

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 23 October 2019

**Public Authority:** NHS Bromley Clinical Commissioning Group  
**Address:** Bassetts House  
Broadwater Gardens  
Orpington  
Kent  
BR6 7UA

### **Decision (including any steps ordered)**

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1. The complainant has requested information about adherence to various NHS Codes of Conduct. NHS Bromley Clinical Commissioning Group ("the CCG") refused the request as vexatious.
2. The Commissioner's decision is that the request was vexatious and therefore the CCG was entitled to rely on section 14(1) of the FOIA to refuse it. However, she also finds that the CCG failed to issue a refusal notice citing section 14(1) within 20 working days and thus breached section 17(5) of the FOIA.
3. The Commissioner does not require any further steps to be taken.

### **Request and response**

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4. On 13 November 2018, referring to three NHS Codes of Conduct, the complainant requested information of the following description:
  - [a] "I request the names and titles of those members of Bromley CCG who have signed up to these Codes with the name of which of the three Codes the signed up to.*
  - [b] I request the name of the FOIA officer who is responsible for the FOIA at Bromley CCG.*
  - [c] I request to understand if all those members of Bromley CCG who have been issued with copies of the Code/Codes indicated that they have read the provisions of the Code/Codes and fully*

*understand it constituted part of their Terms and Conditions of employment.” [sic]*

5. On 11 December 2018, the CCG responded. In relations to elements [a] and [b], it provided some information but withheld the remainder. The CCG relied on Section 40(2) of the FOIA (Personal Data) to do so. In relation to element [c], the CCG stated that it did not hold information within the scope of the request.
6. The complainant requested an internal review on 1 January 2019. The CCG sent the outcome of its internal review on 12 April 2019. The CCG revised its position and now refused the request as vexatious (Section 14(1) of the FOIA).

## Scope of the case

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7. The complainant contacted the Commissioner on 10 June 2019 to complain about the decision to cite section 14(1) of the FOIA and the failure of the CCG to provide him with the requested information.
8. The Commissioner considers that the scope of her investigation is to determine whether the request was vexatious.

## Reasons for decision

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### Section 14 - Vexatious

9. 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.*

10. Section 14 of the FOIA states that:

*Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.*

11. The term “vexatious” is not defined within the FOIA. The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It

commented that “vexatious” could be defined as the “manifestly unjustified, inappropriate or improper use of a formal procedure”. The Upper Tribunal’s approach in this case was subsequently upheld in the Court of Appeal.

12. The *Dransfield* definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
13. *Dransfield* also considered four broad issues: (1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the requester, (3) the value or serious purpose of the request and (4) harassment or distress of and to staff. It explained that these considerations were not meant to be exhaustive and also explained the importance of: “...adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests.” (paragraph 45).
14. The Commissioner has published guidance on dealing with vexatious requests<sup>1</sup>, which includes a number of indicators that may apply in the case of a vexatious request. However, even if a request contains one or more of these indicators it will not necessarily mean that it must be vexatious.
15. When considering the application of section 14(1), a public authority can consider the context of the request and the history of its relationship with the requester, as the guidance explains: “*The context and history in which a request is made will often be a major factor in determining whether the request is vexatious, and the public authority will need to consider the wider circumstances surrounding the request before making a decision as to whether section 14(1) applies*”.
16. However, the Commissioner is also keen to stress that in every case, it is the request itself that is vexatious and not the person making it.
17. In some cases it will be obvious when a request is vexatious but in others it may not. The Commissioner’s guidance states: “In cases where the issue is not clear-cut, the key question to ask is whether

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.”

*The complainant's view*

18. The complainant explained to the Commissioner that he believed that the CCG had victimised him because of his past actions. Actions which, he claimed, had been undertaken in the public interest.
19. In 2013, the complainant had attended a public meeting of the CCG board, at which he'd raised a question about the then-Chief Officer Dr Angela Bahn's second job at another organisation. Dr Bahn subsequently decided to give up her secondary role.
20. The complainant argued that he had raised an issue of substantial public interest, but one which had caused a considerable financial loss to Dr Bahn. He considered that his scrutiny had caused Dr Bahn to forego a lucrative second salary and that she therefore had a "personal grudge" against him. The complainant considered that he had "been punished ever since."
21. The complainant had filed a complaint against the CCG in general and Dr Bahn in particular which had not been upheld.
22. In a letter to the CCG of 12 May 2019, the complainant went on to dispute the CCG's use of section 14(1), to challenge the CCG's assertion that he had been unreasonably persistent in pursuing matters and to explain why he wanted to receive the particular information he had sought via this request:

*"I consider these [previous complaints] to have been wrongly addressed by the BCCG....what I seek is an apology for the lies written about me in letters signed by Dr Angela Bahn and this has never been addressed. I do not intend to make any new complaints; I intend to report those who breach the Code of Conduct for NHS Managers to an authority who should investigate the issue properly as the Code states. If I don't know who is actually signed up to the Code then I can't report the issue to the proper authority."*

23. The complainant was also keen to draw the Commissioner's attention to a number of emails he had received in response to a Subject Access Request (SAR). The emails the complainant supplied showed senior staff at the CCG discussing drafting changes to letters sent to him, to remove a sentence thanking him for a piece of correspondence. There was also an exchange between Dr Bahn and the Chair of the CCG which discussed how to handle a question which the complainant was intending to pose at the next Board meeting. The

complainant argued that these emails demonstrated the CCG's attitude towards him and a determination to avoid scrutiny.

