Information Tribunal Appeal Number: EA/2007/0081
Information Commissioner's Ref:FS500108885

Heard at Procession House, London, EC4 **Decision Promulgated**
On 30th January 2008 **5th March 2008**

BEFORE

CHAIRMAN

Mr H FORREST

and

LAY MEMBERS

MR A WHETNALL
MR G JONES

Between

Mr D LAWTON

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

NHS DIRECT

Additional Party

Representation:

For the Appellant: Mr Kennedy
For the Respondent: Mrs J Oldham, barrister
For the Additional Party: Ms A Proops, barrister

Decision

The Tribunal upholds the decision notice dated 30 July 2007 and dismisses the appeal.

Reasons for Decision

Introduction

1. NHS Direct is a large, national, public organisation which provides a free telephone advice line on health issues. It operates from 22 call centres, accessed by a single national number: 0845 4647. Mr Lawton is a member of a group campaigning against the use of such 0845 telephone numbers, which they regard as a hidden and unjustified levy on the public, since the charges for use of 0845 numbers vary widely between different phone providers, and can be used to generate considerable income for the service provider. Both OfCom and the Central Office of Information have expressed concern at the use of 0845 numbers by government agencies, at least as a revenue raising practice; and the Minister of Health has also commented adversely on the use of 0845 numbers. A new range of numbers, 0300, is currently being introduced which will provide standard, low cost access to national services. NHS Direct intend, at an appropriate time, to switch to such a number.

2. In the meantime, Mr Lawton's group have pressed a number of agencies to reveal the geographic numbers which lie behind 0845 numbers, so that callers may choose whether to dial 0845, or to dial the ordinary number either as a local call, or with the appropriate STD code before it. This will enable some callers, particularly those on mobile phones where higher charges for 0845 numbers are widespread, to have cheaper access to agencies using 0845 numbers.

The request for information

3. On 12 January 2006, Mr Lawton therefore made a request, citing the Freedom of Information Act (FOIA), to NHS Direct asking for the equivalent geographical number for their 0845 number, together with a number of other questions about their use of 0845 numbers.

4. NHS Direct replied on 19 January 2006 explaining why they had originally chosen an 0845 number. At the time, [1998], it had offered a simple, recognisable national number with a uniform charge from anywhere in the country, at a BT local call cost. They stated they derived no income whatsoever from the use of an 0845 number. They stated that " we do not have geographical numbers into our contact centres for the core NHS Direct Service".

5. Mr Lawton was dissatisfied with that answer and requested a review. Prompted by Mr Lawton, who had to explain to NHS Direct what a review was and why they should have a review process (in accordance with the Code of Practice issued under section 45 FOIA), NHS Direct reviewed their decision and, on 24 February 2006, confirmed that they would not release the geographic numbers. This time they explained that there were geographical telephone numbers for NHS Direct call centres, but claimed three exemptions from disclosure under FOIA applied:

section 22 : Information intended for future publication

section 38: Health and safety

section 44: Incompatible with any community obligation.

They confirmed that they were unwilling to release the underlying geographic numbers as calls on these numbers could not be integrated into the national system for handling calls; delays could therefore result; and delays in handling a call would delay advice which might be to seek urgent medical treatment, for example, from the 999 Service. There was therefore a risk to health and safety.

The complaint to the Information Commissioner

6. On 10 March 2006 Mr Lawton complained to the Information Commissioner (IC). On 3 January 2007, NHS Direct provided the IC with a lengthy, reasoned reply for their refusal to provide the geographic number behind the 0845 number. They accepted that they had initially attempted to mislead Mr Lawson by giving him an incorrect answer to his question, when they stated that they did not have "geographical numbers into our contact centres for the core NHS Direct Service". They explained why they had done this: "We have had a number of people enquire about the use of the 0845 number in a short period of time and we have provided a response to these that seems to have satisfied these enquirers. Most enquirers do not understand telephone systems and to try to explain that although there are geographic numbers within the system, the use of these as dedicated numbers by which you can access NHS Direct would be incorrect. …. To say that geographic numbers are available to access NHS Direct would not only be dangerous but also misleading. Therefore we had taken the stance that although they were within the system, they were not acknowledged as a way to contact us. Therefore we often referred to them as being not available. We recognise that this is misleading and have now changed our explanation."

