



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

Appeal No: EA/2014/0295

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FS50554858
Dated: 13 November 2014**

Appellant: Timothy Fuller

Respondent: The Information Commissioner

2nd Respondent: Monitor

**Heard on the papers: Field House, Breams Buildings Chancery Lane,
London**

Date of Hearing: 21 May 2015

Before

Chris Hughes

Judge

and

Suzanne Cosgrave and David Wilkinson

Tribunal Members

Date of Decision: 15 June 2015

Subject matter:

Freedom of Information Act 2000 s31(1)(g) law enforcement

Cases:

Birkett v DEFRA and the ICO [2011] EWCA Civ 1606

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal in part and substitutes the following decision notice in place of the decision notice dated 13 November 2014

IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2014/0295**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

SUBSTITUTED DECISION NOTICE

Dated: 15 June 2015

Public authority: Monitor

Address of Public authority: Wellington House 133-135 Waterloo Road, London SE1 8UG

Name of Complainant: Timothy Fuller

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 13 November 2014.

Action Required

Subject to redaction of the name, email and telephone number of the author of the letter the public authority disclose to Mr Fuller the letter dated 15 April 2014 to the Chief Executive of University Hospital Southampton NHS Foundation Trust concerning Mr Fuller's complaint.

Dated this 15 day of June 2015

Judge Hughes

[Signed on original]

REASONS FOR DECISION

Introduction

1. Mr Fuller was treated at Southampton University Hospital in 2009. He was dissatisfied by his treatment and has subsequently complained and sought information about his treatment through requests for information under FOIA or subject access requests under DPA. During the course of these he has complained to the First Respondent in these proceedings, the Information Commissioner, about the way that the University Hospital Southampton NHS Foundation Trust ("the Trust") has handled his requests. Monitor is the body charged with oversight of the governance of foundation trusts such as the one responsible for the hospital which treated Mr Fuller.
2. From 12 March 2014 onwards Mr Fuller made complaints to Monitor about the Trust. On 26 June 2014 Monitor wrote to Mr Fuller (bundle page 168):-

" ... As I have explained in earlier e-mails, we do not have a role in the NHS complaints procedure or in resolving individual complaints. However we have considered whether the information you have provided impact on the trust's compliance with its NHS provider license.

You made the following allegations to Monitor in respect of the Trust:

- *the clinical treatment you received at the Trust*
- *how the Trust has dealt with your complaint, in particular the (alleged lack of) completeness of the disclosures that the trust has made in dealing with your requests for information.*

Clinical standards and quality of care do not come under Monitor's regulatory remit so we have referred this aspect of the complaint to the CQC.

However, as I explained in my e-mail of 8 April, the team here which monitors the Trust contacted the Trust about certain elements of your complaint which we consider are relevant to our role. This focused specifically on the completeness of the disclosures it made to you and the potential impact on the trust's provider licence.

Having considered the information provided by the Trust regarding these concerns, which included some details of the changes it has made to its

process as a result of the ICO's findings, we do not consider that concerns exist which fall within Monitor's remit or suggest that the Trust may be in breach of its provider license. Therefore, we do not propose to open an investigation in relation to the Trust."

3. Mr Fuller was dissatisfied with this reply and on 6 July made a request for information:

"This is a request under the provisions of the Freedom of Information Act 2000 for copies of the enquiries sent by Monitor to the Southampton Trust regarding their "completeness of disclosure". I would also request a copy of the response sent to Monitor by the Trust."

4. Monitor replied on 4 August confirming that it held the information but refused to disclose it relying on exemptions relating to law enforcement (section 31) and personal information (section 40). Following a review it maintained this position and on 11 September Mr Fuller contacted the Information Commissioner to complain about the refusal and also to complain about the timeliness of Monitor's response.
5. In his decision notice the Information Commissioner found that Monitor had replied within 20 working days. He noted that Monitor's duties under the Health and Social Care Act 2012 included the licensing of providers of health services including governance arrangements and enforcement and he accepted therefore that Monitor's functions fell within section 31(2). In considering whether the exercise of Monitor's functions would be prejudiced (s31(1)(g)) he noted that (dn paragraph 12): *"whilst it is Monitor's policy to release information about complaints when it carries out enforcement action, in the complainant's case no formal investigation was commenced and no enforcement action was taken"*. He accepted Monitor's arguments (dn paragraph 11) that disclosing the information meant that organisations willingness to share information with Monitor would diminish, the Trusts would be less inclined to cooperate with its investigations and Monitor's relationships with Trusts would be harmed. He reasoned that there could be a reduction in frankness in responses, a refusal to provide information voluntarily and delays in responding. He therefore concluded that section 31(1)(g) was engaged.

