

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 November 2019

Public Authority: NHS England
Address: 4N22
Quarry House
Quarry Hill
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant requested information regarding procedures for conducting investigations. NHSE England ("NHSE") refused to comply with the request, citing section 14(1), as it considered the request to be vexatious.
2. The Commissioner's decision is that NHSE was correct to apply section 14(1) to the request.
3. The Commissioner does not require NHSE to take any further action.

Background

4. The complainant believes she was subjected to an inappropriate examination and drug mis-administration in 2013.
5. She raised a complaint to the General Medical Council ("GMC") and NHSE about the two alleged events. The GMC investigated the complaint about the suggested inappropriate examination at the same time as, and in conjunction with NHSE. Both bodies decided to take no further action.
6. NHSE found that it was unable to take any action regarding the alleged inappropriate examination. In regards to the alleged drug mis-administration, NHSE uncovered evidence that did not support the complainant's version of events, so did not uphold her complaint. By June 2016 the investigation by NHSE was complete.

7. The complainant explained her motivation for requesting the information was to determine whether NHSE followed procedure when investigating her complaint.

Request and response

8. On 18 February 2019, the complainant wrote to the public authority and requested information in the following terms:

"1. What is the correct procedure for a NHS local investigation into a doctor?

2. What records of NHS local investigations into a doctor must be kept (interviews, statements phone calls etc)?

3 What is the length of time that records of a NHS local investigation must be kept?

3 [sic] What person would be responsible in a NHS local investigation for taking statements and interviewing a doctor under investigation?

4. What person would be responsible in an NHS local investigation for interviewing witnesses and for taking witness statements?

4 [sic] What person would be responsible for writing to a doctor informing him that an investigation was to take place.

5. What person would be responsible for writing to witnesses about a NHS local investigation into a doctor?

5 [sic] What would be the reason for taking statements from three witnesses in an NHS local investigation but not taking a statement from the doctor under investigation?"

9. The public authority responded on 18 March 2019. It stated that it would not respond to the request for information, as it was vexatious.
10. Following an internal review the public authority wrote to the complainant on 8 May 2019. It stated that it upheld its original position that section 14(1) was engaged..

Scope of the case

11. The complainant contacted the Commissioner on 9 May 2019 to complain about the way her request for information had been handled.
12. The Commissioner considers the scope of this case to be whether the public authority correctly applied section 14(1) to the request.
13. Detailed background information was submitted by the complainant to the Commissioner about the alleged events described above. It is not the role of the Commissioner to make a judgement about either her complaint to NHSE, or whether NHSE carried out the investigation into her complaint correctly. Rather, it is to establish whether NHSE was correct in refusing to respond to the complainant's request for information by engaging section 14(1) of the FOIA.

Reasons for decision

14. Section 14(1) of the FOIA states that a public authority is not obliged to comply with a request for information if the request is vexatious. There is no public interest test.
15. The term 'vexatious' is not defined in the FOIA. The Upper Tribunal (Information Rights) considered in some detail the issue of vexatious requests in the case of the *Information Commissioner v Devon CC & Dransfield (GIA/3037/2011)*. The Tribunal commented that vexatious could be defined as the "manifestly unjustified, inappropriate or improper use of a formal procedure". The Tribunal's definition clearly establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
16. In the Dransfield case, the Upper Tribunal also found it instructive to assess the question of whether a request is truly vexatious by considering 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.
17. The Upper Tribunal did however also caution that these considerations were not meant to be exhaustive. Rather, it stressed 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).

18. 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 requests¹. In brief these consist of, in no particular order: abusive or aggressive language; burden on the authority; personal grudges; unreasonable persistence; unfounded accusations; intransigence; frequent or overlapping requests; deliberate intention to cause annoyance; scattergun approach; disproportionate effort; no obvious intent to obtain information; futile requests; frivolous requests.
19. 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.
20. 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.
21. Where relevant, public authorities need to take into account wider factors such as the background and history of the request.
22. The complainant’s argument is that both her and the public have a right to obtain information about how an investigation into a GP is conducted. She believes NHSE did not follow procedure when investigating her case, and seeks the information to explain how an investigation into a doctor should take place.
23. In her communications to the Commissioner, she asserted that a named member of staff at NHSE is responsible for a ‘cover up’ and is protecting the doctor who has ‘lied’ about his conduct. However, NHSE stated that she has not provided it with the required level of evidence to support her claims.
24. NHSE outlined that it has, over the past four years, given all the information it can to the complainant, and that it is unable to provide her with any further information regarding the issue that would be helpful to her.

