

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 January 2019

Public Authority: Oxford University Hospitals NHS Foundation Trust

Address: John Radcliffe Hospital
Headley Way
Oxford
OX3 9DU

Decision (including any steps ordered)

1. The complainant has requested the number of surgeons, whose main residence is outside the EU, used by Oxford University Hospitals NHS Foundation Trust (the Trust) to perform operations at the Horton General Hospital over the financial year 2016/17, and up to 5 October 2017. The Trust confirmed that it held the requested information, and that the number was "0". The complainant considered that the information was wrong and that the number should be at least "1".
2. The Commissioner's decision is that the Trust has provided the complainant with the information that it held at the time of the request. However, she has recorded a breach of section 1 and section 10 of the FOIA, as the Trust failed to respond to the complainant's request within 20 working days of receipt.
3. The Commissioner does not require any further steps to be taken.

Request and response

4. On 13 December 2017, the complainant wrote to the Trust and requested information in the following terms:

"How many surgeons, whose main residence is outside the EU, were used by the OUH to perform operations at the Horton General Hospital over the financial year 2016/17, AND the current half financial year to 5 October 2017, and on each occasion how long was the non EU surgeon working at the Horton? "

5. The Trust responded on 17 January 2018. It confirmed that it held the requested information, and that the number was "0".
6. The complainant responded to the Trust on 17 January 2018, explaining that he had been operated on by a surgeon who was a "*locum from Pakistan*" and asked the Trust to explain its answer in light of this.
7. The Trust responded on 21 January 2018 and explained that it was unable to locate any recorded information relating to a locum from Pakistan. It advised the complainant to request an internal review and, if he remained dissatisfied with the handling of his request, that he had a right of appeal to the Commissioner.

Scope of the case

8. The complainant initially contacted the Commissioner on 14 February 2018 to complain about the way his request for information had been handled. The Commissioner wrote to the complainant on 7 March 2018 to request further information to support the complaint. The complainant provided the Commissioner with the further information on 4 April 2018.
9. The Commissioner contacted both the complainant and the Trust on 4 April 2018, informing them that the complaint had been deemed eligible for formal consideration under section 50 of the FOIA.
10. From the information provided by the complainant in support of his complaint, it appeared that he had submitted more than one request for information to the Trust. The Commissioner therefore contacted the complainant again on the 29 June 2018, asking him to clarify which request for information he wished the Commissioner to investigate.
11. Upon receiving the clarification from the complainant, the Commissioner wrote to him on 27 July 2018, and to the Trust on 30 July 2018, explaining that although the complainant did not appear to have specifically asked for an internal review of the handling of his request of the 13 December 2017, his correspondence of 17 January 2018 could be construed as written expressions of dissatisfaction with the response to his request. The Commissioner therefore asked the Trust to conduct an internal review of its response to the request of 13 December 2017 within 20 working days.
12. The Trust provided the outcome of its internal review on 7 September 2018. In this correspondence, the Trust stated that its response of "0" on 17 January 2018 was technically correct, but it accepted that it did not provide any explanation to support the response. The Trust stated

that the further explanation in its response to the complainant dated 21 January 2018 should have been provided in the original response. It therefore appeared that the Trust ultimately maintained its original position that it held the requested information, and the number was "0".

13. On 8 September 2018, the complainant wrote to the Commissioner to complain about the internal review response that he had received from the Trust. The complainant was concerned that the information given to him was wrong because he stated that he was operated on by a locum surgeon, whose main residence was outside the EU, and therefore the answer should have been at least "1".
14. With regards to the complainant's concern that he does not believe the number provided by the Trust to be correct, based on his own experience of being treated by the Trust, the Commissioner explained that the FOIA does not consider the accuracy of the information provided. Instead, it is concerned with what recorded information is held by a public authority, and whether that information can be provided.
15. The Commissioner therefore considers that the scope of this case is to determine whether the Trust has complied with its obligations under section 1(1) of the FOIA and, in particular, whether or not the Trust has provided the complainant with the information it held at the time of receiving his request for information.