7. The dangers they referred to from the use of underlying geographic numbers arise because such calls were not integrated into the national system with two adverse consequences: that some callers on geographic lines would risk not getting through at busy times; while in other situations, calls on geographic numbers would adversely affect the way calls on the national system were handled; the consequent delays in both cases could potentially delay urgent medical advice, and therefore that health and safety consideration meant they were unwilling to release the information; and that it was therefore exempt from disclosure under section 38 of FOIA.

8. Unfortunately, some confusion remained because NHS Direct then went on to describe a separate category of geographic numbers to call centres, inherited from the first days of the service before centres were linked nationally. These are referred to now as fall back numbers. They are not linked or connected in any way to the core NHS Direct advice function, and callers to those numbers could therefore encounter major obstacles in accessing an advisor, who would have to leave their normal place of work to answer the phone; indeed, phones might be located in unstaffed rooms, and could therefore be left ringing indefinitely. Fall back numbers would only be used for health advice calls in a local emergency, or where

some technical problem had arisen with the normal service. Mr Lawton had never requested the numbers of these fall back lines.

9. In subsequent correspondence, NHS Direct withdrew their claim that the geographic numbers were exempt under section 44. It appears that the reference to this had simply been a mistake on their part.

10. In his Decision Notice, the IC largely accepted NHS Direct's explanation of the difficulties that would arise if geographic numbers were to be released, and therefore ruled that the exemption under section 38 was properly engaged, and agreed with NHS Direct's assessment that the balance of the public interest lay in maintaining the exemption rather than in releasing the information. However, it is clear that he was influenced in reaching that decision by the example of a call to an unanswered fall back number, which was not strictly relevant to the request.

11. In other respects, the IC found NHS Direct had breached their obligations under FOIA in a number of ways. They had not dealt with Mr Lawton's initial request properly, by denying they held the information, in breach of section 1; they had breached section 17 by not setting out properly the exemptions relied on, or by giving the necessary technical information required about reviews and appeal rights. The IC rejected the claim that section 22 was involved, since the information was not held with a view to publication at some future date. None of these rulings have been challenged before the Tribunal.

<u>The appeal to the Tribunal</u>

12. Mr Lawton did not accept the IC's ruling on the key question of the health and safety reasons for refusing to disclose the geographic numbers underlying the NHS core system. He, and other members of his group, were confused by NHS Direct's responses to the IC, and did not accept that the IC had been given an accurate picture. Mr Lawton appealed on the basis that the health and safety consequences claimed for disclosure were avoidable, over stated, and would simply not arise as claimed; the information was not exempt from disclosure on health and safety grounds.

<u>The questions for the Tribunal</u>

13. The question for the tribunal was therefore essentially whether the IC had correctly concluded that the information was exempt under section 38 FOIA:

> (1) information is exempt information if its disclosure under this Act would, or would be likely to –
>
> (a) endanger the physical or mental health of any individual, or
>
> (b) endanger the safety of any individual. .

Claiming exemption under section 38 is a two-stage process: firstly, it must be shown that there is a real risk to health and safety: that disclosure would or would be likely to endanger the safety of an individual. Secondly, if that hurdle is passed, then as a qualified exemption, the balance of the public interest in maintaining the exemption

must be shown to outweigh the public interest in disclosing the information (section 2(2)(b) FOIA).

Evidence

14. The tribunal was referred to an agreed bundle of documents; oral evidence was given by a number of witnesses, initially from prepared written statements; Mr Lawton himself gave evidence and was supported by Mr Shersby, an economist, and Mr Dixon. In view of his considerable experience of the telecommunications industry, we accepted Mr Dixon as an expert witness, but he accepted that he had little recent first hand knowledge of the NHS Direct system. For NHS Direct, we heard from Mr Price, the national ICT Infrastructure Manager, and Mr Foord, the Associate Director of Clinical Governance. Mr Price was able to explain the current telephone system in use at NHS Direct, and how it had evolved, in considerable detail. The system he described was in a number of significant respects different from the system as described to the Commissioner; moreover, the system has changed, and is still changing. It was not always clear from the written descriptions of the system provided by NHS Direct at various stages whether what was being described was the original, post 1998 system, the system as it operated between 2003 and 2006, or the system as it operated currently. The Tribunal was concerned with the system as it was at the date of the request, January 2006, the critical time at which NHS Direct's refusal to disclose the information must be judged. Having heard the witnesses, we set out below our findings on how the system operated at that time.

