IN THE FIRST-TIER TRIBUNAL **Case No EA/2013/0193.**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS50480984
Dated: 7 August 2013

Appellant: **Michele Paduano**

Respondent: **The Information Commissioner**

On the papers

Date of decision: **11th January 2014**

Before
CHRIS RYAN
(Judge)
and
ALISON LOWTON
PAUL TAYLOR

Subject matter: Whether information held s.1

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2013/0193.**
GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

REASONS FOR DECISION

Summary

1. This is an appeal from a Decision Notice issued by the Information Commissioner on 7 August 2013 ("the Decision Notice") in which he concluded that, at the date of an information request submitted by the Appellant, the public authority under investigation had not been holding information, falling within the scope of the information request, which should have been disclosed. We have concluded that the Information Commissioner's decision on this point was correct and that the Appeal should therefore be dismissed.

Background

2. On 20 April 2012 the Appellant wrote to the West Midlands Strategic Health Authority ("the SHA") asking to be provided with any information it held "*concerning allegations made by the Indian Workers Association about discrimination and racism at University Hospitals Coventry and Warwickshire. The documentation should span the dates January 2007 to July 2009. This should include all communications between the Strategic Health Authority and officers or representatives of the trust. All communication between John MacDonald or any other appointed investigator(s) with the trust and/or strategic health authority and/or the Department of Health. Any communications between the SHA and the department of health."*
We will refer to this communication as "the Information Request".

3. The Information Request was made under section 1 of the Freedom of Information Act 2000 ("FOIA"), which imposes on the public authorities to which it applies an obligation to state whether it holds the requested information and, if it does, to communicate that information to the requester unless certain conditions apply or the information falls within one of a number of exemptions set out in FOIA.

4. The SHA was disbanded in April 2013. Its functions were taken over by the NHS Commissioning Board, which is, therefore, now the

relevant public authority for the purposes of FOIA. However, for convenience, we continue to refer to it as "the SHA".

5. In its reply to the Information Request dated 1 June 2012, written on the SHA's behalf by a Mr Steve Hilton, the Appellant was told: *"The number of documents is limited, as Mr John MacDonald was commissioned to carry out an investigation by the Trust, and the Terms of Reference for that investigation were agreed by the Trust without the involvement of the SHA. There is no correspondence between the SHA and the Trust discussing these matters, although the SHA had suggested Mr MacDonald to the Trust as a suitable person to carry it out."*

6. Mr Hilton's letter was accompanied by copies of three letters and a number of emails. One of the letters was from the Committee of a Sikh Temple in Coventry in April 2008 complaining that the Trust had been guilty of victimisation and discriminatory treatment towards a particular doctor, who we will refer to as "X", and had failed to lift a suspension order imposed on him despite a recommendation to that effect made by a Trust Inquiry Panel, chaired by a Queen's Counsel. The second letter was written by the Chief Executive of the SHA to the General Secretary of the Sikh Temple stating that the SHA was aware of concerns regarding X's treatment and that it had *"appointed an independent person to look into the grievances raised directly by Dr [X] himself and negotiations with Dr [x] on how the investigation should proceed are ongoing".* The disclosed emails had been created in response to the same complaint and had passed between Mr Hilton and Mr John MacDonald, the individual who had been appointed by the Trust to investigate X's grievance about the way in which the Trust had treated him. The email exchanges discussed a number of issues in relation to the conduct of Mr MacDonald's investigation. Finally, the third disclosed letter was from Mr MacDonald to the Trust dated 4 July 2008 and had been copied to the SHA. It was said to have been seen and approved by X. The letter set out a detailed explanation of the attempts that had been made to reach agreement with X on the Terms of Reference for Mr MacDonald's investigation and the reasons why the process had taken so long. It also included an apparent attempt to resolve some difficulties that had arisen in maintaining separation between X's grievance, on the one hand, and, on the other, complaints made by the Sikh Temple or the Indian Workers Association ("IWA") broadly covering the same subject matter.

7. We note, in passing, that much of this disclosed information contains personal information about X. We have been shown no documentation to suggest that he had agreed to the disclosure.

8. The Appellant's first response to the SHA was to express surprise that there was so little material disclosed. He sought confirmation that it included "*absolutely all the documentation that exists with respect to the original FOI that I made".* Mr Hilton replied by email on the same

day stating "*You can be assured that I checked all the documentation, which has involved a trawl across the records of current and former SHA staff."*

9. After the Appellant had carried out a more detailed review of the disclosed materials he wrote a fuller email to Mr Hilton at the SHA on 7 July 2012, in which he raised a number of questions as to the completeness of the disclosure and, in particular, why it had not included material that had come into existence during the early stages of Mr MacDonald's investigation. That part of the investigatory process had been summarised by Mr MacDonald in his letter to the Trust of 4 July 2008, referred to in paragraph 6 above. Although the Appellant appears not to have given full weight to the distinction between the SHA and the Trust, his request for an explanation of how the SHA had been involved in the appointment of the independent investigator and yet had no documentation to disclose earlier than April 2008 does not seem to us to have been an unreasonable response. This is particularly so in light of the inclusion among the materials disclosed to the Appellant of a letter from the SHA to the Sikh Temple referred to in paragraph 6 above suggesting that it was the SHA that had appointed the independent investigator.

10. Against that background we found the SHA's reply, again in the form of an email from Mr Hilton, both unjustified (on our reading of the papers) and disturbing. It read, in full:

> *"Before I take action on your request, I would like an explanation of the various allegations about me personally that you are making in this email.*
> *You can be assured that I will not hesitate to take a complaint to the BBC about you if you make unfounded allegations about me and my professionalism."*

11. The correspondence appears at this stage to have been taken over from Mr Hilton by a Mr Moosa Patel, the SHA's Director of Corporate Affairs. He appears to have interpreted the Appellant's emails as constituting a request for an internal review of the SHA's response to the Information Request. On 2 August he sent the following email message to the Appellant:

> *"I have … completed the internal review of all of the information we hold in terms of your request. I have also liaised further with Steve Hilton in terms of the hard copy and electronic documents that we hold in terms of your specific request for information.*
> *I can now confirm that we have provided you with all of the information that we hold which falls within the remit of your request. I would like to assure you that I carried out a robust search of the relevant information to ensure that all of the pertinent documentation had been included in our previous response to you. I can confirm that this is the case.*

I appreciate that this might not be the response that you would wish to receive. If you remain dissatisfied you may complain to the Information Commissioner…"

The Information Commissioner's investigation and Decision Notice

12. On 6 November 2012 the Appellant complained to the Information Commissioner about the manner in which his request had been handled. By this time the Appellant had pursued a separate line of enquiry through X, who had informed him that:
    a. he, X, had repeatedly raised allegations of victimisation and discrimination within the Trust since 2001;
    b. the Trust had never investigated his grievances, having aborted one investigation in 2001 and then halted the one conducted by Mr MacDonald, referred to above;
    c. X was himself suspended in February 2001 on the basis of what he referred to as *"a falsified allegation of bullying which the GMC later investigated and firmly rejected on 16 March 2009"*
    d. the suspension was ultimately lifted in July 2007.

    We have no way of testing the veracity of those statements, and it is not part of this Tribunal's role to investigate them or to express any view about them. They do, however, provide relevant context for the Information Commissioner's investigation.

13. At the same time as X provided the Appellant with the information summarised above he also provided copies of correspondence which had been disclosed to him by the SHA *"and other health agencies".* The disclosure had been made following a request X had made to the SHA for any personal data it held about him (which he was entitled to see in response to a request made under section 7 of the Data Protection Act 1998 ("DPA")). The correspondence included letters dated between June 2003 and June 2007 passing between the IWA, on the one hand, and the Trust and the Commission for Racial Equality, on the other. It also included copy correspondence between the Trust and the SHA in which the SHA had been invited to investigate the IWA complaints but had declined to do so. Its reasons were that it considered it inappropriate for it to carry out the investigation because one conducted by an independent third party would be preferable. It recommended Mr MacDonald as a suitable candidate for the role of investigator.

14. At an early stage of the Information Commissioner's investigation he asked whether the SHA held correspondence to and from the IWA that the Appellant claimed had not been disclosed to him in response to the Information Request. The reply, written on the SHA's behalf by Mr Moosa Patel, was as follows:

    "[SHA] *provided all of the information that we hold which falls within the remit of the complainant's request.* [SHA] *carried out*

a robust search of the relevant information to ensure that all pertinent documentation had been included in our response."

In the same communication the Information Commissioner asked:

"The complainant has informed the Commissioner that he has since been in contact with both the [IWA and X] *and they have both confirmed that they have more correspondence than has been provided by the SHA and that this dates from 2007. Please can you provide your response?"*

Mr Patel replied:

"The information requested by [X] relates to personal information relating to him as an individual. This was accessed by [X] *and provided by us via the Subject Access Provisions of Section 7 of the* [DPA].
Personal data about another individual, whose disclosure would breach the data protection principles in the DPA is exempt from provision under Section 40(2) of the FOIA. The complainant has no entitlement to that information. Only [X] *does, as it is his information. I trust this explains why the information we provided the complainant under the remit of the FOIA differs from that provided to* [X] *under the Subject Access Provisions of the DPA.*
Having further considered the complainants recent FOI request, I am content that the specific documentation provided included everything that he requested. The information sets we provided were a subset of the ones we provided to [X] *, so our response was entirely consistent."*

15. We pause at this stage to state that the first obligation of a public authority under FOIA section 1 (see paragraph 3 above) is to state whether or not it holds information falling within the scope of a request for information. It then has a secondary obligation to either disclose that information or state its reasons for refusing to do so. We are concerned that it was only at this stage of the Information Commissioner's investigation, some time after the original refusal of the Information Request and only after the existence of non-disclosed material had been drawn to its attention, that the SHA accepted that it did hold such information. This notwithstanding the very clear statements made in previous correspondence about the rigour of its search and the belligerent attitude adopted by Mr Hilton in his email quoted in paragraph 10 above. It is likely, of course, that, as the SHA has asserted, it would have been entitled to refuse disclosure on the basis that the material consisted of X's personal data, disclosure of which to a third party would very probably have breached one or more of the Data Protection Principles, so as to render the information exempt from disclosure, pursuant to FOIA section 40(2). However, the change of stance from "not held" to "held but exempt" without any

attempt to explain why the existence of the additional information had not been disclosed earlier causes us some concern, particularly as the SHA disclosed other personal information without appearing to consider that it was exempt.

