

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 14 July 2009

Public Authority: Heart of England NHS Foundation Trust
Address: Birmingham Heartlands Hospital
Information Governance
Devon House
Bordesley Green East
Birmingham
B9 5SS

Summary

The complainant requested copies of statements which were allegedly taken from key members of staff by the public authority during the course of the investigation of a complaint she had made. The public authority denied it held the information requested. The Commissioner finds that the public authority does hold statements matching the complainant's request and therefore finds the public authority in breach of section 1(1)(a). He has ordered the public authority to issue another response in accordance with section 1(1) and (2) of the Act. The Commissioner additionally finds the public authority in breach of section 10(1) for failing to confirm it held the information requested within 20 working days.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 26 June 2007, the Chief Executive of the public authority wrote to the complainant pursuant to a complaint she had made about her late mother's treatment. In the letter the Chief Executive partly explained the public authority's investigation process and added that depending on the nature of the complaint, the public authority could request statements from relevant staff as part of the investigation.

3. The public authority concluded its investigation and the complainant was informed of the outcome in a letter dated 16 May 2008. The public authority specifically mentioned in that letter that it had, as part of the investigation, *'obtained statements from key members of staff.'*
4. On 10 June 2008, the complainant requested copies of statements taken from key members of staff during the investigation of the complaints she had made to the public authority regarding her late mother's treatment.
5. The public authority responded on 27 June 2008 and explained that it did not hold the information requested. According to the public authority; *'In preparing the response (to her complaint) information was gathered from various sources. Formal statements were not taken and therefore we are unable to forward staff statements as you requested.'*
6. In light of the ongoing complaint in relation to her late mother's treatment, it is unclear if the complainant did actually request a review of the public authority's decision in relation to the request for statements. However, in a letter dated 21 July 2008 the complainant did reiterate her wish to be provided with the statements she had requested on 10 June 2008. However, following the intervention of the Commissioner's staff, the public authority conducted a review and responded to the complainant in a letter dated 18 September 2008. The Commissioner has further commented on this point in the 'Other Matters' section of this Notice.
7. The public authority confirmed that no formal statements were taken from the relevant staff, rather, investigating officers interviewed the relevant staff, drafted the response to the complaint based on the information which had been verbally provided. The *'rough working notes'* taken during this process were destroyed once the final draft was completed.
8. The public authority however added that it had identified the following documents *'which fit the purpose of (the complainant's) request of formal statements in that they are supportive documentation which informed the Trust's responses to your complaint'*:
 - A. Letter from (named Doctor) to the Acting Medical Director of medical safety dated 17 June 2008
 - B. Physiotherapy response, dated 20 June 2008, and
 - C. Response prepared by the Directorate Manager (undated).
9. The public authority decided that these documents could be disclosed to the complainant under the Act. Document C was disclosed to the complainant on 18 September 2008 and documents A and B were subsequently disclosed on 26 September 2008.

The Investigation

Scope of the case

10. The complainant had already contacted the Commissioner on 21 August 2008 to complain about the way her request for information had been handled prior to the internal review which was completed on 18 September 2008. The complaint prompted the ICO's intervention which led to the internal review. The complainant specifically asked the Commissioner to determine whether the public authority had correctly concluded that it did not hold the information requested on 10 June 2008.

Chronology

11. On 05 January 2009, the Commissioner wrote to the complainant outlining the scope of the investigation and inviting her comments if any.
12. The scope of the investigation as noted above was confirmed in a letter from the Commissioner to the complainant dated 29 January 2009.
13. On 02 February 2009, the Commissioner wrote to the public authority requesting its submissions in relation to the complaint.
14. The public authority responded in a letter dated 13 March 2009. The Commissioner wrote back to the public authority on 01 April 2009 and requested a copy of the complaints file held by the public authority in relation to its investigation of the complaint made by the complainant as well as any correspondence or document generated as a result of the investigation not held in the complaints file but nonetheless held by the public authority.
15. The public authority responded to the above request on 14 April 2009 and provided the Commissioner with the complaints file which also included other documents collated pursuant to the Commissioner's request.