6. In weighing the competing public interests the Commissioner acknowledged the importance of *“disclosing information that would hold Monitor to account and increase transparency in how [it performs its functions]...Public confidence in the standards achieved by NHS foundation trusts is a matter of legitimate public interest”*.
7. However he also acknowledged the risk envisaged by Monitor of *“A loss of trust and confidence, and any unwillingness to provide information voluntarily, would delay the course of our enquiries and investigations. Monitor’s statutory functions must be exercised in order to protect the users of health services as a whole. Whilst [Mr Fuller] has a direct personal interest in the circumstances of this case, Monitor’s statutory remit concerns the protection of service users as a whole. Monitor has corresponded with [Mr Fuller] in relation to his complaint and the enquiries that were undertaken. In the circumstances I consider this is a strong factor in support of maintaining the exemption”*.
8. The Commissioner considered the framework of publications from Monitor and noted that *“the information in this case has only limited value given that no formal investigation was commenced and no enforcement action was taken following the complaint...”* (dn paragraph 17). He noted that Monitor had power to compel trusts to provide information *“However it is important to note that the information in this case was provided to Monitor voluntarily. If organisations were reluctant to provide information voluntarily or to cooperate with Monitor to the fullest extent this would make its investigations more time consuming and less efficient, even if ultimately it would be able to rely on its statutory powers to ensure that organisations provide it with the information it needs to carry out its investigations.”* In the light of this he concluded that the balance lay in upholding the exemption.

The appeal to the Tribunal

9. In his appeal Mr Fuller argued that Monitor had not responded to him within the 20 days allowed by section 1 of FOIA and he claimed in the light of this no exemption could be relied upon. He also argued that he had rights under the NHS Constitution to his health records and to the outcome of any

investigation into his complaint. However it seems to the tribunal that Mr Fuller's rights under the NHS Constitution are to access his health records which as that would be sensitive personal information is not covered by FOIA nor therefore this appeal and secondly that the information concerning the "outcome" of the investigation has been relayed to him by the Trust and relates to the complaint against the Trust not the specific issue under consideration in this appeal.

10. The Commissioner resisted the appeal relying on the arguments in the decision notice. He recalculated the 20 day period and concluded that while July 14 was commemorated as the anniversary of the Battle of the Boyne for the purpose of a public holiday in Northern Ireland it was not a bank holiday and accordingly the response from Monitor had been outside the 20 day period. He submitted that this did not affect the substance of the issue and cited the authority of the Court of Appeal *Birkett v DEFRA and the ICO* [2011] EWCA Civ 1606 for support for the proposition that a public authority may claim an exemption at any time.
11. Mr Fuller responded by reiterating his view that breach of 20 days meant that no exemption could be claimed by the public authority and relied on his rights under the NHS Constitution.
12. Monitor submitted that the response to Mr Fuller had been made within time, that the arguments Mr Fuller had advanced on the issues were in any event "*fundamentally misconceived*". Monitor supported the Commissioner's reasoning on public interest, explained that the NHS Constitution summarised existing rights and did not confer new ones. Monitor did not hold clinical records and the right to know the outcome of complaints applied to the bodies providing services to the public and not to Monitor, "*In any event, the Appellant was informed of the outcome of Monitor's investigation by its letter dated 26 June 2014*".
13. In his response Mr Fuller argued that it would be fair and reasonable to treat the response to his request as out of time. He argued that patient's rights were now "*elevated to the highest level of law in the NHS Constitution*" and that Monitor had to take that document into account in its decisions. He

argued that Monitor had failed in its obligations to ensure that the Trust had complied with his rights under the NHS Constitution.

The questions for the Tribunal

14. There are two issues for the tribunal.
15. The first is whether the Information Commissioner was correct in the decision notice to find that Monitor had responded within the 20 day limit, or whether, as Mr Fuller maintains, it was not within 20 days.
16. Although Mr Fuller argues that the breach of the 20 day limit is determinative of the issue and that having breached the 20 days a public authority is permitted under s10 the public authority is debarred from relying on exceptions to the duty to disclose; this assertion has no legal force. It would not be in the public interest for inadvertence to prevent a public body legitimately protecting its information from disclosure when such disclosure could have clear and substantial detrimental effects. FOIA makes no provision preventing a public authority from relying on exceptions after the 20 day period and there is binding authority that public authorities can claim exceptions months after the 20 day period. The dispute, for all the substance Mr Fuller invests in it, is entirely technical and of no practical significance.
17. During the course of the proceedings the Information Commissioner changed his position and concluded that Monitor's response of 4 August was outside the 20 day period; Monitor disputed this.
18. S10(1) provides that a public authority must comply with its duty under s1(1) (the duty to confirm it has the data and if appropriate supply it) promptly:-
"and in any event not later than the twentieth working day following the date of receipt".
19. S10(6) provides;
"In this section—
"the date of receipt" means—
(a) the day on which the public authority receives the request for information,
or

(b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

20. The Banking and Financial Dealings Act 1971 provides:-

“1 Bank holidays.

