

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 April 2013

Public Authority: Birmingham Children's Hospital NHS Foundation Trust

Address: Steelhouse Lane, Birmingham, B4 6NH

Decision (including any steps ordered)

1. The complainant has requested information relating to a review of the paediatric intensive care unit at Great Ormond Street Hospital.
2. The Commissioner's decision is that Birmingham Children's Hospital NHS Foundation Trust (the Trust) does not hold the requested information.
3. The Commissioner does not require any steps to be taken as a result of this decision notice.

Request and response

4. On 25 June 2012, the complainant wrote to the Trust and requested information in the following terms:

"I am writing to make an open government request for all the information to which I am entitled under the freedom of information act. In order to assist you with this request, I am outlining my query as specifically as possible. If however this request is too wide or too unclear, I would be grateful if you could contact me as I understand that under the act, you are required to advise and assist requesters.

- *I request to see the initial draft report of December 2011.*
- *I request to see all modifications to the report by Review Committee of Jan-Apr 2012*
- *I request to see the draft report circulated for review of factual accuracy.*
- *I request to see all early draft versions of the report sent to the Trust.*

- *I request to see all dialogue between with the Trust and the Committee concerning the report and the review process that you have."*
5. The Trust responded on 11 July 2012. It stated that the request fell outside of the FOIA as the individual involved was acting in his capacity as an independent member of the Review Committee. Therefore the information was not held by the Trust.
 6. Following an internal review the Trust wrote to the complainant on 4 December 2012. It stated that it did not hold the requested information.

Scope of the case

7. The complainant contacted the Commissioner on 2 January 2013 to complain about the way his request for information had been handled.
8. The complainant stated that he found it had to believe that the Trust did not hold any information *"as Dr .. must have received some communication or request to be part of the Review and I presume must have asked the Trust for time to undertake the review. He must also have received draft versions of the Review."*
9. The Commissioner considers the scope of this case to be to determine if the Trust holds any of the information for the purposes of the FOIA relevant to the request under section 1(1)(a).

Reasons for decision

10. 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 the requested information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

11. In determining whether a public authority holds the requested information the Commissioner considers the standard of proof to apply is the civil standard of the balance of probabilities.
12. As part of his investigation the Commissioner took into account the complainant's comments and asked the Trust a number of questions, as

well as to provide an explanation of the searches it had carried out to locate recorded information within the scope of the request.

13. In its response the Trust stated that between 24 November and 6 December 2012 the searches that had been carried out by the Head of IT on the individual's Trust computer covered the following: email box, email account archive, personal folders, 'my documents' folder and the computer desk top.
14. The Trust stated that no information falling within the scope of the request was found. However there was a copy of the GOS Critical Care Review Report which had been sent to a colleague within the Trust. The email contained a copy of the final report and nothing else. There were a number of emails relating to an expenses claim for rail travel in connection with the review.
15. The Trust explained that it had searched using the terms 'Great Ormond Street', 'Critical care' and 'Review'. It further explained that if relevant information was held it would most likely be as electronic records.
16. The Trust considered that it is unlikely that these searches would yield information that would answer the complainant's questions.
17. The Commissioner is satisfied that the public authority made appropriate searches to determine whether it holds relevant information to the complainant's request.
18. The Commissioner acknowledges that it can be difficult for a public authority to "prove" that it does not hold any information on a particular subject. However, having reviewed the evidence, the Commissioner is satisfied that, on the balance of probabilities the Trust does not hold the requested information.
19. It is important to clarify when a public authority holds information for the purposes of FOIA.

Section 3(2) – information held by a public authority

20. The Trust's position in this particular case is that following the searches it has conducted it does not hold the requested information. However in light of the capacity in which the individual was acting as part of an independent member of a Review Committee the Commissioner considers that any information which would have been held whilst acting in this role is unlikely to have been held by the Trust as a public authority under FOIA.

21. Section 1 of FOIA states that any person making a request for information is entitled to be told whether the public authority holds the information requested and, if held, to be provided with it.
22. Section 3(2) sets out the two legal principles that establish whether information is held for the purposes of FOIA:

"For the purposes of this Act, information is held by a public authority if—

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority."

23. Although the Trust has not referred to section 3 it has explained to the complainant that the individual was acting in his capacity as an independent member of the Review Committee. He considers that both the Trust and the individual concerned were of the belief that the individual was operating in an independent private capacity and outside the scope of his employment with the Trust when acting as an independent member of this committee. Therefore this information is not held by a public body and the Trust had no interest in, or control over, the requested information.
24. The Commissioner understands the complainant's view that it is difficult to believe that there are no communications held on the individual's email account at the Trust.
25. Because this information is not Trust business, it cannot be argued to be held by the individual on behalf of the Trust. It may instead be considered to be held by the Trust, on behalf of the individual, solely by virtue of being hosted on the council's email systems.
26. Whether or not the use of a Trust email address for non-Trust business is appropriate is not a matter for the Commissioner to determine. It seems to him that there is no obvious reason why such arrangements may not be agreed by mutual consent, or established custom and practice. The Commissioner accepts that a reasonable amount of personal use of Trust computers is often likely to be considered normal practice.
27. The Commissioner's position in situations such as this is that unless the information in the emails relates to Trust business, it is not held by the Trust in its own right, and there is no right of access under FOIA.

28. In conclusion, in this case having considered all of the points above the Commissioner is satisfied that the Trust does not hold any information relevant to the request.

Right of appeal

29. 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

30. 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.
31. 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, Complaints Resolution
Information Commissioner's Office
Wycliffe House
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