



NCN: [2024] UKFTT 848 (GRC)

Case Reference: FT/EA/2023/0336

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard : Determined on the papers
16 January 2024
Decision given on: 24 September 2024

Before

TRIBUNAL JUDGE JACQUELINE FINDLAY
TRIBUNAL MEMBER DAVE SIVERS
TRIBUNAL MEMBER EMMA YATES

Between

STEPHEN PURDEN

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision

The appeal is Dismissed.

REASONS

Background and Request

1. This appeal is brought under s.57 of the Freedom of Information Act 2000 (FOIA) against the Decision Notice (DN) of the Information Commissioner (the

Commissioner) dated 19 June 2023 with reference IC-232171-L2K1 which is a matter of public record.

2. The parties opted for a paper determination of the appeal. The Tribunal was satisfied that it could 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 (the Rules).
3. In reaching its decision the Tribunal took into account all the evidence before it in an agreed open bundle and made findings on the balance of probabilities.
4. The full details of the background to this appeal, Mr Purden's FOIA request for information (the Request) and the Commissioner's decision are set out in the DN.
5. In 2022 (exact date unknown), Mr Purden made the Request to the Harrogate Healthcare Facilities Management Ltd (HHFM) in the following terms:

“[1] What measures have HHFM Ltd put in place to adopt and maintain a Publication Scheme in compliance with Section 19 of the Freedom of Information Act since the Information Commissioner gave Notice (ref.FS50902137, dated 18th February 2020) to HHFM Ltd of the requirement to do so? [2] I should also be grateful to receive details of the documents publicly available under the Scheme (such as policies and procedures, minutes of meetings, annual reports and financial information) and how access to them can be made.”

6. Harrogate Integrated Facilities (also referred to as HIF Ltd) (HIF) is a wholly owned subsidiary of Harrogate and District NHS Foundation Trust (the Trust) (also referred to as Harrogate and District Foundation Trust) and was formerly called HHFM. As part of that relationship there was a Service Level Agreement (SLA) whereby HIF utilised elements of the Trust's corporate functions. The administrative arrangements

for FOIA requests were part of the SLA. In effect this meant that requests were logged and tracked on a database held within the Trust.

7. All FOIA requests relating to HIF were submitted to the HIF Managing Director and the relevant Senior Managers for their response. All responses were reviewed and approved by the HIF Director or Senior Manager. Once the response had been approved, this was recorded on the database that the Trust held and the response was sent to the requestor via the Trust's FOIA Team.
8. The Commissioner considered that the arrangement between the Trust and HIF for managing FOIA requests was an appropriate one and did not have any concerns about it.
9. In relation to HIF's publication scheme, as a subsidiary company wholly owned by the Trust, HIF is a public authority in its own right. All public authorities have a duty under section 19 of FOIA to adopt and maintain a publication scheme.
10. The Trust explained to the Commissioner in a letter dated 7 June 2023 (D63 and D64) that previously, its publication scheme also covered HIF, however, in recent months, HIF had produced its own publication scheme, and this was in the process of being uploaded to HIF's website.
11. The scheme was not published on HIF's website at the date of the Commissioner's DN. The Commissioner expected HIF's publication scheme to be published without too much further delay and asked HIF or the Trust to let both him and the Mr Purden know when it went live.
12. Mr Purden had previously submitted a request to HHFM about its publication scheme which resulted in the Commissioner's decision (FS50902137) in February 2020. That decision instructed HHFM to provide Mr Purden with a response to his request. HHFM were not instructed to produce a publication scheme.

13. The Trust responded to the Mr Purden's Request in a letter dated 15 November 2022 (C44 and C45).
14. The Trust did not provide an internal review in response to Mr Purden's Request for one or the Commissioner's subsequent instruction to the Trust, in February 2023, to provide a review. In April 2023 the Trust advised Mr Purden that HIF was in the process of developing its own publication scheme. In an email dated 19 May 2023 the Trust confirmed that a dedicated Publication scheme based on the ICO Model had been drafted and approved for HIF.

