First-tier Tribunal
General Regulatory Chamber
Information Rights

Appeal Reference: EA/2019/0317 P

Decided without a hearing
On 27 October 2020

Before

JUDGE HAZEL OLIVER
MR GARETH JONES
DR MALCOLM CLARKE

Between

GARY SPIERS

Appellant

and

INFORMATION COMMISSIONER

Respondent

DECISION

The appeal is upheld.

SUBSTITUTE DECISION NOTICE

The Garstang Medical Practice (the "Practice") was not entitled to rely on the exemption in section 14 of the Freedom of Information Act 2000 in order to withhold the information requested by the Appellant. The Practice is to provide the information to the Appellant by 14 December 2020 unless the Practice wishes to rely on any alternative permitted exemptions to disclosure.

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the "Commissioner") dated 8 August 2019 (FS50814768, the "Decision Notice). It concerns information sought from Garstang Medical Practice (the "Practice") for copies of General Medical Services contracts.

2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. The brief background to the appeal is as follows. In March 2015 a particular prescription was removed from some treatment that the appellant was using. The appellant says that this caused serious deterioration in his medical condition, which has had both physical and psychological effects on him. He says that the prescription was removed without any prior consultation with him. The appellant has been in correspondence with the Practice (which is his GP practice) about this decision and the way it was made, and he has raised concerns with other bodies including the Care Quality Commission ("CQC").

4. On 18 October 2018 the appellant made a request for information from the Practice under the Freedom of Information Act 2000 ("FOIA") as follows (the "Request"):

> "…*under the Freedom of Information Act 2000 we require digital copies of the General Medical Services (GMS) Contracts for Windsor Road Surgery / Garstang Medical Practice / Kepple Lane Pharmacy from 2014 to 2018. That is the contract between Windsor Road Surgery / Garstang Medical Practice / Kepple Lane Pharmacy and NHS England for delivering Primary care services to the local community. We require this information as we believe that serious breaches of the contracts has occurred by NHS Employees leading to the trauma described above, and we do not want further suffering to occur to innocent Patients".*

5. The appellant chased for a reply on 23 October and 16 December 2018. The Practice responded on 3 January 2019, in a letter which states, "*Just to confirm that all of the information we currently hold, and that which has been requested, has been sent to yourself. We do not hold any other current information about you*."

6. The appellant complained to the Commissioner on 18 January 2019 and requested an internal review on 20 January 2019. The Practice wrote to the appellant on 21 January 2019 about an irretrievable breakdown of relationship between them, but did not specifically address the Request in this letter.

7. The Practice raised its reliance on section 14(1) for the first time during the Commissioner's investigation. On 24 July 2019 the Practice wrote to the appellant stating, "*I write to inform you that Garstang Medical Practice finds your FOI request of 18/10/18 to be vexatious under section 14(1) of the FOIA. Consequently your request will not be complied with*."

8. The Commissioner found that section 14(1) did apply and so the Practice was entitled to refuse the Request. In summary, the reasons were:

a. The Commissioner noted the long history of correspondence between the appellant and the Practice, which started in June 2015, together with two subject access requests and a complaint to the CQC.
b. The Commissioner also noted the Practice's position that corresponding with the appellant had put significant strain on its time and resources, and given the history the appellant will not be satisfied with any response he receives.
c. The Commissioner concluded that the appellant's correspondence had moved from reasonable concern in 2015 to a campaign against the Practice, and gives the appearance of using FOIA to vent frustration and harass or annoy the Practice, rather than to obtain information. Overall, the Practice had dealt with the appellant's correspondence satisfactorily. By the time of the Request there had been over 3 years of correspondence from the appellant on substantially the same matter, which had been comprehensively dealt with in 2017.
d. The Practice was right to draw the line when it did. By the time of the Request, the appellant's correspondence did not have a useful purpose and it was a burden to the Practice that was disproportionate to the value of the Request.