Analysis

16. The text of all the statutory provisions referred to in this section can be found in the Legal Annex at the end of this Notice.

Section 1

17. A public authority is required by virtue of the provisions of section 1(1)(a), upon receipt of a request for information, to inform an applicant in writing whether or not it holds information of the description specified in the request.
18. With regard to the inconsistency in what the complainant was told the authority held (see paragraphs 3 and 5 above), the public authority explained that during

the course of an investigation, information may be collected from staff via written statements from the relevant staff or by an investigator taking handwritten notes whilst conducting interviews with staff. According to the public authority, although the guidance for recording interviews with staff which forms part of the public authority's Complaints Policy states that a printed copy of the interview should be sent to the staff in question for confirmation, in some cases, including complex or lengthy investigations like the one involving the complainant, an investigator may instead choose to verbally confirm the accuracy of the handwritten notes.

19. The Commissioner was provided with a copy of the relevant guidance in relation to recording interviews with staff and he is satisfied that the guidance does state that interview notes may be verbally verified by the relevant staff.
20. The public authority explained that between June 2007 (when it received the initial letter of complaint from the complaint) and May 2008, it had received a further 14 letters from the complainant raising additional issues. Therefore, due to the increasing complexity of the complaint, the public authority decided it was more appropriate to undertake individual interviews with key members of staff where possible. In total, 5 members of staff were interviewed during the course of the investigation.
21. The handwritten notes taken during the course of these interviews were then verbally reiterated to the interviewees and incorporated in the final response to the complainant. However, these notes were not retained once the drafting process was completed. The public authority added that a number of email exchanges between the investigator and members of staff held in the complaints file were not considered to be '*final clinical/nursing statements for the purpose of answering the complaints response.*' and were therefore not considered as falling within the scope of the request.

Commissioner's Assessment

22. The Commissioner reviewed the complaints file including the other documents provided in order to determine whether there were any documents in the file which could objectively be described as information falling within the scope of the complainant's request but not recognised as such by the public authority. Any relevant documents are referred to using the same index numbering provided by the public authority.
23. The Commissioner considers documents W2 and W3 as falling within the scope of the request. The former document contains a statement from the matron for the elderly care ward in response to a number of nursing issues raised by the complainant. The latter document contains a statement from the matron for General Surgery in response to the issues raised by the complainant regarding the nursing care on wards 5 and 12.
24. In addition, the Commissioner considers documents S2, S3, and S4 are captured by the complainant's request. These are however the same documents which were disclosed to the complainant on 18 and 26 September 2008.

25. The Commissioner therefore finds that the public authority incorrectly denied it held 'statements' as requested by the complainant in her letter of 10 June 2008. In the Commissioner's opinion, this would have been most probably as a result of the public authority's interpretation of the request, and he has further commented on this point in the 'Other Matters' section of this Notice.
26. The Commissioner however next considered whether at the time of the request, the public authority held any additional 'statements' other than those already identified from the complaints file.
27. The public authority explained that as the 'statements' would have been taken as part of the investigation of the issues raised by the complainant, they could only be held on the complaints file. According to the public authority, in line with its complaints procedure, the relevant wards would have initially attempted to informally resolve the issues raised by the complainant before advising her to make a formal complaint in order to initiate a formal investigation.
28. The other documents which were included in the complaints file sent to the Commissioner were therefore correspondence generated from that informal process. They would not include the 'statements' requested by the complainant as this could only be held in the complaints file, since it was created by virtue of the formal investigation conducted in relation to her complaint.
29. It appears to the Commissioner that the complaints file contains all the relevant documents generated during the formal investigation. There is internal consistency between documents contained in the file and documents referred to within it, and there is no indication as far as he can see that other relevant information might exist.
30. The Commissioner is therefore satisfied there is no evidence to suggest that a bulk of additional information in relation to the complaint is held elsewhere. He notes that the public authority had already informed the complainant that 'statements' would be taken pursuant to a formal investigation, and it was in fact this revelation that prompted the request. In addition, as only 5 members of staff were interviewed, it would be reasonable to suggest the 5 statements (from different members of staff) identified above were the only statements generated from the investigation.
31. In the *Information Commissioner v Environmental Agency EA/2006/0072*, the Information Tribunal ("Tribunal") upheld the Commissioner's view that that the test to be applied in establishing if information is held is not certainty, rather it should be based on a balance of probabilities. The application of the test requires a consideration of a number of factors including the quality of the public authority's final analysis of the request, scope of the search it made on the basis of that analysis and the rigour and efficiency with which the search was then conducted. It will also require considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held.
32. The Tribunal also adopted the above approach in *Fortune v Information Commissioner and the National Patient Safety Agency EA/2004/0004* where it