*The CCG's view*

24. The CCG argued that the complainant's request, when placed in context, was vexatious. It cited five factors which, when taken together would indicate that the request might be vexatious: personal grudges; unreasonable persistence; unfounded accusations; intransigence and a scattergun approach to requests.
25. The CCG noted that the complainant had submitted 70 pieces of correspondence between February 2013 and May 2014 which related to either its governing body or its complaints procedure and which it deemed relevant to the current request. It stated that it had received 150 emails on other topics from the complainant over a similar period. Some of these emails were requests for recorded information, some were more general enquiries and others were statements.
26. In 2015, the CCG applied its policy for dealing with unreasonable or vexatious complainants. It stated that it would no longer deal with complaints or correspondence, which the complainant attempted to submit, which could be linked back to the original complaint. It felt that it had made reasonable attempts to resolve the dispute and that, as these had been unsuccessful, it saw no point in continuing to devote resources to responding. The complainant complained to the Parliamentary and Health Services Ombudsman who did not uphold the complaint.
27. In addition, the CCG noted the complainant's references to an intent to submit further complaints. It considered that this was a continuation of the complainant's underlying grievance with the CCG and therefore answering the request would only prolong the correspondence.
28. Finally, the CCG noted that, prior to carrying out its internal review, it had sought clarification, from the complainant as to what his definition of a "manager" was, so that it could ensure that it had provided him with the correct information. The complainant responded to say:

*"I am not going to provide you with my definition as it may differ from yours."*

The CCG argued that this approach showed that the complainant was trying to "catch out" the CCG and to "fish" for information in the hope of finding something that was useful – rather than having a clear idea of what he was seeking.

*The Commissioner's view*

29. The Commissioner's view is that the request, when seen against the backdrop of the complainant's broader interaction with the CCG, was vexatious.
30. The Commissioner is conscious that the evidence provided by the CCG related to a period of time some four and a half years prior to the current request. As the CCG has not provided any evidence to suggest that the same volume of correspondence persisted at the time of the request, the Commissioner cannot consider the volume of requests to have been burdensome.
31. Nevertheless, the wording of the complainant's correspondence with both the CCG and the Commissioner demonstrate clearly that this latest request is a continuation of an underlying grievance between the CCG and the complainant.
32. It is evident that the underlying issues have not been resolved to the complainant's satisfaction. Given that the PHSO was unwilling to uphold the complainant's complaint, it is equally evident to the Commissioner that the complainant is not going to be able to resolve matters in a manner he will find satisfactory and that therefore responding to this request will not bring matters to a conclusion.
33. The Commissioner accepts that, certainly at the outset, the complainant had raised issues of genuine public concern – namely the thorny issue of remuneration for senior managers within the public sector. It is evident, from the correspondence disclosed in response to his SAR, that the complainant was raising questions which the CCG found awkward to answer. The Commissioner does not consider that a request becomes vexatious purely because it raises questions that a public authority would prefer not to answer and she considers that there was, initially at least, a value in the complainant's queries on the matter.
34. Nevertheless, that was some five years before the request in question and the Commissioner is required to consider afresh whether there is still value in continuing to respond to the complainant's requests.
35. Having reviewed the correspondence, the Commissioner takes the view that, whatever public interest there might have been at the outset has been overtaken by the unreasonable persistence and intransigence which the complainant has displayed in pursuing the matter. Complaints are now being made about complaints, requests about requests and the correspondence has now drifted into vexatiousness.

36. In particular, the Commissioner notes the unwillingness of the complainant to clarify his request when asked to do so by the CCG. Whilst the Commissioner notes that this should have been done before the CCG issued its initial response, she still considers that it was a reasonable approach to take. The complainant's refusal to provide clarification gives the impression to the Commissioner that he was in fact trying to fish for information or "catch out" the CCG rather than having a clear idea of what information he was seeking.
37. The Commissioner's role in such matters is not to pass judgement on whether the CCG handled the complainant's original grievance correctly. Her role is to judge whether answering the request would be likely to move matters towards some form of resolution. In this case, as the complainant himself has stated, providing the information would only lead to a further round of complaints and more correspondence for the CCG to deal with.
38. The Commissioner considers that the present request is little more than an attempt, by the complainant, to re-open and re-litigate matters which have already been addressed. This is an inappropriate use of the FOIA procedure.
39. The Commissioner is therefore satisfied that the request was vexatious and thus the CCG was entitled to rely on section 14(1) of the FOIA to refuse it.

#### Refusal Notice

40. 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."*
41. The CCG did not cite section 14 of the FOIA until 12 April 2019, when it had completed its internal review. This is significantly beyond 20 working days from the day it received the request. The CCG therefore breached section 17(5) of the FOIA in responding to the request.

## **Other matters**

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42. Whilst there is no statutory time limit, within the FOIA, for carrying out an internal review, the Commissioner considers that internal reviews should normally take no longer than 20 working days and never longer than 40 working days.
43. In this particular case, the CCG took three months to complete its internal review. The Commissioner considers such a delay to be poor practice.



## Right of appeal

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44. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

45. 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.
46. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**