

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 November 2020

Public Authority: East London NHS Foundation Trust

Address: Trust HQ
9 Alie Street
London
E1 8DE

Decision (including any steps ordered)

1. The complainant has requested from East London NHS Foundation Trust (the "Trust") information about aspects of its mental health treatment services. The Trust refused to provide the requested information, citing section 12(1) of the FOIA – that the cost of complying would exceed the appropriate limit for compliance.
2. The Commissioner's decision is that the Trust has correctly cited section 12(1) and provided advice and assistance to the complainant in line with its duty under section 16(1) of the FOIA. However, the Trust breached section 10(1) of the FOIA by not responding within the statutory time for compliance.
3. The Commissioner does not require the public authority to take any further steps.

Request and response

4. On 16 April 2020 the complainant made a request for information under the FOIA. Due to its length, the request can be found in an annex at the end of this decision notice.
5. Having sent holding letters to the complainant on 2 June and 30 June 2020, the Trust responded on 22 July 2020 and refused to provide the requested information, citing section 12 of the FOIA. The Trust attached a spreadsheet itemising what could be provided within the fees limit and suggesting that she refine her request.
6. The complainant wrote to the Trust on 23 July 2020 pointing out that she had requested 2019 data, and that some of the Trust's response concerned 2018 data. On 24 July 2020, the Trust responded again in light of this.
7. The complainant made a request for review on 24 and 30 July 2020. She confirmed that she wanted the information in its entirety.
8. The Trust provided an internal review on 28 August 2020 in which it maintained its original position, reattached the spreadsheet, and suggested again how she could refine her request to bring it within the fees limit.

Scope of the case

9. The complainant contacted the Commissioner on 29 August 2020 to complain about the way her request for information had been handled.
10. After the Commissioner began her investigation the Trust wrote again to the complainant on 29 October 2020. The Trust invited her to resubmit her request. This is discussed in more detail later in the decision notice.
11. The complainant declined to refine or narrow her request on 31 October 2020.
12. The Commissioner considers the scope of this case to be the Trust's citing of section 12(1) and whether advice and assistance had been

offered to the complainant in line with its duty under section 16 FOIA. She has also considered any procedural issues.

Reasons for decision

Section 12 – cost of compliance exceeds the appropriate limit

13. Section 12(1) 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.”

14. The appropriate limit is set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations'). The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour. This means that in practical terms there is a time limit of 18 hours in respect of the Trust. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) of the Fees Regulations states that an authority can only take into account the costs it reasonably expects to incur during the following processes:

- determining whether it holds the information;
- locating the information, or a document containing it;
- retrieving the information, or a document containing it; and
- extracting the information from a document containing it.

15. 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

The complainant's view

16. The complainant considers that if the requested information is not being gathered there is a problem. She questions whether the Trust thinks these issues are important and whether it wishes to work collaboratively. The complainant believes that the requested information would be useful at this time and that the information should already have been collected, in which case the cost would be minimal. She also stated that other Trusts had provided the information last year.

The Trust's view

17. Firstly, the Trust provided clarification to the Commissioner concerning the data requested by the complainant both in a letter and a spreadsheet where it set out how it had responded to her. This spreadsheet was different than the one provided to the complainant at refusal and internal review stage. The Trust stated that at no stage had it attempted to supply 2018 data when 2019 had been clearly requested (about 90 questions were specifically about 2019 data). The Trust's response to data led questions had been only in relation to 2019 data. The remaining questions concerned the provision of leaflets, consent forms, reports, tests and Trust plans to reduce recurrence in the future. The Trust considered these questions to be generic rather than data relating to 2018 or 2019. It was explained that the Trust had previously received a similar request for data from earlier years that contained the same generic questions.
18. When the Trust responded to the complainant on 22 July 2020 it did not apply an exemption to the entirety of the request. It considered that, in total, 18 of the 110 questions were generic and had previously been responded to. The Trust therefore provided hyperlinks to these previous responses. It also explained what was not held, what could be provided or potentially provided within the fees limit and what individual questions would take over 18 hours to provide. Questions and responses were set out on a spreadsheet. The Trust sought clarification concerning

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<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf> (para 12)

six questions relating to time periods concerning deaths due to the fact that the complainant had referred to "*soon after*" and "*several months after*" in her request. The complainant was asked to provide definitive time periods but did not respond to the requests for clarification, which were set out on the spreadsheet.

