

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 October 2024

Public Authority: NHS England
Address: Quarry House
Quarry Hill
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant has requested information from NHS England (NHSE) related to a protected disclosure that had been made in October 2020 by several members of staff at the Christie NHS Foundation Trust. NHSE refused to provide the requested information citing section 31(1)(g) – law enforcement, section 41(1) – information provided in confidence, and section 40(2) – personal information. NHSE later cited section 14(1) of FOIA.
2. The Commissioner's decision is that NHSE has correctly cited section 14(1). However, the Commissioner has found that NHSE failed to rely on section 14 within 20 working days, and therefore breached section 17(5) of FOIA.
3. The Commissioner does not require further steps.

Request and response

4. On 10 March 2022, the complainant wrote to NHSE and requested information in the following terms:

“The protected disclosure made in October 2020 highlighted

1. Concerning behaviours around the relationship between Trust parties and Roche.
2. The interactions of parties during contract negotiation and acceptance of travel and trips during this period.
3. Mis-use of charitable funding donation made by Boot Out Breast Cancer. NHSI/E has covered some elements of your findings in section 2.4.4 but not all.

Under the Freedom of Information Act, I formally request full disclosure of the investigation notes and findings conducted by NHSI/E related to these protected disclosure across; This includes;

1. Email conversations between you, parties of the investigation review team and Trust parties regarding this matter.
 2. MIAA report you have referenced in the NHSI/E report under section 2.4.4
 3. Any referrals to the NHS Fraud team or the independent expert advice sought in the investigation process of these allegations.”
5. NHSE responded on 8 April 2024 and refused to provide the requested information citing the following FOIA exemptions: section 31(1)(g) – law enforcement, section 41(1) – information provided in confidence, and section 40(2) – personal information.
 6. On 10 April 2024 the complainant made a review request. NHSE provided an internal review on 21 June 2024 in which it maintained its original position but acknowledged the significant lateness of the refusal notice.

Scope of the case

7. The complainant contacted the Commissioner on 5 June 2024 to complain about the way their request for information had been handled.
8. On 26 September 2024, after the Commissioner began his investigation, NHSE revised its position and cited section 14(1) – vexatious request “in addition or the alternative” to the previous exemptions. It provided detailed argument to the complainant which was also sent to the Commissioner. He did not seek any further submission.

9. The Commissioner considers that the scope of his investigation is to decide whether NHSE's citing of section 14(1) has been appropriately cited.

Reasons for decision

Section 14(1) of FOIA – vexatious request

10. The word “vexatious” is not defined in FOIA. However, as the Commissioner's guidance on section 14(1) states, section 14(1) is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress.
11. FOIA gives individuals a greater right of access to official information in order to make bodies more transparent and accountable. As such, it is an important constitutional right. Therefore, engaging section 14(1) is a high hurdle.
12. However, the Commissioner recognises that dealing with unreasonable requests can strain resources and get in the way of delivering mainstream services or answering legitimate requests. These requests can also damage the reputation of the legislation itself.
13. The emphasis on protecting public authorities' resources from unreasonable requests was acknowledged by the Upper Tribunal (UT) in the leading case on section 14(1), *Information Commissioner vs Devon County Council & Dransfield* [2012] UKUT 440 (AAC), (28 January 2013) (“Dransfield”). Although the case was subsequently appealed to the Court of Appeal, the UT's general guidance was supported, and established the Commissioner's approach.
14. Dransfield established that the key question for a public authority to ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
15. The four broad themes considered by the Upper Tribunal in Dransfield were:
 - the burden (on the public authority and its staff);
 - the motive (of the requester);
 - the value or serious purpose (of the request); and
 - any harassment or distress (of and to staff).

16. However, the UT emphasised that these four broad themes are not a checklist, and are not exhaustive. They stated:

“all the circumstances need to be considered in reaching what is ultimately a value judgement as to whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA” (paragraph 82).

NHSE's view

17. NHSE explained to the complainant that it had -

“taken particular account of the circumstances at the time of your request (including that the Christie Rapid Review report was published on its website, and the terms of reference make reference to the confidential circumstances in which the investigation was being conducted)”.