The Decision Notice

15. On 19 June 2023 the Commissioner issued the DN which stated that on the balance of probabilities HIF did not hold the information about its publication scheme that Mr Purden requested and had complied with s.1(1) FOIA.
16. On 15 February 2023 Mr Purden lodged an appeal against the Commissioner's DN.
17. In the Response dated 27 July 2023 the IC submitted the DN was served upon HIF Ltd a trading name of HHFM and that HHFM was the correct legal entity upon which the DN should have been served. As the DN was not served upon the correct public authority it should be deemed a nullity. An application was made to strike out the appeal under 8(2)(a) of the Rules due to lack of jurisdiction in relation to the proceedings.
18. Mr Purden opposed the strike out on the following grounds:
 - a) There is no misunderstanding, misleading or confusion as to whom the DN had been served on.
 - b) The DN was served in fulfilment of the statutory purpose and complies with s. 50 (3)(b) FOIA.

- c) The title page of the DN used the words 'Public Authority' and the public authority is identified as HIF. The use of 'Ltd' raises issues. The public authority uses on its website 'Public Authority: Harrogate Integrated Facilities' and 'Public Authority: Harrogate Healthcare Facilities Management Ltd.'
 - d) Mr Purden does not agree that a reasonable person, including the parties to the appeal, with knowledge of this case, would dispute that it is beyond doubt as to who the DN was served on.
 - e) HIF is a wholly owned subsidiary and a designated a public authority under s.3(1)(b) FOIA by virtue of s.6(1)(b)FOIA and has been correctly identified by either choice of name.
 - f) Mr Purden refers to Rule 2 and submitted that it was in the interests of justice that the Tribunal determine the appeal because if the case was struck out the IC would serve an identical DN and this would be a waste of time and effort.
19. Judge Buckley on 8 September 2023 refused the IC's application for the appeal to be struck out. It was the view of Judge Buckley that the Tribunal could make its decision on the issue of the naming of the wrong authority at the same time as considering the substantive points made by Mr Purden. Her view was that this approach had the attraction of avoiding disproportionate duplication of effort and resource because Mr Purden had indicated he would appeal any re-issued DN.

Legal Framework

20. A person requesting information from a public authority has a right, subject to exemptions, to be informed by the public authority in writing whether it holds the information under s.1(1)(a) of the FOIA and to have that information communicated to him if the public authority holds it under s.1(1)(b) of the FOIA.

21. The powers of the Tribunal in determining this appeal are set out in s.58 of the FOIA as follows:
- (1) if on an appeal under s.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.
22. The Tribunal stands in the shoes of the Commissioner and takes a fresh decision on the evidence. The Tribunal does not undertake a review of the way in which the Commissioner's decision was made. When determining whether or not information is held, the Commissioner and the Tribunal applies the normal civil standard of proof, on the balance of probabilities.
23. Section 3(1)(b) FOIA states that a publicly-owned company as defined by section 6 FOIA is a public authority for the purposes of FOIA.
24. Section 6(1) FOIA states that a company is 'publicly-owned' if it is wholly owned by:
 - (a) the Crown;
 - (b) the wider public sector; or
 - (c) the Crown and the wider public sector.
25. The Tribunal in *Linda Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072 31 August 2007) held that in determining a dispute as to whether information is 'held' at [13]:

“There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records. This is particularly the case with a large national organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different locations. The Environment Agency properly conceded that it could not be certain that it holds no more information. However, it argued (and was supported in the argument by the Information Commissioner) that the test to be applied was not certainty but the balance of probabilities. This is the normal standard of proof and clearly applies to Appeals before this Tribunal in which the Information Commissioner's findings of fact are reviewed. We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.”

