

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 January 2020

Public Authority: North West Boroughs Healthcare NHS Foundation Trust

Address: Hollins Park
Hollins Lane
Winwick
Warrington WA2 8WA

Decision (including any steps ordered)

1. The complainant has requested information concerning the harm caused to individuals' mental health by racism and the perception of racism. North West Boroughs Healthcare NHS Foundation Trust ('the Trust') considers it has addressed the request as far as it understands it and has released all the relevant information it holds. The Trust acknowledged that it had breached section 10 of the FOIA (time for compliance) but considered it had complied with its obligation under section 1 (general right of access). The complainant disagrees.
2. The Commissioner's decision is as follows:
 - The Trust's final interpretation of the request is reasonable interpretation. The Trust breached section 1(1)(a) of the FOIA as, in its final response and internal review, it did not clearly confirm to the complainant that it does not hold the specific information he requested on 20 October 2018. The Commissioner is satisfied, on the balance of probabilities, that the Trust does not hold the information specifically requested.
 - The Trust's response dated 29 January 2019 to the request of 20 October 2018 breached section 10(1) as it was provided outside the 20 working day limit and the Trust had not complied with section 1(1).

- The Trust complied with the time limit under section 17(5) regarding its refusal of the request when it was originally submitted on 18 September 2018.
3. The Commissioner does not require the Trust to take any remedial steps.

Request and response

4. Through the WhatDoTheyKnow (WDTK) website, on 18 September 2018 the complainant wrote to the Trust and requested information in the following terms:

"a). I am requesting a copy of all information you hold of the harm that can be caused to the mental health of individuals as a result of their experience of racism. In particular I wish to receive information of the harm racism can cause to the mental health of individuals as a result of them experiencing racism both as a child and also as an adult.

b). I am requesting a copy of all information you hold of the harm that can be caused to the mental health of individuals as a result of their perception that racism is present, in their lives, in such locations as;
**Their place of work.*

** Their community.*

**Their place of learning.*

**Wider society.*

To assist you;

*** My request is made in order to ascertain what understanding you have of the relationship between racism and mental health.*

*** By racism I mean such things as racial abuse, assault, harassment, prejudice, stereotyping, discrimination."*

5. The Trust acknowledged the request on 20 September 2018, giving it the reference FOI 18/330.
6. In correspondence dated 15 October 2018 the Trust responded under the reference FOI 18/330. It said it would hold the information requested in both part a) and b) of the request but the information would not be in a readily accessible format. The Trust said it would therefore be unable to comply with the request under section 12(1) of the FOIA (cost exceeds the appropriate limit).

7. The complainant wrote to the Trust on 20 October 2018. He said he was re-submitting his request, with clarifications. The complainant then submitted the same request, with the following clarifications:
 - He was not requesting information that would require detailed review and analysis of care records, personnel records, incident reports or that would be amongst the Trust's service users' personal data/records.
 - The complainant said he had seen information that fell within the scope of his request in documents from many bodies (such as Department of Health [DH]) and that these documents list organisations such as the Trust's as being on their circulation list and/or their target audience.
 - The complainant noted information published on the Trust's website in respect of, 'Eating disorders,' 'Sleep problems,' 'Insomnia' etc and again considered this type of information fell within the scope of his request.
 - The complainant considered that such information would not be likely to require redaction and would be available in a readily accessible format.
8. The Trust contacted the complainant on 25 October 2018 under a new reference number - FOI 18/370. It asked if he could clarify his request further ie talk to a member of its staff or provide it with more examples of the sort of information he is seeking. The Trust advised that the 20 working day deadline for a response would be paused until the request had been made clear.
9. In correspondence on 26 October 2018 the complainant advised the Trust that he considered his request clearly described the information he has requested. He said that as a courtesy he would, however, inform the Trust about information regarding 'the harm that can be caused to the mental health of individuals as a result of their experience of racism' in the Equality and Human Rights Commission's Triennial Reviews.
10. In correspondence to the complainant dated 21 November 2018 the Trust advised that it considered the request was still ambiguous and too broad. Referring to its duty under section 16 of the FOIA to offer advice and assistance the Trust asked the complainant if he could provide the exact titles and dates of the documents he had referred to (ie that had indicated the Trust would be on certain circulation lists) and the exact websites and their links. The Trust said it would then be able to confirm if it has received these documents and taken action to address them.

