



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2017/0148

Decided without a hearing

**Before
KAREN BOOTH
JUDGE**

**MS ROSALIND TATAM and DR HENRY FITZHUGH
TRIBUNAL MEMBERS**

**Between
HEATHER RYDER**

Appellant

**and
THE INFORMATION COMMISSIONER**

Respondent

DECISION AND REASONS

Decided on the papers on 3 May 2018.

DECISION

1. For the reason set out below, the Tribunal allows this appeal and substitutes the following Decision Notice for that issued by the Commissioner on 22/6/2017. The correct name of the public authority is South West Yorkshire Partnership NHS Foundation Trust (“the Trust”).

“The Trust has interpreted parts 1, 3 and 4 of the request for information too restrictively. Objectively, the references to “referred”, “referral” and “referrals” should have been interpreted as including references to referrals made other than following assessment by the Trust’s Single Point of Access (“SPoA”)

team; which would include referrals for art therapy requested by GPs and other healthcare professionals (including those employed by the Trust), via the SPoA or otherwise.

As regards part 2 of the request for information, it is considered unlikely that the only information that is held by the Trust in relation to the closure of the waiting list for the art therapy service is contained within the supervision records referred to in paragraph 9 of the Tribunal's decision below.

Accordingly, on the balance of probabilities, the Trust does hold further information that falls within the scope of the request. The Trust therefore contravened section 1(1) of the Freedom of Information Act 2000 ("FOIA") by failing to inform the requestor whether it holds information of the description specified and, if so, to communicate that information to her.

With regard to the information that has been disclosed by the Trust in response to part 2 of the request, the Trust contravened section 1(1) by changing some of the wording contained in those records and thereby failing to accurately provide the information that it holds.

The Trust has contravened section 10(1) of FOIA by failing to comply with the request for information within the twenty working day deadline.

The Trust is required to take the following steps within 35 days:

- conduct a further search of its records for information falling within parts 1, 3 and 4 of the request (applying the wider interpretation described above) and for further information falling within part 2 of the request;*
- inform the requestor in writing whether the Trust holds information of that description and, if so, communicate that information to the requestor (subject to the provisions of sections 2, 9, 12 and 14 of FOIA);*
- re-communicate the relevant parts of the disclosed information to the requestor (with any appropriate redactions of personal data and any appropriate annotations/footnotes, if required, for clarity), without changing or re-wording the information held."*

REASONS

Background

2. This appeal relates to a request under the Freedom of Information Act 2000 ("FOIA") for information about the provision of art therapy services in Calderdale by the Trust. According to the report entitled "Independent review of Art Therapy in Calderdale" and published in November 2016 (at page 118 of the bundle of evidence), "...*art therapists are engaged in the practice of long-term psychodynamic psychotherapy using art materials as a medium for*

analysis. The emphasis is on psychotherapy, not the production of art. According to the same report, art therapy has been delivered in Calderdale for around 30 years and, at the date of its publication, there were 51 people receiving such therapy.

3. The Appellant had been keen to attend art therapy for some time. Her support worker/advocate (Ms Tamsin Walker from Healthy Minds) made enquiries about this on her behalf and, on 21/9/2015, Ms Walker informed the Appellant that she had been advised by the Trust that the Appellant's GP could make a referral for art therapy to Calderdale Royal Hospital via the Trust's Single Point of Access ("SPoA") (which receives and manages all referrals to secondary Mental Health services in Calderdale). On 9/11/2015, the Appellant's GP sent a referral letter to SPoA asking for her to be seen "for the initiation of art therapy".
4. It subsequently transpired that the provision of art therapy in Calderdale had been under review for a number of years and that, in 2014, the art therapists were instructed to accept no further referrals. The report referred to above refers to a decision having been taken to close the waiting list whilst consideration was being given to the appropriateness of the service model for the future. In December 2015, the Trust issued notices of compulsory redundancy to the art therapists but, in the light of opposition from service users and a formal legal challenge, the Trust subsequently rescinded the notices of redundancy pending a full review of the provision of art therapy in Calderdale.

