

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 May 2015

Public Authority: University Hospitals of Morecambe Bay NHS Foundation Trust (UHMB)

Address: Trust Headquarters
Westmorland General Hospital
Burton Road
Kendal, LA9 7RG

Decision (including any steps ordered)

1. The complainant requested information about communications between 3 UHMB directors and Monitor and the Care Quality Commission in 2010. The University Hospitals of Morecambe Bay NHS Foundation Trust (UHMB) stated that to carry out an electronic search would breach the cost limits set by section 12(1) of the Freedom of Information Act 2000 ("the FOIA").
2. The Commissioner's decision is that UHMB incorrectly applied section 12(1) and found a breach of sections 10(1) and 16(1).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the complainant that does not rely on section 12 as its basis for refusing to provide the requested information.
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 22 August 2014 the complainant made a request for information under the FOIA on the following:

'1. Copies (electronic copies only, no paper documents requested) of any recorded, written, printed, paper or electronic communication, including any associated files and any replies, between all of (individually or combined) former Chairman Eddie Kane, former Chief Executive Tony Halsall and former Medical Director Peter Dyer and Monitor and the Care Quality Commission dated during the months of June, July and August 2010, but excluding the 2009/10 Annual Report and Accounts and the associated Quality Account/ Report, and also excluding purely financial documents and any individual document file which is itself over 50 pages long, and also excluding any formal document, statement of liability etc. which may have been required either by Monitor and CQC as part of any registration or authorisation process. In other words, for each of the 3 UHMB directors I am requesting their individual and combined communications with Monitor and/ or CQC which convey specific information, requests, ideas etc. which may or may not be related to registration/ authorisation, and may or may not refer to UHMB failures, serious incidents or patients (patient names would be improbable in such documents but would be redacted in any case), but I am not requesting the documents describing UHMB ward by ward, department by department etc. which may be part of the process. Typically, the requested communications would be letters and emails of 1-10 pages long.

2. Information about whether and when each communication, document or file was provided to the [Morecambe Bay Investigation](#)'

6. On 7 October 2014 UHMB responded that it could not supply the material as

- a. 'We were not able to identify any documents*
b. To carry out the electronic search would breach the cost limits set out under Section 12 of the FOIA.'

7. UHMB searched its physical files and supplied three files to the complainant.

8. On 7 October 2014 the complainant requested an internal review.

9. On 25 March 2015 UHMB provided an internal review. UHMB had made a search of their separate file to the Morecambe Bay Investigation and supplied one additional document to the complainant. The review upheld

the decision not to carry out the electronic search as it would breach the cost limits set out under section 12 of FOIA.

Scope of the case

10. On 29 December 2014 a complaint was made to the Information Commissioner about the failure of the public authority to provide the outcome of the internal review.
11. The Commissioner wrote to UHMB on a number of occasions and the internal review was provided to the complainant on 25 March 2015.
12. The Commissioner considers the scope of the case to be the timeliness of the UHMB responses, whether or not UHMB has correctly applied section 12 and whether or not UHMB provided appropriate advice and assistance under section 16 of the FOIA.

Reasons for decision

Section 12 – The cost of compliance

13. Section 12(1) of the FOIA states that:

"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."

14. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Regulations") sets the appropriate limit at £450 for the public authority in question. Under the Regulations, a public authority may charge a maximum of £25 per hour for work undertaken to comply with a request. This equates to 18 hours work in accordance with the appropriate limit set out above.
15. A public authority is only required to provide a reasonable estimate or breakdown of costs and in putting together its estimate it can take the following processes into consideration:
 - determining whether it holds the information;
 - locating the information, or a document which may contain the information;
 - retrieving the information, or a document which may contain the information; and
 - extracting the information from a document containing it.

Would the cost of compliance exceed the appropriate limit?

16. As is the practice in a case such as this, the Commissioner asked UHMB to confirm if the information is held and if so, to provide a detailed estimate of the time/cost taken to provide the information falling within the scope of this request.
17. In his assessment of whether UHMB has correctly relied upon section 12 of the FOIA, the Commissioner has considered the refusal notice and subsequent internal review provided to the complainant. UHMB have not supplied an additional submission to the Commissioner despite requests on 16 February, 4 March, 20 March and 26 March 2015.
18. In the refusal letter of 7 October 2014, UHMB estimated *'that to carry out a full physical and electronic search of our records to ascertain and extract the information you have requested would exceed those limits. The estimates are as follows:*

*To conduct an electronic search of mailboxes - 22.5 hours
To conduct a physical search of files kept in storage - 3 hours
Total 25.5 hours.'*