15. In essence the system that operated in January 2006 involved 22 separate call centres, accessed by the public through a single, national number: 0845 4647. A caller ringing that number would be connected to an "Intelligent Network" (IN) which first played a pre-recorded message, and would then automatically route the call to an operator, in a set order: the IN would first see if an operator in the nearest, local call centre was free; if so, the call was routed there; if not, the IN would check to see whether any operator in any of the 22 call centres nationally was free, and route accordingly; if all operators were busy, the IN would identify which call centre had the shortest anticipated response time, and send the call there. By 2006, 10 of the call centres were directly and constantly monitored by the IN so that if calls took longer than anticipated to be answered, calls could be rerouted elsewhere within the system; the remaining 12 call centres, with older technology, were unable to redirect calls once assigned to them; calls would remain in the queue at that centre, until an operator became free.

16. The number of lines into call centres varied from 10 to 60; at busy times all lines might be staffed; the IN was informed of the number of lines/operators available at any time, so that it could allocate calls appropriately. These lines all had geographic numbers, which, were they to be released, the public could call in on directly. The geographic number for any particular call centre was referred to as the pilot number; all lines connected to the core service in each call centre would have that same number; calling that number directly would connect to whichever of the phones in that centre next became free. However, such a direct call into the call centre could not be routed to other call centres if the lines were busy; the caller would simply hear an engaged tone. The call would not be recognised by, or processed through, the IN. The IN would therefore operate on the basis that that

line was free to take calls, without realising that it was in fact occupied by an external direct caller, thereby distorting the IN's calculation of availability and anticipated waiting times at the different call centres.

17. In addition, and quite separately from the core NHS Direct Service, each call centre also had a number of telephone lines with their own numbers which were used for staffing and office calls. These normally connected to the call centre's internal reception or switchboard; they were not normally used for advice calls to NHS Direct; they were not connected to the Intelligent Network. If the core lines were affected for some reason, they might be used in an emergency. They were therefore referred to as fall back lines; they were quite separate from the geographic lines for the core system; it was the core system numbers that Mr Lawton was requesting.

18. NHS Direct received an average of some 14000 calls a day in January 2006; some 5 million calls a year. However, averages are misleading: call volumes can vary enormously: over the 24 hours, depending on the time of day; from place to place, depending on local conditions and outbreaks; seasonally; and in the case of a national epidemic, nationally. Capacity is therefore kept under constant review and adjusted; the ability of the IN to route calls nationally to wherever demand is lowest is a key element of this system. Another is the initial pre-recorded message played to all callers coming through the IN: this can be changed to help manage the volume of calls. When there is no pressure on the system, the message simply gives information about data protection and call recording; as the system gets busier, it may be changed to give specific information on a particular condition, or suggest alternative sources of information: for example, it may suggest callers visit the NHS direct website, rather than wait for an operator; at its busiest, the message may suggest that callers call the emergency 999 service, or contact their local Accident and Emergency Centre. NHS Direct's aim is to manage the volume of calls in such a way that callers are always answered, rather than left hanging on with an engaged tone. If the volume of calls is overwhelming, in the event of a national pandemic, for example, then callers can at least hear a message telling them that NHS Direct cannot answer their call, giving some brief specific advice if that is appropriate, and referring them to 999 or A & E. 95% of all calls to NHS Direct were answered within 60 seconds, and only 1% of callers abandoned their call without receiving an answer; 0.04% of callers got an engaged tone.

19. By contrast, an external caller calling in on one of the geographic, pilot numbers direct to the call centre would get through to an operator if one was free, or would hear an engaged tone until one became free, in that call centre. In either event, they would not hear the pre-recorded message.

20. Just over a quarter of all callers are referred by NHS Direct advisors to either Accident and Emergency or asked to call 999; these are often cases where the NHS advisor suspects that the symptoms described may be more serious than the caller realises; 999 calls were advised in 3 to 4% of cases. A small proportion of these may be life threatening conditions such as heart attacks or poisoning.

