

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 June 2022

Public Authority: Royal Berkshire NHS Foundation Trust
Address: Royal Berkshire Hospital
London Road
Reading
RG1 5AN

Decision (including any steps ordered)

1. The complainant requested serious incident reports into Covid-19 outbreaks. The Royal Berkshire NHS Foundation Trust ("The Trust") initially relied on section 40(2) – personal data – and section 41 of FOIA – actionable breach of confidence – to withhold the information, but disclosed a redacted version during the course of the investigation.
2. The Commissioner's decision is that the Trust has now disclosed all the non-exempt information it holds within the scope of the request. However, the Trust failed to identify all the information that it held within the scope of the request within 20 working days and therefore breached section 10 of FOIA.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 5 July 2021 the complainant requested information of the following description:

"The Royal Berkshire Hospital document "Public Board - 27 January 2021" reports 41 Hospital onset cases from Covid-19 Outbreaks in December 2020 in Royal Berkshire Hospital-

1. These 41 hospital onset cases are split between how many Covid-19 outbreaks in December 2020?
 2. Please supply the names of the wards within the hospital where the cases or outbreaks were located
 3. Was an Investigation(s) into the outbreaks conducted?
 4. If an investigation(s) were not conducted, please let me know why not
 5. If an investigation(s) were conducted, please supply full copies of the report or reports
 6. What was the reason(s) for the outbreaks?"
5. On 16 July 2021, the Trust responded. It provided the information it held in respect of each element, with the exception of element 5 – where it withheld the requested information and relied on section 40(2) of FOIA to do so as the information represented the personal data of third parties.
6. The complainant requested an internal review on the same day. The Trust sent the outcome of its internal review on 1 October 2021. It revised its position and now additionally relied upon section 41 of FOIA to withhold information relating to deceased individuals.

Scope of the case

7. The complainant contacted the Commissioner 19 July 2021 to complain about the way his request for information had been handled. At that point, he had yet to seek an internal review. However, on 15 September 2021, when the Trust had still not completed its internal review, the Commissioner's intervention was necessary.
8. On 15 October 2021, following the outcome of the internal review, the complainant contacted the Commissioner again to ask him to investigate the Trust's use of exemptions to withhold information within the scope of element [5].
9. The Commissioner opened his investigation on 13 January 2022 with a letter to the Trust asking it for a submission in support of its arguments and to provide copies of any information it was withholding. The Trust supplied the withheld information on 8 February 2022.
10. Having reviewed the withheld information, the Commissioner wrote back to the Trust to offer his preliminary view of the complaint. He noted that the majority of the information the Trust had identified did not relate to any particular identifiable individual. He therefore asked the Trust to consider disclosing the information with relatively minor redactions which he had pointed out as being necessary to protect individual

patients. After some initial reluctance, the Trust did eventually disclose the withheld information on 21 March 2022.

11. Once the withheld information had been disclosed, the Commissioner wrote to the complainant. He noted that the only information now being withheld would (in his view) identify patients and would therefore either be their personal data (and, hence, exempt under section 40) or, if they had since died, would have been provided in confidence (and hence exempt under section 41). He therefore asked the complainant to consider withdrawing his complaint.
12. The complainant responded to the Commissioner on 24 March 2022. He noted that the information that had been disclosed related to a different ward, not listed in the Trust's response to element 2 of the request. The report was also dated October 2020, when his request had specifically referred to December 2020 – which was the month specified in the Trust's minutes. Understandably, the complainant was not willing to withdraw his complaint, however he did not raise any issues with the way that the document had been redacted.
13. The Commissioner wrote to the Trust again on 31 March 2022, pointing out the discrepancy between the request and the information disclosed. He asked the Trust to locate the correct reports and disclose them with similar redactions. If no further reports were held, the Trust was asked to explain the steps it had taken to search for the information.
14. The Trust contacted the complainant again on 14 April 2022. This time it disclosed five reports with a small number of redactions. Once again, the Commissioner asked the complainant if he was now satisfied with the information received.
15. The complainant contacted the Commissioner again on 27 April 2022 to say that he remained dissatisfied. He noted that all of the reports were dated November or earlier and one of the reports provided did not relate to a ward that had been listed in the Trust's response to element [2] of the original request.
16. The Commissioner was therefore obliged to write to the Trust a fourth time. He noted the discrepancy in the ward names on the reports and the discrepancy in dates. Once again, he asked the Trust to search its records and, if no further information could be located, explain what steps had been taken to search.
17. The Trust provided its fourth response on 9 May 2022. It now provided a further document, much longer than the previously-disclosed reports. The Trust once again relied on sections 40(2) and 41 of FOIA to withhold some information, but this time it also relied on section 31 of FOIA (law

