

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 April 2018

Public Authority: East of England Ambulance Service NHS Trust

Address: Whiting Way
Melbourne
Cambridgeshire
SG8 6EN

Decision (including any steps ordered)

1. In two requests, the complainant has requested information about tail breaches and Unit Hours Production for the months of May and June 2017. East of England Ambulance Service NHS Trust ('the Trust') has refused to comply with the requests which it says are vexatious under section 14(1) of the FOIA.
2. The Commissioner's decision is that the complainant's requests are not vexatious and the Trust is not entitled to rely on section 14(1).
3. The Commissioner requires the Trust to take the following step to ensure compliance with the legislation:
 - Issue a fresh response to the complainant's requests that does not rely on section 14(1) of the FOIA.
4. The public authority must take this step 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 25 July 2017 the complainant wrote to the Trust and requested information in the following terms:

Request 1

1. *Please can you provide the red and green tail breaches by CCG and by SLM area, as well as the overall performance for the Trust, as monthly figures, for May 2017.*
2. *Please include the percentage of breaches as well as the number of breaches and the number of incidents.*
3. *Please can you provide the tail breaches separately for each call category, ie separate figures for each month by R1, R2, G1, G2, G3 and G4.*
4. *Please also provide the UHP for DSAs and RRVs monthly, for April 2017, by SLM area and if possible by CCG. Please include RRV officer hours if possible - as I understand this is the UHP which is given to Commissioners and is also recorded information held by the Trust. Please can I also ask that all of the above information UHP is further split down to show PAS and Trust UHP (both for RRVs and DSA by area).*
5. *Please can you also discount the non frontline emergency ambulances from the UHP (HCRT and ITV vehicles) - as these do not respond to emergency calls and the majority of the time they are not crewed by a Paramedic or EMT.*

Request 2

1. *Please can you provide the red and green tail breaches by CCG and by SLM area, as well as the overall performance for the Trust, as monthly figures, for June 2017.*
2. *Please include the percentage of breaches as well as the number of breaches and the number of incidents.*
3. *Please can you provide the tail breaches separately for each call category, ie separate figures for each month by R1, R2, G1, G2, G3 and G4.*
4. *Please also provide the UHP for DSAs and RRVs monthly, for April 2017, by SLM area and if possible by CCG. Please*

include RRV officer hours if possible - as I understand this is the UHP which is given to Commissioners and is also recorded information held by the Trust. Please can I also ask that all of the above information UHP is further split down to show PAS and Trust UHP (both for RRVs and DSA by area).

5. *Please can you also discount the non frontline emergency ambulances from the UHP (HCRT and ITV vehicles) - as these do not respond to emergency calls and the majority of the time they are not crewed by a Paramedic or EMT.*
6. The Trust responded on 5 September 2017 – its references 11928 and 11929. It categorised the requests as vexatious under section 14(1) of the FOIA and refused to comply with them.
7. Following an internal review the Trust upheld its original position. It also acknowledged that it had breached section 10(1) of the FOIA as it had not provided a response to the complainant's request within 20 working days of receipt of the request.

Scope of the case

8. The complainant contacted the Commissioner on 27 September 2017 to complain about the way her requests for information had been handled.
9. The Commissioner's investigation has focussed on whether the requests are vexatious under section 14(1) of the FOIA.

Reasons for decision

10. Section 14(1) of the FOIA says that a public authority is not obliged to comply with a request if the request is vexatious.
11. The term 'vexatious' is not defined in the FOIA. The Commissioner has identified a number of 'indicators' which may be useful in identifying vexatious requests. These are set out in her published guidance on vexatious requests. 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
12. 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.
 13. The Commissioner's guidance suggests 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.
 14. Where relevant, public authorities also need to take into account wider factors such as the background and history of the request.

The Trust's submission

15. In its submission to the Commissioner, the Trust has first provided a history and context to the requests. It has advised the Commissioner that it has received 171 requests from the complainant from 1 November 2015 to 31 October 2017 and notes that this is 13.4% of the Trust's FOI workload in this time period. It says that of the 67 internal review requests received in this timeframe, 31 were from the complainant, which constitutes 46.3% of the workload. The Trust argues that this imposed a considerable burden on its FOI team and the wider departments, and caused additional stress to a number of hard-working teams. The Commissioner notes that a proportion of these requests (and internal review requests) will have been submitted after the complainant submitted the current requests in July 2017 and therefore she cannot include these in her considerations.
16. The Trust notes the Commissioner's published guidance on section 14(1) and the case of Information Commissioner versus Devon County Council and Dransfield. In that case it is stated that a public authority should not consider that section 14(1) should be applied in the most extreme circumstances only but rather, it should be considered in any case where the authority believes the request is disproportionate or unjustified.
17. The Trust has confirmed that the reason for refusing the requests was not due to any concern about the consequences of releasing the information but due to the nature of the request. The Trust has advised the Commissioner that it did provide the information in response to three previous requests received in January, April and May 2017, relating to different months.