18. It argued that it had also taken account “of the circumstances that we have become aware of subsequently, insofar as they are relevant to determining the ‘true circumstances surrounding the request at the time it was made’”.
19. NHSE had not completed a detailed review of all the information it had located so far and that other exemptions might apply than it had already determined. It stated that legally privileged information (section 42) was “scattered throughout the information requested”. To undertake a comprehensive review would be “likely to pose a disproportionate burden” on NHSE. In doing so it had viewed the ICO’s guidance on section 14 and the Dransfield decision. NHSE had “real concerns about potentially exempt information” due to it being dispersed throughout the requested information.
20. NHSE then turned its attention to what it describes as the October 2020 Concerns and the “chronological events relating to those concerns and matters which the NHSE contends “are indicative of the purpose and true intention” behind the request.
21. The Commissioner is unable to provide this chronological summary of events for personal data considerations except in the most general terms. Concerns were raised in 2020 by a number of staff members of the Christie NHS Foundation Trust, following completion of an internal review process about which they had been “dissatisfied”. Concerns continued to be raised with various individuals. An external party contacted the Regional Director of NHS England for the North West Region who “decided that an independent rapid review of the issues raised should be undertaken”. This independent review was

commissioned by NHS Improvement (now part of NHSE) to consider the 2020 concerns that had been raised. This was known as the Christie Rapid Review which NHSE states "...specifically incorporated independent expert audit and investigation of the economic crime aspects of the October 2020 Concerns, the Terms of Reference of which were published at the outset." These findings¹ were published on 15 November 2021 and "did not make any findings of criminality on the part of NHS staff".

22. NHSE provided a series of events as supporting information to underpin its citing of section 14(1). This information cannot all be detailed here (again for personal data reasons) and occurred after the request had been made but before NHSE's response had been provided. NHSE explained that it was the "complex and charged history" that led it to characterise the request as "a continuation of a wider dispute through the lens of the FOI Act, and that the provision of any information under the FOI Act is unlikely to resolve matters that were part of a wider dispute".
23. NHSE then moved on to the individual factors it had considered in line with the Dransfield judgment and the Commissioner's guidance.

24. **The Burden:**

The key members of staff within NHSE that dealt with the concerns about the Christie are no longer employees. Members of existing staff who had knowledge of the Christie Rapid Review have searched and identified approximately 66 emails, amounting to 1,612 pages of information falling within scope of the request. This information involves a number of stakeholders and because it asked for all correspondence held it is likely that there is information that may be held by members of staff that have left NHSE. Therefore NHSE would be required to -

- Identify the staff that have left, obtain access to their accounts and undertake a reasonable and proportionate search.
 - Review and identify potential exemptions and separate them from information that might be suitable to disclose.
25. NHSE explained to the complainant that reviewing the information in order to apply exemptions "will be technically demanding" as exempt information is likely to be scattered throughout. Before doing so, this would necessitate packaging the files by downloading them onto a local

¹ [Christie-Rapid-Review-FINAL.pdf \(england.nhs.uk\)](#)

server, converting them to a machine readable format such as PDF, including all attachments and utilising specialist software to mark out redactions line by line. Regarding the 66 emails it had found, NHSE stated that it had spent approximately 15 hours saving (separately saving attachments), converting, using Adobe Acrobat Pro for redaction purposes "to merge the original email file with the separately saved attachment/s".

26. After this, NHSE would need to consult with the North West regional team to discuss any identified harms where information would require redaction and what exemptions were engaged. In order to do so an index was required to "reconstruct the events and timeline" as the "basis for identifying the initial scope of potential exemptions for consideration". This had taken 12 hours.
27. NHSE stated that it had already taken 27 hours for review and redaction. However, it would need to take further steps. The national team are not "factual experts". Therefore "there would need to be extensive discussions between the team that understands the subject matter and the FOI specialists before applying exemptions. It then listed the exemptions it would need to consider: sections 21, 31, 36, 40, 41, and 42 of FOIA. NHSE would need to consult with the Christie, use redaction software line by line, and it stressed its "real concerns about potentially exempt information within the information located so far". The information identified so far was considerable and sensitive and would need to be reviewed more than once. Even deleting the more "obvious" personal data would take a significant time. The NHSE explained that it could not carry out a sampling exercise to determine how long it would take to review and apply redactions as the volume and nature of each one and the length of time taken to identify, review consult on and redact would be unlikely to be accurate.
28. Nevertheless, the NHSE picked 10 emails (37 pages) and considered the application of sections 31, 36, 41 and 42. These would require input from the FOI Team and the North-West regional team. This sample took approximately two minutes per page which equated to over 53 hours for the emails it had identified so far. Although NHSE would still make the final decision, it would need to consult with the Christie in line with the FOI Code of Practice² (pursuant to section 45(2)(c) of FOIA), most likely with senior members. In all, a "significant burden" though hard to quantify.

