Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/ 2007/0088
Information Commissioner's Ref: FS50170171

Heard on the papers
On 20 March 2008

Decision Promulgated
16 April 2008

BEFORE

CHAIRMAN

Mr H Forrest

and

MR A STOLLER

MR A WHETNALL

Between

Mr J WELSH

Appellant

and

INFORMATION COMMISSIONER

Respondent

Decision

The Tribunal upholds the decision notice dated 9 August 2007 and dismisses the appeal.

Reasons for Decision

Introduction

1. In this appeal Mr Welsh claims that the Information Commissioner (IC) was wrong in his Decision Notice to rule that his request for information about the "top-up training" received by a GP was vexatious, within section 14 of the Freedom of Information Act (FOIA), and that therefore the doctor did not have to comply with the request.

2. We have decided the appeal without a hearing, after considering all the evidence submitted to us by the parties, and their various submissions and correspondence. The doctor involved did not wish to take part in the appeal. We have not therefore had the benefit of hearing his side of the story; and have heard from none of the parties in person. That should be borne in mind in considering our findings of fact, set out below.

The Factual Background to the Request

3. Mr Welsh was registered as a patient of the Torrington Park Group Practice. On 4 October 2004 he went to the surgery about a swollen lip; he told the Doctor he had had the condition for a couple of weeks. The GP he saw asked another GP in the practice for a second opinion; neither Doctor thought the condition was urgent or especially serious. Mr Welsh was prescribed some cortisone cream and told that he should return in two or three weeks for a review. A month later, Mr Welsh returned. He saw a different GP, whom he told he had had the condition for 5 months. She found a solid lesion on his lip, and referred him for an urgent dermatological opinion. Subsequently a skin cancer was diagnosed, and Mr Welsh received surgery and radiotherapy.

4. Mr Welsh believes that the 2 Doctors he first saw should have recognised the skin cancer on his first visit, and has made a series of complaints about that failure, and other matters, ever since. His complaint was first investigated by the practice internally, and subsequently by the General Medical Council.

5. We have not seen the GMC's report, but we are told by the Medical Director of the Primary Care Trust, Dr Barnett, that "the GMC's view is that there appears to be no grounds to question either of the Doctor's fitness to practise."

6. Dr Barnett conducted an investigation on behalf of the PCT. He himself has worked as a clinical assistant in dermatology, dealing mainly with skin cancers. He found that both Doctors had relevant training and experience, including top-up training; that the practice generally provided a high quality of care; and that the Doctors had taken appropriate action at the time, in taking preliminary action and asking Mr Welsh to return in 2 weeks. He noted the explanation already given to Mr Welsh by the practice that "in the early stages, skin cancer can often resemble non-serious skin conditions", and that the history give by Mr Welsh initially was different to the history he gave on his second visit.

7. Partly as a result of his complaints, Mr Welsh and his family were removed from the list of patients by the practice. It appears that a GP's practice can do this without giving a reason, and without any right of appeal. In fact, the practice did explain that it had been done because of a breakdown in trust between the Doctors and Mr Welsh and his family.

8. Mr Welsh complained to the Healthcare Commission. In their report, in 2007, the Healthcare Commission's clinical advisor gives his opinion the that the two Doctors had taken reasonable and appropriate action when Mr Welsh was first seen in relation to the detection of the skin cancer. However, the advisor was critical of the procedures followed by the practice in removing Mr Welsh and his family from their list.

The request for information

9. Throughout the course of these investigations and complaints Mr Welsh has kept up a correspondence with the practice and the various investigating bodies. On the 18 September 2006 he sent a letter to the practice manager, by personal delivery. The letter gives a flavour of his style, apparent in his letters to us. The letter is headed:

> FREEDOM OF INFORMATION ACT 2000 AND DATA PROTECTION ACT 1998, EUROPEAN COURT OF HUMAN RIGHTS ACT 1998, Articles 6(1) and 10.

The letter starts with a reference to some prescriptions issued for him by the practice in 2004, asking if he saw a doctor on that day; it continues with a Latin tag; and refers to Article 6(1), the right to fair hearing, citing an article by Harris, O'Boyle and Warbrick on European Convention of Human Rights; it continues with a discussion of the breach of his Convention rights involved in his removal from the practice list, and the absence of any hearing or appeal; there follows a complaint about secret meetings within the practice, and some critical comments on the Doctors' clinical judgement. The letter is 4 pages long; it contains a number of questions, some of them rhetorical and tendentious; it gives a deadline of 20 working days to answer them, and refers again to the Freedom of Information Act. The letter was not answered.