11. In correspondence to the Trust of 6 December 2018 the complainant again advised that he considered that he had clearly described the information he had requested and that he considered the Trust well understood what information he was requesting, and that it holds such information. However, the complainant went on to provide the following clarifications and views:

- (i) The request would not require detailed review and analysis of care records, personnel records or incident reports and it is not amongst the Trust's service users' personal data/records.
- (ii) The Trust has equality duties and responsibilities as stated in the NHS Constitution.
- (iii) The Trust had acted as an equality and diversity adviser, especially in respect of racism, to other organisations such as the previous Primary Care Trusts.
- (iv) NHS staff and NHS service users are reported as experiencing racism and they would be entitled to appropriate support [from the Trust].
- (v) The Trust has 'anticipatory' duty to its service users and staff who experience racism and therefore the Trust would hold information on the harm such experiences can cause.
- (vi) A review of the publications and websites of other bodies (not just NHS ones) had identified information within the scope of the request there. The Trust would therefore also hold such information, particularly since the Trust advises on its website that it delivers '*... a range of health services across a population of more than 3.5 million people to support our local communities to live life well.*'
- (vii) Racism and racist hate incidents reported and recorded by local media and local police forces mean it is likely that individuals and families that the Trust has a responsibility for have been harmed by racism and or their perception of racism.
- (viii) NHS bodies, such as the Trust, are expected to address the social determinants of ill health such as racism.
- (ix) The Trust's clinical and non-clinical staff would undergo training in supporting individuals, harmed by racism and or their perception of racism.
- (x) Particular guidance referred to by Lord Prior of Brampton in 2015.

- (xi) A particular Department of Health Code of Practice from 2015 which evidenced that the Trust would be likely to understand what information the complainant was requesting and would hold that information.
12. The complainant closed this correspondence by stating that he did not consider that the Trust necessarily holds any of the guidance he had mentioned above, but rather the above guidance evidenced, in his view, that the Trust would understand what his request is for and would hold information relevant to the request.
 13. In correspondence dated 29 January 2019, the Trust provided a response under reference FOI 18/370. The Trust said it was unable to confirm whether it holds information that specifically details the specifics of part a) and part b) of the complainant's request. However, the Trust then went on to address each of the complainant's clarifications.
 14. Regarding (i) the Trust confirmed that it holds information in relation to incidents that can lead to harm. It released information from its incident reporting system – the number of incidents concerning Trust staff and patients reported during a particular period - and information about those incidents.
 15. Regarding (ii) it released its Equality and Diversity policy.
 16. Regarding (iii) the Trust confirmed that it does not hold any information related to this.
 17. Regarding (iv) the Trust said that policies related to supporting staff and service users if they experience racism were under review.
 18. Regarding (v) and (vi) the Trust provided hyperlinks to where information about its Workforce Race Equality Standard is published.
 19. With regard to (vii) the Trust released a briefing note that had been sent to its staff, a draft action plan it is preparing in response to new National Institute for Health and Care Excellence (NICE) guidance and a link to the relevant published Quality Standard.
 20. Regarding (viii) the Trust provided some general information about its Equality Impact Assessment process.
 21. Finally, regarding (ix) the Trust provided the complainant with details about particular staff training it delivers. It again invited the complainant to meet and talk to it about this aspect.
 22. The complainant requested an internal review on 10 February 2019. He said the Trust had not confirmed whether it holds information relevant

to his request; had not provided him with the information he has requested and which he considered the Trust holds; and had not provided a valid refusal notice.

23. The Trust provided an internal review in correspondence dated 8 March 2019. It said that it had responded to the original request of 18 September 2018 within 20 working days and had advised that it held the requested information but in an inaccessible format.
24. The Trust acknowledged that it had not responded to the request within 20 working days the second time the complainant submitted it. The Trust said it had sought clarification from the complainant multiple times; that without that clarification it had identified any information it considered was relevant to the request; and where possible it had confirmed or denied it held relevant information.
25. The Trust confirmed it considered it had breached section 10(1) of the FOIA (regarding its response to the request submitted on 20 October 2018). But because it considered it did not receive enough clarification from the complainant, the Trust confirmed that it considered that it had not breached section 1 but, where possible, had confirmed or denied whether information was held.