19. UHMB provided a breakdown of the time estimated to carry out the electronic search:

<i>Step</i>	<i>Requirement</i>	<i>Time</i>
1 Setting up Accounts	3 accounts over 2 email domains No accounts require restoration only permissions for search accounts to access, two search accounts are required as they are on different domains	1 hour
2 Raw Data Search	2 defined search criteria for each mailbox over a 3 month defined period. 2 email accounts on slower domain 1 account @ 30 minutes per search 2 accounts @ 1 hour per search	5 hours
3 Integrity Check	Repeat of Step 2	5 hours
4 Data Cleanse	6 folders to be reviewed removal of exclusions such as out of office replies, non-relating emails	3 hours
5 Final Data Cleanse	6 folders per criteria	6 hours

	combined. Soft deleting of duplicates and exclusions defined in request	
6 Final Review before disclosure	Review of combined folders	2 hours
7 Preparation for disclosure	Prepared for email or printing	0.5 hour
Total		22.5 hours

20. The Commissioner has viewed this estimate closely and considers that the estimated time to locate, retrieve and extract the information is a generous estimate. In particular, the estimate for steps 3 (a repeat of step 2 at 5 hours), 4 and 5 could reasonably be reduced or removed to bring the total estimate within the time limits.
21. UHMB's position on the electronic search at the internal review remained the same. No further explanation or advice was provided to the complainant or the Commissioner.
22. Given the generous estimated times that would be involved in responding to the complainant's request, the Commissioner is not satisfied that the cost of compliance with the request would exceed the appropriate limit. UHMB was therefore incorrect to apply section 12 of the FOIA to the complainant's request.

Section 16(1) – The duty to provide advice and assistance

23. Section 16(1) of the FOIA provides that a public authority should give advice and assistance to any person making an information request. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 code of practice ([section 45 code of practice](#)) in providing advice and assistance, it will have complied with section 16(1).
24. In this instance, UHMB did not provide any advice to the complainant on how the electronic search could be achieved within the cost limits. For example, the time estimated to remove duplicates when combining the files (step 5) could have been reduced if the complainant was willing to accept duplicates. At no stage did UHMB suggest that it could comply with a new request for a narrower category of information. (For example using specific search terms.)
25. The Commissioner considers that UHMB did not provide advice and assistance as was reasonable in the circumstances, and therefore breached section 16(1).

Section 10(1) Time for compliance

26. Section 10(1) of FOIA states that on receipt of a request for information a public authority should respond to the applicant within 20 working days.
27. UHMB did not respond to the request within the statutory time limit. The Commissioner has therefore found that UHMB breached section 10(1) of FOIA.

Other Matters

28. Although they do not form part of this decision notice, the Commissioner would draw UHMB's attention to the following points.
29. The Code of Practice under section 45 of the FOIA provides that internal reviews should be undertaken "promptly". While no explicit timescale is laid down by FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. This is set out in the Commissioner's Guide to Freedom of Information which is published on his website at http://ico.org.uk/for_organisations/freedom_of_information/guide/refusing_a_request#when-can-we-refuse-a-request-for-information-20 .
30. In this case the complainant did not receive the outcome of the internal review, despite telephone calls and letters from the Commissioner, for five and a half months.
31. In particular, the Commissioner is concerned that his email of 12 January 2015 sent to two addresses (the FOI email address and to an employee who it transpired had retired) at the public authority was not answered. UHMB have since confirmed that the FOI email address is still a valid address. The Commissioner asked UHMB to investigate this matter (emails of 17 February, 4, and 26 March 2015) but has had no response.
32. The Commissioner does not consider this case to be 'exceptional', so he expresses his concern that it took well over 20 working days for the internal review to be completed. The Commissioner does not consider this to be satisfactory and would expect UHMB to deal with reviews within the suggested deadlines in the future.
33. The [section 46 code of practice](#) covers good records management practice and the obligations of public authorities under the Public

Records Acts to maintain their records in an ordered and managed way, so that they can readily retrieve information when it is needed.

34. These codes of practice are not directly legally binding but failure to follow them is likely to lead to breaches of the Act.
35. The Commissioner notes that UHMB offered a reason for the delay in providing the internal review and that a change will be made: *'Due to similarities with another request, it was filed incorrectly. We have recently re-introduced a process for the tracking of all requests to prevent a recurrence.'*
36. It is clear that the delays to respond to the complainant have led to breaches of FOIA and demonstrate non-conformity with the codes. The Commissioner expects UHMB to make improvements in the handling of requests and in the accuracy of their record keeping in the future.
37. The Commissioner also has concerns regarding UHMB's failure to interact during his investigation.
38. In summary, the Commissioner would expect that in the future UHMB will ensure that requests for information are dealt with in a way which would not conflict with any of the provisions of the FOIA. He would also expect UHMB to engage positively with the Commissioner as the regulator of FOIA.

Right of appeal

39. If 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: <http://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

**Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
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Cheshire
SK9 5AF**