10. Included in the letter, on the third page, was the request for information with which this appeal is concerned:

> [8] – Dr Burnett' letter of 22 August 2006: Where did [the two Doctors complained of] receive their top-up from, date of top-up & the nature of their top-up training: I hope that this training was ex-practice, included on this training was face cancer recognition!

Receiving no reply, Mr Welsh complained to the Information Commissioner on 19 October 2006.

The Information Commissioner's Investigation

10. Prompted by the IC, the practice replied on 15 November 2006:

> … , you have received copies of all information about you held by the practice. Referring to paragraphs 8 and 9, please regard this as a refusal notice issued under section 17 of the Freedom of Information Act 2000. In not responding, I am relying on section 14 because your continued correspondence is vexatious. Furthermore, we do not regard it as necessary or pertinent to review this decision internally.

11. The IC's investigation was protracted. During the course of it, Mr Welsh complained to the Department of Health, referring to his correspondence with the Royal College of GPs and Physicians. At the end of his letter, dated 14 March 2007, he states:

> I promised the Torrington Park Group Practice (Practice) publicity for my case. I am having a website designed for me, setting out my grievances, inviting all those who have suffered like my family & I have from the Practice and naming names [he names various Doctors and others in the Practice] to log on and give their comments. I will come-on line with my website only when all avenues of Appeal (that means Strasbourg if necessary) are exhausted. Perhaps a daily paper will run my story! This paper will not necessarily be based in the UK, anywhere will do.

12. The Practice wrote to the IC on 8.3.2007 listing the 10 letters they had sent to Mr Welsh since the beginning of 2005 about his complaints; and continuing: "These GP's are independent contractors in a partnership and not employees. Training is the GP's responsibility and we do not keep a record of the individuals' training." (That would of course be a complete answer to Mr Welsh's request, since if the information is not held, there is no duty under FOIA to disclose it. FOIA only applies to recorded information which is held by the public authority.) However, the IC then realised that the public authority, as listed in Schedule 1 of FOIA, was not the GPs practice, the partnership, but was the individual doctor.

13. The IC therefore wrote to one of the two individual GPs involved in Mr Welsh's complaint, asking him if he had the information requested and, if so, whether he would disclose it to Mr Welsh. That Doctor replied on 22 January 2007:

> I do not hold the information requested by Mr Welsh. As part of our continuous professional development we do not need to hold details of all self-study and courses.
>
> …….
>
> Having read your Freedom of Information Act Awareness Guidance No 22, I feel that this gentleman's repeated requests are vexatious."

14. On 9 August the IC published his Decision Notice. He upheld the Doctor's view that the Doctor was entitled to refuse the request for information because it was vexatious. In his Decision, the IC closely follows his Awareness Guidance. These are notes issued by the IC as part of his statutory duty to promote observance of FOIA: No 22 deals specifically with vexatious requests. The IC found that Mr Welsh's requests placed a significant burden on the Doctor in replying, placing particular weight on the fact that the Doctor, an individual who was a public

authority personally within the Act, had fewer resources to deal with such requests than most public authorities. He found that Mr Welsh's request had a serious purpose, given Mr Welsh's medical history; but that it had the effect of causing disruption and annoyance, and the effect of harassing the public authority, and was therefore properly described as vexatious, within section 14 of FOIA.

The appeal to the Tribunal

15. Mr Welsh appealed that Decision Notice to the Tribunal. Mr Welsh sets out 60 numbered points in his detailed letter of appeal. Apart from making clear his disagreement with the Decision Notice, only a few of these points develop any clear argument explaining why the Notice is wrong. Many repeat the factual background; or restate Mr Welsh's dissatisfaction with what he sees as a missed diagnosis on his first visit to the practice; and his complaint at being removed from the practice register.

Legal Analysis

16. Section 1 of FOIA sets out the right to receive information from public authorities:

> 1(1) 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.

"Information" is defined in section 84 as "information recorded in any form".

Section 14 of FOIA provides:

> 14(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

17. The simple and central issue in this case is whether Mr Welsh's request was vexatious. However, the Tribunal added a second issue, of its own motion, when giving Directions on 7 December 2007.