The Appeal and Responses

9. The appellant appealed on 3 September 2019. His grounds of appeal can be summarised as follows:

a. This is a matter of national importance as the GMS contract and CQC regulations affect every NHS patient. It raises issues of abuse, harm and breaches of NHS regulations, including disregard for the Duty of Candour.
b. The Request is also essential for the appellant's treatment for complex post traumatic stress disorder.
c. Section 14(1) should only be applied in the most extreme circumstances (ICO guidance).
d. The Request has only been submitted once. Section 14(1) should be applied to the Request, not the individual.
e. The matter had not been comprehensively dealt with.
f. The Practice was in breach of the GMS contract, and the actual contracts are requested so the appellant can escalate the matter of these breaches. The information is in the public interest as it is needed for correspondence with the CQC, NHS England, the Parliamentary and Health Service Ombudsman, and the National Eczema Society

10. The Commissioner's response can be summarised as follows:

a. Although this may have been the first request for the requested information, the Commissioner was entitled to take into account the evidence of the full context and history of communications concerning the issue which is the subject of the request.
b. The conduct of the requester can be taken into account in considering whether the request itself was vexatious, taking a holistic approach as supported in the caselaw.
c. The issue of the appellant's treatment is a private matter, and the prescription was reinstated before the Request in any event.
d. The CQC had concluded the Practice clearly followed an appropriate process in dealing with the complaints, and the CQC would surely have addressed this with the Practice if its prescribing decision was against the GMS contract. It was correct to

conclude that the appellant is attempting to reopen an issue that has already been addressed by the Practice or otherwise subjected to some form of independent scrutiny.

e. The Commissioner understands that the GMS contract is a standard core contract, so it is unlikely disclosure would assist the public as a whole. Many of the appellant's reasons refer to "our correspondence" with various bodies, which indicates a narrower purpose of continuing a campaign against the Practice.

f. Even if there is a wider genuine purpose and value to the request, it is still necessary to consider in all the circumstances whether they are proportionate to the impact on the authority.

g. A reasonable person would conclude that the burden imposed on the doctors in the Practice by the appellant's request, in light of the context and history, has reached the point where it is unwarranted and disproportionate to the value of the request. In addition, compliance is likely to lead to further communication and requests for information from the appellant, with a consequential burden on the doctors and their staff.

11. The appellant has submitted a reply which states he had come to the Tribunal to "*request essential evidence to enable us to present the case to the Parliamentary and Health Service Ombudsman (PHSO). The PHSO have made it clear they will class cases as 'premature' if evidence is not sufficient*." The appellant complains that the Commissioner has relied on evidence from the Practice which is not correct. He says that there is a conflict of interest with the Commissioner, as another case officer at the Commissioner has refused to enforce a subject access request for personal data and medical records. The appellant has provided a list of the laws and procedures he says were breached by the Practice.

Applicable law

12. The relevant provisions of FOIA are as follows.

> ***1 General right of access to information held by public authorities.***
> *(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.*
> ……
> ***14 Vexatious or repeated requests.***
> *(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.*

13. There is no further guidance on the meaning of "vexatious" in the legislation. The leading guidance is contained in the Upper Tribunal ("UT") decision in ***Information Commissioner v Dransfield*** [2012] UKUT 440 (AAC), as upheld and clarified in the Court of Appeal ("CA") in ***Dransfield v Information Commissioner and another & Craven v Information Commissioner and another*** [2015] EWCA Civ 454 (CA).

14. As noted by Arden LJ in her judgment in the CA in ***Dransfield***, the hurdle of showing a request is vexatious is a high one: "…*the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for*

thinking that the information sought would be of value to the requester, or to the public or any section of the public. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and that is consistent with the constitutional nature of the right. The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious." (para 68).

15. Judge Wikeley's decision in the UT ***Dransfield*** sets out more detailed guidance that was not challenged in the CA. The ultimate question is, "*is the request vexatious in the sense of being a manifestly unjustified, inappropriate or improper use of FOIA?*" (para 43). It is important to adopt a "*holistic and broad*" approach, emphasising "*manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests*." (para 45). Arden LJ in the CA also emphasised that a "*rounded approach*" is required (para 69), and all evidence which may shed light on whether a request is vexatious should be considered.