The request

5. On 20/4/2016, the Appellant made an information request to the Trust. She requested the following information:
 - “1. The number of individuals, across Calderdale and Kirklees, referred to the Art Psychotherapy Service, after the waiting list was closed.
 2. Any documents, including; letters, memos, internal correspondence, emails and minutes relating to the closure of the waiting list for this service.
 3. Any documents, including; letters, memos, internal correspondence, emails and minutes, through which [the Trust] has informed professionals who are in a position to make referrals to the Art Psychotherapy Service, of the closure of the waiting list.
 4. Any documents, including; letters, memos, internal correspondence, emails and minutes, relating to [the Trust] offering alternative services to those individuals who requested referral to the Art Psychotherapy Service after the waiting list was closed.”
6. The Trust responded on 10/5/2016.

With regard to request 1, they advised that Kirklees does not have an art therapy service and that, within Calderdale, all referrals are triaged by the SPoA and signposted according to need, following assessment. They advised that after the waiting list was closed, the same system applied.

With regard to requests 2, 3 and 4, they advised that there was no correspondence other than that contained in individual staff supervision records.

7. The Appellant challenged this response on 20/5/16, expressing disbelief that the Trust did not hold further information. The Trust reiterated their previous response. The Appellant wrote to the Trust again on 17/6/2016 complaining about the lack of a refusal notice required by the Freedom of Information Act 2000. She again expressed disbelief about the alleged absence of any further relevant information. She questioned the accuracy of the assertion that all referrals to the SPoA were and are signposted to the appropriate services. The Appellant described how her contact at Healthy Minds had contacted the Trust on her behalf and been advised that a referral for long term art psychotherapy could be made by the Appellant's GP through the SPoA. She said that, on the basis of that advice, her GP had sent a referral letter to the SPoA on 9/11/2015 and informed her that the waiting list for the service was approximately 14 months. She said that she subsequently learnt about the compulsory redundancies (subsequently rescinded for legal reasons) "through word of mouth" and was informed by an officer of the Trust on 5/4/2016 during a telephone discussion that she was not on the waiting list for the service, as the list had been closed for approximately 2 years. She included various emails and her GP letter in support of her complaint. On querying how many other individuals like herself had been referred to the service after the list was closed and not been told about the proposed closure (and therefore allegedly deprived of their rights of consultation), she says it was suggested that she make a Freedom of Information Act request.
8. The Trust reviewed its response and wrote again to the Appellant on 6/7/2016. As regards request 1, they advised her that there were no referrals made to art therapy because referrals are received for secondary care service and the SPoA team signpost to the most appropriate service. As regards requests 2,3 and 4, they confirmed that there is no correspondence other than that contained in staff supervision records. They asserted that that information constituted personal data and was exempt from disclosure under section 40 of FOIA.

The complaint to the Information Commissioner

9. The Appellant complained to the Respondent about the Trust's response. The Respondent raised questions with the Trust about the searches that had been undertaken and about the possibility of providing redacted copies of relevant staff supervision records of one member of staff. On 31 May 2017, the Trust

informed the Respondent that they could agree to the latter. They provided: (a) 5 A4 sides of information consisting of extracts from the supervision records (with redactions of personal data) to the Respondent and the Appellant and (b) copies of the (unredacted) original records from which the extracts had been compiled (hereafter referred to as “the closed material”) to the Respondent only.

10. On completion of the investigation, the Respondent issued a decision notice (Reference: FS50658543) concluding that:

- On the balance of probabilities: the Trust does not hold information relevant to requests 1 and 4; holds no further information relevant to requests 2 and 3; and has now fully complied with section 1(1) of FOIA;
- The Trust breached section 10(1) of FOIA with regard to requests 2 and 3 because it did not communicate the relevant information it holds to [the Appellant] within 20 working days.

The Trust was not required to take any steps to ensure compliance with FOIA.

The appeal to the First-tier Tribunal

11. The Appellant appealed to the First-tier Tribunal. Her grounds of appeal can be summarised as follows.

- She did not accept, on the balance of probabilities, that the Trust does not hold information relevant to requests 1 and 4 and holds no further information relevant to requests 2 and 3. She alleged that the Trust do hold further information that they have failed to disclose (or have deliberately destroyed in order to avoid having to disclose it). She questioned the credibility of the Trust not keeping written records on decision making processes.
- She alleged that another service user had submitted a FOIA request for a copy of the report referred to above, which had also been refused when it was clear that the Trust held that information.
- She asserted that it was implausible, given the chronological history of events included in that report, that no relevant records falling within the scope of her request, were kept.
- She challenged the Respondent’s acceptance of the Trust’s interpretation of “referral” and the apparent exclusion of a GP “referral” with specific reference to art therapy. She also queried the apparent exclusion of “referrals” direct to art therapy made by professionals employed by the Trust.
- She asserted that the Trust should have helped her to re-phrase her request in order to catch the information she was trying to obtain.
- She did not accept that there were no further records held relating to the supervision of the art therapists by managers employed by the Trust.
- She queried the suggestion that additional information could legitimately have been destroyed as part of the Trust’ routine records management processes.