21. We accepted Mr Foord's evidence that NHS Direct has never been involved in any revenue sharing arrangement with the telephone companies, and generates no income from its use of 0845 numbers. We note Mr Shersby's scepticism, and his

point that benefits to those who operate systems using 0845 numbers need not consist of direct revenue sharing, of monthly payments, but may be taken in discounts elsewhere. Nevertheless we accept NHS Direct's position that no financial benefits are received by them: there was simply no evidence to the contrary.

Submissions and analysis

22. Ms Proops and Mrs Oldham urged us to uphold the IC's decision notice. If the geographic numbers were released there clearly was a real risk to health and safety. It arose in a number of ways: direct callers to call centres using the geographic numbers faced unknown and unmanaged delays in being answered, since their calls were not routed to the call centre with the shortest queue, nor could they be rerouted if calls took longer to answer than anticipated. At busy times, there was a real possibility that they could just be left hanging on with an engaged tone, with no recorded message to give them information on alternatives or likely waiting times. Moreover, external callers would tie up lines in individual call centres, but the IN could not factor these calls into its reckoning of line availability in call centres. Calls would therefore be reallocated nationally on a false premise, leading to longer delays than necessary for some calls. In extreme cases of very high call volume, external calls might simply go unanswered and would not even hear the recorded information advising them of alternatives and unavailability.

23. Section 38 was therefore clearly engaged; when it came to applying the balance of the public interest, even a remote and small risk of significant delay – of just minutes – to a stroke victim could be fatal; and given the vast numbers of callers involved, there was a real possibility that some callers with life threatening conditions could be delayed from contacting the emergency service by some minutes, if they were unlucky enough to call in on an external line at the wrong time. Given the potential severity of the consequences, the balance of the public interest clearly outweighed the public interest in revealing the information.

24. Much of Mr Kennedy's arguments to the contrary were concerned with various amendments which might be made to the system to avoid the dire consequences claimed by NHS Direct. Mr Dixon, for example, argued that it might be possible to reconfigure the system in a variety of ways to avoid the risks relied on by NHS Direct. For example, he argued that pre-recorded messages could be placed on external incoming calls, just as they were placed on the IN. In answer, Mr Price argued that this would take up capacity, thus reducing the volume of calls that could be handled; moreover, changing the pre-recorded message could be done instantly and nationally on the IN; changing messages locally would take time and be less efficient. Similarly, Mr Dixon suggested that the system could be fitted with alternative software so that calls coming externally might be rerouted one way of another to other call centres; Mr Price disagreed.

25. If we had to resolve these conflicts of evidence, we would accept the evidence from Mr Price, if only because his knowledge of the system was direct and first hand, whereas Mr Dixon in suggesting alternative possibilities, accepted that he was not fully aware of the particular systems capacities or limitations. More fundamentally, however, we remind ourselves that we are not here to debate the merits of the system NHS Direct have chosen to adopt, install and operate. We are adjudicating

simply on a request for information. We have to accept the system as it was at the time, with any health and safety consequences that arose from the way NHS Direct chose to operate it at that time. If those consequences followed, then it is no answer to say that a different system or method of operation could avoid or reduce the consequences. It is not for us to tell NHS Direct how they should have operated the system, let alone to tell them that if they had chosen a different system, the health and safety consequences might have been different.

26. In cross examination, Mr Lawton accepted that some of the risks to the health and safety of callers claimed by NHS Direct if the direct line numbers were released would arise, though he felt these had been exaggerated. However, he also pointed to positive benefits from the release of direct numbers which counted in favour of release when it came to weighing the balance of the public interest. His evidence that call charges varied widely for 0845 numbers, depending on the telephone company used by the caller was not challenged; charges could be as high as 50 p per minute on some mobile networks. Such charges could be a significant deterrent for callers on low incomes; and such callers were disproportionately high users of mobile phones, which incurred the highest charges. Mr Foord, for NHS Direct, accepted that this was a factor recognised by NHS Direct, and one which caused them concern, though in his view outweighed by the factors favouring the exemption. He pointed out that the NHS Direct advisor would, if requested, call the caller back, though this possibility was not advertised.