enforcement) to withhold information. No explanation was offered for the discrepancy in dates.

18. A further round of correspondence followed in which the Commissioner asked the Trust to satisfy itself that it had provided all the requested information, to explain the discrepancy in dates and to provide its arguments in support of the section 31 exemption. The Trust responded to say that it no longer considered that the most recent report fell within the scope of the request. It had identified one further report that it disclosed to the complainant on 27 May 2022 (after further prompting from the Commissioner) and it now provided an explanation for the discrepancy which the Commissioner has considered below.
19. As the Commissioner accepts, for reasons explained below, that the report disclosed on 9 May 2021 did not fall within the scope of the request, he has not considered whether it was correctly redacted. It is open to the complainant to seek an unredacted version, should he wish to do so. Any subsequent complaint about that matter will be dealt with on its own merits.
20. The Commissioner has only considered whether the Trust holds further information within the scope of the request.

Reasons for decision

Section 1 (Held/Not Held)

21. 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."

22. 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. He 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, he will consider any reason why it is inherently likely or unlikely that information is not held.

23. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

The Trust's position

24. The Trust explained that the reports it had now disclosed were the reports referred to in the Board minutes of January 2021.
25. It noted that the date of each report referred to the date on which the first positive test had occurred and not the date on which an "outbreak" was deemed to have occurred.¹ The seven outbreaks (which had involved cases spread over the months of October, November and December had resulted in a single Serious Incident being declared in December capturing all seven outbreaks. Therefore the dates of the reports should be expected to vary slightly.
26. The Trust accepted that the six reports it had disclosed as falling within the scope of the request were considerably shorter than the more detailed report it had disclosed on 9 May 2022. It noted that, during the pandemic there had been a need to streamline such reports so that they could be produced more quickly without reducing the scrutiny of the most important areas or the lessons required to be learnt. Reducing the detail in each report allowed it to prioritise resources to the frontline at what was an exceptionally busy period. It was partly as a result of the earlier, larger, report that the Trust had identified the need to reduce future ones in length, where that could be done without compromising their integrity.

The Commissioner's view

27. The Commissioner accepts that the Trust has, albeit four months into his investigation, now located all the relevant information it holds in recorded form.
28. The complainant sought reports relating to specific wards over a specific period. He has now received reports relating to those wards.

¹ UKHSA guidance defines an outbreak as "Two or more test-confirmed or clinically suspected cases of COVID-19 among individuals (for example patients, health care workers, other hospital staff and regular visitors, for example volunteers and chaplains) associated with a specific setting (for example bay, ward or shared space), where at least one case (if a patient) has been identified as having illness onset after 8 days of admission to hospital)."

29. The Commissioner accepts the Trust's explanation as to why the dates on the reports do not appear to reconcile with what was reported in the Board minutes. However, given that this explanation is relatively straightforward, he can see no good reason why it was not provided to either the complainant, or himself, at an earlier stage – especially when it was brought to the Trust's attention on several occasions.
30. The Commissioner also accepts that the longer report does not relate to the period covered by the request and therefore does not fall within the scope of the request.
31. The complainant is understandably concerned by the Trust's failure to identify information (even when prompted) and this has fed suspicions that more information may be held – especially when each enquiry from the Commissioner appears to result in further information being disclosed. He is entitled to his view that the Trust should have carried out more thorough reports for each outbreak – but the fact of the matter is that the information the Trust holds is the shorter reports and therefore that is what it is obliged to disclose to him.
32. The Commissioner agrees with the complainant that the reports should have been identified at a much earlier stage. However, he now considers it more likely than not that the Trust has identified all the information it holds and has therefore discharged its duty under section 1(1) of FOIA.

