



Neutral citation number: [2022] UKFTT 517 (GRC)

Case Reference: EA/2022/0452

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

Determined on the papers

**On 12 July 2023
Decision given on: 10 August 2023**

Before

**TRIBUNAL JUDGE C GOODMAN
TRIBUNAL MEMBER S SHAW
TRIBUNAL MEMBER D SIVERS**

Between

TIM LEWCOCK

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision: The appeal is dismissed.

Decision Notice IC-200195-X9P0 is in accordance with the law. No further steps are required.

REASONS

Background

1. The NHS Derby and Derbyshire Integrated Care Board (“the ICB”) is the statutory health body for Derby and Derbyshire, bringing together NHS organisations and partners in the area.

2. Primary Care Networks (“PCNs”) are groups of GP practices who work together with community services, social care and other providers of health and care services. From 1 October 2022, PCNs are required to deliver “Enhanced Services” beyond the core obligations of general practice and to show that they have engaged with their local community about this.
3. The ICB hosted a patient engagement survey known as the Enhanced Access Survey (“the survey”) for a number of PCNs on SurveyMonkey, a third party platform. The ICB collected the raw data from survey responses, anonymised it where necessary, and distributed to each PCN the relevant results. Not all the PCNs in Derby and Derbyshire used the ICB to conduct a survey.
4. The Appellant is secretary of a patient participation group at a GP practice in one of the PCNs. On 27 May 2022, the Appellant made a request to the ICB for a copy of the data it had collected through the survey as follows:

“The Enhanced Access Survey you were running, closed on Fri 15 Jul 2022. There should have been sufficient time to have downloaded the data from Survey Monkey by now.

As requested on 15 Jun 2022, a copy of the raw data is expected, cleansed of any personally identifiable information. As the removing of personally identifiable information prior to sending reports to the PCNs would be done anyway, this is by no means additional effort. Also as previously requested, I am only interested in the raw data, not receiving any reports which would need to be filtered/produced for the PCNs to use. Again, no additional effort required on the part of Derby NHS.

The effort required is simply the attaching of an excel spreadsheet export from the Survey Monkey service to an email and sending it.

The previously stated reluctance to share the data as requested raises a powerful question, “What are they trying to hide?” I trust that question will be proven to be one which does not need to be asked.

Could you please confirm when the spread sheet of the raw data will be supplied?”

(“the Request”)

5. The ICB refused to provide the requested information pursuant to the Freedom of Information Act 2000 (“FOIA”) on the basis that it was held by the ICB solely on behalf of the PCNs. That refusal was not changed on internal review and the Appellant complained to the Commissioner.

The Decision Notice

6. On 21 December 2022, the Commissioner issued Decision Notice IC-200195-X9P0 which held that the ICB was entitled to refuse to disclose the withheld information because it was held by the ICB solely on behalf of the PCNs. No further steps were required.
7. In the Decision Notice, the Commissioner acknowledged that the ICB had hosted the survey and physically held the withheld information. The Commissioner referred to factors set out in its published guidance on holding information for the purposes of FOIA. Two factors indicated that the ICB also held the withheld information on its own behalf: namely, that the ICB had borne the cost of conducting the survey and that it had an interest in ensuring that the PCNs conduct the survey and in the plans which the PCNs would produce as a result. However, more – and more significant – factors indicated that the ICB held the information solely on behalf of the PCNs: in particular the ICB had no interest in the raw data itself and would not use the raw data for its own purposes.
8. The Commissioner concluded that the ICB did not hold the withheld information for the purpose of FOIA and had responded to the Request appropriately.