² [CoP FOI Code of Practice - Minor Amendments 20180926 .pdf](#)

29. Although NHSE recognises the complainant's "strength of feeling" it has set against this and the general public interest, the burden, the passage of time, the litigation history, the "significant information" already published and the input that would be necessary from "the only member of staff who has significant knowledge of the underlying factual issues" who now has another role that they are focused on. Similarly, processing the information would mean an impact on the work of the regional team and the support they are able to give to healthcare commissioning and delivery.
30. NHSE argues that the Commissioner's guidance and caselaw state that requests can be refused on burden alone in circumstances where -
- the requester has asked for a substantial volume of information; and
 - the public authority has real concerns about potentially exempt information; and
 - the public authority cannot easily isolate any potentially exempt information because it is scattered throughout the requested material."

NHSE contends that it has "adequately demonstrated how all of the above points are applicable" to this request.

31. **Motive and value or serious purpose:**

NHSE states that the complainant has made "allegations" in their correspondence that have not been substantiated:

"The information sought under the FOI was created as a result of a Protected Disclosure made in the interest of the public after complaints of bribery, fraud and collusion in the NHS by very senior parties and the very people investigating the matter." And

"There is a very strong evidence to suggest members of NHS England and its subsidiaries are actively harbouring criminals who have been involved in acts of bribery under the Bribery Act. This includes members of the investigation panel and the Trust in question. Preventing the disclosure of the information sought, is actively covering up and preventing criminal charges being brought against those found guilty of charges and/or perverting the course of justice."

32. NHSE's view is that an independent review was commissioned and the findings of the review published on its website. The review made

recommendations and the Christie has been "required to take forward all recommendations within the Christie Rapid Review Report". After consideration, NHSE concluded that there was "only very limited additional value to complying with the request" where the context of the information is in the public domain, where matters have been addressed "within the NHS" amongst other considerations that cannot all be outlined here, however, "in relation to the allegations of financial irregularities, the published report clearly sets out that this matter was referred to MIAA Counter Fraud". The report concluded that there was "no evidence to investigate these allegations".

33. It referred the complainant to the Commissioner's guidance:

"If the request does have a value or serious purpose, there may be factors that reduce that value. For example, a request may seek greater transparency over the possible failings of a public authority, or a particularly controversial decision. However, if those matters have already been comprehensively investigated and reports of those investigations are in the public domain, the value in disclosing the requested information is diminished. The value may be decreased further if the matter has been the subject of some form of independent scrutiny. In such cases the requester may be demonstrating unreasonable persistence by seeking to re-open the matter, or their request may have become futile in light of the matter having already been conclusively resolved."

34. NHSE recognised that this was the first FOI request the complainant had made. However, it had considered the context that surrounded the wider request and "wider claims and challenges" the complainant had made. It referred again to the principles in the Commissioner's guidance it had set out earlier. NHSE took into account the ongoing correspondence it had received over issues it believed "have already been well rehearsed and dealt with" and that "merely repeat what has previously been properly considered and opined on through independent review and judicial consideration". NHSE considers that these aspects are so inextricably linked and therefore appropriately form part of its consideration of whether section 14 applied to the request.

