

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 August 2013

Public Authority: University Hospitals Bristol NHS Foundation Trust

Address: Trust Headquarters
Marlborough Street
Bristol
BS1 3NU

Decision (including any steps ordered)

1. The complainant has requested various information relating to the University Hospitals Bristol NHS Foundation Trust's (the Trust) histopathology/pathology services. The Trust refused to comply with the request as it considered it `vexatious under section 14 of the Freedom of Information Act (FOIA).
2. The Commissioner's decision is that the Trust has correctly applied section 14 FOIA in this case. It is not therefore obliged to comply with the request.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 31 July 2012 the complainant made the following request (via the 'Whatdotheyknow' website) for information under the FOIA for;
"Please provide the following documents:
 1. The latest version of the operational policy for Avon Brest Screening.
 2. Terms of reference for and the report of the review commissioned

October 2010 from Professor William Roche of likelihood of harm to the 26 cases of concern that were reviewed by the Mishcon inquiry¹.

3. Please list the specific information provided to Professor Roche in order to inform his opinions.

4. Terms of reference for and the report of additional diagnosis commissioned November 2010 from Source BioScience of 17 gynaecology cases identified as B1 errors in the 3,508 case review performed by Source BioScience in 2009, with the names of the reviewers.

When considering your response please note this precedent:

http://whatdotheyknow.com/request/histopathology_inquiry_report²"

5. The Trust responded on 7 August 2012 and said that the request was vexatious under section 14 of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 30 October 2012 to complain about the way her request for information had been handled.
7. The Commissioner has considered whether the Trust correctly applied section 14 FOIA in this case.

Reasons for decision

8. Section 14(1) of the FOIA provides that a public authority is not obliged to comply with a request if it is vexatious.
9. The Commissioner's published guidance³ on section 14(1) (which was the current guidance at the time of the request) provides that the following five factors should be taken into account when considering whether a request can accurately be characterised as vexatious:

¹ A reference to the Independent Inquiry into Histopathology Services chaired by Jane Mishcon which reported in December 2010. For the full report see; <http://www.uhbristol.nhs.uk/files/nhs-ubht/Histopathology%20report%20December%202010.pdf>

² Request made by the complainant to the Trust on 4 January 2011 regarding information and evidence presented to the Mishcon inquiry.

³http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/vexatious_and_repeated_requests.pdf

- whether compliance would create a significant burden in terms of expense and distraction;
 - whether the request is designed to cause disruption or annoyance;
 - whether the request has the effect of harassing the public authority or its staff;
 - whether the request can otherwise fairly be characterised as obsessive or manifestly unreasonable; and
 - whether the request has any serious purpose or value.
10. The guidance stated that it is not necessary for all five factors to be engaged, but explained that the Commissioner will reach a decision based on a balance of those factors which are applicable, and any other relevant considerations brought to his attention.
11. The Commissioner has recently issued new guidance⁴ on the application of section 14(1) and this adopts a less prescriptive approach. It refers to a recent Upper Tribunal decision⁵ which establishes the concepts of 'proportionality' and 'justification' as central to any consideration of whether a request is vexatious.
12. The new guidance therefore suggests that the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. Where this is not clear, the Commissioner considers that public authorities should weigh the impact on the authority and balance this against the purpose and value of the request. Where relevant, public authorities will need to take into account wider factors such as the background and history of the request.
13. The Trust has submitted its detailed arguments to the Commissioner with reference to the five headings as outlined in the old guidance and has also tested its original decision against the new guidance. It has relied upon the same arguments detailed in a Decision Notice issued on 26 March 2013 under case reference FS50452727 which were reiterated in a subsequent Decision Notice dated 16 July 2013 under case reference FS50481492. As these cases relate to requests made on the

⁴http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/dealing-with-vexatious-requests.ashx

⁵ *Information Commissioner vs Devon County Council & Dransfield* [2012] UKUT 440 (AAC) (28 January 2013)

same subject matter and from the same complainant, the Commissioner considers that the reasons behind the decisions in these cases would equally apply in this case. The decision in case FS50452727 related to 11 requests made between 23 November 2011 and 8 January 2012. The Trust explained that since March 2009 up to the date of the first request being considered in that case (23 November 2011) it received 38 freedom of information requests from the complainant relating to histopathology or pathology services which featured in an independent Inquiry. In addition it confirmed that there had been other interactions, and challenges received from the complainant on a weekly basis. It said this included letters to Trust governors and the Chief Executive.