18. **Disproportionate or unjustified level of disruption:** The Trust says that it is committed to being an open and transparent organisation and strives to achieve this through its website and responses to FOI requests and media requests. However, on this occasion, it says it feels that the two requests in question have, and still are, causing a disproportionate level of disruption to its FOI team, Informatics Department and the Operations Directorate.
19. **Purpose and value of request:** The Trust has noted that, although the complainant did not include any comments or context around this specific request, it is aware of the complainant's circumstances, which it has passed on to the Commissioner. The Trust says it accepts that the complainant is likely to believe there is value behind these requests but it believes this value is restricted to the complainant's own personal aims and does not serve a wider public interest. When balancing the serious purpose of the request against the detrimental impact caused to the authority, the Trust has told the Commissioner that it believes that the unjustified irritation and distress caused to the Trust far outweighs any possible value to the complainant.
20. **Burden on the authority:** The Trust considers that the number of requests the complainant has submitted has caused considerable disruption to the Trust and been an excessive burden on relevant Trust teams. It says that during 2017, the complainant began making six to eight requests per month. Although these were different requests each time, the Trust says it received these on a regular monthly basis.
21. Although most of these requests did not meet the eighteen-hour threshold in terms of the FOIA's section 12 provision (cost exceeds appropriate limit), the Trust says that a number of the previous requests took it an inordinate amount of time to complete. This imposed a significant burden on the Trust, specifically the FOI team and the wider departments involved in collating the information.
22. The Trust says that in relation to these specific requests, it took a number of hours to validate the data to ensure it was accurate. (The Commissioner assumes here that the Trust is in fact referring to its responses to the complainant's earlier requests for similar information for different months.) Although it appreciates that this did not fall within the threshold of the section 12 provision, the Trust says the effect was grossly oppressive on its core work and required the Trust to divert staff away from core functions.
23. **Campaigns and personal grudge:** According to the Trust these two requests, taken with the other 169 requests up to 31 October 2017, have constituted a deliberate intention to cause annoyance, and is part of a wider campaign to discredit and disrupt the Trust due to the sheer

volume of requests. The Trust says it also has good reason to believe that a number of other FOI requests it has received are also from this complainant using pseudonyms, one of which is currently going through the Commissioner's complaint and appeal process.

24. The Trust also believes that this complainant has a personal grudge against a number of senior members of the Trust, which it says is reflected in the high number of requests received and the tone of some of these requests and other correspondence concerning the current Trust CEO and a specific Director.
25. **Intransigence:** In the Trust's view, perhaps key to its belief that these two requests are vexatious is that the complainant has not been willing to engage with the Trust to try and resolve some of the issues and explore ways to provide this information without the need to impose such excessive conditions on the Trust. The Trust says it has tried to engage with the complainant a number of times to understand if it can provide this information through a different route. The Trust appreciates that it would be useful to share some of this information with the complainant outside of FOI. However it says that whenever this has been suggested, the complainant is always very clear that she does not believe that she will receive accurate or timely information. The Trust says it has asked the complainant, on a number of occasions, for a comprehensive list of the data that she requires regularly during Staff Partnership Forum (SPF) meetings; however this has not been forthcoming.
26. The Trust has told the Commissioner that the level of work created by the complainant's repeated requests is not sustainable for either its FOI team or the wider departments involved in these requests (the Informatics and Operations departments in relation to these two specific requests). It says responding to the (previous) requests has taken numerous members of staff away from their core work for considerable periods of time and has caused a disproportionate and unjustified burden.
27. The Trust has observed that its FOI team was so engaged with completing, and supporting the completion of, these numerous (previous) requests that it has been distracted away from working on more proactive publication projects. It has given as an example 'Transparency' pages on its website, which the Trust says are additional pages on the website where routine information is published in relation to frequent regular requests. Finally, the Trust has said that it believes that the work required to complete the complainant's frequent requests is disproportionate to the legitimate aims of the FOIA.

The complainant's arguments

28. The complainant has provided the Commissioner with material that she considers is evidence that her requests have a purpose and value and, as such, cannot be categorised as vexatious.
29. First is a paper the Unison union appears to have been prepared for an SPF meeting on 7 February 2018. In this paper Unison says that it has been raising FOI requests monthly to try to gain access to the information it needs to monitor trends and evidence change for its members. The paper notes that in September 2017, the Trust applied section 14(1) to the two current requests.
30. The complainant has next referred the Commissioner to the Hansard record from an adjournment debate on 2 February 2018, raised by a local MP. The debate concerns the Trust specifically and discusses concerns about delays and patient harm, and the Trust not making information available (through its application of section 14(1) to the current, and later, requests).
31. The complainant has advised the Commissioner that the NHS England (NHSE) "risk summit", referred to in the Minister's response to the adjournment debate, was put in place as a result of the concerns over patient harm. The summit outlined that the Trust must increase its resources and specified an increase in UHP, which should be met each week. This further supports the complainant's view that the request for the disputed information is justified and proportionate and that the information should be provided openly.
32. The complainant has also told the Commissioner that there has been a lot of media interest in delays and other concerns about the Trust, with the media interest including reports of a senior whistle blower raising concerns about patient harm and patient deaths as a result of delays. She has provided the Commissioner with a link to the relevant article published in 'HSJ' on 19 January 2018 and says that similar reports were published in regional papers, regional television news and also featured on the BBC's 'One Show'.
33. The complainant says that the UHP data she has requested would show how many resources the Trust is allocating and the tail breaches information relates to delays. She says that this information has been requested as a proportionate means of determining the safety of the Trust's service. The complainant notes that this information used to be provided freely on a monthly basis. She considers that, due to escalating concerns over lack of resources over the winter, and delays that have occurred, it is very likely that the Trust has withheld this information potentially to hide a worsening of the situation.

