



**IN THE FIRST-TIER TRIBUNAL**  
**GENERAL REGULATORY CHAMBER**  
**INFORMATION RIGHTS**

**Case No. EA/2015/0042**

**ON APPEAL FROM:**

**The Information Commissioner's  
Decision Notice No: FS50553394  
Dated: 26 January 2015**

**Appellant: Mr MICHAEL LATHAM**

**1<sup>st</sup> Respondent: INFORMATION COMMISSIONER**

**2<sup>nd</sup> Respondent: BROMLEY CLINICAL COMMISSIONING GROUP  
(BCCG)**

**Heard at: FIELD HOUSE, LONDON**

**Date of hearing: 25 AUGUST 2015**

**Date of decision: 15 SEPTEMBER 2015**

**Date of Promulgation: 16 SEPTEMBER 2015**

**Before**

**ROBIN CALLENDER SMITH**  
Judge

and

**STEVE SHAW and ROSALIND TATAM**  
Tribunal Members

**Attendances and representations:**

For the Appellant: Mr Michael Latham in person.

For the 1<sup>st</sup> Respondent: written representations from Mr Rupert Paines, Counsel instructed by the Information Commissioner.

For the 2<sup>nd</sup> Respondent: written representations from BCCG.

**GENERAL REGULATORY CHAMBER**

**INFORMATION RIGHTS**

**Subject matter:**

**Freedom of Information Act 2000**

Personal Data - s.40

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 26 January 2015.

**SUBSTITUTED DECISION NOTICE**

**Dated** 15 SEPTEMBER 2015

**Public authority:** BROMLEY CLINICAL COMMISSIONING GROUP  
(NHS SOUTH LONDON COMMISSIONING  
SUPPORT GROUP)

**Address of Public authority:** 1 LOWER MARSH, LONDON, SE1 7NT

**Name of Appellant:** Mr M LATHAM

**The Substituted Decision**

For the reasons set out in the Tribunal's determination, the Tribunal allows the majority of the elements of the appeal and substitutes the following decision notice in place of the decision notice dated 26 January 2015.

**Action Required**

Within 14 days of receipt of this Decision Notice the 2<sup>nd</sup> Respondent is required to give the Appellant the information detailed within this Decision notice, specifically Items 1 and 3 – 7 of the request.

15 September 2015

Robin Callender Smith

Judge

## REASONS FOR DECISION

### Background

1. Mr Michael Latham (the Appellant) asked the Bromley Clinical Commissioning Group (BCCG) the 2<sup>nd</sup> Respondent for the following information on 19 June 2014<sup>4</sup>, in connection with a document said to have been sent by [name given] to BCCG, in response to a request from [said person] asked on 9.4.2014 for evidence from BCCG in relation to [his] several complaints to BCCG:
  1. The name and position of the person at the BCCG who authorised this document to be produced?
  2. The name and position in the BCCG of the person or persons in the BCCG who produced and compiled this document?
  3. As the Governing Body are all responsible for the actions of the BCCG under the Nolan Principles, were members aware of, and agreed to the production of the document? If so — their names and position?
  4. Did Governing Body members approve of the final document sent to Mr Williams? If so their names and positions?
  5. What was the cost of producing the document? Separately as;
    - (a) In staff time, locating and assembling the original papers?
    - (b) In staff time compiling the summary schedules from the original papers?
    - (c) Printing and binding the two-part document?
  6. How many of these documents were produced? Who authorised the number? Who received copies? — name and position in the BCCG?
  7. Who authorised that this document be sent to Mr Williams? Name and position?
  8. The document includes references to the Health and Wellbeing Centre (HWBC) being promoted by the BCCG and states that three GP practices 'which are in substandard accommodation' will be relocated into this. Provide the names of the three GP practices concerned and the addresses of the substandard accommodation?"
2. Initially the BCCG resisted the request on the basis that it refused to confirm or deny that the information requested was held in relation to the items at 1 to 7. In relation to item 8 within the request it pointed out the

information was already in the public domain and it provided the information to the Appellant.

3. The Appellant complained to the Information Commissioner on 2 September 2014 about the way his request for information had been handled. There was then correspondence between the Commissioner and BCCG which resulted in the latter telling the Appellant that it wished to rely on section 40 (5) (b) (i) of FOIA rather than section 40 (2).
4. The BCCG's position was that, if held, the information would be considered for third-party personal data because of the background circumstances would indicate that a complaint had been made. The Appellant's position was that, if a third party had given consent for the information to be disclosed, then BCCG should do so.
5. The Commissioner decided in the original Decision Notice and – in his written submissions dated 16 March 2015 following the Appellant's appeal – maintained that BCCG's reliance on section 40 (5) was justified on the basis that the public authority had explained that if it was to confirm or deny whether a complaint had been made by third party then that itself could breach Principle 1 of the data protection principles. Confirmation or denial could also breach the DPA rights of other third parties such as BCCG employees. Although the Appellant had argued that the alleged complainant had consented to the release of the information the Commissioner considered that the employees' rights were also relevant.