16. The UT set out four non-exhaustive broad issues which can be helpful in assessing whether a request is vexatious:

a. **The burden imposed on the public authority by the request.** This may be inextricably linked with the previous course of dealings between the parties. *"…the context and history of the previous request, in terms of the previous course of dealings between the individual requester and the public authority in question, must be considered in assessing whether it is properly to be characterised as vexatious. In particular, the number, breadth, pattern and duration of previous requests may be a telling factor*." (para 29).

b. **The motive of the requester.** Although FOIA is motive-blind, "*what may seem like an entirely reasonable and benign request may be found to be vexatious in the wider context of the course of dealings between the individual and the relevant public authority*." (para 34).

c. **The value or serious purpose.** Lack of objective value cannot provide a basis for refusal on its own, but is part of the balancing exercise – "*does the request have a value or serious purpose in terms of the objective public interest in the information sought?*" (para 38).

d. **Any harassment of, or distress caused to, the public authority's staff.** This is not necessary in order for a request to be vexatious, but "*vexatiousness may be evidenced by obsessive conduct that harasses or distresses staff, uses intemperate language, makes wide-ranging and unsubstantiated allegations of criminal behaviour or is in any other respects extremely offensive*." (para 39).

17. Overall, the purpose of section 14 is to "*protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA*." (UT para 10), subject always to the high standard of vexatiousness being met.

18. The Commissioner also referred us to the Upper Tribunal decision in ***Parker v Information Commissioner*** [2016] UKUT 0427 (AAC) which emphasised the need to a holistic approach, and concluded that the fact that there is public interest in the information requested cannot act as a "trump card" to tip the balance against a finding of vexatiousness.

Issues and evidence

19. The issue in the appeal is whether the Practice was entitled to rely on section 14(1) FOIA in order to refuse to respond to the Request – i.e. was the Request vexatious within the meaning of FOIA?

20. In evidence we had an agreed bundle of open documents, which includes a number of web links to other documents relied upon by the appellant.

Discussion and Conclusions

21. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision.

22. We note that we are only considering the specific request made by the appellant on 18 October 2018, and the position at the time this request was received. We are not making any findings on the many wider issues that have been raised by the appellant, and to do so would be to exceed the Tribunal's permitted jurisdiction. We start with considering the four issues suggested by the UT in ***Dransfield***.

23. **The burden imposed on the public authority by the request.** The Request itself is not particularly burdensome. It is a specific request for copies of contracts for a defined period of time, and would not appear to be something that would take a long time to respond to. This is also the first formal request that the appellant made to the Practice under FOIA – although he had previously asked for other information without terming it a FOIA request.

24. We can also take into account the course of dealings between the parties, and this is what the Commissioner did in her decision. The context and history can be summarised as follows:

a. The appellant submitted a complaint about the Practice in October 2016, and was invited to a meeting at the Practice the same month.
b. The appellant submitted a subject access request to the Practice in December 2016 (which was responded to).
c. Between 1 July 2015 and 20 April 2017, the appellant sent 26 emails to different members of the Practice about the same matter. A number of these were chasing for responses to previous correspondence rather than new communications.
d. The appellant submitted a second subject access request to the Practice in March 2018 (which was also responded to).
e. The appellant sent further emails to the Practice in June and July 2018, and the Practice suggested an informal meeting with him – although this suggestion was withdrawn following an email from the appellant on 15 July which set certain requirements for the meeting.
f. On 19 July 2018 the Practice told the appellant they would not be engaging in further communication about the matters he had raised repeatedly in the last few years.
g. The Practice spoke to the CQC in August and September 2018, and they were satisfied with how the Practice was managing the appellant. We have seen an email from the CQC of 2 August 2018 which states, "The practice has clearly followed an appropriate process in dealing with his complaints".

h. A doctor at the Practice had four clinical consultations with the appellant between July and October 2018, during which the appellant continued to try and raise the same issues.
i. The Request was made on 18 October 2018. The Practice did not inform the appellant it was regarded as vexatious until 24 July 2019.

