



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

Case No. EA/2018/0144

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50671158
Dated: 17 July 2018**

Appellant: Jonathan Sturgeon
Respondent: Information Commissioner
Second Respondent: NHS Commissioning Board (NHS England)
Date & venue of hearing: 1 April 2019, Fleetbank House
Date of decision: 7 May 2019

Before

Anisa Dhanji
Judge
and
Michael Jones
Melanie Howard
Panel Members

Subject matter

Freedom of Information Act 2000, section 1(1)(a) – scope of a request for information.

DECISION

Dated: 7 May 2019

Name of Complainant: Dr. Jonathan Sturgeon

Public Authority: NHS England

Address of Public Authority: 79 Whitehall
London SW1A 2NS

This appeal is dismissed.

Signed

**Anisa Dhanji
Judge**

REASONS FOR DECISION

Introduction

1. This is an appeal by Dr. Jonathan Sturgeon (the “Appellant”), against a Decision Notice (“DN”) issued by the Information Commissioner (the “Commissioner”), on 17 July 2018.
2. It concerns a request for information made by the Appellant under the Freedom of Information Act 2000 (“FOIA”), to NHS England, for information relating to a decision by the Department of Health and Social Care (“DHSC”), to change the contractual terms of junior doctors, so as to improve the “7-day” service of the NHS.
3. That decision was driven by concern that mortality rates were affected by the lack of comprehensive 7-day coverage in the NHS. A figure of approximately 6,000 additional deaths was cited by the then Secretary of State for Health, Jeremy Hunt, in a speech at the King’s Fund in July 2015, in which the intention to move to a 7-day NHS was announced. That figure was one estimate; there were also other estimates within a range of 6,000 to 6,700. The announcement received considerable press attention.
4. NHS England is distinct from DHSC, although it works closely with the DHSC. In relation to the 7-day service, NHS England’s role was in providing input that was used by DHSC in making its decision.
5. The Appellant is a junior doctor working in the NHS. His concern is about whether the evidence being used for what he describes as “generation-defining” changes to the NHS, are in fact sound.
6. Before the request that is the subject of this appeal, the Appellant had already made 14 FOIA requests aimed at understanding the rationale for the changes to junior doctors’ contracts, as well as the mortality figure. Following the request that is the subject of this appeal, the Appellant has made a further 5 requests. About 31 FOIA requests on the same theme, and over the same period, were also made by a Mr. Dean, working at least in some cases, in conjunction with the Appellant.

The Request

7. On 4 August 2016 the Appellant made the following request for information (the “Request”). It was made via www.whatdotheyknow.com on the following terms:

I would like to make a new FOI request:

On 16/7/15 at 18:05, NHS England’s Deborah Williams wrote via email to Nick Freemantle at UCL:

Thanks very much for your advice today. In the end we managed to supply our press/media teams with the simplest possible statement, as follows. [FYI the “estimate” was made by Deloitte, and was actually 6700]

The 6,000 figure is an estimate of additional deaths in hospital, based on an analysis of 2013/14 HES data that is due to be published in the BMJ shortly.

Please provide the emails/documents which detail Deloitte's calculation which come up with the figure of 6700. Please provide all attachments with emails.

Please state how this figure was given to the secretary of state or Department of Health.

Please provide the email/letter chain giving the figure to the Department of health/secretary of state, with attachments.

8. NHS England replied on 25 November 2016. It provided some information with redactions made under section 40(2) of FOIA. It refused to disclose other information on the basis that it was exempt under sections 36 and 43 of FOIA.

Complaint to the Commissioner

9. The Appellant complained to the Commissioner, who investigated the complaint.
10. During the course of the Commissioner's investigation, NHS England provided the Appellant with additional information. It also withdrew its reliance on section 43(2) of FOIA. However, it maintained its reliance on section 36 (prejudice to effective conduct of public affairs), in respect of the remainder of the information.
11. We will refer to the information withheld by NHS England under section 36 as the "disputed information". The information withheld under section 40(2) is not in issue and does not form part of the disputed information.
12. The Commissioner issued a DN on 17 July 2018. She found that the exemption in section 36 was engaged in relation to the disputed information. She also found that the qualified person's opinion was reasonable.
13. As regards the public interest arguments for and against disclosure of the disputed information, she concluded, on balance, that the public interest favoured the maintenance of the exemption. While she regarded the arguments in favour of transparency, accountability, and increasing public understanding, carried some weight, particularly given that the NHS changes are a matter of great public interest, she concluded that there was a significant risk of a "chilling effect" if the disputed information were to be disclosed. In reaching this view, she noted that the disputed information contained the candid views of senior individuals within NHS England concerning the 7-day NHS reforms. Although the disputed information was over 12 months old at the time of the Request, the implementation of the NHS changes was not due to commence until August 2016, and contractual negotiations were still ongoing at the time of the Request.
14. The Commissioner also considered whether any further information was held, falling within the scope of the Request, which should have been provided to the Appellant. Following discussions with the Commissioner, NHS England had released one e-mail to the Appellant, and had confirmed that there were no emails which detailed Deloitte's calculation of the 6700 figure. NHS England had stated that there were four additional e mail attachments (the "Attachments"), but it considered (and the Commissioner agreed), that these did not fall within the scope of the Request.