19. In the Trust's response of 22 July 2020 it advised the applicant that 32 questions would independently take over eighteen hours to process and that it was applying section 12 FOIA accordingly. Since the Commissioner's investigation began, the Trust has looked again and concluded that 32 questions can be aggregated into 20 questions. For example, if it takes 22 hours to identify if any formal complaints regarding 'serious incidents' have been made, it will not take another 22 hours to identify what those concerns are and will take minimal additional time to determine this information. However, given that each of the 20 aggregated questions would take over 18 hours to respond to, the Trust has not recalculated the total time each of those questions would take.
20. In an effort to be helpful the Trust wrote on 23/24 July directly providing links to the requested information, for example, the Trust's ECT leaflet.
21. The Trust provided the same spreadsheet at internal review on 28 August 2020 along with contact details, if the complainant wished to discuss this matter.
22. As the Trust has accepted that its original response to the complainant was incorrect, it has contacted her again to explain how it has now calculated timings, although this would not change the level of disclosure. The Trust provide the Commissioner with a spreadsheet with questions that could be incorporated into another question shaded out.
23. The Trust went on to say that it advised the complainant in its 22 July 2020 response that any of 49 specific questions could be individually answered and that it would be able to process any of her chosen questions up to a limit of 18 hours. To date, the complainant has not advised which of these questions she would like processed. The Trust showed these on a separate tab on the spreadsheet it provided to the Commissioner.
24. The Trust ensured that the proposed timings were reasonably accurate by doing the following -
 - Establishing whether the information is held and the system(s) held on;
 - If the information is held in a pre-determined and retrievable report format;

- How long it would take to provide the information from an existing report;
 - How the information would be retrieved if a report needed to be created/data manually extracted;
 - Where base information would need to be extracted from one system and then matched to another, how long this would take;
 - The research that would need to be undertaken, particularly within its clinical systems, to provide the data.
25. In each case the Trust explained that it undertook a sample to determine the average time it would take to process the request. The Trust asked the Commissioner to note that whilst NHS organisations may use the same risk management and clinical systems, these have all been set up locally with different interpretations and uses. Whilst one organisation may be able to satisfy this request, not all organisations are able to do so. The Trust suggests that, although this may be a source of frustration to the complainant, it has attempted to explain this to her.

The Commissioner's view

26. Despite the fact that the Trust miscalculated the timings in its initial response to the complainant and the internal review, the length of the request and the revised breakdown provided to the Commissioner remain well beyond the fees limit. The overestimate ultimately makes no difference to this fact. The Commissioner's view, as stated in her guidance, is that public authorities should avoid providing information for part of a request and refusing the rest under section 12 because it denies the requester the right to express a preference as to which part/parts of the request they would prefer a response to. In this instance the Trust clearly asked which parts the complainant wanted a response to, without the complainant providing any indication. The complainant clearly wanted the whole of the request responding to and confirmed this several times. The Commissioner therefore finds that section 12 was cited correctly and she does not require the Trust to take any further action.

Section 16 – duty to provide advice and assistance

27. Section 16 of the FOIA states:

“(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority

to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case."

28. The Trust provided the complainant with several opportunities to narrow her request. Firstly, the refusal notice on 22 July 2020 looked at the questions and attached a spreadsheet where it showed what could be provided within the fees limit. Column A contained the request, column B advised what could be answered in the time and column C whether it could be answered, it it was held, or whether there was a need for clarification. Column D provided links to a previous response to the complainant or files on its website.
29. In the complainant's two requests for internal review on 24 and 30 July 2020 she indicated that she wanted the information in its entirety.
30. At internal review on 28 August 2020 the Trust provided the same spreadsheet along with contact details if the complainant wished to discuss this matter. It also explained that it might be able to answer some questions simultaneously which could reduce the time taken.
31. The Trust wrote again to the complainant on 29 October 2020 in an attempt to get her to narrow her request in order that it could provide her with more information. In this letter the Trust set out each question individually, advising what she had previously been supplied with and reattaching that information, what information it did not hold, and what could be supplied within the 18 hour limit if the request was refined. It also stated which questions individually would go beyond the 18 hours and which questions would need clarification before they could be responded to.
32. On 31 October 2020 the complainant copied the Commissioner into her response to the Trust which again indicated that she was not prepared to refine or narrow her request.
33. The Commissioner considers that the Trust has fulfilled its duty in attempting to engage so often with the complainant in an effort to elicit a request that could be responded to within the statutory timeframe. As set out above, the complainant did not wish to narrow her request. The Commissioner therefore requires no further action on the part of the Trust.

