

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 November 2018

Public Authority: Great Ormond Street Hospital for Children NHS Foundation Trust

Address: Great Ormond St
London
WC1N 3JH

Decision (including any steps ordered)

1. The complainant has requested information from the public authority on various issues involving the gastroenterology department, including information on discussions about reviews and outcomes of reviews. The Trust initially refused the request on the basis of section 14 and later stated it was seeking to rely on section 12 as complying with the request would exceed the cost limit.
2. The Commissioner's decision is that the Trust applied section 14(1) and 12(1) incorrectly as it did not demonstrate that the cost of the request would exceed the limit or that the burden of responding would outweigh any serious value the request had. The Commissioner finds that the Trust did comply with section 16(1) by providing advice and assistance but that this was not necessary as section 12 had been incorrectly applied.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Write to the complainant with a fresh response to the request that does not rely on either section 12(1) or 14(1) of the FOIA.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 17 January 2018, the complainant wrote to Great Ormond Street Hospital for Children NHS Foundation Trust ("the Trust") and requested information in the following terms:

"Please provide all information held (including memos, emails, reports) in relation to:

- a. discussions with the director of research in the second half of 2015 following concerns raised by RCPCH during its review of gastroenterology relating to recruitment and enrolment onto research studies.*
 - b. The review of informed consent trials of immune suppressing agents in children without IBD carried out by the research directorate [sic] in 2015/15 subsequent to these discussion*
 - c. The re-allocation of research trials to other principle and chief investigators by the research directorate [sic] following this review. Please detail the affected trials.*
 - d. The delay or halt to publication and presentation of papers put in place by the research directorate following this review – please detail those papers delayed or halted and stated [sic] whether these have since been cleared for publication or presentation."*
6. The Trust responded on 8 March 2018 and refused the request on the basis of section 14(1) – that the request was vexatious. The Trust explained this further by stating that it seemed the request was a fishing exercise and was made with no knowledge of what might be revealed.
7. The complainant responded on the same date to clarify that the request was being made as part of an investigation into the Trust's gastroenterology department and pointed to a document which stated that following a review of informed consent for trials, trials had been reassigned and publications delayed. The complainant asked for an internal review.
8. Despite chasing up the response to the internal review request and letters from the ICO no internal review was conducted and the Commissioner therefore accepted the case for investigation.

Scope of the case

9. The complainant initially contacted the Commissioner on 23 May 2018 and then later on 14 June 2018 to complain about the way her request for information had been handled.
10. After writing to the Trust, the Commissioner received a response on 6 September 2018 stating an internal review had now been conducted. In the internal review response the Trust stated that it considered it had been correct to rely on section 14(1) due to the disproportionate amount of time it would require to answer the request but went on to state that section 12(1) could also have been cited for the same reasons.
11. The Commissioner considers the scope of her investigation to be to determine if either section 12 or 14 have been correctly applied to refuse the request.

Reasons for decision

Section 12 – cost of compliance

12. Section 12(1) allows a public authority to refuse to comply with a request for information if the authority estimates that the cost of compliance would exceed the 'appropriate limit', as defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Regulations").
13. This limit is set in the fees regulations at £600 for central government departments and £450 for all other public authorities. The fees regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 18 hours in this case.
14. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) states that an authority can only take into account the costs it reasonably expects to incur in:
 - determining whether it holds the information;
 - locating a document containing the information;
 - retrieving a document containing the information; and
 - extracting the information from a document containing it.

The Trust's position

15. The Trust, having reconsidered the request, stated that the information requested was not centrally recorded and it was therefore considered to be a vast amount of work for one member of staff to initially make several enquiries with a number of teams/departments and individual staff members to check through separate email chains and identify, locate and extract relevant information. The Trust believes that these initial enquiries and individual searches alone would exceed the cost limit of 18 hours.
16. The Trust explained to the Commissioner that the information could be held electronically (for emails, reports and memos) or in hard copy for which there would be no way of identifying the level of information unless staff were to manually review all the drives, emails, committee papers and other types of correspondence held. It was at this point that the Trust considered it would be unjustified and disproportionate to conduct this type of search. The Trust acknowledged though that section 12 should have been applied.
17. The Trust has estimated that to conduct a significant search would have taken at least 50 hours due to the number of teams and department it would have to contact, including several individual staff members. It states the information would be held in different formats and with different subject titles which would make using key works difficult and would require opening every email or record and reading through each document.
18. The Trust informed the Commissioner that if the complainant could refine the request by naming specific staff members/teams where the information might be held or titles of documents as well as reducing the time frame then it might be possible to conduct searches to see what level of information can be identified and collated within the 18 hour cost limit.

The Commissioner's decision

19. When dealing with a complaint to the Commissioner under the FOIA, it is not the Commissioner's role to make a ruling on how a public authority deploys its resources, on how it chooses to hold its information, or the strength of its business reasons for holding information in the way that it does as opposed to any other way. Rather, in a case such as this, the Commissioner's role is simply to decide whether or not the requested information can, or cannot, be provided to a requester within the appropriate costs limit.
20. In order to consider the arguments presented by the Trust the Commissioner has looked carefully at the request wording. She notes that the request did ask for ALL information including memos, emails

and reports which on face value does seem particularly wide ranging and all-encompassing however the subsequent bullet points do add some more restrictive context to this.

