

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 October 2024

Public Authority: Newcastle upon Tyne Hospitals NHS Foundation Trust

Address: Freeman Hospital
Freeman Road
High Heaton
Newcastle upon Tyne
NE7 7DN

Decision (including any steps ordered)

1. The complainant has made a multi-part request concerning various elements of Newcastle upon Tyne Hospitals NHS Foundation Trust's operation, including information on waiting lists, budgets, and job descriptions. Newcastle upon Tyne Hospitals NHS Foundation Trust ('the Trust') provided responses for questions six to nine, but refused questions one to five under section 12 of FOIA (cost limit).
2. The Commissioner's decision is that the Trust was entitled to rely on section 12(1) of FOIA to refuse questions one to five of the request. However, he also finds that the Trust did not comply with its section 16 obligation to offer advice and assistance.
3. The Commissioner requires the Trust to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with appropriate advice and assistance to help them refine their request so that it falls within the appropriate limit.
4. The public authority must take these steps within 30 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 14 June 2024, the complainant wrote to the Trust and requested information in the following terms:

"I would appreciate your assistance in providing the following information:

1. ****Waiting list data****:

- A breakdown of the amount of patients currently on the waiting list, the totals on an active RTT Pathway and Non-RTT pathway including the reasons for the stopped pathways outlining the date of stoppage. Also the amount of patients exceeding a 52 week RTT status.

2. ****Budgets of Each Department****:

- The budget allocated to each department within your organization for the financial years 2019/2020, 2020/2021, 2021/2022, and 2022/2023, and the breakdown of where and when allocated funds were appropriated.

3. ****Job Descriptions****:

- Current job descriptions for all positions within your organization. - Job descriptions for all positions within your organization as they were prior to March 2020 (pre-COVID-19 pandemic).

4. ****Clinical Surge Overtime****:

- Details on the decision-making process behind clinical surge overtime.

- A breakdown of clinical surge overtime costs per month. - Reasons for including Band 8 employees in clinical surge overtime, especially when it is against NHS terms and conditions.

5. ****Staff Anxiety/Stress Illnesses****:

- The number of staff who went off work with anxiety or stress-related illnesses during the same period as the clinical surge overtime.

- For those staff members who went off sick, information on whether they sold annual leave that year and the number of hours sold. Please refer to each employee anonymously as Employee 1, Employee 2, etc.

6. ****Ethnicity Clauses in Jobs and Study Placements****:
 - The number of job positions and study placements that had ethnicity clauses over the past five years.
 - The rationale behind the decision to include ethnicity clauses for each of these positions or placements.
 7. ****Restructure Project****:
 - All information relating to the recent clinical boards restructure project, including the rationale behind the decisions made.
 - A list of job descriptions that were changed during the restructure and direct links to the replacement job descriptions, this needs to include payscales.
 8. ****Day Treatment Centre Project****:
 - All documentation relating to the recent day treatment centre project at the Freeman Hospital effective September 2022.
 - Information on whether the Trust Clinical Governance team rejected the initial proposal and if their guidance was not adhered to.
 9. ****HR Staff Engagement and Experience Team****:
 - All changes in budget, roles, and job descriptions of the HR Staff Engagement and Experience Team since 2019."
6. The Trust responded on 19 June 2024. It refused the request in full, relying on section 12 of FOIA.
 7. Following an internal review, the Trust wrote to the complainant on 20 June 2024. It maintained its position.

Scope of the case

8. The complainant contacted the Commissioner on 20 June 2024 to complain about the way their request for information had been handled.
9. When providing its submissions to the Commissioner, the Trust advised that the complainant had since submitted separate requests for questions six to nine, and the Trust had provided responses to these. It

stated that it was still relying on section 12 of FOIA to refuse questions one to five of the request.

10. The Commissioner considers that the scope of his investigation is to determine whether the Trust was entitled to rely on section 12 of FOIA to refuse the request.