Section 10 – time for compliance with request

34. 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.”

35. Section 10(1) of the FOIA states that a public authority must respond to a request promptly and *“not later than the twentieth working day following the date of receipt”*.

36. The information request was received on 16 April 2020. The Trust sent holding emails to the complainant on 2 June 2020 and 30 June 2020 explaining why it was unable to respond because of the Covid-19 pandemic. In the event, the Trust responded on 22 July 2020 which was well beyond the time for compliance and breached section 10 accordingly.

Other matters

37. The Commissioner wishes to place on record her understanding of the immense pressures placed on public authorities during the coronavirus pandemic. She is sympathetic to the difficult decisions such authorities must make, between prioritising front-line services and continuing to meet their obligations under the FOIA.

Right of appeal

38. 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

39. 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.
40. 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

Annex

Information request – 16 April 2020

"Please provide ECT information under the FOI act to the following questions : -

1. *Please supply patient's information ECT leaflet.*
2. *Please supply patient ECT consent form.*
3. *Please supply any ECT reports/investigations*
4. *How many ECT in 2019?*
5. *What proportion of patients were men/women?*
6. *How old were they?* 7. *What were the diagnoses and in what proportions?*
8. *What proportion of patients were classified BAME?*
9. *How many were receiving ECT for the first time?*
10. *How many patients consented to ECT?*
11. *How many ECT complaints were investigated outside the NHS and CCG?*
12. *How many patients died during or soon after ECT and what was the cause (whether or not ECT was considered the cause)?*
13. *How many patients died a few months after ECT and what was the cause (whether or not ECT was considered the cause)?*
14. *How many patients died by suicide within a few months of receiving ECT (whether or not ECT was considered the cause)?*
15. *How many patients have suffered complications during and after ECT and what were those complications?*
16. *Have there been any formal complaints from patients/relatives about ECT?*
17. *If so, what was their concerns?*
18. *How many patients report memory loss/loss of cognitive function?*
19. *What tests are used to assess memory loss/loss of cognitive function?*
20. *Have MRI or CT scans been used before and after ECT?*
21. *If so what was the conclusion?*
22. *How does the Trust plan to prevent ECT in the future?*

Please provide SERIOUS INCIDENT information under the FOI act to the following questions: -

1. *Please supply SERIOUS INCIDENT REPORTS patient's information leaflet.*
2. *Please supply patient SERIOUS INCIDENT REPORTS consent form.*
3. *Please supply any serious incident reports/investigations*
4. *How many SERIOUS INCIDENT REPORTS in 2019?*
5. *What proportion of patients were men/women?*
6. *How old were they?*
7. *What were the diagnoses and in what proportions?*
8. *What proportion of patients were classified BAME?*
9. *How many were receiving SERIOUS INCIDENT REPORTS for the first time?*
10. *How many patients consented to SERIOUS INCIDENT REPORTS?*
11. *How many SERIOUS INCIDENT REPORTS were investigated outside the NHS and CCG?*

12. How many patients died during or soon after *SERIOUS INCIDENT REPORTS* and what was the cause (whether or not *SERIOUS INCIDENT REPORTS* was considered the cause)?

13. How many patients died a few months after *SERIOUS INCIDENT REPORTS* and what was the cause (whether or not *SERIOUS INCIDENT REPORTS* was considered the cause)?

14. How many patients died by suicide within a few months of receiving *SERIOUS INCIDENT REPORTS* (whether or not *SERIOUS INCIDENT REPORTS* was considered the cause)?

15. How many patients have suffered complications during and after *SERIOUS INCIDENT REPORTS* and what were those complications?

16. Have there been any formal complaints from patients/relatives about *SERIOUS INCIDENT REPORTS*?

17. If so, what was their concerns?

18. How many patients report memory loss/loss of cognitive function? 19. What tests are used to assess memory loss/loss of cognitive function?