- a. discussions with the director of research in the second half of 2015 following concerns raised by RCPCH during its review of gastroenterology relating to recruitment and enrolment onto research studies.
 - b. The review of informed consent trials of immune suppressing agents in children without IBD carried out by the research directorate [sic] in 2015/15 subsequent to these discussion
 - c. The re-allocation of research trials to other principle and chief investigators by the research directorate [sic] following this review. Please detail the affected trials.
 - d. The delay or halt to publication and presentation of papers put in place by the research directorate following this review – please detail those papers delayed or halted and stated [sic] whether these have since been cleared for publication or presentation.”
21. In part a. of the request there is a specific time frame given of six months (the latter half of 2015) but the request is also more specific as it clearly asks for information only on a particular subject – discussions with the Director of Research on the concerns about recruitment and enrolment onto research studies following the review by the Royal College of Paediatrics and Child Health. The Commissioner considers this to be quite a narrow request and is not convinced that locating information in relation to this point would require such a broad trawl through emails as has been suggested by the Trust. It is not clear why it would not be possible to conduct keyword searches for emails given there are clear topics. In addition to this, this part of the request only asks for information on discussions with the Director of Research about these issues. It would therefore follow that searches could be focussed on this particular individual's email account or emails sent to/from this person.
22. Part b. of the request asks for specific information – a review document and there is no logical argument as to why this would be particularly burdensome to locate.
23. For part c. the wording of the request is perhaps a little less clear but at the same time the Commissioner does not consider it is so ambiguous that there is more than one objective reading of the request. It is clear the complainant is seeking information, specifically any emails, memos, reports, on the re-allocation of research trials following the RCPCH

review. Again, the Commissioner considers that the information requested is on quite a specific area and restricts this to the research directorate. It therefore seems reasonable that any searches required to locate relevant information could be restricted to this directorate and as the subject area is the reallocation of research trials; that staff could be asked to search for information relatively easily.

24. Finally, for part d. the request ask for information on the delay or halt to publications following the review. As with part c. this is restricted to the research directorate and is on a specific issue.
25. Whilst the Commissioner can accept that these activities would take some time and are activities covered by the fees regulation, she has difficulty accepting the time estimates given the lack of detail. The 50 hours cited by the Trust has not been broken down much more specifically than stating that teams and individuals would need to conduct searches.
26. Given the lack of detail in the reasoning of the Trust, the Commissioner does not consider herself to be in a position where she can accept the estimate made by the Trust was sensible, realistic and supported by evidence. This was despite being informed at the start of the investigation that *"the approach of this office is to give a public authority one more opportunity to justify its position before issuing a decision notice;"* and, in fact, in this case being given an additional opportunity due to the initial response being unclear as to whether section 14 or section 12 was being applied.
27. In light of the lack of detail in the description of its cost estimate, the Commissioner's view is that she has no choice other than to find that the cost estimate made by the Trust was not reasonable and that compliance with the request would not exceed the cost limit. In addition to this she considers the wording of the parts of the request does contain enough detail to allow the Trust to search for information within certain departments/individuals and on specific topics. Her conclusion is, therefore, that the Trust relied on section 12(1) incorrectly.

Section 16 – duty to provide advice and assistance

28. Section 16(1) of the FOIA provides that all public authorities are under a duty to provide advice and assistance to any person who has made or who intends to make an information request to it. The Commissioner's published guidance on section 12 sets out the following minimum advice and assistance that a public authority should provide to a requester when refusing a request on cost grounds:

- either indicate if it is not able to provide any information at all within the appropriate limit; or
 - provide an indication of what information could be provided within the appropriate limit; and
 - provide advice and assistance to enable the requester to make a refined request.
29. The Trust did provide advice and assistance to the complainant following prompting by the Commissioner. However, this advice focused on suggesting that the request be refined to a shorter period of time or identified specific individuals/department to focus any searches on. As stated above, the Commissioner considers the request already allows for focused searches to be carried. That being said, as advice and assistance was provided the Commissioner does not consider there has been a breach of section 16(1) of the FOIA. However, as the Commissioner does not find that section 12 has been correctly applied she also does not consider that any advice or assistance was needed to refine the request and bring it within the cost limit.

Section 14 – vexatious requests

30. Initially the Trust refused the request as vexatious as it considered it was a fishing exercise with the request being made with no knowledge as to what might actually be held. Whilst the Trust later provided more substantial arguments to support its use of section 12 it did state that it still considered section 14 had been correctly applied due to the burden that would be imposed by responding to the request.
31. Section 14(1) of the FOIA says that a public authority is not obliged to comply with a request under the FOIA if the request is vexatious.
32. The term 'vexatious' is not defined in the FOIA but the Commissioner has identified a number of 'indicators' which may be useful in identifying vexatious requests. These are set out in her published guidance and, in short, they include:
- Abusive or aggressive language
 - Burden on the authority
 - Personal grudges
 - Unreasonable persistence
 - Unfounded accusations
 - Intransigence
 - Frequent or overlapping requests
 - Deliberate intention to cause annoyance

33. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is vexatious.
34. The Commissioner's guidance goes on to suggest that, if a request is not patently vexatious, the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. In doing this the Commissioner considers that a public authority should weigh the impact of the request on it and balance this against the purpose and value of the request.
35. In this case the only argument advanced by the Trust is that responding to the request would place an unreasonable burden on the Trust in terms of resources and time. The explanations for this are as set out in the Commissioner's analysis of the application of section 12 of the FOIA so have not been repeated here.
36. The Commissioner does not consider it unreasonable for the complainant to want to gather information on this subject. Issues with the gastroenterology department were being investigated at the time of the request and the Trust were aware of the interest of the complainant in this. The Commissioner does not see any evidence of a grudge or deliberate attempt to cause annoyance to the Trust.
37. The Commissioner understands that dealing with the request may stretch the Trust's resources to an extent by the Commissioner does not consider the burden of dealing with the request to be so great that it would be disproportionate to the request's value, as the Commissioner does consider the request has some value.
38. The Commissioner has therefore not been persuaded that the complainant's request can be categorised as vexatious under section 14(1).

Right of appeal

39. 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

40. 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.
41. 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

Jill Hulley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF