

Information Tribunal

Appeal Number: **EA/2005/0028**
FS 50070880

FREEDOM OF INFORMATION ACT 2000

Determined on Papers

Decision Promulgated
31 May 2006

Before

**CHRISTOPHER RYAN – DEPUTY CHAIRMAN
PETER DIXON – LAY MEMBER
MICHAEL HAKE – LAY MEMBER**

Between

ALAN WALES

Appellant

and

**THE INFORMATION COMMISSIONER
AND
NEWCASTLE NATIONAL HEALTH SERVICE TRUST**

Respondent

DECISION

We have decided to dismiss the Appeal.

Reasons for Decision

Introduction

1. On 5 January 2005 the Appellant wrote an e-mail to Newcastle upon Tyne Hospitals NHS Trust (“the Trust”) requesting certain information under the Freedom of Information Act 2000 (FOIA). He wrote:

“I wish to be informed on what date the Trust first introduced its ‘Policy and Procedure for Handling Habitual or Vexatious Complaints’” (We will refer to this enquiry as the “Vexatious Complaints Enquiry”)

The letter went on to make a second request, in the following terms:

“The Trust provided Mr P Jenkinson, Independent Lay Chairman, with information from my data in 2004. I wished to be informed where the information is now and who has control of it”. (the “Lay Chairman Enquiry”).

2. The Appellant was not satisfied with the response which he received from the Trust to either the Vexatious Complaints Enquiry or the Lay Chairman Enquiry and accordingly complained to the Information Commissioner. On 7 December 2005 the Information Commissioner issued a Decision Notice which dismissed the complaint in respect of both of those enquiries (“the Decision Notice”). The Appellant has appealed to this Tribunal against that dismissal. Both parties to the Appeal have agreed that it may be decided without an oral hearing and this decision is based on the following materials:
 - (a) The Decision Notice.
 - (b) An e-mail from the Appellant to the Tribunal dated 19 December 2005 (which predated the formal Notice of Appeal – see (c) below – but which has been treated as part of the Grounds of Appeal).
 - (c) The Appellant’s formal Notice of Appeal dated 3 January 2006.
 - (d) An e-mail from the Appellant to the Tribunal dated 21 March 2006 in which he responded to a direction from the Tribunal to provide clarification on certain points in his Grounds of Appeal.
 - (e) A witness statement from Mr L R Fenwick, the Chief Executive of the Trust (prepared in response to a direction from the Tribunal that the Trust should be joined as a party to the appeal and that one of its senior officers should provide evidence on certain issues arising in the Appeal).
 - (f) Written submissions from the Information Commissioner, the Trust and the Appellant (the latter taking the form of an e-mail from the Appellant dated 12 April 2006, in which he set out certain submissions in response to the content of Mr Fenwick’s witness statement).

The Vexatious Complaints Enquiry

3. On 24 January 2005 the Trust wrote to the Appellant, in response to his request of 5 January 2005, in the following terms:

“I can confirm that the Policy for the Handling of Habitual or Vexatious Complaints was formalised and approved in April 2001 by the Complaints and Incidents Panel which is a standing committee of the Trust Board. The formal policy was not put into practice until 19 April 2002 when a copy was forwarded to your goodself”

4. The Appellant has made a number of points on the Trust's response and the Information Commissioner's rejection of his complaint based on that response. They are set out in the following paragraphs.
5. The Appellant complained, in his e-mail of 19 December 2005, that the Trust had provided

him with “misinformation” because it had informed him that the Policy for the Handling of Habitual or Vexatious Complaints (“the Policy”) had been formalised and approved in April 2001 whereas the Policy document itself bore the statement “Review Date 1st April 2001”. The Appellant made the quite understandable comment that “you cannot review a policy that has not been introduced”.

6. The Information Commissioner concluded that it was not for him to adjudicate on the accuracy of the information held and disclosed by the Trust. On the face of it that was a correct interpretation of the relevant provisions of the FOIA. However, inconsistencies and apparent errors between, on the one hand, a statement made in response to a request for information and, on the other, material contemporaneous to a past event to which the statement refers, may point to a breach the FOIA. In this case the reference to a review date in 2001 might have been evidence that the statement in the 24 January letter was in fact wrong. If that had been the case the Trust might have been in breach of FOIA Section 1(1) (b) by failing to communicate the information requested. It was possibly for this reason that the Information Commissioner did, in fact, obtain confirmation from the Trust’s Complaints Manager that the information which it had provided was correct to the best of his knowledge. On that basis the Information Commissioner concluded that the Trust had complied with its obligations under FOIA.
7. We have been provided with additional information on the issue. This took the form of a Witness Statement by Mr L R Fenwick, the Trust’s chief executive. Mr Fenwick describes the process under which the Policy was drafted and submitted to the Clinical Policy Group, a Committee of the Trust Board. According to the minutes of a meeting of that Group held on 17 April 2001 (a copy of the minutes is exhibited to the witness statement) the draft Policy was agreed on that date. Mr Fenwick’s witness statement goes on to say that the reference on the Policy itself to a review date of April 2001 was “wrong”. He says that the review date is normally 3 years from the date of the issue and that in this case the review was in fact carried out in December 2004. He exhibits, as support for his evidence on this point, a copy of the current version of the Policy, which records the effective date of the new version as December 2004, with the next review date in December 2007.
8. In the light of this evidence we have concluded that, while understanding why the Appellant should have queried the apparent discrepancy between the Trust’s response to his enquiry and the review date appearing on the face of the Policy document, the Policy was in fact introduced in April 2001. The Trust did therefore comply with FOIA section 1 (1) (b) by providing the Appellant with the information requested.
9. The Appellant also complained, in his 19 December 2005 e-mail, that the Trust had stated that the Policy had been “formalised and approved” in April 2001 and had not therefore answered the Appellant’s enquiry as to the date when it had been “introduced”. He asserted that, “you cannot formalise and approve a policy that has not been introduced”. The Appellant in fact raised this point with the Trust at the time and apparently received a letter dated 1 March 2005 clarifying that the Policy was indeed “introduced” in April 2001.
10. There is little merit in this point. The evidence of Mr Fenwick establishes very clearly that the Policy was indeed introduced in April 2001. The Trust could be said to have adopted a helpful attitude towards the Appellant when it provided a little more information than was strictly necessary in explaining to him that the Policy had been introduced by being formalised and approved in that month. It is in our view over analytical of the language

used for the Appellant to assert that this constituted a breach of the FOIA. The complaint appears particularly pointless in light of the clarification set out in the Trust's letter of 1 March 2005.

11. The Appellant's next ground of complaint appears in his formal Grounds of Appeal. He complains that the Trust's letter of 24 January 2005 provided him with "confirmation and not information and thereby acted in breach of [FOIA]". The alleged breach appears to be that FOIA required the Trust to inform the Appellant in writing whether or not it held the information requested and that its letter did not contain that information. We are satisfied that nothing turns on this point. It is correct that FOIA section 1 does create a right for any person making a request for information to a public authority to be "informed in writing by the public authority" whether it holds the information. The Trust complied with the FOIA in that it gave the Appellant the information he had requested and did so in writing. The fact that in doing so it used the word "confirm" is irrelevant.
12. The formal Grounds of Appeal also contain the following complaint:

"If the Trust is holding the information requested, then the [FOIA] requires the Trust to have that information communicated to me. The Trust has failed to do this".

We have found it difficult to determine what exactly the Appellant is saying on this point. If he is referring to the information about the date on which the Trust introduced the Policy then it clearly was communicated to him. If the essence of the complaint is that the Trust should have supplemented its statement on that point with a copy of the Policy, or of other documents evidencing its introduction, then it is clear that the original request did not ask for that information, either expressly or by implication. It may be that if the Trust had been a little more forthcoming, in its letter of 24 January 2005, about the process by which the Policy had been introduced then some of the Appellant's concerns may have been allayed at the time. But that is not to say that the Trust fell short of its legal obligation to provide the information requested. We find that it in fact complied with that obligation.

13. The Appellant sent an e-mail to the Tribunal on 12 April 2006 commenting on Mr. Fenwick's witness statement. It appears that on 6 April 2004 the Trust had written to the Appellant on certain issues arising from his relationship with the Trust. In the course of that letter it mentioned the Appellant's belief that he had in fact been treated as "vexatious" prior to the date when the Policy had been adopted. In the process it stated that the Policy had been introduced in "April 2002". The Appellant has raised this point in the course of criticising the evidence filed by the Trust, but we have treated it, also, as a more general criticism of the information provided by the Trust and the handling of his complaint by the Information Commissioner. There is certainly a discrepancy between the date mentioned in that letter and the Trust's statement to the Appellant that the Policy had been introduced in April 2001. However, we have the clear evidence of Mr Fenwick on the date when the Policy was actually introduced and are satisfied that the reference to April 2002 was simply a mistake by the writer of the 6 April 2004 letter.

The Lay Chairman Enquiry

14. The letter from the Trust dated 24 January 2005, referred to in paragraph 3 above, also

responded to the Lay Chairman Enquiry. It stated:

“With regard to the information provided to Mr Jenkinson, Lay Chair to facilitate consideration of your request for an Independent Review in March 2004, I confirm that all copies of information forwarded to him were destroyed once consideration of your request had been completed”

Again, the Appellant has made a number of points on the Trust’s response and the Information Commissioner’s handling of the complaint based on that response. We will deal with each in the following paragraphs.

15. In his e-mail of 19 December 2005 the Appellant wrote:

“My letter to the Trust of 5 January 2005 under the Freedom of Information Act is concerned with information and not copies of information as stated by the Commissioner”.