> A subsidiary issue, raised by the Tribunal of its own motion, is whether the IC was correct to determine that [the Doctor] was a "public authority" for the purposes of this request for information. Public authorities are defined in section 3 of the Act as those listed in Schedule 1 of the Act. Schedule 1, Part III lists public authorities in the NHS. These include, within paragraph 44:
>
> > Any person providing general medical services … under Part II of the National Health Services Act 1977, in respect of information relating to the provision of those services.
>
> This raises the issue of whether the request for information in this case, "Where did [the Doctors] receive their top-up training from, date of top-up training and nature of top-up training…" was a request for information "relating to the provision of those services", as defined in paragraph 44.

18. What information might "relate to" the provision of services under the NHS Act? "Relate to" is a broad, inclusive descriptor. It would include, for example, information about the place where services were provided; about the type and range of services provided; and information about the people providing the services (for example, a Doctor, a nurse, a physiotherapist…). Since information about the people who provide services is included, so should information about their qualifications or training, providing the information *relates to* their provision of services under the NHS Act. Thus a question about their medical training would be covered, a question about their general secondary education would not. Since top-up training appears to be a necessary part of a Doctor's vocational training to provide NHS services, questions about "top-up training" are questions about the provision of those services. The Doctors in this case, who provide such services, are, for the purpose of this request, public authorities within the First Schedule of FOIA.

19. It follows that a request to an NHS GP for information about top-up training he has attended is a valid request for information to a public authority; and, (provided the information is held by the GP), the information should therefore be disclosed, under section 1 of FOIA.

20. We have not considered the question of whether the information requested should be exempted from disclosure under section 40 of FOIA, the exemption for personal data. Information about training received by an individual will normally be personal data, within section 1 of the Data Protection Act, and section 40 of FOIA. Indeed, given the anomaly that the public authority in this case is an individual, arguably all information sought about an individual GP, should be exempt under section 40. Since that exemption has not been claimed in his letters to the IC, nor by the practice manager, and neither party to the appeal has raised it, we have not pursued the point.

<u>Was the Request vexatious?</u>

21. So if, on the face of it, the request was a valid one, was the IC correct to describe it as vexatious, and find the duty to disclose under section 1 did not apply? There may be some requests where vexatiousness is immediately apparent. In most cases, the vexatious nature of a request will only emerge after considering the request in its context and background. As part of that context, the identity of the requester and past dealings with the public authority can be taken into account. When considering section 14, the general principles of FOIA that the identity of the requester is irrelevant, and that FOIA is purpose blind, cannot apply. Identity and purpose can be very relevant in determining whether a request is vexatious. It follows that it is possible for a request to be valid if made by one person, but vexatious if made by another; valid if made to one person, vexatious if made to another.

22. Looking at the context and background of this request, it is very clear that it is intricately bound up with Mr Welsh's longstanding grievances against the two Doctors. The immediate context of the request is a four page letter, reciting those grievances; the request itself is easy to miss, surrounded by a series of contentious legal arguments. It takes a considerable degree of familiarity with the legislation to separate out, as the IC was able to do, the one FOI request dealt with in this

appeal, from the various other requests in the letter, including a number of subject access requests under the Data Protection Act, which were also contained in the letter: these related to Mr Welsh's own records and had all, one way or another, been dealt with by the practice. The context of the request also includes the three external investigations into Mr Welsh's allegation of clinical incompetence, all of which have cleared the two Doctors involved. It is because Mr Welsh wishes to see for himself that the Doctors have now received top-up training, (and whether it includes skin cancer recognition), that he includes his request alongside his wider grievances.

23. Mr Welsh asserts in his grounds of appeal at point 17: "All I wanted was a few questions asked to be answered by the Practice, lawful questions, instead, they hid behind section 14 of the Act, gagging me". He is misleading in saying this: he wanted much more, as he makes clear in point 39: " I only wanted the two GPs …. to apologise for their part in the fiasco, in that collectively, and on 2 separate occasions, [they] failed to recognise my face cancer which was at an advanced level, which lead to a delayed diagnosis of my cancer. That's all."

24. Mr Welsh simply ignores the results of the 3 separate clinical investigations into his allegation. He advances no medical evidence of his own to challenge their findings. He asserts, in point 9 of the appeal, : "It is inconceivable that my face cancer grows from a blister on 4 October 2004 … to my consultation on 4 November, to a fully grown face cancer eating half of my lower lip". It may be inconceivable to Mr Welsh, but it was not to the Doctors who have investigated the question on behalf of the GMC, the PCT and the Healthcare Commission. That unwillingness to accept or engage with contrary evidence is an indicator of someone obsessed with his particular viewpoint, to the exclusion of any other. As Mr Welsh has continued to maintain his allegations, so he has embellished them with wide ranging arguments about the law and human rights, and demands that his various requests be met, that his view of justice should prevail, on pain of ever continuing complaints and legal action, and wider and wider publicity.