26. The First-tier Tribunal has repeatedly confirmed that the relevant test is whether the information is held on the balance of probabilities. For example, in the cases of *Malcolm v Information Commissioner* EA/2008/0072 at [24], *Dudley v Information Commissioner* EA/2008/008 at [31] and *Councillor Jeremy Clyne v the Information Commissioner and London Borough of Lambeth* EA/2011/0190 at [21]-[22]).
27. In *Oates v IC and Architects Registration Board* EA/2011/0138 at [11] (*Oates*) the Tribunal recognised that:

“As a general principle, the IC was, in the Tribunal’s view, entitled to accept the word of the public authority and not to investigate further in circumstances, where there was no evidence as to an inadequate search, any reluctance to carry out a proper search or as to a motive to withhold information actually in its possession. Were this to be otherwise the IC, with its limited resources and its national remit, would be required to carry out a full scale investigation, possibly onsite, in every case in which a public authority is simply not believed by a requester.”

28. In *Councillor Jeremy Clyne v IC and London Borough of Lambeth* EA/2011/0190 [38] the Tribunal recognised that: “The issue for the Tribunal is not what should have been recorded and retained but what was recorded and retained.”

Grounds of Appeal

29. Mr Purden submits the following grounds of appeal:
- a) His Request related to the information about what measures HHFM had put in place to adopt and maintain a publication scheme under s. 19 of the FOIA. HHFM’s trading name is HIF and is a wholly owned subsidiary of the Trust. He requested details of documents available under the scheme (such as policies and procedures, minutes of meetings, annual reports and financial information). The Request was for information about ‘measures’ put in place since February 2020.
 - b) His focus is on the first part of his Request and not the second part because HIF is about to adopt a publication scheme and the requested documents will become available. He submits that there is little practical benefit to anyone in a burdensome pursuit of this matter and he is content to set aside his grounds for doing otherwise.
 - c) The Commissioner failed to balance and give due weight to correspondence, and in particular the email dated 1 October 2020 which contradicts his findings. Mr Purden

referred to the email dated 1 October 2020 in his email dated 22 May 2023 to the IC caseworker.

- d) The Commissioner was wrong to conclude that it was only during 2023 that the Trust and HIF discussed the matter of HIF having its own publication scheme because an email dated 1 October 2020 from Mr Jonathan Coulter, Chief Executive of HIF Ltd and Deputy Chief Executive/Finance Director of the Trust (A15) stated that the publication scheme for the Trust was currently under review and development and that there were plans in place for this to be finalised and available in the future.
- e) Recorded information relating to 'review' and 'development' activities and documents such as 'plans' would have been generated. These amount to the 'measures' he was requesting and which should have been confirmed as existing and disclosed.
- f) Mr Purden submitted a screen shot of HIF's website. The Commissioner used a trading name as a limited company in its own right. HIF Ltd is a fictitious name and without legal standing and does not appear on Companies House's register of companies. He submits that HHFM was the correct name to use or HHFM trading as HIF.
- g) There is an error of law in that the IC erroneously accepted HHFM/the Trust's account of matters and ignores key evidence and disregards relevant case law and failed to uphold his procedural requirements for searches to check for information.
- h) He agrees with the Commissioner's invitation to the Tribunal to consider requesting written submissions or to join HIF to the proceedings. He suggests the following questions should be asked:
 - Please describe thoroughly any searches of relevant paper/electronic records and include details of any staff consultations.

- Is there a business purpose for which the requested information should be held? If so, what is this purpose?

The Commissioner's Response

30. The Commissioner submits the following:

- a) The DN was served upon HIF Ltd which is a trading name of HHFM. The latter being the correct legal entity upon which the DN should have been served. Given the DN was not served upon the public authority the DN should be deemed a nullity. The Tribunal must therefore strike out the appeal under 8(2)(a) of the 2009 Rules due to lack of jurisdiction.
- b) The Commissioner submits, noting *Oates*, that he was entitled to accept the word of the public authority in this case as there appears to be no motive to withhold information in its possession.
- c) No further DN was served in relation to this section 50 complaint.
- d) The Tribunal would be further assisted in its decision-making on this matter by input from the public authority, and the Tribunal is invited to consider requesting written submissions or requiring HHFM/HIF to join the proceedings.