16. In the event the Information Commissioner issued a Decision Notice on 7 August 2013 in which, having summarised the questions he had raised with the SHA during his investigation, he concluded that he was satisfied that, other than personal data correctly withheld under FOIA section 40(2), the SHA did not hold information additional to that previously supplied to the Appellant.

This Appeal

17. The Appellant's Grounds of Appeal did not challenge the Information Commissioner's conclusion that the SHA had been entitled to rely on FOIA section 40(2) when resisting the Appellant's request to have disclosed to him the information that had been disclosed to X under his Subject Access Request. His only complaint was limited to the issue of whether the SHA had been correct to claim that it held no further relevant information at the relevant time. Although, therefore, we think it very likely that the exemption would have been available to the SHA we make no decision on the point.

18. It was part of the Appellant's case that the SHA's credibility was undermined by the fact that it relied on FOIA section 40(2), once it had been pointed out that it did hold information additional to that disclosed to the Appellant, yet had apparently not taken that provision into account when releasing the personal data referred to in paragraph 6 above.

19. That apparent inconsistency, combined with the circumstances we have summarised in paragraphs 2 - 11 above, is relevant to the Tribunal's assessment as to whether, on the balance of probabilities, the SHA did hold other information at the relevant time, which was not disclosed in response to the Information Request. It has led us to approach with some caution the SHA's explanations of its actions. We gave close consideration as to whether it would be necessary for SHA to be joined as a party so that one of its officers, with direct familiarity with the case, could provide a Witness Statement detailing the steps taken and how it came about that the Appellant was given information which, it subsequently transpired, was not correct. We ultimately decided that it would be disproportionate to go to such lengths and that we could make a fair determination of the appeal on the basis of the written materials provided to us.

20. The SHA's explanations were set out in a communication from it to the Information Commissioner dated 13 February 2013 in response to a number of challenges raised by the Appellant and passed on by the Information Commissioner. The SHA explained, first, that the small

number of documents it held resulted from the fact that it was the Trust, and not the SHA, which had engaged Mr MacDonald to carry out an investigation and "*the Terms of Reference for that investigation were agreed by the Trust without the involvement of the SHA. There is no correspondence between the SHA and Trust discussing these matters, although the SHA had suggested Mr MacDonald to the Trust as a suitable person to carry it out."* The Information Commissioner was also provided with information about how the document search had been conducted. This was in the following terms:

> *"For the DPA Subject Access request we searched for everything that had any mention of* [X]. *This search was conducted by all Personal Assistants of all directors, and within Communications by Steve Hilton. The information that was collated was disclosed to* [X] *in compliance with the DPA.*
>
> *For Mr Paduano's Freedom of Information request, Steve Hilton searched the same set of documents for items that complied with his request, and that did not contain personal information relating to* [X]. *The documents complying with Mr Paduano's request did not include any personal data about* [X], *so Steve Hilton disclosed these without having to use S40 personal data exemption."*

The SHA provided additional detailed information in response to the Information Commissioner's questions in both that communication and a later letter dated 2 August 2013. It also provided an explanation for the absence of a particular document from the information disclosed to the Appellant. The responses indicated that a serious attempt had been made to locate relevant documents, following logical routes of enquiry. It satisfied us, on the balance of probabilities and despite our initial scepticism, that the SHA did not hold any further information that should have been disclosed in response to the Information Request.

21. The Appellant expressed concern in his Grounds of Appeal that both Mr Hilton and Mr Patel had played a significant role in both the handling of the Information Request and the investigation of X's grievances. However, we do not think that this undermines our conclusion that, whatever additional information the Trust may have held, the SHA did eventually disclose the existence of all relevant information that it held. The Appellant also raised an argument to the effect that the SHA had breached FOIA section 77, which makes it a criminal offence to alter, erase or conceal any materials with the intention of preventing disclosure under FOIA section 1. It is, however, outside the jurisdiction of this Tribunal to consider the application of that section, not least because the Information Commissioner did not

consider its possible application in the Decision Notice.

Conclusion

22. For the reasons we have given we are satisfied that the conclusion reached in the Decision Notice was correct and that it contains no error that would justify setting it aside. The Appeal is accordingly dismissed.

23. Our conclusion is unanimous.

Chris Ryan
Judge
Date of Decision: 11th January 2014
Date of Promulgation: 13th January 2014