The Appeal

9. The Appellant appealed to the Tribunal. He submitted that the ICB were a public authority which had conducted the survey on behalf of other public authorities, borne the cost of the survey, held the raw data generated by the survey, and manipulated that data in order to distribute subsets to the PCNs. The withheld information was therefore held by the ICB for the purposes of FOIA and in refusing to disclose it, the ICB were taking an overly formulaic approach.
10. In Response, the Commissioner relied on the Decision Notice. The Commissioner submitted that:
 - a. the factors set out in its guidance were only indicative and that the weight attached to each would vary from case to case; and
 - b. it was reasonable to accept the word of the ICB that the survey was controlled and administered by the PCNs and that the ICB had no interest itself in the raw data.
11. In Reply, the Appellant provided a copy of an email from the ICB confirming that the ICB had distributed to each PCN only the data relating to that PCN. The Appellant submitted that the withheld information should be disclosed if any test in favour of disclosure was satisfied. As the data was of public interest and was “collected, manipulated, stored, distributed and paid for by a Public authority”, the ICB must either provide the withheld information itself or forward the Request on to the PCNs so that each PCN could provide the data they held to the Appellant.

Determination on the papers

12. All the parties consented to this matter being dealt with on the papers. The Tribunal was satisfied that it was fair and in the interests of justice to do so.
13. In reaching its decision, the Tribunal took into account all the evidence and submissions before it, whether or not specifically referred to in this Decision. The Tribunal had before it an open bundle of 142 pages.

The Law

Freedom of Information Act 2000

14. Section 1(1) FOIA provides that:

“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.”

15. Section 3(2) provides that:

“For the purposes of this Act, information is held by a public authority if –

- (a) it is held by the authority, otherwise than on behalf of another person, or
- (b) it is held by another person on behalf of the authority.”

16. In (*University of Newcastle upon Tyne v Information Commissioner and the British Union for the Abolition of Vivisection* [2011] UKUT 185) (“BUAV”), the Upper Tribunal decided that the effect of section 3(2) is to:

“confirm the inclusion of information within the scope of FOIA s1 which might otherwise have been arguably outside it. The effect of paragraph (a) is that information held by the authority on behalf of another is outside s.1 only if it is held solely on behalf of the other: if the information is held to any extent on behalf of the authority itself, the authority ‘holds’ it within the meaning of the Act” [paragraph 21]

and that:

“... ‘holding’ is not a purely physical concept, and it has to be understood with the purpose of the Act in mind... s.1 would not apply merely because information is contained in a document that happens to be physically present on the authority’s premises: there must be an appropriate connection between the information and the authority, so that it can be properly said that the information is held by the authority...” [paragraph 23].

Powers of Tribunal

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

“(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.”

18. The Tribunal stands in the shoes of the Commissioner and takes a fresh decision on the evidence before us. The Tribunal does not undertake a review of the way in which the Commissioner’s decision was made.

Discussion

19. The reasons for the Tribunal’s decision are set out in full below; there is no Closed Annex.

20. It was not disputed by the ICB nor the Commissioner that the withheld information was physically held by the ICB. The issue for the Tribunal was whether, applying the law as set out at paragraphs 14 to 16 above, it was held by the ICB solely on behalf of the PCNs, or whether there was an “appropriate connection” (as suggested in *BUAV*) between the information and the ICB with the result that it was also held to some extent by the ICB on its own behalf.

21. The fact that both the ICB and the PCNs are public authorities, that the information is of public interest, and that the survey was publicly funded, does not mean that the ICB is required to disclose it under FOIA if it is not “held” by the ICB for the purposes of FOIA, nor that the ICB is required by FOIA to forward the Request to the individual PCNs.

22. All the parties referred in their correspondence and pleadings to guidance from the Commissioner entitled “Information held by a public authority for the purposes of the Freedom of information Act”. That Guidance, which is marked 20190322 Version: 2.0, was attached by the Appellant to his notice of appeal.