Scope of the case

26. The complainant contacted the Commissioner on 7 June 2019 to complain about the way his request for information had been handled.
27. In that correspondence the complainant said that he was dissatisfied that the Trust had not provided him with all the information he has requested and which the Trust is likely to hold, and had not issued him with a valid refusal notice, within 20 working days.
28. On 18 October 2019 the complainant provided the Commissioner with what he categorised as a 'detailed analysis'. This is an annotated analysis of his correspondence with the Trust about his request.
29. The Commissioner has considered whether the Trust's interpretation of the request was a reasonable interpretation and whether its response to this request, as it understood it, complied with section 1(1) of the FOIA. She has also considered the timeliness of the Trust's responses.

Reasons for decision

Section 1 – general right of access to information held by public authorities

30. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b) to have the information communicated to him or her if it is held and is not exempt information.
31. Under section 1(3), if a public authority (a) reasonably requires further information in order to identify and locate the information requested, and (b) has informed the applicant of that requirement, the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.
32. Under section 1(5), a public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).
33. In its response dated 29 January 2019, the Trust said it was unable to confirm whether it holds information that specifically details the factors under part a) and b) of the complainant's request. However, the Trust's response then addressed the clarifications and views the complainant had provided on 6 December 2018. The complainant had told the Trust that he did not consider that the Trust would necessarily hold the clarification material he had referred to but that in his view this material evidenced that the Trust would understand what information he had requested and that it would hold this information.
34. The Trust confirmed that it holds information in relations to incidents that can lead to harm, which includes incidents concerning racism. This was information that concerned the Trust's staff and patients, and which had been captured by its incident reporting system. The Trust released this information to the complainant.
35. In addition, the Trust released to the complainant: its Equality and Diversity policy; a briefing note; a draft action plan and links to particular information that is already published.
36. The Trust said that certain policies it holds were undergoing a review. Finally, it discussed some of its relevant practices more broadly, including staff training.

37. To the degree that the Commissioner is clear what information it is that the complainant has requested, she considers that certain information that the Trust refers to in its response dated 29 January 2019 cannot be said to fall squarely within the scope of the request. It is more relevant to the various clarifications the complainant went on to provide. The Commissioner's objective reading of the request, when combined with the complainant's clarifications, is that it is a request for any information the Trust may hold that concerns the effect of racism, and perceived racism, on individuals' mental health and by 'individuals' the Commissioner understands the complainant to be referring to Trust staff and service users.
38. The Commissioner has considered the Trust's position regarding policies it indicated that it holds but which it said were under review. The Commissioner put her understanding of the request to the Trust and asked it to consider whether the policies in question would specifically address the request. She also asked it to consider whether any training materials it used for its staff would address the specifics of the complainant's request as it could be reasonably interpreted.
39. In correspondence on 23 December 2019 the Trust advised the Commissioner that during 2019 it had reviewed its policies and procedures on the following matters: domestic abuse, prevention and management of violence, resolution (respect at work), safeguarding adults, safeguarding children, and staff stress and mental wellbeing. The Trust confirmed that these documents do not specifically discuss the effect of racism on the mental health for either service users or staff. Some of them (eg those on domestic abuse and safeguarding) refer generically to hate crimes, but not specifically to racism.
40. The Trust told the Commissioner that it has had extensive correspondence with the complainant over several years. It appears to the Trust that the complainant believes that the Trust should hold information specifically on racism and its effect on mental health. However, it has noted that there are nine protected characteristics under 'Equality and Diversity' and, as such, associated documentation tends to be generic to cover all nine, rather than specific to a particular one, such as race.
41. Regarding its staff training, the Trust confirmed to the Commissioner that it does not hold any information that refers specifically to the subject of the complainant's request. The Trust says that all its staff undergoes training on Equality and Diversity and Safeguarding. This is done by e-learning using the national NHS e-learning modules and these are made up of generic content created by Health Education England.