### The Oral Hearing

6. Very shortly before the oral hearing of this appeal BCCG, on 11 August 2015, wrote to the Appellant and copied Tribunal and the Information Commissioner. In that letter it stated:

The request from you centres around a document you say was sent to Mr Thomas Williams by the CCG. The CCG is concerned to protect the rights of Mr Williams under the Data Protection Act 1998 and applied section 40 (5) (b) (i) FOIA to do so, by neither confirming nor denying

that it holds information falling within parts 1 – 7 of your request. The CCG understands from the Information Commissioner's Office that Mr Williams plans to be in attendance at the hearing before the First Tier Tribunal. The CCG further understands that Mr Williams may be seeking to consent to disclosure of information about him to the world at large under the FOIA. The CCG has seen a letter provided by Mr Williams to the Information Commissioner's Office dated 5 November 2014. However, this letter does not provide consent for the information you have requested being disclosed under the FOIA, even were the CCG to hold such information.

In order to protect the Data Protection Act rights of Mr Williams the CCG cannot confirm whether or not it holds information falling within your request (other than the information already provided to you). However, if it is the case that Mr Williams intends to consent to disclosure certain information under the FOIA at the upcoming hearing before the First Tier Tribunal, it would save both court time and expense and also inconvenience to you if Mr Williams writes to the CCG with confirmation of this now. We provide suggested wording below for this purpose. If the CCG receives this from Mr Williams the CCG will be able to consider your FOIA request anew and the CCG will seek to respond to you promptly about this....

7. In the event the Appellant declined to get Mr Williams to send a letter or communication to BCCG in these terms, maintaining that he wished the matter to be decided formally at the oral appeal hearing on 22 August 2015.
8. The Appellant told the Tribunal that he had been concerned that his FOIA request had taken over a year due to complications created by the ICO and BCCG at great expense to the taxpayer and to him. He maintained that the information he requested was not of a personal nature, that the cost of the document had been ignored and that it should be in the public domain.
9. In essence he made it clear to the Tribunal that he did not believe that the BCCG would do what it had suggested in that letter of 11 August 2015 unless ordered to do so by the Tribunal.
10. At the hearing Mr Williams attended and gave his oral evidence, in support of his written statement. This included his statement:

....I do not wish to be protected with the Data Protection Act as regards any part of Mr Latham's FOI request and that remains the case to this very day. It is my opinion that this is in the public interest to know the cost and on whose authority that these two worthless documents were produced....

### Conclusion and remedy

11. The Tribunal has seen all the information requested by the Appellant on a closed, confidential basis. The Tribunal reminded itself of the recent guidance for the approach to be taken by courts and tribunals in respect of any closed material procedure.
  
12. In *Bank Mellat v HMT (no. 1)* [2013] UKSC 38, which was not a case about FOIA, Lord Neuberger said at paragraphs 68-74 that:
  - i) If closed material is necessary, the parties should try to minimise the extent of any closed hearing.
  - ii) If there is a closed hearing, the lawyers representing the party relying on the closed material should give the excluded party as much information as possible about the closed documents relied on.
  - iii) Where open and closed judgments are given, it is highly desirable that in the open judgment the judge/Tribunal (i) identifies every conclusion in the open judgment reached in whole or in part in the light of points made or evidence referred to in the closed judgment and (ii) says that this is what they have done.
  - iv) A judge/Tribunal who has relied on closed material in a closed judgment should say in the open judgment as much as can properly be said about the closed material relied on. Any party excluded from the closed hearing should know as much as possible about the court's reasoning, and the evidence and the arguments it has received.
  
13. In *Browning v Information Commissioner and Department for Business, Innovation and Skills* [2013] UKUT 0236 (AAC) the Upper Tribunal issued similar guidance about the use of closed material and hearings in FOIA cases, noting that such practices are likely to be unavoidable in resolving disputes in this context:

i) FOIA appeals are unlike criminal or other civil proceedings. The Tribunal's function is investigative, i.e. it is not concerned with the resolution of an adversarial civil case based on competing interests.

ii) Closed procedures may therefore be necessary, for consideration not only of the disputed material itself, but also of supporting evidence which itself attracts similar sensitivities.

iii) Parliament did not intend disproportionate satellite litigation to arise from the use of closed procedures in FOIA cases.

iv) Tribunals should take into account the Practice Note on Closed Material in Information Rights Cases (issued in May 2012). They should follow it or explain why they have decided not to do so.

v) Throughout the proceedings, the Tribunal must keep under review whether information about closed material should be provided to an excluded party.

14. The closed bundle in this appeal contained the disputed information. It was necessary for the Tribunal to see the disputed in order to reach its decision, particularly in relation to Item 2.

15. Having analysed this material and the BCCG response – in the face of Mr Williams waiving his Data Protection Act rights specifically at the oral hearing – it is clearly correct and a proportionate result that BCCG reveal the requested and currently withheld information in relation to Items 1 and 3 to 7.

16. In relation to Item 2, this relates to a member of staff who would not expect such details of personal data relating to a name or position to be revealed given the relatively low level of seniority in respect of the position held by that member of staff. This information should not be disclosed, under s. 40(2).

17. On that basis BCCG should reveal the information requested in Items 1, and 3 to 7 to the Appellant within 14 days of receipt of this Substituted Decision Notice.

18. Our decision is unanimous.

19. There is no order as to costs.

Robin Callender Smith

Judge

15 September 2015