She provided the additional evidence listed on page 16 of the bundle of evidence in support of her appeal.

12. The Respondent provided a detailed and thorough Response to the appeal (page 38 of the bundle of evidence). That response helpfully and correctly summarised the legal framework relating to the relevant issues.

Her main points were as follows:

- The Trust's interpretation of the request was reasonably objective and it was appropriate for the Trust to interpret parts 1 and 2 of the request in accordance with the SPoA system that was in place. She acknowledged, however, that the Tribunal might wish to explore the issue of *internal* referrals or requests for art therapy.
- In relation to part 4 of the request, the Respondent accepted that "individuals who requested a referral" could mean a GP or another individual who requested a referral, as opposed to formal referrals processed via the SPoA. She committed to raising this further with the Trust.
- The Trust had not failed to comply with its obligations under section 16 of FOIA. The Trust did not consider that the request was unclear or ambiguous. It had been open to the Appellant to submit a broader request.
- The evidence submitted by the Appellant (page 31 of the bundle) post-dates the request.
- The Trust did not hold the supervision records of the art therapists for the purposes of FOIA.
- The evidence submitted did not suggest that the Trust held information or further information falling within the scope of the request.
- The Tribunal has no jurisdiction to determine whether the Trust was guilty of an offence under section 77 of FOIA (we agreed that this would be a matter for the criminal courts).
- The Trust could have legitimately destroyed relevant information before the request for information was received.

The Appellant submitted a detailed Reply to this Response, with additional supporting evidence.

13. The Trust made some short submissions in a letter dated 13/9/2017. They again referred to the SPoA referral system and confirmed that the Trust does not hold any further relevant reports/information over and above that provided. In two separate letters, both dated 19/10/2017, the Respondent (a) raised some queries arising from those submissions and (b) queried why some specific extracts from the closed material were considered to be outside the

scope of the request and withheld. The Trust responded on 3/11/2017, making the following points:

- referrals that expressed a preference for psychological therapy would be unlikely, given the SPoA system in place and users' likely understanding of the process;
- to confirm this by searching relevant records would not be viable;
- the withheld extracts were considered to be outside scope because: they do not include reference to numbers referred after the waiting list was closed; do not relate to correspondence relating to the closure of a service and do not relate to information for referrers or alternative services being offered to individuals.

Paper determination

14. The Appellant and the Respondent elected to have the appeal determined on the papers. After considering the evidence before us (which included: an agreed open bundle of evidence comprising some 161 pages; 3 additional open documents; and a closed hearing bundle, comprising an email dated 19/10/2017 from the Respondent to the Trust and the unredacted supervision records referred to above), we 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.

Our task and the issues we had to decide

15. Our task is set out in section 58 of FOIA:

58 Determination of appeals

(1) 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.

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

16. The issues we had to decide were:

- (a) Whether the Trust had correctly interpreted the Appellant's request; and
- (b) Whether the Respondent had correctly concluded that the Trust did not hold any further information that fell within the scope of the request.

Some of the appeal grounds fell outside our remit. We could not, for examples, consider other FOIA requests other than this one or any unsubstantiated allegations of misconduct on the part of the Trust.

17. We convened on 30/1/2018 to determine the appeal.

Our decision and the reasons for it

18. As regards issue (a), we decided that the Trust's interpretation of the words "referred" and "referrals" was unreasonably narrow. In our experience, it is commonplace for the medical profession and members of the public to use the term "referral" in relation to a GP request for specialist intervention. If a GP (or other healthcare professional) decides that a patient needs to be seen by a rheumatologist or a cardiologist, for examples, his/her initial communication with such specialists is invariably referred to as a "referral". The same terminology is used in relation to requests for specialist intervention for mental health problems. It is of course for the specialist to decide what, if any, intervention may be necessary, but that does not alter the fact that the word "referral" is routinely used for the initial request for specialist input.

