



Freedom of Information Act 2000

Heard on:
18 January 2007 and
1 March 2007

Decision Promulgated: 5th April 2007

BEFORE

INFORMATION TRIBUNAL

DEPUTY CHAIRMAN

Anisa Dhanji

and

LAY MEMBERS

Jacqueline Clark and Pieter de Waal

BETWEEN

JOHN WILLIAM BRIGDEN

and

Appellant

THE INFORMATION COMMISSIONER

and

Respondent

NORTH LINCOLNSHIRE AND GOOLE HOSPITALS NHS TRUST

Additional Party

DECISION

The Tribunal allows the appeal but does not issue a substituted decision notice.

REASONS FOR DECISION

Introduction

1. This is an appeal by Mr John Brigden (“the Appellant”), against a Decision Notice of the Information Commissioner (“the Commissioner”) dated 18 May 2006, in connection with a request for information made by the Appellant to the North Lincolnshire and Goole Hospitals NHS Trust (the “Trust”).
2. The request for information related to the withdrawal of medical treatment from the Appellant by the Trust, on 19th June 2002.

The Request for Information

3. The Appellant has taken a number of steps and has made various complaints in connection with the withdrawal of his treatment. He also requested the Trust to provide him with a number of documents. There has been much correspondence between him and the Trust, but the request for information in issue was set out in the Appellant’s letter to the Trust dated 16 February 2005.
4. That letter requested various documents. It is paragraph 1 that is relevant to this appeal. It stated as follows:

“I require a copy of the specific “zero-tolerance and or withdrawal of treatment policy/s” in use by your Trust (and therefore applicable to me at that time, as your then patient) and referred to by your Divisional Manager of Medicine, Frank Hazelhurst in his Media Release of Thursday, 17 January 2002.

It is the specific “step by step” process stated within the applicable procedure, that would, as of the above date, have been used to “withdraw treatment” from any and all patients, that I require.”

5. On 4th March 2005, the Trust wrote to the Appellant and provided him with several documents. Further correspondence then ensued, in the course of which it appears that most of the Appellant’s requests were met. By 29 March 2005, when the Appellant submitted what he described as “21 Formal Complaints”, he referred to only one outstanding item of information. He stated:

“I have made numerous documented requests of your Trust within and according to the Freedom of Information Act for a full and complete copy of the one specific individually named actual Policy that was referred to and strictly adhered to and used by your Trust to Withdraw my Treatment 19.06.02.

The North Lincolnshire and Goole Hospitals NHS Trust have failed to provide me with a copy.”

6. In his Formal Complaint 1, the Appellant explained that he has sought the above information in order to support his complaint that the Trust withdrew his treatment on 19 June 2002 without “sufficient or relevant grounds” required “according to any individual or specific NHS or Trust Policy.”

7. On 21st April 2005, Mr A K North, Chief Executive of the Trust, replied to the Appellant's letter of 29th March 2005, as follows:

"...I would acknowledge that you have not received a copy of a Northern Lincolnshire and Goole (NLG) Hospitals NHS Trust Policy covering the above period and providing specific guidance on the withdrawal of treatment where patients are violent and abusive. As I believe you have been informed by Simon Rigg, this is because no such policy existed for the merged Trust at that time.

I can also confirm, however, that in November 2001 the Department of Health (DOH) issued guidance to Trusts under cover of Health Service Circular HSC 2001/018 'Withholding Treatment from Violent and Abusive Patients in NHS Trusts – NHS Zero Tolerance Zone' on this issue. This was made available to senior Trust management in January 2002and I can confirm therefore [sic] would have been available and referred to at the time of the withdrawal of your treatment. (emphasis added)

....

Whilst I understand that Simon Rigg has previously sent you a copy of the above mentioned circular, the detailed guidance document enclosed with the circular was not sent to you, although Simon Rigg did confirm that copies were available from the DOH. I have however now enclosed a copy of the complete guidance received by the NHS Trusts, for your reference.