decided that on the basis of the searches conducted by the public authority, the public authority did not, on the balance of probabilities, hold the information the appellant alleged had been provided to it.

33. Guided by the above decisions, the Commissioner finds that, at the time of the request, on a balance of probabilities, the public authority did not hold any additional 'statements' within the scope of the complainant's request other than those already identified above.
34. However, the Commissioner would like to record his concern that the public authority did not consider the application of any of the Act's exemptions to the complainant's request when it released the documents identified at paragraph 8 above.
35. In particular, section 40 of the Act exempts information from disclosure if constitutes the personal data of the person making the request. Such a request would need to be considered under the Data Protection Act 1998 ("DPA") in line with the provisions of section 7. Furthermore, section 40(2) of the Act exempts information from disclosure if it constitutes the personal data of individuals other than the requester. The Commissioner has produced guidance on the application of section 40¹ as well as guidance to aid public authorities in determining whether information constitutes personal data.²
36. In *Galloway v Information Commissioner (EA/2008/0036)*, the Tribunal upheld the Commissioner's decision that the public authority was correct to withhold similar statements to those requested in the present case, although in that case it considered the application of sections 31 and 36 of the Act rather than section 40.
37. The Commissioner therefore expects the public authority to give due consideration to the application of any relevant exemptions in the Act in complying with the steps he has ordered below, in particular section 40 and section 7 of the DPA.

The Decision

38. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act;
 - The public authority incorrectly denied it held information matching the description specified by the complainant's request and is therefore in breach of section 1(1)(a).

¹ Available at:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/personal_information.pdf

² Available at:

http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf

- The Commissioner also finds the public authority in breach of section 10(1) for failing to confirm it held the information requested within 20 working days.

Steps Required

39. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- Correctly respond to the request of 10 June 2008 in accordance with section 1(1) and (2) of the Act. In other words, either disclose the information in documents W2 and W3, or provide the complainant with an adequate refusal notice if it considers the information should be withheld due to the application of a relevant exemption or provision of the Act, such as those referred to at paragraphs 35 to 37 above.

40. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Other matters

41. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

42. In the Commissioner's view, the public authority could have fully clarified the nature of the 'statements' requested by the complainant before deciding that it did not hold the requested information. In line with the Code of Practice issued by the Secretary of State pursuant to section 45 of the Act, the public authority should have described the nature of the documents held in the complaints file in relation to the subject of her request and clarified whether she considered those documents were captured by her request. The potential to misinterpret the request could have therefore been avoided.

43. The Code of Practice also states that a public authority should consider a written expression of dissatisfaction of its original decision as a request for an internal review. Therefore, in the Commissioner's view, the public authority should have treated the complainant's letter of 21 July 2008 as a review request. Although the letter merely reiterated the original request, in light of the fact that the complainant did not accept the public authority's initial decision, it would have been reasonable to infer that she was dissatisfied with the original decision. As the review was communicated to the complainant on 18 September 2008, it took the public authority 44 working days to complete.

44. The Commissioner's position as explained in the 'Freedom of Information Good Practice Guidance No. 5' is that internal reviews should take no longer than 20 working days, and in exceptional circumstances which have been clearly explained to the complainant, the total time taken should not exceed 40 working

days. This guidance was published in February 2007 well before the complainant's request. Although the delay does not constitute a breach of the Act, the Commissioner would like to make it clear that this does not accord with good practice. He therefore expects the public authority to be aware of his position as provided in the published guidance as his office will monitor the public authority's compliance or otherwise via future complaints made against it.