25. We accept that for Mr Welsh to complain initially is perfectly understandable. Cancer is a horrific and frightening disease and any delay in diagnosis is alarming and distressing. But Dr Burnett's report for the PCT makes it clear that the steps taken by the Doctors in asking Mr Welsh to return to the practice for a Review rather than refer him immediately to a dermatologist, probably lead to him receiving treatment quicker than he would have if referred at his first consultation: no urgency was indicated at that time, in contrast to the situation four weeks later. It is the persistence of Mr Welsh's complaints, in the teeth of the findings of independent and external investigations, that makes this request, against that background and context, vexatious. Had the Doctors complied with the request for information about their top-up training, no one can have any confidence that compliance would not simply have triggered further correspondence and requests, given the strength of Mr Welsh's obsessive behaviour.

26. In reaching our conclusion that the request was vexatious, we note that Parliament has not sought to define the term further at all. The word is used in various other legal contexts, such as vexatious litigants, or when considering whether costs should be awarded against a party, but we have not generally found these other contexts helpful. As the Tribunal pointed out in Hossack v Department for Work

and Pensions, EA/2007/0024, in paragraph 11: " the consequences of finding that a request for information is vexatious are much less serious than a finding of vexatious conduct in these other contexts, and therefore the threshold for a request to be found vexatious need not be set too high." Indeed, there is a danger that setting the standard of vexatiousness too high will diminish public respect for the principles of free access to information held by public authorities enshrined in FOIA. There must be a limit to the number of times public authorities can be required to revisit issues that have already been authoritatively determined simply because some piece of as yet undisclosed information can be identified and requested. This is such a case.

27. The IC reached the same conclusion, by a more structured route, following the tests laid down in Awareness Guidance No 22. We find that Guidance interesting and helpful, but we are cautious about elevating the two-stage test there into a necessary sequence. The first stage, (does the request place a significant burden on the public authority ?), was clearly met in this case, taking into account the size of the public authority in question, an individual Doctor. We agree with the IC that significant burden is not just a question of financial resources, but includes issues of distraction and diversion from other work. However, even if the public authority in this case had been substantial (such as a Strategic Health Authority for example) we would still have held the request vexatious, given the context and background.

28. Mr Welsh's response to the question of significant burden is instructive: "why doesn't he employ temporary office workers to remove the significant burden on his time; if there is one. In any way, the tax payers would pick up the bill for temporary office workers for a public authority". Simply to shrug off the burden placed on the Doctors shows no awareness of the real burden placed on them from the cumulative effects of persistent demands, and the potential distraction from their ability to perform their normal duties.

29. We agree with the IC's assessment of the other tests in the Guidance: that, whatever Mr Welsh's intention, the effect of the request was to cause disruption and annoyance to the Doctors, and had the effect of harassing them. If following the Guidance to reach our decision, we would also have found the fourth condition was satisfied, that the request can fairly be characterised as obsessive.

Other Issues

30. In conclusion, we mention three other points which arose during our deliberations. None has been argued by the parties. Firstly, although Mr Welsh's request related to the top-up training for both Doctors initially involved in his treatment, the Decision Notice only relates to one. Since Mr Welsh has raised no specific ground in his appeal in relation to this point, we have not addressed the position of the other Doctor. From what we have seen, we have no reason to suppose that our decision would have been any different had we been considering the request to both Doctors.

31. Secondly, Mr Welsh's original request, in his letter of 18 September 2006 was addressed to the manager of the Torrington Park Group Practice, which as the IC discovered during the course of the appeal, is not itself a public authority. Technically, Mr Welsh has never requested the information from a public authority,

from the individual Doctors, who are the relevant public authorities, within the First Schedule to FOIA. However, since the IC put the question to one of the Doctors, who replied, we have dealt with the appeal on the basis that at least since that reply, the Doctor has accepted that there was a valid request to him, which potentially fell within section 1 of FOIA.

32. Thirdly, in that reply, of 22 January 2007, quoted above in paragraph 13, the Doctor stated that he did not hold the information requested; that he had not kept a record of his courses. Since the duty in section 1 of FOIA only applies to information which is held as recorded information, that is a complete answer to the request, without the need to consider section 14 and vexatiousness at all. Since none of the parties have taken the point, neither have we.

33. Our decision is unanimous.

Humphrey Forrest

Deputy Chairman

Date 16 April 2008