In summary, therefore, whilst no specific policy existed for NLG, there was in fact National NHS policy on the withdrawal of treatment available to Trusts covering the period in question."

Mr North went on to say that he accepted that the above guidance was not strictly adhered to in the Trust's decision to withhold treatment from the Appellant.

8. On 6 May 2006, Mr North wrote again to the Appellant. In respect of the Appellant's Formal Complaint 1, Mr North stated:

"I have already acknowledged to you in my letter of 21st April 2005, that the staff involved in the withdrawal of your treatment in 2002 failed to strictly adhere to the guidance that was in fact current and available to the Trust at that time..."

He gave a similar response in respect of the Appellant's Formal Complaint 2.

The Complaint to the Information Commissioner

9. On 22 April 2005 the Appellant made a complaint to the Information Commissioner. His grounds were as follows:

"I asked the Trust to provide me with a copy of the specific policy they used to withdraw my treatment, they told me they could not be specific and did not produce it. Today 22 April 2005 the Trust have written + admitted they did have

a specific policy and failed to produce it via my Freedom of Information Request, and have only done so now as it is the subject of an NHS formal complaint I have made about this very issue.”

10. The Commissioner undertook inquiries. He put a number of specific questions to the Trust in writing, and also had several telephone discussions with the Trust. The Commissioner also communicated with the Appellant, in writing and by telephone. The Commissioner informed the Appellant, in advance of issuing his Decision Notice, that he was satisfied that the Trust did not have a policy specific to the Trust at the time of the Appellant’s request. He asked if the Appellant had any evidence to demonstrate that the specific policy he had asked for did exist. The Appellant’s replies to the Commissioner are not entirely clear. He appeared to maintain that the Trust did in fact have a policy, but it is not clear whether he then accepted that he had been provided with all the relevant documentation.
11. The Commissioner’s inquiries focused on whether the Trust had complied with section 1 of the Freedom of Information Act 2000 (“the Act”) (right to information). The Commissioner did not consider whether the Trust had complied with section 10 of the Act (time for compliance), on the basis that the Trust had agreed with the Appellant a response date exceeding 20 days.
12. Following his inquiries, the Commissioner was satisfied, that the Trust had complied with Section 1 of the Act. Specifically, the Commissioner found, as stated at paragraph 4.10 of the Decision Notice, that:

“...there was no single policy ‘specific’ to the complainant’s withdrawal of treatment in 2002. Rather, a host of national and historical guidance and policy was of relevance and this has been provided. In the absence of a “specific” policy, Health Circular HSC 2001/18, is the closest document the Trust have been able to supply of relevance to the complainant’s circumstances at the relevant time.”
13. Accordingly, the Commissioner did not uphold the Appellant’s complaint and required no remedial steps to be taken by the Trust. The Commissioner issued a Decision Notice dated 18th May 2006 to this effect.

The Appeal to the Tribunal

14. By a Notice of Appeal dated 15th June 2006, the Appellant appealed to the Tribunal against the Decision Notice. The Notice of Appeal does not set out the grounds of appeal. Following inquiries by the Tribunal staff, the Appellant stated, in his e mail of 28th June 2006, that he disagreed:

“...with the whole of the Commissioner’s arguments in his decision notice, not because of any fault of the Commissioner but because his decision notice was, in hindsight, based on “unmeaningful, inaccurate and misleading” information given to him by the NLG Trust.”
15. The Tribunal joined the Trust as a party pursuant to Rule 7 of the Information Tribunal (Enforcement Appeals) Rules 2005 (2the Rules”).

Evidence and Submissions

16. The Tribunal has considered all the documents and submissions received from the parties, even if not specifically referred to in this determination. In particular, the Tribunal has considered the agreed bundle of documents, as well as the further submissions received in response to the Tribunal's Directions of 26 January 2007.
17. At the request of the parties, this appeal has been determined without an oral hearing, pursuant to rule 16 of the Rules. Having regard to the nature of the issues raised, the Tribunal was satisfied that the appeal could be properly determined without an oral hearing.