14. In case reference FS50452727 the Commissioner upheld the Trust's application of section 14 FOIA. The Commissioner has not included all of the detailed reasoning contained in that Notice but would reiterate that it would be equally applicable in this case as it relates to an earlier request on the same subject matter. However the Trust has provided some further submissions in support of its application of section 14 FOIA. The Commissioner has therefore considered the arguments put forward by the Trust in light of the new guidance.

Unreasonable persistence

15. The new guidance states that to show unreasonable persistence, the public authority must demonstrate that the requester is attempting to reopen an issue which has already been comprehensively addressed by the public authority, or otherwise subjected to some form of independent scrutiny.
16. The Trust has explained that a Histopathology Inquiry was independently conducted to address concerns in this area, with a range of expert involvement and reported in December 2010. The Commissioner is aware that the report and subsequent follow up actions were made publicly available.
17. The Commissioner considers that concerns relating to histopathology have been subject to independent scrutiny and the complainant is seeking to reopen this issue in this and previous information requests. This therefore displays an unreasonable persistence.

Intransigence

18. The new guidance states that to show intransigence, the public authority must demonstrate that the requester takes an unreasonably entrenched position, rejecting attempts to assist and advise out of hand and shows no willingness to engage with the authority.

19. The Trust has explained that it considers that it has tried to answer many of the complainant's previous requests, even at the stage where they began to become duplicative. It said that the Trust has met with the complainant on two occasions to try to agree an approach to conclude the issues being raised by the complainant. However this was unsuccessful in coming to a resolution.
20. The Commissioner considers that given the length of time the complainant has been making requests for information regarding this issue, the number of requests made and the fact that the issue has been subject to independent scrutiny, the Trust has demonstrated that the complainant has taken an unreasonably entrenched position.

Frequent or overlapping requests

21. The new guidance states that the public authority must demonstrate that the requester submits frequent correspondence about the same issue or sends in new requests before the public authority has had an opportunity to address their earlier enquiries.
22. The Trust reiterated that over the last three years the Trust has been managing sustained and persistent correspondence from the complainant regarding histopathology services. It said that this correspondence has been received on an almost weekly basis across all levels of the organisation. It said that these interactions included FOIA and subject access requests but also complaints, challenges, accusations and allegations and questions posed at public meetings. The Trust explained that the complainant has also been corresponding with other local arms of the health service which the Trust has been involved in responding to.
23. The Trust said that whilst it is positive for patients to be able to engage with and challenge the NHS, the scale, scope and volume in which the complainant has done so, both through the making of FOIA requests and other correspondence, this has taken the interactions to a disabling level for the Trust. It has said that the requests have created a significant operational as well as managerial distraction which has disrupted the organisations duties to other service users.
24. The Commissioner considers that due to the length of time the complainant has been making requests to the Trust regarding this issue, the number of requests made and the fact that the requester is asking for information about matters that were dealt with as part of the independent Histopathology Inquiry, this demonstrates that the requests are frequent and overlapping.

25. The Commissioner has considered the arguments put forward by the Trust in light of the Upper Tribunal's view of the importance of 'proportionality' and 'justification' and has balanced this against the purpose and value of the request. Where relevant, he has taken into account wider factors such as the background and history of the request.
26. The Commissioner recognises that whilst there was a serious purpose and value behind the requests when the complainant first contacted the Trust, this has now been outweighed by the unreasonable persistence, intransigence and the frequency and overlapping nature of the requests. He considers that any serious purpose in the request is outweighed by the drain on resources and the diversion from the public functions of the Trust.
27. The Commissioner also recognises that the Trust has tried to answer many of the complainant's earlier requests even where they became duplicative and has attempted to try to resolve the complainant's issues. It decided to apply section 14 at the point when the complainant persisted to make requests on the same issue and it became apparent that no response would satisfy the issue as set out in detail in the Decision Notice for case reference FS50452727. Due to the volume of correspondence on these issues and the fact that the issues have been subject to significant external scrutiny, the Commissioner is satisfied that the request is vexatious and that section 14(1) has been applied correctly.

Right of appeal

28. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

29. 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.
30. 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

Rachael Cragg
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SK9 5AF