We interpret this to mean that the Appellant considers that the Trust was in breach of Section 1 FOIA, (and that the Information Commissioner should have concluded that it was in breach), by virtue of the fact that the original request to the Trust asked where the information provided to the Lay Chairman was at the date of the request and the Trust’s reply stated that all copies of information provided to the Lay Chairman had been destroyed. Section 1 FOIA requires a public authority to inform any person making a request “whether it holds information of the description specified in the request”. This point does not appear to have formed part of the Information Commissioner’s investigation into the original complaint and is not mentioned in the Decision Notice. It is, however, self evident that when the Trust decided to involve an Independent Lay Chairman it would have copied relevant material from its file of original documents and forwarded the copies, not the originals. The Appellant’s request referred to the material passed to the Independent Lay Chairman (i.e. copies) and not to the Trust’s original file. The Trust’s response therefore complied with the law (and may, indeed, have gone a little further than was strictly necessary in stating that all copies of the information in question had been destroyed).

16. The Appellant has also asserted, in his e-mail of 19 December 2005, that the information provided to the Lay Chairman had not been destroyed and is still controlled by the Trust. In response to a direction from the Tribunal that he provide detail of the facts and matters on which he intended to rely in support of that assertion the Appellant produced copies of the following three letters written by the Trust:

- (a) a letter dated 11 March 2004 confirming the Lay Chairman’s appointment as such;
- (b) a further letter to him of the same date enclosing copies of correspondence relating to the Appellant’s Request for an Independent Review; and
- (c) a letter of 6 April 2004 to the Appellant (and copied to the Lay Chairman) informing the Appellant of the outcome of the Request for Independent Review.

The Appellant invites us to conclude that, as the Trust did not, in any of those letters, request the Lay Chairman to destroy or return the information copied to him, it follows that “the Trust is currently in control of the information that the Commission refers to and has not destroyed it”. Against that the Witness Statement of Mr L R Fenwick referred to above has exhibited to it a file note dated 19 January 2005 which records that a member of the Trust’s staff had contacted the Lay Chairman who had confirmed that all documents provided to

him had been destroyed. The Information Commissioner appears not to have had either of those elements of evidence before him when he finalised his Decision Notice but, in the

absence of any evidence suggesting that the information did exist, he concluded that it did not and that the Trust's original response to the Appellant complied with FOIA. Under section 58(2) FOIA we have the power to review any finding of fact on which the Decision Notice has been made. Having done so, we have concluded, in the light of the additional evidence that was available to us, that the Appellant's complaint on this point is unsustainable and should be rejected. It is true to say that the evidence we have seen does not make it clear whether the destroyed materials included the letter of 6 April 2004 referred to in (c) above and that neither the Trust nor the Information Commissioner appear to have sought clarification from the Appellant as to whether he intended to refer only to the material that the Independent Lay Chairman took into account in contributing to the decision recorded in that letter. Nevertheless, we are satisfied that the Appellant's original request for "information from my data" clearly referred only to information from his file that was relied on in reaching the decision, and not the decision itself. It follows that, even if the Independent Lay Chairman's copy of the 6 April 2004 letter has not been destroyed, the Trust provided full and accurate information in response to the Appellant's request and therefore complied with its obligations under FOIA.

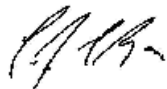
17. The formal Grounds of Appeal also include an assertion that the Trust provided the Lay Chairman with information about him "after he had concluded his considerations and after I was informed in a letter dated 6 April 2004 that my case had been closed". The Appellant was again directed to set out the facts and matters that he intended to rely on in support of that assertion. In his reply he stated that he relied upon the letter of 6 April 2004 referred to in paragraph 16(c) above and said that it proved that the Trust "communicated information about me to Mr Jenkinson after he had concluded his considerations, after the Trust had concluded not to set up an Independent Review Panel, after the Trust had closed my complaint file and after the Trust had advised me of my rights concerning the Health Service Commissioner". It is not clear what bearing this allegation may have on the Appellant's original request for information. However, it is also clear that an allegation that information was passed to the Independent Lay Chairman after 6 April 2004, which is based solely on the fact that the Trust's letter to the Appellant of that same date was copied to the Independent Lay Chairman, has no basis in fact or reason. We accordingly dismiss it.

Costs

18. The Trust has invited us to both dismiss the Appeal, which we do, and also to make a costs order against the Appellant. The Trust was joined in the Appeal by order and provided thorough and convincing evidence from its Chief Executive which we have found helpful in reaching our decision. The basis on which we may make a costs order against a party is set out in the Rules at Rule 29. In the circumstances that apply in this case it provides that we may order costs against a party if we consider that it has been responsible for frivolous, vexatious, improper or unreasonable actions. Rule 29 (2) provides that, if we are minded to make an award of costs we should first give the party facing that potential liability an opportunity to make representations on the matter.
19. We have concluded that, although it could certainly be argued that some of the Appellant's arguments (noticeably those mentioned in paragraphs 10, 11 and 17 above) crossed the threshold of vexatiousness, his appeal overall did not. There were two discrepancies in the materials which did require explanation and one of the issues might have been avoided had the Trust explained matters to the Appellant at the time in a little more detail. On balance,

therefore, we do not believe that a costs order against the Appellant would be appropriate in this case

Signed



Date 31 May 2006

Christopher J L Ryan

Deputy Chairman