Reasons for decision

Section 12 – cost of compliance

11. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the “appropriate limit” as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Fees Regulations”).
12. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 at £600 for central government, legislative bodies and the armed forces and at £450 for all other public authorities. The appropriate limit for the Trust is £450.
13. 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 for the Trust.
14. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
15. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v Information Commissioner & Medicines and Healthcare Products Regulatory Agency* EA/2007/0004, the Commissioner considers that any estimate must be “sensible, realistic and supported by cogent evidence”. The task for the

Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.

16. Section 12 is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement there's no requirement for the public authority to comply with the request.
17. Where a public authority claims that section 12 of FOIA is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit, in line with section 16 of FOIA.

Would the cost of compliance exceed the appropriate limit?

18. In its submission to the Commissioner, the Trust explained that, with the exception of question one, the requested information is not held centrally.
19. For question one, the Trust explained that the information concerning waiting list information wasn't held in the level of detail requested, by Referral to Treatment (RTT) pathway and non-RTT pathway. This means that individual records for patients on waiting lists would need to be manually checked to verify RTT or non-RTT pathways, and the dates and reasons for stopping the pathways recorded if applicable. The Trust estimated that there are around 100,000 patients on waiting lists and if five minutes were needed to review each record, it would take more than 8000 hours for question one alone.
20. For question two, the Trust estimated that it would take four hours per year specified in the request. Therefore, for the four years requested, the Trust estimated it would take 12 hours to provide the information for this question.
21. For question three, the Trust explained that there are currently 5856 positions within the Trust and 21,645 members of staff, in 69 service areas. The Trust stated that the requested job descriptions were not held centrally so it explained that a member of staff would be required to contact each service to provide each job description. Although not mentioned in the Trust's submission, the Commissioner notes that the question also specified job descriptions pre and post March 2020 which he imagines would require further checks. The Trust did not provide an estimate for this question.
22. For questions four and five, the Trust explained that the information is held within individual staff files and not recorded centrally. For question five, it explained that a member of staff would be required to access each employee's staff record to understand the reasons for sickness

absences, and for example, collate whether this coincided with clinical surge support shifts. The Trust did not provided an estimate for these questions.

23. The Trust did not provide the Commissioner with detailed submissions or time estimates for all parts of the request. The Trust stated that due to the type of information requested and the experience of its FOI Team, it could tell that request would exceed the cost limit. That may be the case, nevertheless the Commissioner is disappointed in the quality of the Trust's submission. He reminds the Trust that it should provide responses to his investigation questions in the required detail to enable him to make a decision. For submissions about section 12, public authorities are required to provide detailed estimates for each part of the request, and carry out a sampling exercise to demonstrate that the estimates are reasonable.
24. However, from the information that was provided to him, the Commissioner is satisfied that it would take the Trust more than the 18 hour limit to respond to the request. This is due to the wide scope of the request, covering a large range of operational information, and the fact that individual patient and staff records would need to be checked to identify and compile most of the information in the requested detail.
25. While the Commissioner finds the time estimate for question one to be overly generous, he notes that even if this was reduced to even one or two minutes per record, it would still require at least 1600 hours and still far exceed the time limit of 18 hours alone.
26. The Commissioner's decision is therefore that the Trust was correct to apply section 12(1) of FOIA to the request.

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

27. Section 16(1) of FOIA provides that a public authority should give advice and assistance to any person making an information request so far as it would be reasonable to expect the authority to do so. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 code of practice¹ in providing advice and assistance, it will have complied with section 16(1).

¹ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

28. The Commissioner notes that in, its initial response, the Trust advised that complainant that if they were to refine their request then the Trust would consider it again. The complainant then asked for time estimates for each question to enable them to refine their request. The Trust did not provide these, and instead repeated that it would take more than 18 hours.
29. The Commissioner finds that while the Trust did advise the complainant to refine their request, it did not offer any advice or assistance on how this could be done to try and bring the request within the cost limit.
30. The Commissioner therefore finds that the Trust did not comply with section 16 of FOIA when dealing with this request.
31. The Trust must now provide reasonable advice and assistance, to the complainant, to help them refine questions one to five of their request.

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.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.

Keeley Christine
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