25. We note that the appellant had corresponded with the Practice for a considerable period of time about the same issue, namely the withdrawal of his prescription and the effect this had on him, and what he saw as their failure to comply with their duties. There is a pattern of the appellant being dissatisfied with responses from the Practice and continuing correspondence on the same issue. However, we also note that both the Practice (in their representations to the Commissioner) and the Commissioner (in her decision and submissions) have referred to events which occurred after the Request was sent to the Practice. We must decide whether the Request was vexatious at the time it was made, so should not take into account the later course of dealings between the parties. The fact the Practice delayed until 24 July 2019 to tell the appellant his request was vexatious does not allow it to rely on events between October 2018 and July 2019 in order to refuse his request.

26. **The motive of the requester.** The Request itself sets out a motive for requesting the information – "*We require this information as we believe that serious breaches of the contracts has occurred by NHS Employees leading to the trauma described above, and we do not want further suffering to occur to innocent Patients".* The appellant's position is that the Practice acted in breach of its contract with the GMS by withdrawing his prescription. The Commissioner concluded that the appellant was using FOIA to vent frustration and harass or annoy the Practice, rather than to obtain information. We have noted the pattern of the appellant being dissatisfied with answers from the Practice, and we also note that his prescription was restored in 2017. However, looking at all of the material provided to us as a whole, we accept that the appellant has genuine concerns about the clinical appropriateness and legal legitimacy of the withdrawal of a particular medication and believes that this caused him psychological harm. We do not find that he submitted the Request simply to harass or annoy the Practice, although we can understand why the Practice may have taken this view in light of the lengthy period of previous correspondence with the appellant.

27. **The value or serious purpose of the request.** This relates to objective public interest in the information sought. Again, the terms of the Request provide a purpose – a belief that the Practice had acted in breach of contract, which would be of interest not only to the appellant himself but also to the wider public, and would be relevant to protection of the public if this is something that might happen to other patients. The appellant has also provided other explanations for needing the information – he says it is essential for his treatment for PTSD, and in his final submissions he says he requires the information in order to present a case to the Parliamentary and Health Service Ombudsman. These are issues relating to the appellant's own treatment and complaints about the Practice, so less relevant to the value and serious purpose of the Request which has a focus on the public interest. We would also expect that the Ombudsman would be able to ask for copies of the contracts as part of any investigation.

28. The Practice says that the accusations about breach of contract are unfounded, but we are not able to assess this in the absence of the contracts. The Commissioner makes a number of points as to why the appellant's original stated purpose is not weighty. She says that the CQC concluded the Practice had followed an appropriate process in dealing with the appellant's complaints, and the CQC would surely have told the Practice if there was merit in

the argument the decision not to prescribe went against the GMS contract – the appellant is trying to reopen an issue that has already been subject to independent scrutiny. We agree that the CQC said there had been an appropriate process in dealing with the complaints. But, it is not clear from the information before us that the CQC looked at the contracts issue, as opposed to the process the Practice followed in addressing the complaints. The Commissioner notes that the Practice has said this is a GMS standard core contract, so it is unlikely to assist the public as a whole. It may be that the standard obligations from a GMS contract are already publicly available, but it is arguable that the full contracts with the Practice are relevant to assessing if there has been a breach of those specific contracts. The Commissioner also says that the appellant says the information is needed for "our" correspondence with various bodies, which indicates a purpose of enabling the appellant to continue his campaign against the Practice. However, this could also be read as in the public interest, as the bodies he names in his appeal would potentially also be concerned about general patient safety. We do agree with the Commissioner that issues around the professional duty of candour are not relevant to the Request.

29. Overall, we can see from the appellant's correspondence that at least some of his stated reasons for the Request do have a wider genuine purpose and value – namely addressing what he sees as harm caused by a potential breach of contract which may also affect other patients.