Conclusions

31. In reaching its decision the Tribunal took into account all the evidence before it whether or not specifically referred to in this Decision. The Tribunal applied the legislation and case law as set out above.
32. The Tribunal found that the DN was addressed to 'Public Authority: Harrogate Integrated Facilities Ltd.' HIF is a trading name of HHFM. The Tribunal decided to proceed on the basis that service should be deemed to have been made on the Trust

on behalf of HHFM. It would not be proportionate to do otherwise. If the appeal were allowed on the grounds that the DN should have been addressed and served on a different legal entity the Commissioner would issue an identical DN which would result in a disproportionate waste of resources for the parties and the Tribunal.

33. In reaching its decision on the validity of the DN, the Tribunal attached weight to the following points:

- a) There has been some inaccuracy by the Trust in the naming of the legal entities referred to in this appeal which has led to some confusion. HIF and HIF Ltd have been used interchangeably by the Trust when referring to the same legal entity.
- b) Notwithstanding this imprecision the parties are aware of the different bodies involved and their roles.
- c) The Trust has not even been consistent when referring to itself, in that it calls itself the Harrogate and District NHS Foundation Trust and the Harrogate and District Foundation Trust.
- d) The HIF's website refers to itself as both as HIF and HIF Ltd. The website states that HIF Ltd is a wholly owned subsidiary company of Harrogate and District Foundation Trust (not Harrogate and District NHS Foundation Trust). It also states that HIF (not Ltd) is a trading name for HHFM (A19).
- e) The first email in response to Mr Purden's Request came from the Freedom of Information Officer of the Trust (C44 and C45) in an email dated 15 November 2022 on behalf of HHFM and HIF.
- f) That email stated that HIF was a private limited company and a wholly owned subsidiary of Harrogate and District NHS Foundation Trust (not Harrogate and District Foundation Trust as stated on the website). The email stated that the

policies that apply to HIF could be requested and provided through the Trust as the holding company.

- g) In the email dated 1 October 2020, Mr Coulter (A15) signs himself as Chief Executive, HIF Ltd and Deputy Chief Executive/Finance Director, Harrogate and District NHS Foundation Trust. He attached a copy of HHFM Limited t/a HIF Ltd's accounts for the year ending 31 March 2019. He stated that HIF was a wholly owned subsidiary of the Trust.
- h) Mr Coulter refers to both HIF and HIF Ltd as one and the same body. In his email he states that HIF (not Ltd) is a wholly owned subsidiary of the Trust and refers to HHFM trading as HIF Ltd.
- i) The parties are agreed that the DN should have been served on HHFM and that HIF is the trading name.
- j) There is no prejudice to the parties in proceeding with this appeal on the basis that service can be deemed to have been made on the Trust on behalf of HIF and HHFM.
- k) The Trust responded to Mr Purden's Request, corresponded with him, corresponded with the Commissioner and is aware of the Request, this appeal and all the matters in issue.
- l) The Trust responded to emails addressed to HIF Ltd (pages D63 to 64) and explained this was because there was a SLA whereby corporate functions were utilised by HIF and that FOIs were logged and tracked on a database held within the Trust. In effect the Trust was acting on behalf of HIF and HHFM.
- m) There has been some inconsistency by the Commissioner in the naming of the identity of the body dealing with the Request. For example, in the email dated 12 May 2023 to Mr Purden (D52 and D53) the Commissioner writes: "Your complaint about: Harrogate Healthcare Facilities Management Limited" and refers to HHFM being the public authority handling his Request.

