It is not within our or the Commissioner's remit to order the CCG to remedy this breach in a particular manner.
67. The submissions made by Mr. Farrugia in relation to the difficulties caused by a different body dealing with FOI requests fall outside the tribunal's remit.

However, we note that the CCG has committed to dealing directly with Mr. Farrugia in discussions about providing information from a sample of cases.

Signed ,

Sophie Buckley

Judge of the First-tier Tribunal

Date of Decision: 30 January 2021

Date Promulgated: 02 February 2021