42. The Commissioner notes that the complainant's request in this case is for information on the effects of racism or perceived racism on individuals' mental health – it is very specific information. While the Commissioner considers that the Trust may hold general information on recognising racism, and/or addressing racism, as examples, she does not consider it probable that the Trust would hold information that the complainant appears to have requested, which has a very narrow focus, and that includes either in its policies or any training material it uses.
43. The Commissioner checked with the Trust whether its interpretation of the request concurred with the Commissioner's, and whether its final position is that it does hold any information relevant to the specifics of the request. In correspondence dated 13 January 2020 the Trust confirmed its interpretation of the request is as above and that it does not hold any information directly relevant to the request.
44. The Commissioner considers that the Trust's interpretation of the request is reasonable; that it undertook adequate searches for any relevant information; has released broadly relevant information that it holds but, on the balance of probabilities, does not hold the specific information the complainant has requested.
45. The Commissioner has reviewed the Trust's response of 29 January 2019 and its internal review of 8 March 2019. Because the Trust provided a response at this point – having sought clarification about the request more than once – the Commissioner must assume that it understood what was being requested to the extent that it considered it was able to provide a response at that point. However, in both responses it indicated it was still not clear what information it was that the complainant is seeking. These were therefore somewhat muddled responses.
46. In the Commissioner view, if the Trust was clear what information was being requested and its position was that it did not hold this information, the Trust should have stated more clearly in either its response of 29 January 2019 or its review of 8 March 2019 that it does not hold this specific information.
47. As discussed, the information the Trust holds and has communicated to the complainant very broadly falls within the scope of the request as it might reasonably be interpreted but it is not completely relevant to it. Having considered the Trust's submission, its correspondence with the complainant and having discussed the specifics of the request with the Trust, the Commissioner is satisfied, on the balance of probabilities, that the Trust does not hold the specific information that the complainant has requested. However, she has decided that the Trust breached section

1(1)(a) of FOIA as it did not clearly confirm to the complainant that the information is not held.

Section 10 – time for compliance

48. Under section 10(1) of the FOIA an authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.
49. As has been noted, under section 1(3) of the FOIA if a public authority needs more details to identify and locate the requested information and has contacted the requester for further clarification, the date of receipt will be the day the authority receives the information it requires to comply with the request. The 20 working day clock will start the day after the authority receives the necessary clarification.
50. The complainant first re-submitted his request on 20 October 2018 and the Trust first sought further clarification from him on 25 October 2018. The complainant provided what he considered to be further clarification on 26 October 2018 and the Trust advised the request was still unclear in correspondence dated 21 November 2018, posted on the WDTK website on 23 November 2018. The complainant provided what he considered to be further clarification on 6 December 2018 and the Trust provided a response to the request as it understood it in correspondence dated 29 January 2019, posted on the WDTK website on 4 February 2019.
51. The Commissioner notes that in this response the Trust advised the complainant that it was unable to confirm whether it holds information falling within the scope of parts a) and b) of his request, specifically. However, it provided some information and did not invite the complainant to clarify his request again.
52. Although the Trust advised in this response that it was unable to confirm whether or not it held the specific information requested, as discussed above, the Commissioner must assume that the Trust considered it had received sufficient clarification from the complainant in his 6 December 2018 correspondence to enable it to provide the response that it did. A response was therefore due within 20 working days of 7 December 2018, but the Trust did not provide one until 4 February 2019, effectively. And as discussed, the Trust did not clearly comply with section 1(1)(a). The Commissioner has decided that the Trust therefore breached section 10(1) in respect of the request of 20 October 2018, and it acknowledged this in its internal review response.

Section 17 – refusing a request

53. Section 17(5) of the FOIA says that where an authority is relying on section 12 (or section 14) it should provide the applicant with a refusal notice within the time for complying with section 1(1).
54. The complainant submitted his request the first time on 18 September 2018. In correspondence dated 15 October 2018, which was posted to the WDTK website on 16 October 2018, the Trust advised the complainant that the cost of complying with his request would be disproportionate and referred to section 12 of the FOIA. This refusal was provided within 20 working days of the request and the Commissioner has decided that the Trust did not breach section 17(5). The Trust subsequently withdrew its reliance on section 12.

Other matters

55. The Commissioner reminds the Trust that, as noted above, an authority is not obliged to comply with section 1(1) of the FOIA until it is clear what information is being requested ie it is not obliged to confirm whether it holds information or to communicate any information at all to an applicant. If, after it has made a reasonable attempt at clarifying the requested information with an applicant, an authority remains unclear as to what information an applicant has requested, it is entitled to rely on section 1(3) to refuse to comply with the request. This would avoid the authority diverting its resources in lengthy correspondence and searches for information that the applicant may not, ultimately, be seeking – as happened in this case.
56. If an authority relies on section 1(3) to refuse to comply with a request, the applicant has the option of referring the matter to the Commissioner for a decision under section 50 of the FOIA.

Right of appeal

57. 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

58. 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.
59. 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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