The Commissioner's decision

34. The complainant submitted her requests in July 2017, with the Trust finally providing a response in September 2017. The Commissioner has noted that the evidence the complainant has submitted concerns events – debates and media interest – from the early part of 2018. Generally, when considering complaints, the Commissioner takes account of the situation as it was at the time of the request and disregards things that may have then happened some time after the request was submitted, and responded to.
35. On this occasion, the Commissioner is inclined to include the subsequent published and broadcast interest in the Trust in her deliberations. She considers that the concerns that finally gave rise to this interest would have arisen over a number of months and may well have been emerging around the time the complainant submitted her requests.
36. The Commissioner has noted that the Trust has released similar information to the complainant in response to previous requests and that, according to the complainant, this information used to be routinely released. The Trust has argued that it would be a burden to comply with the current requests. However, it has not gone into any detail to explain why this is the case ie what work is involved, and the Commissioner wonders if, having responded to similar requests previously, the Trust does not now have the processes already in place to enable it to comply with the current requests more efficiently. The Commissioner notes that the Trust has not suggested that complying with similar requests previously has exceeded the cost/time threshold under section 12(1) of the FOIA. Furthermore, that responding to a request is a burden does not make that request vexatious; for a request to be vexatious the burden must be disproportionate to the request's value.
37. In this case, the Commissioner tends to the view that the requests in this case *do* have a value. Concerns have been raised about the Trust's performance and the complainant has explained that the information she has requested – which concerns the allocation of resources and delays in responding to incidents for particular months – would help to identify any trends associated with the Trust's performance: its performance in these areas could be shown to be improving, staying the same or deteriorating. As such, and based on the information provided by the Trust, the Commissioner is not persuaded that the complainant is deliberately setting out to annoy and disrupt the Trust purely out of a personal grudge she has against its senior management.

38. The Commissioner does, however, note the very high volume of requests that the complainant has submitted to the Trust; on average seven per month from November 2015 to October 2017. It appears that the relationship between the Trust and other parties has broken down and, rightly or wrongly, the complainant considers she has no alternative other than to use the FOIA to access the information she seeks.
39. She notes that the Trust has created an area of its website where it states that it will pro-actively publish certain information, such as information associated with its partnership working (including with Unison) and letters to MPs, in the interests of being transparent. From the information published on this site, it appears that, towards the end of 2017, steps may have begun to be taken to improve the relationship in question; if so, the Commissioner hopes positive progress has been made in this regard.
40. The Commissioner recognises that complying with the number of FOI requests the complainant has submitted up to and including the current requests has added significantly to the workload of the relevant teams. However, she has taken account of all the circumstances of this case and is inclined to the view that the requests are not vexatious, on this occasion.
41. First, the complainant's motive. The Commissioner is not persuaded that the complainant's motive is to deliberately annoy the Trust. The Commissioner accepts that the complainant is motivated by concerns about the Trust's performance in certain areas, and possible risks to service users. In this case, the complainant has requested the same information for different months in order to identify any trends in the Trust's performance and to see whether the Trust is taking the steps the NHSE risks summit required. This information for earlier months has been released in response to previous requests.
42. Next, given the subsequent media and parliamentary interest in the Trust, involving possible harm to patients and patient deaths, the Commissioner considers that the requests have a serious purpose. Complying with the requests may well involve a lot of work for the Trust and its staff but the Commissioner considers that the requests have sufficient purpose and value such that any burden is not disproportionate.
43. The Upper Tribunal and Court of Appeal in the Dransfield case described the complainant's requests as representing a "*manifestly unjustified, inappropriate or improper use of a formal procedure*" and decided they were therefore vexatious. The Commissioner has not been persuaded in the current case that, at this point, the complainant's requests represent

the same manifestly unjustified, inappropriate or improper use of the provisions of the FOIA. She has therefore decided that the requests are not vexatious and that the Trust cannot apply section 14(1) to them.

44. As stated previously, the Commissioner notes the number of earlier requests the complainant has made to the Trust. Irrespective of the current decision, the Commissioner considers that the complainant may be approaching the line where further requests may become vexatious.
45. Finally, the Commissioner urges both parties to work to improve their relationship so that information can be exchanged without the need to resort to the FOIA. This would avoid or reduce complaints being submitted to the Commissioner, and the associated impact on all parties' resources.

Right of appeal

46. 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

47. 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.
48. 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

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