35. It had formed the view that providing this information "is extremely unlikely to resolve anything" to the complainant's satisfaction. It contended that disclosure would "only serve to generate further correspondence on matters that have already been through the scrutiny of an independent review and judicial consideration. The Commissioner notes the further information supporting this view that cannot be included in this decision. NHSE accepts that the complainant has a serious purpose but that "the underlying issues behind" the request "have already been investigated comprehensively" and that it was likely

that the complainant "would have been reasonably aware" that the information could not be disclosed "because of the circumstances in which the Review took place". The request, NHSE argued, "forms part of a persistent attempt to continue or reopen the principle matter via different avenues". It has concerns in asking for information where there were "clear expectations of confidentiality that were generated around the Rapid Review process" and represents "an abuse of the review process".

36. Any harassment or distress (of and to staff):

NHSE again acknowledged that the complainant had not submitted multiple FOI requests or that the "request is intending to cause offence". Nonetheless NHSE considered that the "sustained and continuing unsubstantiated allegations of criminal behaviour and wrongdoing that continue to be directed towards NHS colleagues demonstrate the criteria described in the ICO's guidance".

37. NHSE considered whether it could offer advice and assistance to "refine or reframe" the request "to reduce the disproportionate burden" it had detailed. However, it concluded that -

"doing so would be unlikely to change the substantive position. This is because of the context, in which all of the information requested relates to issues that have already been considered by independent review..."

The complainant's view

38. Obsessive or manifestly unreasonable

Firstly, the complainant refutes NHSE's view that the request is obsessive or manifestly unreasonable. They point out that, "The request seeks information related to alleged misconduct involving public bodies and public funds, specifically surrounding a protected disclosure made in October 2020. This suggests a focused concern on a specific and potentially serious issue within a public institution."

39. Burden

The complainant sets out one of the Dransfield criterion against NHSE's reason for not providing the requested information due to the significant burden it represented:

"The request must not only be burdensome but must lack sufficient justification. Given the public interest in transparency around

potential governance failures and misuse of funds, the justification for enduring this burden is strong.”

40. **Motive**

The complainant argues that their motive for making the request -

“originates from concerns about alleged improprieties and misconduct within a public institution. This suggests a motive aligned with the FOI Act's goal of promoting transparency and accountability in public services”.

They contend that there is a “strong public interest and serious purpose behind the request” as it “relates to the investigation of potentially serious malpractices within the NHS”.

41. **Harassment**

The complainant’s motive is not to harass but to “promote accountability and transparency” and is “grounded in uncovering details about alleged improprieties within the NHS”. Under the Dransfield criteria, a lack of reasonable grounds was a sign of vexatiousness. The complainant has reasonable grounds – “ensuring accountability regarding serious allegations”.

42. **Causing Distress**

The complainant emphasises that the request is not intended “to cause distress or upset to individuals; instead, it is targeted at obtaining documentation regarding the handling of a serious disclosure”. This fails the Dransfield criterion that “a request might be deemed vexatious if its primary purpose is to distress staff”.

43. The complainant cites *University of Newcastle upon Tyne v Information Commissioner* (EA/2007/0063) in support of their view where:

“The Tribunal decided that the disclosure of information relating to animal research, although controversial, was in the public interest, reducing the weight of the university's concerns about potential harassment and security risks.”

44. They then moved on to contest NHSE’s view that it needed to seek third party approval to disclose information requested under the FOIA:
“The information sought from NHS England was used in their conclusion

outlined in the Schofield^[3] Report, published January 2022". Referring again to EA/2007/0063 the complainant asserts that it -

"supports the argument that once a topic is subject to public scrutiny, additional disclosures related to that topic may have a reduced potential for harm compared to the benefits of increased public understanding".

45. The complainant argues that once information is in the public domain no permission is needed and protection has been waived. In other words, it can no longer be considered confidential. Additionally, they contend that "when the information pertains to public spending or public safety" the public interest "can outweigh" the exemption used and they quote *British Broadcasting Corporation v Information Commissioner (EA/2007/0078)*, in this case it was commercial interests.

46. The complainant's view is that -

"the request has a clear, serious purpose"; it is not primarily obsessive or harassing; nor does it seem intended to cause distress. Instead, it aims to contribute to public understanding and oversight of potentially significant issues within a public body. The burden of processing the request, while non-trivial, is justified by the potential public interest in the information sought".