Findings

18. The scope of the Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of the Act. If the Tribunal considers that the notice is not in accordance with the law, or to the extent the notice involved an exercise of discretion by the Commissioner, the Tribunal considers that he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the notice is based.
19. In the present case there was no exercise of discretion by the Commissioner.
20. Having considered carefully the Appellant's initial request (as set out in paragraph 4 above), as well as all the other evidence and submissions put forward by the parties during the course of this appeal, the Tribunal considers that there has been some misinterpretation, both on the part of the Trust, as well as the Commissioner, as to precisely what information the Appellant had requested. However, in the Tribunal's view, it is clear that the Appellant was requesting information not only as to the policy or policies applicable at the time his treatment was withdrawn (which we refer to for convenience as "Part A" of his request), but also that he was seeking information as to which policy or policies, if any, were actually applied by the Trust in deciding to withdraw his treatment (which we refer to for convenience as "Part B" of his request). If there was any doubt on the part of the Trust as to what information the Appellant was seeking, then the Trust had an obligation to assist the Appellant to clarify this, pursuant to its duties under section 16 of the Act (duty to provide assistance and advice).
21. We consider that it was clear from his letters of 16 February 2005 and in particular from his letter of 29th March 2005 that the Appellant's request included Part B. In his letter of 29th March 2005 he specifically requests:

"...the one specific individually named actual Policy that was referred to and strictly adhered to and used by your Trust to Withdraw my Treatment 19.06.02."

The Appellant reiterated this in his e mail dated 2 October 2006, in which he explained the basis of his appeal in the following terms:

“The NLG NHS Trust instead provided me with a mixed bundle of various policies, without any indication as to which was the specific policy they did refer to, and should have referred to, did adhere to, and should have adhered to”.

22. The Trust appears to have responded to the Appellant only in relation to the Part A request, namely as to which policy or policies were applicable at the time the Appellant’s treatment was withdrawn. Likewise, as is evident from paragraph 4.2 of the Decision Notice, the Commissioner appears to have directed its inquiries to the same issue, and to confirming that such policy or policies had been supplied to the Appellant.
23. It was the absence of proper consideration of the Part B request by the Trust and the Commissioner that led the Tribunal to seek further evidence from the parties by its Directions of 27 January 2007. The response to the Directions from Mr Riggs, on behalf of the Trust, includes a statement that:

“At no time in correspondence with myself did Mr Brigden ask for a “ full and complete copy of the one specific individually named actual policy that was referred to and strictly adhered to and used by your Trust to withdraw my treatment”.

The Tribunal finds this statement puzzling because the request, in exactly these terms, was made by the Appellant in his letter dated 29th March 2005 to the Trust’s Chief Executive, and that letter was acknowledged by him on 30th March 2005.

24. We turn now to consider more specifically whether the Trust has complied with its obligations under the Act in respect of Parts A and B of the Appellant’s request.

Part A

25. The Tribunal makes the following findings in respect of Part A of the Appellant’s request:
- When the Trust withdrew treatment from the Appellant on 19th June 2002, it did not have a policy, specific to the Trust, in relation to the withdrawal of treatment. The Trust was then in the process of formulating a policy. That policy (the Policy for the Management of Violent and Aggressive Behaviour), came into effect in 2003. It was supplied to the Appellant on 21 March 2005.
 - The Appellant’s belief that there was a policy specific to the Trust appears to be based on the Trust’s press release dated 17 January 2002, headed ‘Policy Aims to Reduce Abuse of Staff by Patients’. This press release concerns the Trust’s decision to send out letters to patients who verbally or physically abused members of staff. In it, the Trust’s Divisional Manager of Medicine, Frank Hazlehurst is quoted as stating that the Trust had already adopted a zero-tolerance policy. This is the press release that

the Appellant referred to in his initial request on 16 February (see paragraph 4 above). The Tribunal is satisfied that the policy referred to in the press release was the guidance issued by the Department of Health. This was the Health Service Circular HSC 2001/018 'Withholding Treatment from Violent and Abusive Patients in NHS Trusts – NHS Zero Tolerance Zone' (the "NHS Policy"). This is also clear from the reference, later in the press release, to "*the government's new policy*".