Procedural matters

33. Section 10 of the FOIA states that a public authority must comply with its duty under section 1(1) of FOIA and communicate all non-exempt information "promptly and in any event not later than the twentieth working day following the date of receipt."
34. The evidence provided to the Commissioner indicates that the Trust had not correctly identified **any** information falling within the scope of the request until well into his investigation – let alone communicated that information to the complainant.
35. The commissioner notes that the Trust did issue a refusal notice within 20 working days – however, this did not relate to all the relevant information that the Trust held.
36. The Commissioner therefore finds that the Trust breached section 10 of FOIA when handling the request.

Other matters

37. Once a public authority has decided that it can comply with a request for information, its first task is to identify all the information that it holds that would fall within the scope of that request. It should only begin considering exemptions once it is satisfied that all the relevant information it holds has been located.
38. The Trust has noted (and the Commissioner accepts) that NHS trusts have been exceptionally busy for over two years. Staff have been moved into and out of departments as organisations tried to prioritise resources to deal with an unprecedented public health emergency. It is not clear to the Commissioner whether message were not correctly passed on, whether the Trust decided that the information would have been exempt so did not carry out an appropriate level of checks or whether some other reason caused the failure to identify information correctly. The Commissioner accepts that mistakes do sometimes happen and the Trust would not be the first public authority to identify further relevant information after issuing its initial response to a request.
39. Of more concern to the Commissioner has been the Trust's inability to identify relevant information both in the lead-up to and particularly during his investigation. When he accepted the complaint on 25 October 2021, he informed the Trust that:

"The Commissioner will provide a public authority with **one opportunity to justify its position**. Once a case officer is assigned, you will be given a maximum of 20 working days to provide any withheld information and supporting submissions to the Commissioner.

"Although no information needs to be provided to the ICO before then, the Commissioner expects the public authority to have used the time since receiving this correspondence to have thoroughly reviewed its handling of the request and to ensure that it is **fully prepared and ready** to provide its final, detailed submissions to the Commissioner. The public authority should already be clear and confident in its position, including any public interest arguments, and to have asked for opinions from interested third parties, if relevant. The public authority has already had two previous opportunities to do so when responding to the complainant." [emphasis added]

40. When the Commissioner opened his investigation he informed the Trust that:

"This is your opportunity to finalise your position."

41. In the Commissioner's view, it is unacceptable that, despite setting clear expectations well in advance, he was required to go back to the Trust on no fewer than three occasions in order to ensure that it had disclosed all the information it held – despite the request being very clear in what it was seeking. It also failed to explain the discrepancy in dates, which emerged as an issue early on and for which a simple explanation could have been provided. In failing to do so, it made the complaint more complicated than was necessary.
42. Upon receipt of notification that a complaint to his office has been accepted, the Commissioner expects public authorities to be preparing their arguments to support their position. That includes carrying out basic checks to ensure that all relevant information has been identified and that any exemptions have been correctly applied. Proper preparation leads to shorter and less burdensome investigations for all concerned.
43. The Commissioner has seen no evidence to suggest that there has been any deliberate intent to prevent information from being disclosed. However, the conduct of this case suggests that either the Trust's records management practices are not adequate (leading to searches not identifying relevant information) or it is not carrying out adequate searches of its records – or a combination of both factors.
44. The Commissioner would draw attention to the Code of Practice, issued under section 46 of FOIA, on records management.²

² <https://www.gov.uk/government/publications/code-of-practice-on-the-management-of-records-issued-under-section-46-the-freedom-of-information-act-2000>

Right of appeal

45. 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

46. 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.
47. 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

Roger Cawthorne
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