(1) Subject to subsection (2) below, the days specified in Schedule 1 to this Act shall be bank holidays in England and Wales, in Scotland and in Northern Ireland as indicated in the Schedule.

....

(3) Her Majesty may from time to time by proclamation appoint a special day to be, either throughout the United Kingdom or in any place or locality in the United Kingdom, a bank holiday under this Act.”

21. The bank holidays appearing in the Schedule for July and August are; in England and Wales the last Monday in August and, in Scotland and Northern Ireland the first Monday in August. On that basis the Information Commissioner, during the proceedings of before the tribunal, accepted that since the request was received by Monitor on Sunday 6 July 2014 the twentieth working day thereafter was Friday 1 August.

22. However on 14 June 2013 a proclamation by Her Majesty printed in the London Gazette provided:-

“...Whereas, We consider it desirable that Wednesday the first day of January and Monday the fifth day of May in the year 2014 should be bank holidays in England, Wales and Northern Ireland:

And whereas, We consider it desirable that Monday the fourteenth day of July in the year 2014 should be a bank holiday in Northern Ireland:

Now, therefore, We in pursuance of section 1(2) and section 1(3) of the Banking and Financial Dealings Act 1971, do hereby appoint Wednesday the first day of January and Monday the fifth day of May in the year 2014 to be bank holidays in England, Wales and Northern Ireland and appoint Monday the fourteenth day of July in the year 2014 to be a bank holiday in Northern Ireland.”

23. The effect of this was to insert a bank holiday in July, thus shifting the “*twentieth working day*” on from Friday 1 August to the following week. Since Monday 4 August was already a bank holiday in Northern Ireland and Scotland the twentieth working day was Tuesday 5 August. Monitor replied on 4 August; accordingly it responded within the time limit. This part of Mr Fuller’s appeal is without merit.
24. The second issue is whether the exception is engaged; whether disclosure of the information would be likely to prejudice the carrying out by Monitor of its regulatory functions and if so where the balance of public interest lies between the two competing public goods of on the one hand disclosure and increasing the transparency of the regulatory process with respect to the governance of the NHS and on the other the claim that this disclosure would prejudice the effectiveness of regulation. Monitor argued that by making it harder to maintain the trust and confidence of the regulated trusts as to how they are regulated; trusts will be less willing to co-operate and provide information voluntarily and readily which would delay investigations to the prejudice of the effective regulation of the NHS and so to the prejudice of the public using the service. Mr Fuller has pressed for what he sees as his rights against Monitor under the NHS Constitution, and argued that Monitor has failed to ensure that the Trust has complied with its licence and has alleged that Monitor has attempted a “cover up” of misconduct at the Trust.
25. In considering this appeal the tribunal noted the boundaries of Monitor’s role; it is peripheral with respect to Mr Fuller’s clinical complaint and the concerns he has expressed about the handling of his health records. Mr Fuller remains focussed on these and sees other issues through that prism, leading him to

express unfounded suspicions against Monitor. Similarly, issues of the interpretation of the NHS Constitution and its applicability do not go to the issue which the tribunal has to decide which is where the balance of public interest lies.

26. As the Commissioner found there is a significant public interest in the standards achieved by NHS trusts and also in how Monitor discharges its duties. There is already significant information published by Monitor about its investigations and regulatory actions, in this case, given no such action was necessary, the public interest in any such disclosure is significantly lower. As the Commissioner noted the information has limited value and tells Mr Fuller nothing about the care he received from the Trust (dn paragraph 17). Disclosure of the Trust's responses would however be very likely to have some impact on the level of freely given co-operation from NHS trusts and impede Monitor's ability to regulate effectively.

27. The tribunal is satisfied that the reasoning of the ICO and Monitor on the engagement of the exception and on the balance of public interest is sound. However while that goes to the responses of the Trust to Monitor's inquiries it applies with considerably less force to the inquiries which Monitor made of the Trust. The initial letter which Monitor sent to the Trust as a result of Mr Fuller's complaint gives an insight into how Monitor deals with complaints it has received from patients. It does not disclose any information supplied to it by the Trust, only information supplied by Mr Fuller. Its disclosure would assist the public through greater transparency as to how Monitor discharges its responsibility, while giving no reason for this Trust or other trusts to have concerns about how information they provide is treated. With respect to the initial letter the exception is not engaged.

Conclusion and remedy

28. The tribunal is therefore satisfied that the initial letter from Monitor to the Trust on this issue (subject to redactions to protect personal data in the light of the proper submissions of Monitor under section 40(2)) be disclosed.

29. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 15 June 2015