27. Some of Mr Lawton's arguments we simply reject on the facts : for example, we accepted Mr Foord's evidence that NHS Direct receive no revenue from the use of 0845 numbers. Even if NHS Direct did use the 0845 number as a revenue generating device, that would not directly impinge on the health and safety factors we have to consider; these would still arise, to the same extent, whether or not NHS Direct were profiting from the service. We emphasise that it is no part of our function, as an Information Tribunal dealing with a request for information, to adjudicate on whether NHS Direct is providing a good or a bad service; or could provide a better, or a cheaper service; or a free or expensive service; or a different service. The question we have to determine is whether there would have been, in January 2006, a real risk to the health and safety of individuals if the geographic numbers for NHS Directs call centres had been released; and if so, whether the balance of the public interest in favour of maintaining the exemption outweighed the public interest in releasing the information.

Conclusion

28. On the evidence before us of how the system operated in January 2006, it is clear that there would have been a real risk to the health and safety of some individuals if the geographic numbers for NHS Direct's call centres had been released. The absolute numbers of individuals placed at risk may have been small, but given the severity of the possible consequences to an individual of delay, even of a small delay, in receiving appropriate advice – death – "adverse clinical consequences" in the bland language of NHS Direct, section 38 is clearly engaged.

29. Turning to the balance of the public interest, we accept there is a strong public interest in having a cheap, accessible, uniform rate national number for NHS direct; but there is a much greater public interest in ensuring that those who do call NHS

Direct get the benefits of health advice as quickly as possible, whether through the recorded message or by being put through to a health advisor with minimum delay. If the direct geographic numbers for NHS Direct were to be released, they would be used: the volume of calls on geographic numbers would be unpredictable and, within the system, unmanageable. Circumstances would inevitably eventually arise, sooner or later, where some callers at least would be left hanging on for an unnecessarily long time; and for a few of those callers, a life threatening delay would ensue. Such a possibility clearly outweighs whatever benefits might arise in terms of cheapness and greater accessibility of the service if the geographic numbers were released. The public interest in maintaining the exemption outweighs the public interest in releasing the information. We uphold the IC's decision.

30. However, in reaching that conclusion, we should also record our concern at the way in which NHS Direct have presented their case at various stages (save for the last stage, at the hearing before us). NHS Direct are critical of Mr Lawton for the intemperate language he has used on occasion in attacking their position, for example, when he has repeatedly accused them of lying. To a large extent they have only themselves to blame. Mr Dale's initial reply was, as they belatedly accepted, deliberately misleading. Their case to the Commissioner was still not clear. For example, the Commissioner clearly and understandably attached weight to the example given by NHS Direct of a phone left unanswered because it was ringing in an unattended training room, with potentially disastrous results for the poor caller. That example however, is of what might happen if a fallback line number were provided : Mr Lawton has never requested such numbers. Much time and energy has been expended by Mr Lawton and his colleagues in attempting to understand and untangle the confusing way in which NHS Direct have presented the information. Their case has repeatedly changed, from the initial mistaken reliance on sections 22 and 44, through to today's hearing when much greater prominence was given to the pre-recorded messages on the IN network, than previously. Indeed, it was only in oral examination at the hearing that much of the confusion generated by NHS Direct's different statements was cleared away.

31. Where a public authority such as NHS Direct has technical information which only they have access to and which they rely on to claim an exemption under FOIA, it is incumbent on them to disclose their reasons fairly and fully. Quite apart from any general duty of fair dealing with the public, section 16 of FOIA imposes a duty to provide advice and assistance to persons who have made requests for information. Deliberately to mislead Mr Lawton, as NHS Direct at first did, is quite inconsistent with that obligation.

32. Ultimately, NHS Direct succeed in defeating Mr Lawton's appeal. We uphold the IC's decision, though having heard fuller and different evidence, we have made different findings of fact. Ultimately, the arguments from health and safety are compelling, but NHS Direct through their initial poor understanding of their obligations under FOIA, and their initial denial that there were underlying geographic numbers, have only themselves to blame for the suspicion and distrust generated by the way they have handled this request for information.

33. Our decision is unanimous.

Signed:

Humphrey Forrest

Deputy Chairman

Date: 5th March 2008