47. Their view is that it was not appropriate to classify the FOI request as vexatious and that it is in the public interest as it concerns the "potential misconduct" of "public bodies and funds". The complainant suggests that there could have been negotiation to "manage the burden" and that they were open to exploring this, for example by outlining the priority areas and allowing NHSE "to comply in smaller proportionate responses over an extended period" and that it shouldn't have been refused outright on vexatious grounds.

48. The complainant also makes several points concerning the Post Office Horizon scandal which "shares the theme of confronting institutional opacity and seeking rectification for alleged wrongs" and underlined the "legal mechanisms (like FOI requests and lawsuits) in promoting accountability and transparency, especially when public entities may prefer to maintain secrecy". The Commissioner cannot include all the points raised here for personal data reasons but they reflect and reiterate points already made above.

³ Angela Schofield, Lead Investigator for the Christie Rapid Review report.

The Commissioner's decision

49. Although NHSE has provided argument under the broad criteria that emerged from the Dransfield judgment, the focus of NHSE's argument rests on the burden of the request with points from the other criteria used as supporting evidence. The main criterion that the Commissioner has focused on in his decision is the burden, as that existed at the time the request was made. Some of the points that refer to what occurred post-request are not relevant.

50. Firstly, the Commissioner has referred to his guidance which states:

"A single request taken in isolation, for example the first and only request received from an individual, may be vexatious solely on the grounds of burden. That is, where complying with the request would place a grossly oppressive burden"

on a public authority's "resources which outweighs any value or serious purpose the request may have".

51. The guidance makes it clear that a public authority should always consider section 12 (whether the request exceeds the appropriate cost limit) "if the burden imposed by a voluminous request was the public authority's primary concern". In [Independent Police Complaints Commissioner vs The Information Commissioner \(EA/2011/0222, 29 March 2012\)](#) the Tribunal found that:

"A request may be so grossly oppressive in terms of the resources and time demanded by compliance as to be vexatious, regardless of the intentions or bona fides of the requester. If so, it is not prevented from being vexatious just because the authority could have relied instead on s.12 [section 12 of the FOIA]." (paragraph 15).

52. The Upper Tribunal in [Cabinet Office vs Information Commissioner and Ashton \[2018\]](#) UKUT 208 (AAC) Upper Tribunal stated the following:

"In some cases, the burden of complying with the request will be sufficient, in itself, to justify characterising that request as vexatious, and such a conclusion is not precluded if there is a clear public interest in the information requested. Rather, the public interest in the subject matter of a request is a consideration that itself needs to be balanced against the resource implications of the request, and any other relevant factors, in a holistic determination of whether a request is vexatious." (paragraph 27)

53. Unlike section 12 there is no predetermined level of cost above which a public authority does not need to go when considering section 14(1) in

terms of the burden it represents. In reaching a view, the Commissioner has balanced the public interest against the burden NHSE has outlined. As a large part of that burden is the sheer effort and length of time it would take to apply exemptions, this is not one of the activities that can be factored into any section 12 consideration.

54. The Commissioner accepts the complainant's strong belief that it is in the public interest to obtain this information which is underpinned by supporting argument from both the complainant and NHSE that cannot be included here. However, it is clear that this matter has had an independent review that has been published and is an attempt to resurrect matters that have been examined via FOIA. For these reasons, the burden to NHSE that the request represents is not justified by any wider benefit to the public.
55. As the Commissioner has decided that section 14(1) has been cited appropriately, he has not gone on to consider any other exemptions that NHSE cited in the alternative, nor could he do so as the entirety of the information has not yet been located.

Procedural matters

56. NHSE took so long to provide its refusal notice that it was completely unacceptable, over a year after the request had been made. Even then, it did not cite section 14(1) until the Commissioner began his investigation.
57. NHSE failed to rely on section 14 within 20 working days, and therefore breached section 17(5) of FOIA.

Other matters

58. The section 45 code of practice recommends that public authorities complete the internal review process and notify the complainant of its findings within 20 working days, and certainly no later than 40 working days from the receipt.
59. In this case NHSE provided an internal review beyond the maximum recommended timeframe.

Right of appeal

60. 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

61. 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.
62. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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