- n) Although the DN was addressed to HIF a copy of the DN was attached to an email from the IC dated 19 June 2023 to the Trust (hdft.foi@nhs.net) and the email was copied to HIF (hif.harrogate@nhs.net) (page D66). That email stated “DN served – to pa.”
 - o) Mr Purden made his Request to HHFM and the response to the Request was made by a Freedom of Information Officer of the Trust on 15 November 2022 (C44 and 45). The letter explained to Mr Purden his rights if he was dissatisfied with the response to his Request.
 - p) The IC addressed letters to HHFM using the Trust’s email address. For example on 12 May 2023 (D51).
34. The Tribunal found that service could be deemed to have been made on the Trust on behalf of HIF and HHFM and it was in the interests of justice to do so.
35. The Tribunal found that because a discrete HIF publication scheme did not exist at the time of Mr Purden’s Request, HIF did not hold the information requested in the second part of the Request, namely policies, procedures, minutes of meetings, annual reports and financial information
36. The Tribunal found at the time of the Request the information requested about the publication scheme was not held because at that time the Trust was still managing one publication scheme that covered both it and HIF.
37. The Tribunal does not accept that Mr Coulter’s statement in his email dated 1 October 2020 (A15) indicated that there were documents within scope at the time of the Request. Mr Coulter indicated only that there were plans for the publication scheme to be finalised and available in the future. The Tribunal found that it was only during 2023 that the Trust and HIF developed the plans for HIF to have its own publication

scheme. The Tribunal found that Mr Coulter was indicating an intention for the future in relation to the publication scheme.

38. The Tribunal has considered whether the words used by Mr Coulter, namely that “there are plans in place” for the publication scheme to be finalised and available in the future meant that there would be recorded information of measures such as policies, procedures, minutes of meetings, annual reports and financial information.
39. The Tribunal found it more likely than not that the Trust and HIF developed strategies, policies, social media and governance arrangements that were unique to HIF in 2023. It was decided that a separate publication scheme accessible on HIF’s new website was needed. The Trust confirmed in June 2023 (D63 and 64) that such a publication scheme had been developed and was in the process of being uploaded onto HIF’s website.
40. An Administration Assistant wrote to Mr Purden and copied in the Commissioner on 19 May 2023 (D56) to confirm that a dedicated publication scheme based on the ICO Model had been drafted and proved for HIF Ltd. The email confirmed that all the necessary content and data was currently being gathered and the new page would be uploaded to the website as soon as it was ready.
41. The Trust noted that the original response in 2020 following the Commissioner’s first decision notice, stated that the Trust and HHFM/HIF operated under the same publication scheme. At that point in time strategies, policies and procedures covered by the publication scheme were joint between the two organisations. Therefore, a separate publication scheme solely for HIF did not exist and could not be provided. The Trust confirmed that was the case in 2020 and remained the case at the time of the 2022 request. The Tribunal accepted this information from the Trust as more likely than not.
42. The Tribunal accepted the statement by the Company Secretary of the Trust in the letter dated 7 June 2023 (D63 and D64) to the Commissioner that at the time of the

Request and the response to Mr Purden an HIF publication scheme was not in existence and it was in the months prior to June 2023 that the HIF publication scheme had been developed. The Tribunal found it more likely than not that this statement from the Trust was accurate and correct.

43. The Tribunal accepted the information provided by the Quality and Governance Lead of HIF (E67) dated 31 August 2023 that at the date of the Request HIF did not have a publication scheme but did have “intentions of developing a separate publication scheme.” The Tribunal found it more likely than not that at the time of the Request no focussed work had been undertaken on developing an HIF publication scheme. Although there had been discussions about the need to develop a publication scheme in the future no activity had taken place that would require records to be made.
44. The Tribunal’s view was that it was entitled to accept the word of the public authority and not to investigate further. Following the guidance in *Oates* the Tribunal accepted the explanations and found no evidence as to an inadequate search, found no evidence of a reluctance to carry out a proper search or, in relation to motive, no evidence to withhold information actually in its possession.
45. The Tribunal found that the Trust on behalf of HIF complied with section 1(1)(a) FOIA.
46. The Tribunal found that none of the arguments and grounds presented by Mr Purden identify any error of law in the DN nor do they identify any incorrect exercise of the Commissioner’s discretion.
47. Accordingly, the appeal is dismissed.

Signed: **Judge J Findlay**

Date: 13 September 2024