19. We took account of the Code of Practice issued under section 45 of FOIA, paragraph 8 (under the heading "clarifying the request") of which provides as follows:

A request for information must adequately specify and describe the information sought by the applicant. Public authorities are entitled to ask for more detail, if needed, to enable them to identify and locate the information sought. Authorities should, as far as reasonably practicable, provide assistance to the applicant to enable him or her to describe more clearly the information requested.

20. The Respondent has issued guidance (*Section 45 – Code of Practice – request handling*) on how the Code of Practice can help public authorities to handle requests for information. Paragraphs 33-34 and 36-37 of the guidance read as follows (my emphasis):

"33. The code does not require a public authority to assist applicants in describing the information more clearly if it can deal with the request as it has been presented.

34. If a public authority can objectively read an information request in more than one way it may need further information in order to identify the information requested. Section 16 requires a public authority to assist the applicant to clarify the request under these circumstances.

36. If a public authority is only aware of one objective reading of a request then no section 16 duty arises.

37. If it is later found that the request can be objectively read in more than one way there will be a breach of section 1 of FOIA because the information has not been provided to the requester's intended alternative reading of the request."

21. We considered that there was more than one objective reading of the request and that the Appellant had drawn this to the Trust's attention, with supporting evidence ((a) her own GP letter; (b) Jade Smith's letter at page 31 of the bundle; (c) Helena Dale's letter at page 34; and (d) the correspondence at pages 67-70.

Although (b) post dated the request and (d) pre-dated the closure of the waiting list, we considered that evidence to be relevant given that the SPoA system had apparently operated since 2012 and after the waiting list was closed.

22. Despite this, the Trust has doggedly stuck to its own interpretation which, in our judgement, threw into doubt the Respondent's conclusions that no further information was held.

In our judgement, the consequence of the Trust's unreasonably narrow interpretation of parts 1, 3 and 4 of the request for information was that, on the balance of probabilities, further relevant information was held by the Trust. We were unconvinced by the Trust's assertion that it would not be "viable" to conduct a search of its records for "referrals" (in the wider sense) expressing an interest in/preference for art therapy. It seemed to us that it would be unlikely that section 12 (exemption where costs of compliance exceeds appropriate limit¹) would apply to an electronic search of a set number of records over a two year period.

With regard to part 2 of the request, given the organisational, financial and employment law consequences of a decision to accept no new referrals to an established service, we considered that it would be highly unlikely that the Trust had not created and retained information about that decision-making process. On the balance of probabilities, we considered that further information falling within the scope of part 2 of the request was held by the Trust and could be recovered by appropriate searches of the Trust's records.

The disclosed information

23. We had a further concern about the information that had been disclosed to the Appellant. When we compared the redacted information which had been disclosed to the Appellant against the closed material, we noted (quite apart from the redactions) that there were several instances of the wording having been changed. It is highly unusual, in our experience, for disclosed material to be re-written in part in this way. We considered it likely that the Trust had done this in order to provide more helpful and meaningful extracts, but in doing so they had failed to accurately provide the information that it holds.

¹ https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

Directions

24. In view of the above, we felt unable to decide the appeal fairly and justly without seeking further information. We therefore adjourned and, on 13/2/2018, issued the directions (incorrectly dated 12/2/2017) set out in the Annex to this decision, requesting the provision of specified information from the Trust within 28 days.
25. The Trust failed to comply with those directions and did not apply for any amendment of them in accordance with direction 7.

Conclusion

26. We reconvened on 3/5/2018, after the deadline for compliance with the directions had passed.
27. In view of the Trust's failure to comply with the directions, we decided: (a) that we could not be satisfied, on the balance of probabilities, that the Trust did not hold any information that fell within the scope of parts 1, 3 and 4 of the request or any further information that fell within the scope of part 2 of the request; (b) in relation to the information that had been disclosed, that the Trust had failed to accurately provide the information that it holds; and (c) that accordingly, the Respondent's decision notice was not in accordance with the law.
28. We substituted the decision notice set out in paragraph 1.