- The NHS Policy was applicable at the time the Trust withdrew treatment from the Appellant. It appears that the NHS Policy is two parts, comprising a circular which the Trust sent to the Appellant on 23 March 2005, and a guidance document, which the Trust sent to the Appellant on 21 April 2005.
- There were a number of other policies and documents of general relevance that were in effect, and these were provided to the Appellant on 21st March 2005 and 23 March 2005.

These findings are entirely consistent with the Commissioner's findings as set out in the Decision Notice. In short, the Tribunal finds that the Trust complied with its obligations under section 1 of the Act in relation to Part A of the Appellant's request.

Part B

26. As regards which policy or policies were actually applied by the Trust when it withdrew treatment from the Appellant, the Tribunal finds that the Trust did not respond properly to this part of the Appellant's request, and that it has given inconsistent responses on the issue. As noted in paragraph 7 above, Mr A K North said, in his letter of 21st April 2005, that NHS Policy "*would have been available and referred to at the time of the withdrawal of your treatment*". This suggests that the NHS Policy was actually referred to at the relevant time.
27. However, in response to the Tribunal's Directions of 26 January 2007, the Trust has said that in fact, it has no record of which policies, if any, were referred to by the Trust in withdrawing the Appellant's treatment. The Trust has now explained that Frank Hazelhurst, who wrote to the Appellant withdrawing his treatment on 19th June 2002, was on long term sick leave when the Appellant made his request in February 2005, and that Mr Nasr, the consultant treating the Appellant, had by then left the Trust. The Trust has also said that it had "*no documented records as to which of the policies in existence they had relied on to withdraw Mr Brigden's treatment*". The Tribunal accepts that this is so; there is no reason, on the evidence before the Tribunal, to doubt the Trust's explanation, bearing in mind in particular the length of time that had elapsed between the withdrawal of treatment in 2002 and the Appellant's request in 2005 after the Act came into force. The Tribunal accepts that the Trust does not have this information, and that it did not have it at the date of the Appellant's request. Whether they should have had such information is not a matter for the Tribunal. The Tribunal is concerned only with whether the Trust complied with its obligations under the Act to provide the information it held when the request was received, or to inform the Appellant if it did not hold such

information. The Tribunal finds that the Trust was in breach of its obligations under section 1(a) of the Act by failing to inform the Appellant that it did not hold the information he had requested.

28. The Tribunal notes that the issue of what policy or policies were actually applied by the Trust when it withdrew treatment from the Appellant has also formed part of the Appellant's complaint to the Healthcare Commission and has been dealt with in their decision dated 26 May 2006. They upheld the Appellant's complaint that he should not have been excluded from treatment and found that:

"There is no evidence that any withdrawal of treatment policy or procedure was referred to or followed by the trust staff during the decision to exclude you, or during the carrying out of this exclusion process.....The trust response to you said that the national guidance on zero tolerance 'would have been referred to, which is not the same thing as stating that it was definitely referred to'".

The Healthcare Commission went on to set out the reasons why it considered it extremely unlikely that the Department of Health guidance was used in relation to the Appellant's case. It then concluded that:

"...the trust's statement, made several times in its response letter to your complaint, that it did not 'adhere strictly' to the procedure for withdrawal of treatment, is inadequate and misleading"

29. For the avoidance of doubt, the Tribunal makes it clear that it has referred to the Healthcare Commission's findings for completeness, but that it has reached its findings independently of their findings.
30. For the reasons set out in paragraphs 27 and 28 above, the Tribunal allows the Appellant's appeal against the Decision Notice. However, since the Tribunal has found that at the date of the request, the Trust did not (and does not) hold the relevant information, the Tribunal does not issue a substituted notice and no action by the Trust is required.

Date 05 April 2007

Anisa Dhanji
Deputy Chairman