Appeal to the Tribunal

15. The Appellant has appealed against the DN under section 50 of FOIA. NHS England has been joined as a party to the appeal.
16. The scope of the Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the

Decision Notice is not in accordance with the law, or to the extent that it involved an exercise of discretion by the Commissioner, she ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.

17. The burden of satisfying the Tribunal that the Commissioner's decision was wrong in law, or that she should have exercised her discretion differently, rests with the Appellant.
18. The Appellant has requested that this appeal be determined on the papers without an oral hearing. The Commissioner and NHS England have agreed. Having regard to the nature of the issues raised, and the nature of the evidence, we are satisfied that the appeal can properly be determined without an oral hearing.

The Statutory Framework

19. Under section 1 of FOIA, any person who makes a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information.
20. The duty on a public authority to provide the information requested does not arise if the information sought is exempt under Part II of FOIA. The exemptions under Part II are either qualified exemptions or absolute exemptions.
21. The disputed information has been withheld under sections 36(2)(b) and (c) FOIA. In so far as is relevant, this provides as follows:
 - (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—
 - ...
 - (b) would, or would be likely to, inhibit—
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

The Grounds of Appeal

22. The Appellant's appeal rests on three main grounds:
 - First, he says, as regards the disputed information, that the public interest balance under section 36 FOIA favours disclosure.
 - Second, he says that the Commissioner should have found that the Attachments fell within the scope of the Request.
 - Third, he says that NHS England breached its duty to provide advice and assistance under section 16 of FOIA, by failing to respond to his request for an internal review.

The Disputed Information and Other Documentary Evidence

23. The parties have lodged a substantial quantity of documentary material. There are three volumes of open material ("OB"), and one volume of closed material ("CB").

There are also a number of submissions, as well as a witness statement from Christopher Whitehill, the Freedom of Information Manager for NHS England. We have considered all the material submitted, even if not specifically referred to in this decision.

24. The information already disclosed, in response to the Request, is at OB volume 1, pages 96-104. The figure of 6,700 was detailed in a single slide in a slidepack prepared by the consultants Deloitte (the "Slidepack"). That is at CB, tab 3. It was sent to the DHSC by email in August 2015. That email correspondence (with some redactions under section 40(2) of FOIA), has also been disclosed.
25. A previous version of the Slidepack dating from early June 2015, is at CB, tab 2. Unlike the August version, it does not detail the calculation of the figure of 6,700. In dealing with the Request, NHS England therefore proceeded on the basis that the version of the Slidepack in issue was the August version. The Appellant has not disputed this. However, for both the June and August versions, the information relating to the calculation of the 6,700 figure, has been disclosed.
26. OB volumes 2 and 3 provide background material to the Request.
 - volume 2 contains the Appellant's previous FOIA requests and NHS England's responses. NHS England relies on this to say that it has already been as transparent as possible about the mortality figure; and
 - volume 3 comprises background material, provided by the Appellant.

There is some overlap between the material in OB volume 2 and 3. Also, some of the material in OB volume 3 concerns statements made in Parliament. NHS England has reminded the Tribunal that it should generally not scrutinise or place reliance on Parliamentary exchanges, see **OGC v IC [2008] EWHC 774 (Admin)**.

Findings

27. We will set out our findings, below, by reference to the Appellant's three grounds of appeal.

Ground 1

28. The information provided to the Appellant in response to the first part of the Request was a single slide from the Slidepack. The issue between the parties, centres on whether the exemption in section 36 applies to the rest of the Slidepack.
29. There has been some dispute between the parties as to the scope of the Request, and the Appellant's position has shifted over time, adopting at first a broader interpretation of the Request, but accepting later that it probably could not be justified.
30. Requesters formulate their requests as best as they can, but formulating a request is not an exercise in legal drafting. In most cases, it will be self-evident to the public authority from the terms of the request and/or from what they know of the requester's interests, what the requester is looking for. In other words, the request is usually interpreted purposively. If the public authority is unclear about what the requester is seeking, then it can revert to the requester for clarification as provided for in section 1(3) of FOIA.
31. It is clear from the terms of the Request, that the Appellant's interest lay in Deloitte's calculations behind the mortality figure of 6,700. That information is contained in a single slide which, as already noted, NHS England has disclosed to

the Appellant. It does not follow that by asking for *the emails/documents which detail Deloitte's calculation which come up with the figure of 6700*, the Appellant should reasonably be taken to have been asking for the whole Slidepack which has nothing to do with the mortality figure, but concerns matters such as the cost and staffing implications of a 7-day NHS. In our view, those matters and therefore the information in those other slides, fall outside the scope of the Request.

