



**Appeal number: EA/2016/0210**

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

**GAYNOR LLOYD**

**Appellant**

**- and -**

**THE INFORMATION COMMISSIONER**

**Respondent**

**TRIBUNAL: JUDGE ALISON MCKENNA  
Ms ROSALIND TATAM  
Mr HENRY FITZHUGH**

**Decision Date: 20 February 2017  
Promulgation Date: 21 February 2017**

**Determined on the papers, the Tribunal sitting in Chambers on 9 February 2017**

## DECISION

1. The appeal is allowed in part. No steps are required to be taken.

## REASONS

### *Background to Appeal*

2. The Appellant made a request to the NHS Commissioning Board (NHS England) on 18 November 2015 for notes taken by NHS England staff at an “engagement event” held at the Sudbury GP practice on 13 November 2015. As a result of a conversation held at that event, the Appellant (and, she states, others) believed that the notes would be made available to those who requested them.

3. On 20 November the Appellant reiterated the request in the following terms:

*“All the patients at the event knew that copious notes were being taken. They shared their thoughts on the basis that these notes would be made available. They are also entitled to know that the meeting was recorded and to see that record....May we please have the full notes of the meeting now? Contemporaneous notes are clearly important in context of checking.....I am also now making the request under the Freedom of Information Act.”*

4. NHS England refused the information request on 18 December 2015 in reliance upon sections 1 and 22 of the Freedom of Information Act 2000 (“FOIA”). It stated that “no minutes” were taken of the meeting so that it did not hold the information requested under s. 1 FOIA. Also, that as it was intending to publish a feedback report, s. 22 FOIA permitted it to withhold information which was intended for future publication.

5. The Respondent issued Decision Notice FS50619667 on 11 August 2016, upholding NHS England’s decision. The Decision Notice accepted that the notes taken at the meeting no longer existed at the date of the request as they had been destroyed when their contents were incorporated into the report. NHS England had been unable to give the Respondent the date on which the notes had been destroyed but confirmed that the destruction of the notes was in accordance with its Records Management Policy. The Decision Notice concludes that the notes were not therefore “held” by NHS England for the purposes of s. 1 FOIA.

6. The Decision Notice also held that s. 22 FOIA had been correctly relied upon by NHS England as the information in the notes was incorporated into a patient feedback report published in January 2016, and it was reasonable in all the circumstances for NHS England to have withheld them until publication. It is noted that the engagement meeting invitation letter sent by NHS England to patients in October 2015 stated that the “findings” of the engagement meeting would be published, so there was a settled intention on the part of NHS England to publish the patient feedback report which would include information taken from the notes taken

at the engagement event. Finally, the Decision Notice concluded that the balance of public interest favoured maintaining the exemption.

### *Appeal to the Tribunal*

7. The Appellant's Notice of Appeal dated 9 September 2016 suggests that she finds it inconceivable that the notes should have been destroyed within a week of the meeting, especially after there had been a discussion about making them available. She raises concerns about NHS England's records management policies. She comments that the initial response from NHS England did not state that the notes had been destroyed, only that "no minutes" had been taken. It was not until the outcome of an internal review on 3 March 2016 that she was informed the notes had been destroyed. She did not accept that NHS England had been frank with the Information Commissioner's Office. She also complained about delay in publishing the feedback report, which she says was not in fact available until March 2016.

8. The Respondent's Response dated 12 October 2016 maintained the analysis as set out in the Decision Notice.

9. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The Tribunal considered an agreed open bundle of evidence comprising 125 pages, including submissions made by both parties, for which we were grateful. There was no closed material.

### *The Law*

10. Section 1 of the Freedom of Information Act 2000 ("FOIA") provides that a person requesting information from a public authority has a right to be told if the public authority holds the information and to have that information communicated to them if the public authority holds it.

11. Section 22 FOIA provides that information is exempt from disclosure if it is held by a public authority with a view to its future publication and it is reasonable in all the circumstances to withhold it pending the publication date. S. 2 (2) (b) FOIA applies to s. 22 so that it must be considered whether the public interest favours maintaining the exemption.

12. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

*"If on an appeal under section 57 the Tribunal considers -*

*(a) that the notice against which the appeal is brought is not in accordance with the law, or*

*(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

*the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*

*On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”*

13. We note that the burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

### *Conclusion*

14. The Appellant’s request (see paragraphs 2 and 3 above) was clearly for the contemporaneous notes made at the meeting on 13 November. We conclude that the request was not for “the minutes” of that meeting or for the patient feedback report into which the meeting notes were apparently fed.

15. We note that NHS England’s evidence to the Information Commissioner was that it no longer held the contemporaneous notes as at the date of the request because they had been destroyed. We sympathise with the Appellant’s incredulity that the notes should have been destroyed so quickly and it seems to us that the Information Commissioner could have asked more questions about that matter, for example for the recollection of the members of staff concerned or for the computer records of when the relevant part of the report was up-dated. However, we must consider the evidence before us and apply the test of the balance of probabilities to it. Having done so, we conclude that it is more likely than not that NHS England no longer held the requested information as at the date of the request. We therefore find no error of law in the Decision Notice with regard to s. 1 FOIA.

16. The Appellant invites us to comment on NHS England’s record management policy, but that is beyond our remit. It seems to us that the question of whether the notes *should* have been retained (until the end of the procurement process with which the engagement event was concerned, or until after a FOIA request for them had been concluded) might be a suitable matter for the Parliamentary and Health Service Ombudsman to consider.

17. With regard to s. 22 FOIA, we disagree with the Decision Notice in its interpretation of the scope of the request. It does not seem to us that the request can reasonably be understood as one for information which was taken from the notes and subsequently included (to an unknown extent) within a published report. We find that the information request was specific in referring to the contemporaneous notes taken at the meeting only.

18. On that basis we do find there to be an error of law in the Decision Notice. We have concluded that s. 22 FOIA was not engaged by the information request in this case as the request was not for information which it was intended to publish. From

the evidence before us, we do not consider that NHS England intended to publish the contemporaneous notes of the meeting but a feedback report, which is different information from that requested by the Appellant.

19. For these reasons, the appeal is allowed in part because we find that the Decision Notice was erroneous in its understanding of the scope of the information request and also its conclusion that s. 22 FOIA was engaged.

20. There are no steps to be taken by NHS England in relation to our conclusion.

**(Signed)**

**ALISON MCKENNA**

**DATE: 20 February 2017**

**PRINCIPAL JUDGE**