23. In particular, the parties referred to certain factors set out in the Guidance. At paragraph 9, the Commissioner suggests that the following factors indicate that information is held by a public authority solely on behalf of another person:
- “the authority has no access to, use for, or interest in the information;
 - access to the information is controlled by the other person;
 - the authority does not provide any direct assistance at its own discretion in creating, recording, filing or removing the information; or
 - the authority is merely providing storage facilities, whether physical or electronic.”
24. At paragraph 11, the Commissioner suggests that the following factors indicate that information is not solely held on behalf of another person, but is also held by the public authority:
- “the authority provides clerical and administrative support for the other person, whether legally required to or not;
 - the authority controls access to the information;
 - the authority itself decides what information is retained, altered or deleted;
 - the authority deals with enquiries about the information; or
 - costs arising from holding the information are included in the authority’s overall budget”
25. The Guidance referred to by the parties is different to that currently available on the Commissioner’s website (last updated 8 January 2023), and is in any event, not binding on the Tribunal. However, the Tribunal was satisfied that the factors listed above are useful in analysing whether there was an “appropriate connection” between the withheld information and the ICB, as suggested by the Upper Tribunal in *BUAV*. We find that the factors are indicative and not definite nor determinative. It is not correct, as submitted by the Appellant, that information is held by a public authority for the purposes of FOIA if any factor in paragraph 11 of the Guidance applies.
26. Considering each of the factors, the Tribunal took into account that the ICB had provided clerical and administrative support to the PCNs by offering to host and administer the survey, despite not being legally required to do so, and had borne the cost of conducting it. The ICB had collected the raw data from the survey and, initially at least, controlled access to it. The ICB had manipulated the raw data by anonymising it, dividing the overall results into individual sections, and then forwarded the relevant section to the respective PCNs. The ICB had suggested some

tools for the PCNs to use to analyse the data and provided some “basic reports” with the data. The ICB had itself decided when it would delete the data and it had attempted initially to deal with an enquiry from the Appellant about it.

27. On the other hand, the Tribunal noted that the cost of the survey was negligible and covered by the ICB’s ongoing SurveyMonkey account, meaning that the ICB would have incurred little or no additional cost in hosting it. The work required to host and administer the survey was also likely to be minimal. Although the ICB responded to the Appellant’s enquiry, it then directed him on to his PCN or GP practice to access the relevant data. The Tribunal did not regard these as a substantial factors.
28. The Tribunal placed most weight on the fact that the ICB had no interest itself in the data gathered through the survey. As Ms Haynes, the ICB’s Engagement Manger, explained to the Appellant in an email dated 20 June 2022: “this survey was designed to provide feedback at PCN level back to PCNs as this is the level at which enhanced Access will need to be delivered”. The ICB carried out no analysis of the results and did not prepare a publishable report. In its view, information available through the National GP Survey was “much richer and statistically relevant” for its purposes than the survey results. In particular, the survey did not cover all the PCNs in the ICB’s area: there was no obligation on any PCN to participate – the survey was simply available “on request”.
29. In the Tribunal’s view, the role of the ICB in hosting and administering the survey was akin to a third party agency or service provider, hosting and administering a survey on behalf of a client in accordance with the client’s instructions and for the client’s purposes. The Appellant acknowledged in his email of 20 June that the ICB had “facilitated the data collection” but was not “responsible for drawing conclusions” from it. Ms Haynes described the survey in an email of 22 June as “not our piece of work to deliver”. While the ICB had made a decision to delete its own copy of the raw data (because it had no use for it), there was no suggestion that the ICB would control or direct how each PCN used the data. It was up to each PCN to decide whom they shared the data with, whether they published, retained, altered or deleted it, and what analysis, reports and engagement they generated with it.
30. Taking all this together and applying the relevant law, the Tribunal concluded that the withheld information was held by the ICB solely on behalf of the PCNs, and not to any extent on its own behalf. There was no “appropriate connection” between the withheld information and the ICB. The withheld information was not “held” by the ICB for the purposes of section 1(1)(a) FOIA and the ICB was therefore entitled to refuse to disclose it pursuant to FOIA in response to the Request.
31. The appeal is dismissed.

Signed Judge CL Goodman

Date: 27 July 2023