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

25. The complainant submitted a total of eight information requests and a subject access request to NHSE between August 2015 and November 2018. She also, from February 2016 onwards, directed numerous queries via general correspondence to both the national and regional teams.
26. NHSE explained that all of the requests relate to a particular GP and/or the subsequent investigation of her complaint. It states it does not hold anything relevant further than that it has released under FOI or as a result of the Commissioner's involvement.
27. It added that following each request, the complainant contacted NHSE and individuals within the organisation multiple times. This happened in spite of a restricted communications plan being put in place to prevent this.
28. NHSE's rationale for engaging section 14(1) is that it believes the request is part of a campaign against the public authority and, in particular, the local team that dealt with the complaint.
29. It explained the complainant has contacted NHSE frequently since 2015, amounting to over a hundred communications via both email and telephone, which were often overlapping in theme. NHSE believes this was a means of targeting individuals in the local team with no real purpose except to engage it in a series of communications about issues that have already been resolved by NHSE, in an attempt to re-open these issues. The complainant has asked it, on multiple occasions, to look into her claims again, but has been unable to provide fresh evidence that would warrant doing so.
30. NHSE also believes the request is an attempt to circumvent the restricted communications plan currently in place. For example, the complainant sent her internal review request to not only the customer contact centre as advised to do so in its FOI response, but also to two members of the local team whom she has contacted frequently over the three year period. This is in opposition to the aforementioned plan, and after being advised on multiple occasions that the team members she addressed would no longer correspond with her in a letter NHSE sent to the complainant dated April 2016. Therefore, NHSE views the current request to be an explicit attempt to re-engage the local team in correspondence.
31. It believes the motivation of the requester is a grievance about the GP who is the subject of her complaint to NHSE, the investigation of her claims and the outcome. It views these communications as a prolonged and persistent campaign against it and, in particular, the regional team that investigated her case. This request is seen by NHSE as part of a

grudge the complainant is pursuing due to the outcome of the investigation being unsatisfactory for her.

32. The complainant's claims have also been addressed by other authorities such as the GMC. NHSE regards the request as an improper use of a formal procedure and an attempt to re-open issues that have been comprehensively addressed, thereby demonstrating unreasonable persistence.
33. As of 22 February 2018 NHSE and other authorities had received over 100 communications from the complainant within the preceeding 18 month period, despite NHSE advising the complainant it could no longer respond to her about the issues it investigated, as the investigations had been concluded. At least 79 of these were sent to a named individual at NHSE.
34. NHSE provided the Commissioner with a sample of 11 letters from 22 February 2016 to 22 February 2018 it wrote to the complainant and/or her husband.
35. NHSE attempted to cease all contact with the complainant four times from July 2016 to November 2017, resulting in the aforementioned restricted communications plan being put in place.
36. In November 2017 it advised the complainant it would seek legal advice should her behaviour continue, in order to restrict her persistence in contacting various members of staff.
37. In the appendix to a letter dated November 2017, NHSE provided the complainant with its policy on how to deal with persistent or unreasonable contact as well as guidance on vexatious requests issued by the Commissioner. This gave the complainant an opportunity to change her approach, and outlined what may result if she continued to contact it in the same way.
38. Whilst the content and subject of the request has value in explaining how investigations should be conducted, it is the opinion of the Commissioner that this is overridden by the burden it would place on NHSE by responding to it. The request is not vexatious in and of itself, but it is vexatious within the context of the pattern of behaviour that has emerged over a period of time.
39. This pattern of behaviour is a continuing stream of communications from the complainant that have been evidenced historically. NHSE explained that the volume, frequency and persistence of communications received from the complainant has caused some members of the regional team to feel personally harassed by the applicant. The re-emergence of these issues is reported to have caused anxiety and stress to members of the

team, as they are obliged to contribute to responses. Thus NHSE feels responding to this request for information is likely to impose a high burden on it.

40. NHSE also advised the complainant several times in letters from 2016 to 2018 that she could, if dissatisfied with its findings, contact its regulator to take things further. It assured her that it would fully co-operate with any investigation or enquiry if it was called upon to do so. This was another channel to voice her concerns about the investigation and have it scrutinised.
41. NHSE explained that it has already spent considerable time and resources dealing with the issues raised in the request. It believes spending any further time on this is futile, as the issues have now been exhaustively investigated and concluded. It stated that to respond to this or any further requests about the issue would place an undue burden on it.
42. NHSE explained the complainant made assertions regarding NHSE that are unfounded to a number of authorities. In a letter dated February 2017 it advised the complainant that her "enquiries are repetitive, often inaccurate and are intrusive", and in a letter dated November 2017, it stated the complainant was "making assertions....(that it believes)...are entirely untrue" as they were unsubstantiated.
43. Additionally, the complainant's intransigence in face of both the findings of the investigations, and the channel to further scrutinise them gives further weight to the decision that this request is vexatious.
44. Were NHSE to respond to the request, any response is unlikely to satisfy the complainant, whilst being likely to trigger further communication from her, as demonstrated by her past behaviour.
45. It is the Commissioner's view that the value to be gained from responding to the request is outweighed by the burden it would impose on NHSE, and in particular, the regional team as the issue is a matter that has been comprehensively investigated. NHSE stated it could no longer ignore the impact her conduct has had, and continues to have on its staff and their ability to fulfil their other duties. Staff have also reported that they have experienced stress and anxiety as an effect of the complainant's past and current requests.
46. An aggregated burden has therefore been demonstrated in the history of the complainant's dealings with NHSE, and the Commissioner is satisfied that this is significant enough to warrant the application of section 14(1) to this request.

47. The Commissioner acknowledges the seriousness of the allegations the complainant originally brought to the attention of NHSE, and the wish to explore the circumstances of both them, and the subsequent investigation thoroughly. Whilst her past requests were of value and, were responded to under the FOIA, the Commissioner is satisfied that the actions of the complainant from 2016 to present mean that the current request for information can be categorised as vexatious. NHSE is not obliged to respond to it under section 14(1) of the Act.

Right of appeal

48. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

49. 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.
50. 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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