32. It may be that the entire Slidepack has been put in issue because the Appellant asked for documents which detail Deloitte's calculation which come up with the figure of 6700 (emphasis added).
33. However, FOIA is concerned with information in recorded form, not documents. So, for example, if a requester asks for information about X and that information is contained in a document about X and Y, then the public authority may be able to satisfy the request if it extracts and provides only X. As a matter of practicality, it may of course provide the document itself containing both X and Y, but it is not obliged to do so. Of course, a requester may want to know about what communication there has been between A and B, and in that case, disclosure of an entire letter or e mail may be needed to satisfy the request. The point we make is simply that a request for information should not automatically be understood as being a request for the document in which the information is contained.
34. Although the Appellant referred in his request to *documents*, in our view, that does not change the position. What he was clearly asking for was details of Deloitte's calculations. The rest of the Slidepack does not relate to that figure, and is therefore out of scope.
35. As already noted, the calculations concerning the mortality figure are contained in a single slide. Even if the Request were to be interpreted literally, what comprises a document will often depend on the context. Here, in our view, a single slide is as much a document as the entire Slidepack (which comprises some 157 slides).
36. We also bear in mind that the Appellant is an informed and experienced requester. Having considered his various submissions, it is also clear that he has a reasonable understanding of the law as it relates to FOIA. He could and should have been made it clear in his Request, if he had wanted more than simply the information about the calculations of the mortality figure.
37. Having found that the other slides in the Slidepack fall outside the scope of the Request, it follows that in our view, the question as to whether section 36 is engaged, does not arise. It is of course open to the Appellant, if he wants the information in the rest of the slides, to request that specifically.
38. For completeness, we would add that NHS England says (and the Appellant does not dispute), that as a result of the Request, and previous requests by the Appellant, all the information it holds concerning the estimated mortality risk (and the other figures in the 6,000-6,700 range), has already been disclosed.

Ground 2

39. The Request asked for *all attachments with emails*.
40. Attached to the email with which the August version of the Slidepack was sent to DHSC, were 4 additional attachments which, as noted earlier, we have described as the "Attachments". These relate to the 7-day NHS service, and comprise, amongst other things, output modelling, technical annex notes, and an excel workbook.

41. In the Appellant's Final Submissions (dated 25 February 2019), he says, as regards the Attachments, that:

It was my intention to gather all the information that was being given to the DHSC that was informing them on weekend mortality statistics.

42. The Attachments had not been provided to us, as part of the CB. We directed that they be provided so that we could consider their content. Having received and reviewed them, we note that in one set of slides from Deloitte, there are at least 4 references to the mortality figure. However, there is no reference to the calculations leading to it. We agree with NHS England and the Commissioner, therefore, that the Attachments do not fall within the scope of the Request.

43. It follows that Ground 2 must also fail.

Ground 3

44. The Appellant claims that by failing to carry out an internal review, NHS England breached its duty under section 16 of FOIA, to provide advice and assistance.

45. There is, in fact, no statutory requirement to have an internal review process although it is of course good practice to do so. The Code of Practice issued under section 45 of FOIA provides guidance to public authorities on the discharge of their responsibilities under FOIA. Part 5 deals with internal reviews, and states that:

It is best practice for each public authority to have a procedure in place for dealing with disputes about its handling of requests for information. These disputes will usually be dealt with as a request for an "internal review" of the original decision.

It then goes on to give further guidance about internal reviews. Amongst other things, it says that:

Public authorities are obliged, under section 17(7) of the Act, when responding to a request for information, to notify applicants of whether they have an internal review process and, if they do, to set out the details of their review procedures, including details of how applicants request an internal review.

46. In its letter of 25 November 2016, replying to the Appellant's Request, NHS England set out the Appellant's right to ask for an internal review and provided details of how he could do so. If, as the Appellant says, he requested an internal review and NHS England did not respond, then that reflects poorly on NHS England. Repeated such failures is a matter that the Commissioner will no doubt note, as indeed she indicated to the Appellant in her letter to him of 7 March 2017.

47. Section 16 of FOIA which the Appellant relies on, is not concerned with internal reviews. Section 16, headed *duty to provide advice and assistance*, states as follows:

(1) *It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.*

(2) *Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.*

48. The aim of section 16 is to require public authorities to provide assistance to requesters or prospective requesters, where needed. Typically, this may be to clarify a request, or to help to narrow a request which would otherwise exceed the cost limit in section 12. If a public authority can deal with a request without the need to provide additional advice and assistance, then no duty under section 16 arises.
49. In the present case there is no suggestion that the Appellant sought assistance in how to formulate his request, nor that it would have been reasonable for NHS England to consider, on the face of the Request, that the Appellant would benefit from any assistance. This is particularly so, given that he is an experienced requester.
50. It follows that we find that this ground of appeal must also fail.

Other Matters

51. NHS England has suggested that it may seek to rely on section 14 of FOIA (vexatious requests), if information that it considers is out of scope is held to be within scope. The Appellant has made a number of submissions in protest. However, since NHS England has not actually relied on section 14, it is not necessary (and indeed would not be appropriate), for us to make any findings in relation to section 14.

Decision

52. For all the reasons set out above, we dismiss the appeal.
53. Our decision is unanimous.

Anisa Dhanji
(Judge for the First Tier Tribunal)

Date: 7 May 2019
Date Promulgated: 8 May 2019