30. **Any harassment of, or distress caused to, the public authority's staff.** The Practice's response to the Commissioner of 24 July 2019 during the investigation provided some information about "irritation and distress" caused by the Request. They say that the persistent communications, and their tone, have caused "considerable distress and an unjustified time and burden of work on Practice staff". The Practice did not provide any specific information about such distress. The Commissioner's original decision and submissions in response to the appeal do not address this point in any detail. We note that the tone of the appellant's correspondence is persistent and at times he expresses his views strongly. However, he does not use abusive or intemperate language.

31. **The overall holistic view in all the circumstances of the case**. As noted by the Commissioner, the four issues discussed above should not be considered in isolation, and we should also take an overall holistic view in all the circumstances of the case. We have particularly taken into account the dealings between the parties before the Request. The appellant had already received responses to two subject access requests, and engaged in ongoing correspondence about the issue, which continued after his prescription was restored. He was also informed that the North Lancashire Clinical Commissioning Group had taken the decision to withdraw the product concerned from their list of approved products for prescriptions in their area, and had received a letter from the CCG in which their pharmacist explained the clinical reasons for this. We can see that there is a pattern of the appellant persistently asking further questions after information has been provided. His position is that there is an ongoing issue which still requires further investigation by the Ombudsman. This was clearly a burden for the Practice to deal with. The key question is whether that burden was sufficient at the time the Request was made to make the Request itself vexatious, taking into account the other issues discussed above.

32. We have considered this carefully, and we find that the Request did not meet the high hurdle of being vexatious at the time it was made. We found this to be a finely balanced question. The appellant has provided various submissions on why he believes the Practice acted in breach of contract and why this information is potentially in the public interest in the cause of

patient safety. A request which has value can still be vexatious. We can also see why the Practice may have considered that this relatively simple request was nevertheless a disproportionate burden, in light of their previous dealings with the appellant. However, on balance, we do not find that the Request met the high hurdle of being a manifestly unjustified, inappropriate or improper use of FOIA. The Commissioner found that the Practice was right to draw a line and refuse to comply with the Request. We disagree. There was some value or serious purpose to the Request, and we do not find that the appellant had an impermissible motive. Although responding to the Request was a burden to the Practice when the background circumstances were taken into account, we do not find that this was disproportionate. We have taken into account the guidance from Arden LJ that the starting point for assessing vexatiousness is that there is no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public. Events which took place after the Request might have tipped the balance the other way in terms of the burden on the Practice, but we can only consider the course of dealings between the parties up to the point the Request was made.

33. The appellant should not take this decision as indicating that the Practice is unable to refuse other requests under FOIA on the grounds that they are vexatious. We have made this decision based on the situation at the time this specific Request was sent, which was October 2018, and as stated it was a finely balanced decision. Further dealings between the parties since this Request was sent may tip the balance the other way for later requests – each request must be considered individually based on the circumstances at the time. In this context we note that the appellant is no longer on the patient list of the Practice.

34. The parties should also not take this decision as an indication that the appellant's concerns about his treatment and/or alleged breaches of contract are correct. We make no finding on whether the appellant's allegations against the Practice are correct, and note that the Commissioner is also unable to do that. The appellant provided a considerable volume of information for the purposes of this appeal which was not relevant to the issue we had to decide. Our role is limited to considering whether FOIA has been complied with in relation to this Request.

35. The appellant has also said that the Commissioner has a conflict of interest, because the Commissioner is refusing to enforce a separate request for medical records and personal data, and this is evidence needed for this Tribunal. We do not agree that there is any conflict of interest. It is relatedly common for the Commissioner to deal with more than one appeal from the same individual, and in any event this further information was not required for this appeal.

36. The Practice was not entitled to rely on the exemption in section 14 of FOIA in order to withhold the information requested by the appellant. The Practice is to provide the information to the appellant by **14 December 2020** unless the Practice wishes to rely on any alternative permitted exemptions to disclosure.

Signed: Hazel Oliver
Judge of the First-tier Tribunal

Date: 31 October 2020
Date Promulgated: 03 November 2020