20. Have MRI or CT scans been used before and after *SERIOUS INCIDENT REPORTS*?

21. If so what was the conclusion?

22. How does the Trust plan to prevent *SERIOUS INCIDENTS* in the future?

Please provide restraints information under the FOI act to the following questions: -

1. Please supply *RESTRAINTS* patient's information leaflet.

2. Please supply patient *RESTRAINTS* consent form.

3. Please supply any *Restraints/investigations*

4. How many *RESTRAINTS* in 2019?

5. What proportion of patients were men/women?

6. How old were they?

7. What were the diagnoses and in what proportions?

8. What proportion of patients were classified BAME?

9. How many were receiving *RESTRAINTS* for the first time?

10. How many patients consented to *RESTRAINTS*?

11. How many *RESTRAINTS* were investigated outside the NHS and CCG ?

12. How many patients died during or soon after *RESTRAINTS* and what was the cause (whether or not *RESTRAINTS* was considered the cause)?

13. How many patients died a few months after *RESTRAINTS* and what was the cause (whether or not *RESTRAINTS* was considered the cause)?

14. How many patients died by suicide within a few months of receiving *RESTRAINTS* (whether or not *RESTRAINTS* was considered the cause)? 15. How many patients have suffered complications during and after *RESTRAINTS* and what were those complications?

16. Have there been any formal complaints from patients/relatives about *RESTRAINTS*?

17. If so, what was their concerns?

18. How many patients report memory loss/loss of cognitive function?

19. What tests are used to assess memory loss/loss of cognitive function?

20. Have MRI or CT scans been used before and after *RESTRAINTS*?

21. *If so what was the conclusion?*
22. *How does the Trust plan to reduce restraints in the future?*

Please provide SECLUSION information under the FOI act to the following questions: -

1. *Please supply patient's information SECLUSION leaflet.*
2. *Please supply patient SECLUSION consent form.*
3. *Please supply any SECLUSION reports/investigations*
4. *How many SECLUSION in 2019?*
5. *What proportion of patients were men/women?*
6. *How old were they?*
7. *What were the diagnoses and in what proportions?*
8. *What proportion of patients were classified BAME?*
9. *How many were receiving SECLUSION for the first time?*
10. *How many patients consented to SECLUSION?*
11. *How many SECLUSIONS were investigated outside the NHS and CCG ?*
12. *How many patients died during or soon after SECLUSION and what was the cause (whether or not SECLUSION was considered the cause)?*
13. *How many patients died a few months after SECLUSION and what was the cause (whether or not SECLUSION was considered the cause)?*
14. *How many patients died by suicide within a few months of receiving SECLUSION (whether or not SECLUSION was considered the cause)?*
15. *How many patients have suffered complications during and after SECLUSION and what were those complications?*
16. *Have there been any formal complaints from patients/relatives about SECLUSION?*
17. *If so, what was their concerns?*
18. *How many patients report memory loss/loss of cognitive function?*
19. *What tests are used to assess memory loss/loss of cognitive function?*
20. *Have MRI or CT scans been used before and after SECLUSION?*
21. *If so what was the conclusion?*
22. *How does the Trust plan to prevent SECLUSION in the future?*

Please provide MEDICATION ERRORS information under the FOI act to the following questions: -

1. *Please supply patient's information MEDICATION ERRORS leaflet.*
2. *Please supply patient MEDICATION ERRORS consent form.*
3. *Please supply any MEDICATION ERRORS reports/investigations*
4. *How many MEDICATION ERRORS in 2019?*
5. *What proportion of patients were men/women?*
6. *How old were they?*
7. *What were the diagnoses and in what proportions?*
8. *What proportion of patients were classified BAME?*
9. *How many were receiving MEDICATION ERRORS for the first time?*
10. *How many patients consented to MEDICATION ERRORS?*
11. *How many MEDICATION ERRORS S were investigated outside the NHS and CCG?*

12. *How many patients died during or soon after MEDICATION ERRORS and what was the cause (whether or not MEDICATION ERRORS was considered the cause)?*
13. *How many patients died a few months after MEDICATION ERRORS and what was the cause (whether or not MEDICATION ERRORS was considered the cause)?*
14. *How many patients died by suicide within a few months of receiving MEDICATION ERRORS (whether or not MEDICATION ERRORS was considered the cause)?*
15. *How many patients have suffered complications during and after MEDICATION ERRORS and what were those complications?*
16. *Have there been any formal complaints from patients/relatives about MEDICATION ERRORS?*
17. *If so, what was their concerns?*
18. *How many patients report memory loss/loss of cognitive function?*
19. *What tests are used to assess memory loss/loss of cognitive function?*
20. *Have MRI or CT scans been used before and after MEDICATION ERRORS?*
21. *If so what was the conclusion?*
22. *How does the Trust plan to prevent MEDICATION ERRORS in the future"*