Signed: Karen Booth

Judge of the First-tier Tribunal

Date: 15th June 2018

Annex

(Directions issued on 13 February 2018)



FIRST-TIER TRIBUNAL

(GENERAL REGULATORY CHAMBER)

Information Rights

APPEAL REFERENCE: EA/2017/0148

Between

Heather Ryder

Appellant

and

Information Commissioner

Respondent

Directions

1. This appeal was due to be decided on the papers on 30 January 2018. The Tribunal decided that it was necessary to seek further information from the South West Yorkshire Partnership NHS Foundation Trust (“the Trust”) before deciding the appeal.

Direction 1 – submission required from the Trust - rule 5(3)(d) GRC procedural Rules 2009

2. With reference to Ms Gill’s email dated 3/11/2017 to Ms Smith of the Information Commissioner’s Office, **the Trust (through Ms Gill or other appropriate officer of the Trust) is directed to provide to the Tribunal, the Appellant and the Respondent, within 28 days, a submission which addresses the following points/questions:**

(a) Notwithstanding the expectation that all referrals to secondary mental health services in Calderdale would be received and managed by the Trust’s Single

Point of Access (“SPA”), does the Trust accept that, during the relevant period (from the closure of the waiting list in 2014 to 20/4/16) -

- (a) Correspondence had been sent by GPs to the SPA referring or purporting to refer patients for secondary mental health services, with specific requests for the consideration/provision of particular types of therapy, including art therapy – or that such correspondence could have been sent?
- (b) Referrals had been made direct to the art therapy service by professionals working for the Trust, without going through the SPA?
- (b) (i) With reference to Ms Gill’s statement “... I have yet to determine more precise referral numbers for the 2 year time period...”, are those figures now available (and, if not, why not)?

(ii) Why it is considered that it is not “viable” for the Trust to search the (2000 or so) records to which Ms Gill refers (by, for example, using an electronic search term such as “art”)? The Appellant is entitled to be informed in writing by the Trust whether it holds information of the description specified in the request, subject to the provisions of sections 2, 9, 12 and 14 of FOIA. If the Trust is not able to confirm whether it holds relevant information, it must justify this with reference to one or more of those provisions. If the Trust considers that section 12 applies, this needs to be explained in full, with reference to the guidance referred to in Ms Smith’s letter of 19/10/2017.

Direction 2 – documents/information required from the Trust - rule 5(3)(d) GRC procedural Rules 2009

- 3. The Tribunal noted that the information that has been provided to the Appellant (the art therapy references extracted from the supervision notes in the closed bundle) differs from the actual wording in those supervision notes; i.e. that there are several instances of the Trust having re-worded the records when providing the extracts. See, for example, the art therapy extract relating to the supervision record sheet dated 4/12/2013 on page 3 of Appendix 1 to Ms Gill’s letter dated 31/5/17. The Tribunal assumes that the Trust has done this in order to provide more helpful and meaningful extracts. But in doing so, the Trust has failed to accurately provide the information that it holds.
- 4. **The Trust (through Ms Gill or other appropriate officer of the Trust) is, therefore, directed to re-send the supervision notes to the Tribunal and the Respondent only (and not to the Appellant) within 28 days, with any information which the Trust considers that it is entitled to withhold being redacted from those records.**

A clear explanation must be provided in respect of each redaction - e.g. by way of a margin note - as to why the Trust considers that the information may be withheld. The Trust is requested to use its best endeavours to ensure that what

appear to be computer-generated symbols, presumably absent in the original records, are removed from the first column of the supervision notes before they are re-sent.

Next steps

5. On receipt of the submission referred to in paragraph 1 and the notes referred to in paragraph 4, the Respondent *must* (within 28 days) send to the Tribunal, the Appellant and the Trust a response to that part of Ms Gill's (or other appropriate officer's) submission that deals with the issue referred to in paragraph 2(b) and *may* (within the same timescale) –
 - (a) send to the same parties a response to the remainder of her submission; and/or
 - (b) send to the Tribunal and the Trust only, a response to the proposed redactions to the supervision notes.
6. The Appellant may submit final comments/a submission within 14 days following receipt of any responses from the Respondent which are sent to her in accordance with paragraph 5.
7. Any application for an amendment, suspension or set aside of the above directions should be made to the Tribunal and will be dealt with by the Registrar or the Judge.

(Signed)

**Judge Ms KH Booth
dated 12/02/2018**