

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 March 2019

Public Authority: Chelsea & Westminster Hospitals NHS Foundation Trust

Address: Unit 111, Harbour Yard
London
SW10 0XD

Decision (including any steps ordered)

1. The complainant has requested information relating to "Did Not Attends" ("DNAs").
2. The Commissioner's decision is that Chelsea & Westminster Hospitals NHS Foundation Trust ("the Trust") has provided all the information which it holds in respect of elements [1] and [3] of the request. In respect of element [2] it is entitled to rely on Section 12 of the FOIA to refuse to comply with this part of the request. However, the Commissioner also finds that the Trust failed to communicate information which it held and failed to issue an adequate refusal notice within 20 working days. The Trust therefore breached Sections 10 and 17 of the FOIA respectively.
3. The Commissioner does not require any further steps to be taken.

Definitions

4. Did Not Attends ("DNAs") in this context is the term used by the NHS to describe the situation when a patient fails (for whatever reason) to turn up for an appointment.

Request and response

5. On 4 December 2017, the complainant wrote to the Trust and requested information in the following terms:

"[1] Please provide the percentage of all DNAs for the past five years claimed by your employer(s).

[2] Please provide the percentage of the said DNAs referred back to your employer(s) by the GPs; requesting further appointments.

[3] Please provide the total costs billed to the relevant GPs, directly or indirectly, not forgetting evidence in support."

6. On 20 December 2017, the Trust responded and provided information in respect of element [1]. It stated that it "could not reliably provide" information in respect of element [2]. No information was provided in respect of element [3].
7. Following an internal review, the Trust responded again on 12 June 2018. It stated that it did not hold information within the scope of elements [2] and [3] of the request.

Scope of the case

8. The complainant first contacted the Commissioner on 23 April 2018 to complain about the way his request for information had been handled. At this point, the Trust had yet to complete its internal review and the Commissioner's intervention was necessary to elicit a further response.
9. The complainant contacted the Commissioner again on 1 August 2018 to ask the Commissioner to investigate his complaint further as he believed that the Trust held additional information. He was also unhappy at the delays in handling his request.
10. During the course of the Commissioner's investigation, the Trust accepted that it did hold some information within the scope of element [2] but that the information could not be retrieved within the cost limit. It therefore decided to rely on Section 12 to refuse this element of the request.
11. The complainant put forward a number of arguments as to the public interest in the requested information being made available. Whilst the Commissioner accepts the importance of debate around this policy issue, Section 12 does not allow for consideration of the balance of public interest.
12. The scope of the Commissioner's investigation is therefore to:

- a) Determine whether the Trust is entitled to rely on Section 12 of the FOIA to refuse element [2] of the request.
- b) Determine whether the Trust holds further information within the scope of element [3] of the request.
- c) Assess the procedural elements of the way that the request was handled

Reasons for decision

Section 12 – Cost of Compliance Exceeds Appropriate Limit

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

Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*

14. Section 12 of the FOIA states that:

- (1) 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.*
- (2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.*

15. The “Appropriate Limit” is defined in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Regulations”) and is set at £450 for a public authority such as the Trust. The Regulations also state that staff time should be notionally charged at a flat rate of £25 per hour, giving an effective time limit of 18 hours.

16. When estimating the cost of complying with a request, a public authority is entitled to account of time or cost spent in:

- (a) determining whether it holds the information,

- (b) locating the information, or a document which may contain the information,
 - (c) retrieving the information, or a document which may contain the information, and
 - (d) extracting the information from a document containing it.
17. 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 IC & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be 'sensible, realistic and supported by cogent evidence'.¹
18. In respect of element [2], the Trust explained that it did not hold any central records of re-referred DNAs as there was no business purpose to do so. It went on to say that the only way the information could be produced would be to ask each of its specialist areas to check back through all its DNA records and compare them to its other appointment records to determine whether a particular patient was or was not referred back for a further appointment. It noted that the fact that a patient with a DNA had a further appointment would not necessarily mean that the patient had been referred back as the later appointment might have been for a different reason – making such an assessment could only be done manually.
19. The Trust stated that locating and reviewing each letter would take between 10-15 minutes per letter. It stated to the Commissioner that it would therefore take 250 hours of work for every 1000 letters it needed to review. It came up with a figure of £2275 for the cost of examining 1000 letters.
20. The Commissioner notes that the Trust calculated its figure based on a "London-weighted, Band 4 staff member." The Trust should have used the flat fee of £25 per hour specified in the Regulations but the Commissioner notes that this would mean that the Trust had *understated* the cost of compliance.

¹ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf>

21. The Commissioner notes that the complainant's request contained no time parameters. Whilst the Trust has been unclear about the number of such letters, it stated that there could be "hundreds of thousands."
22. The Commissioner considers that, even if the time spent reviewing each letter could be cut to just five minutes, it would still exceed the cost limit if more than 216 such letters needed reviewing. The Commissioner considers that the size of the Trust and the wide parameters of the request are such that the Trust estimated reasonably that the amount of time required to comply with the request would exceed the appropriate limit. She therefore finds that Section 12 is engaged and the Trust is not obliged to comply with the request.

Section 1 – Further information held

23. The complainant did not put forward any rationale as to why he believed further information would be held in relation to element [3], but his grounds of complaint made clear that he was dissatisfied with the response he received and the Commissioner has therefore given the matter further consideration.
24. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, she will consider any reason why it is inherently likely or unlikely that the requested information is not held.
25. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
26. In relation to element [3], the Trust noted the following:

"The answer that we should have provided is that the Trust does not charge GPs for DNAs and so the answer is nil. To expand on this, the Trust invoices the various Clinical Commissioning Groups (CCGs) for the activity the Trust undertakes on their behalf. Each GP will belong to one CCG so when a patient is treated at the Trust then the CCG the patient's GP belongs to is billed for that activity on a monthly basis. As stated previously the cost of DNAs is carried by the Trust, we do not bill the CCGs for DNAs."
27. The Commissioner considers that the Trust's explanation adequately explains why it should not be expected to hold information beyond that

which it has disclosed. She therefore concludes that, on the balance of probabilities, the Trust does not hold any further information within the scope of element [3].

Procedural Matters

28. Section 10 of the FOIA states that a public authority must comply with its duties under Section 1(1) "*promptly and in any event not later than the twentieth working day following the date of receipt.*"
29. The Trust did not inform the complainant that it did in fact hold information within the scope of element [2] of his request until more than a year after the request was first made. It therefore breached Section 10 of the FOIA.
30. Section 17(5) of the FOIA states that:

"A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact."

31. The Trust did not begin relying on Section 12 until more than a year after its initial response. It therefore breached Section 17 of the FOIA.

Other matters

32. There is no statutory time limit for providing internal reviews, however the FOI Code of Practice states that an internal review should normally be completed within 20 working days.² The complainant in this case requested an internal review on 8 January 2018, but did not receive the outcome of that review until 12 June 2018. Whilst this does not amount to statutory breach of the FOIA, the Commissioner considers such a delay to be poor practice on behalf of the Trust.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Right of appeal

33. 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

34. 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.
35. 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

Ben Tomes
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