45. The Commissioner however acknowledges that the request was made in between what was a lengthy and complex complaint in relation to the complainant's late mother's care. This could have therefore contributed to the manner in which it was addressed. The Commissioner however expects that from the lessons learnt in this case, the public authority would in future be able to separate an information request from an ongoing complaint and address it adequately in accordance with the provisions of the Act.

Failure to comply

46. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

47. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 14th day of July 2009

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides 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.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“Where 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.”

Section 1(4) provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“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).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 10(2) provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

Section 10(3) provides that –

“If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

Section 10(4) provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

Section 10(5) provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

Section 10(6) provides that –

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

Personal information.

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

Section 40(5) provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-

- (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
- (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

Section 40(6) provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

Section 40(7) provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

Section 7 – Data protection Act 1998

Right of access to personal data

(1) Subject to the following provisions of this section and to sections 8 and 9, an individual is entitled—

(a) to be informed by any data controller whether personal data of which that individual is the data subject are being processed by or on behalf of that data controller,

(b) if that is the case, to be given by the data controller a description of—

(i) the personal data of which that individual is the data subject,

(ii) the purposes for which they are being or are to be processed, and

(iii) the recipients or classes of recipients to whom they are or may be disclosed,

(c) to have communicated to him in an intelligible form—

(i) the information constituting any personal data of which that individual is the data subject, and

(ii) any information available to the data controller as to the source of those data, and

(d) where the processing by automatic means of personal data of which that individual is the data subject for the purpose of evaluating matters relating to him such as, for example, his performance at work, his creditworthiness, his reliability or his conduct, has

constituted or is likely to constitute the sole basis for any decision significantly affecting him, to be informed by the data controller of the logic involved in that decision-taking.

(2) A data controller is not obliged to supply any information under subsection (1) unless he has received—

(a) a request in writing, and

(b) except in prescribed cases, such fee (not exceeding the prescribed maximum) as he may require.

(3) A data controller is not obliged to comply with a request under this section unless he is supplied with such information as he may reasonably require in order to satisfy himself as to the identity of the person making the request and to locate the information which that person seeks.

(4) Where a data controller cannot comply with the request without disclosing information relating to another individual who can be identified from that information, he is not obliged to comply with the request unless—

(a) the other individual has consented to the disclosure of the information to the person making the request, or

(b) it is reasonable in all the circumstances to comply with the request without the consent of the other individual.

(5) In subsection (4) the reference to information relating to another individual includes a reference to information identifying that individual as the source of the information sought by the request; and that subsection is not to be construed as excusing a data controller from communicating so much of the information sought by the request as can be communicated without disclosing the identity of the other individual concerned, whether by the omission of names or other identifying particulars or otherwise.

(6) In determining for the purposes of subsection (4)(b) whether it is reasonable in all the circumstances to comply with the request without the consent of the other individual concerned, regard shall be had, in particular, to—

(a) any duty of confidentiality owed to the other individual,

(b) any steps taken by the data controller with a view to seeking the consent of the other individual,

(c) whether the other individual is capable of giving consent, and

(d) any express refusal of consent by the other individual.

(7) An individual making a request under this section may, in such cases as may be prescribed, specify that his request is limited to personal data of any prescribed description.

(8) Subject to subsection (4), a data controller shall comply with a request under this section promptly and in any event before the end of the prescribed period beginning with the relevant day.

(9) If a court is satisfied on the application of any person who has made a request under the foregoing provisions of this section that the data controller in question has failed to comply with the request in contravention of those provisions, the court may order him to comply with the request.

(10) In this section—

- “prescribed” means prescribed by the Secretary of State by regulations;
- “the prescribed maximum” means such amount as may be prescribed;
- “the prescribed period” means forty days or such other period as may be prescribed;
- “the relevant day”, in relation to a request under this section, means the day on which the data controller receives the request or, if later, the first day on which the data controller has both the required fee and the information referred to in subsection (3).

(11) Different amounts or periods may be prescribed under this section in relation to different cases.