Reasons for decision

Section 1 – general right of access

16. Section 1(1) of FOIA says that an individual who asks for information from a public authority is entitled to; (a) be informed whether the authority holds the information and; (b) if the information is held, to have that information communicated to them.
17. In scenarios where there is some dispute between the nature or amount of the information identified by a public authority, and the nature or amount of information that a complainant believes might be held, the Commissioner – in accordance with a number of First-Tier Tribunal decisions – applies the civil standard of the balance of probabilities.
18. The Commissioner understands that the Trust wrote to the complainant on 2 October 2018 and explained that the surgeon who operated on him is a UK resident and therefore would not be counted as a non-EU surgeon.

19. The Trust has explained in its submission to the Commissioner that it contacted its HR team, who in turn asked the agencies that are used to supply locums at this level to the Trust. The Trust has stated that the agencies provided the Trust with information that showed that it did not use any non-EU doctors during the period stated in the complainant's request.
20. The Trust has stated that it is of the view that its response was technically correct because the locum surgeon who operated on the complainant is a UK resident. The Trust has explained that it had not employed any non-EU surgeons at the Horton Hospital.
21. The Trust has explained to the Commissioner that this is the only way it procures such services and has confirmed that the information was held by the agency on its own systems.
22. The Commissioner wrote to the complainant on the 6 November 2018 outlining the Trust's response and providing a preliminary conclusion that, on the balance of probabilities, it appeared the Trust had provided him with the information it held at the time of the request.
23. On the 15 November 2018, the complainant responded to the Commissioner advising that he was not satisfied that the Trust had accurately interpreted or relayed the information supplied to it by the agencies the Trust used to provide locum surgeons. The complainant stated that he is entitled to inspect the record containing the information in question under section 11(1)(b) of the FOIA.
24. On 30 November 2018, the Commissioner wrote to the complainant and explained to him that the provisions of section 11 concern how information requested under the FOIA is to be provided to the requester, where the requester has expressed a particular preference. Section 11(1)(b) provides an opportunity for the requester to inspect a record containing the information instead of being provided with a permanent copy, if the requester would prefer this and it is reasonably practicable for the public authority to arrange access.
25. The Commissioner explained to the complainant that a public authority is only obliged to comply with a requester's preference for the means of communication if the requester expresses it when they make their FOIA request. The public authority does not have a duty to comply with the preference if the requester expresses it later, either after the public authority has started to deal with the request or after it has provided the information.
26. In this case, the complainant did not express a preference for the means of communication when he made his request for information to the Trust

on 13 December 2017. The Trust is therefore not obliged to comply with the preference he has now expressed.

27. On the 2 December 2018 the complainant responded to the Commissioner advising that he is not happy for the case to be closed and would like to appeal to the First-tier Tribunal.

Conclusion

28. The Commissioner recognises that the complainant considers that the answer to his request should be different to the one which he has been provided. However, she can only consider what information is actually held at the time the request is received.
29. As the Commissioner has not been provided with any evidence to show that the information recorded by the Trust is different to the information provided in response to the request, and having considered the responses from the Trust, it is the Commissioner's view that, on the balance of probabilities, the Trust has provided the complainant with the information that it held at the time of the request.

Procedural matters

Section 10 – Time for compliance

30. The Commissioner notes that the Trust's response to the request for information exceeded the time limit of 20 working days from receipt of the request. The Commissioner has recorded a breach of section 1 and section 10 of the FOIA against the Trust as a result.

Other matters

31. The Commissioner notes that the Trust's response to the internal review exceeded the recommended guideline of 40 working days. Although there is no statutory time limit set out in the FOIA within which public authorities must complete a review, the Commissioner takes the view that a reasonable time for completing an internal review is 20 working days from the date of the request for review, and in no case should the

total time taken exceed 40 working days. The Commissioner therefore recommends that the Trust review the Section 45 code of practice¹.

¹ <https://ico.org.uk/media/for-organisations/documents/1624144/section-45-code-of-practice-request-handling-foia.pdf>

Right of appeal

32. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

33. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
34. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF