

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 25 June 2013

**Public Authority:** North Bristol NHS Trust

**Address:** Frenchay Hospital  
Beckspool Road  
Frenchay  
Bristol  
BS16 1JE

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to concerns about histopathology/pathology breast care services. North Bristol NHS Trust (the Trust) refused to comply with the request as it considers it is 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 and it was not therefore obliged to comply with the request.
3. The Commissioner requires no steps to be taken.

#### **Request and response**

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4. On 23 October 2012, the complainant wrote to the Trust and requested information in the following terms:  
  
"On 1st June 2007 a doctor from North Bristol NHS Trust wrote a letter to then Medical Director Dr Martin Morse. The letter included specific examples of what the author regarded as just some examples of cases where patients had suffered or died as a result of misdiagnosis by UH Bristol's Histopathology service.

Please provide me with the following information:

1. What action was taken by Dr Morse on receipt of this letter?
2. Where are these actions documented? Please provide copies.
3. Did Dr Morse, bring this letter to the attention of his Chief Executive and other members of the Trust Board? If so, please provide the records of the discussions about the letter, including the records of any private Board discussions about it.
4. What decisions were made and by whom as to whether to inform the Healthcare Commission about the letter? Where are these decisions documented? Please provide copies.
5. What decisions were made and by whom as to whether to record the cases referred to in the letter as Serious Untoward Incidents/Adverse Incidents? Please provide copies of the documents recording these decisions.
6. Who was NBT's Clinical Governance Lead at the time? Were they informed about the letter? If so please provide a copy of the notification(s) provided to them.
7. If NBT's Clinical Governance Lead took any action, what was it? Please provide a copy of his/her action plan.
8. Did NBT inform NHS Bristol and/or NHS South West about the letter? If so, please provide copies of the notifications to them.
9. Did Dr Morse or anyone else at NBT discuss the letter with anyone at UH Bristol (or UBHT as it was then)? If so, please provide the record of the communications.
10. At the Joint Health Scrutiny Meeting held 15th October 2007 attended by North Bristol NHS Board Members Dr Morse and David Tappin, and Bristol PCT Board member Deborah Lee, the author of the 1st June 2007 letter to Dr Morse said publicly that "Some aspects of UHBT's pathology are not up to standard". What action did North Bristol NHS Trust Board Members Dr Morse and David Tappin take in response to hearing this statement made in public by one of the Trust's senior medical staff? Where are these actions documented? Please provide copies.
11. Were the events of that meeting, including the statement made in public on 15th October 2007 by the letter author reported to the Trust Board, including Chief Executive Sonia Mills? If so, please provide copies of the documents containing the reports.

12. Deborah Lee, Dr Morse and David Tappin left the meeting together. What action did Dr Morse and David Tappin agree with Deborah Lee should be taken in response to the statement made in public by the author of the letter to Martin Morse? Where are these actions documented? Please provide copies.
13. What North Bristol NHS Trust procedures were in place in 2007 that would have instructed Dr Morse about the required process to deal with the letter dated 1st June 2007? Please provide copies of the procedures.
14. What North Bristol NHS Trust procedures were in place in 2007 that would have instructed Dr Morse and David Tappin about the required process for responding to the whistleblowing statement made by one of their doctors in a public meeting? Please provide copies of the procedures. All reference above to documents and records includes information held on computers, in emails and in printed or handwritten documents."
5. On 23 October 2012 the Trust responded. It explained that section 14 FOIA was applicable in this case, as per its letter dated 14 September 2012, in which it had informed the complainant that further requests relating to this subject matter would be deemed vexatious.
6. The complainant requested an internal review on 23 October 2012. The Trust wrote to the complainant on 15 November 2012 to confirm that it would not carry out an internal review.

### **Scope of the case**

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7. The complainant contacted the Commissioner 23 November 2013 to complain about the way her request for information had been handled.
8. The Commissioner has considered whether the Trust correctly applied section 14 FOIA in this case.

### **Reasons for decision**

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9. Section 14(1) provides that a public authority is not obliged to comply with a request if it is vexatious.

10. The Commissioner's published guidance<sup>1</sup> 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:
- 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.
11. 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.
12. The Commissioner has recently issued new guidance<sup>2</sup> on the application of section 14(1) and this adopts a less prescriptive approach. It refers to a recent Upper Tribunal decision<sup>3</sup> which establishes the concepts of 'proportionality' and 'justification' as central to any consideration of whether a request is vexatious.
13. 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

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<sup>1</sup>[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/vexatious\\_and\\_repeated\\_requests.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/vexatious_and_repeated_requests.pdf)

<sup>2</sup>[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/dealing-with-vexatious-requests.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/dealing-with-vexatious-requests.ashx)

<sup>3</sup> *Information Commissioner vs Devon County Council & Dransfield* [2012] UKUT 440 (AAC) (28 January 2013)

authorities will need to take into account wider factors such as the background and history of the request.

14. The Trust has submitted its arguments to the Commissioner with reference to the five headings as outlined in the old guidance. It has relied upon the same arguments detailed in a Decision Notice issued on 14 May 2013 under case reference FS50462149. As this case relates to a request made on the same subject matter and from the same complainant, the Commissioner considers that the reasons behind the decision in that case would equally apply in this case. That case related to a request made on 23 April 2012. The Trust explained that since 2011 it received 27 freedom of information requests from the complainant. Many of the requests contained multiple requests for information and the Trust calculated that in total there had been 126 different information requests of which 102 relate to histopathology or breast care services provided by the Trust or other local healthcare bodies and which featured in an independent Inquiry. In addition it confirmed that there had been other correspondence and the complainant had received letters from the Trust's Medical Director, Chief Executive and Chairman.
15. In case reference FS50462149 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 further submissions in support of its application of section 14 FOIA after consideration of the new guidance. The Commissioner has therefore, in addition, considered the arguments put forward by the Trust in light of the new guidance.

### **Unreasonable persistence**

16. 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.
17. The Trust has explained that the Histopathology Inquiry was independently conducted to address concerns in this area, with a range of expert involvement and reported in 2010. The Trust confirmed that the report and subsequent follow up actions were made publicly available. It said that it was also subject to scrutiny by the Local Authority and other Stakeholders. It provided a link to the information which is publicly available.

18. The Commissioner considers that the Trust has demonstrated 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**

19. 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.
20. The Trust argued that whilst it is difficult to dispute the serious purpose or value behind the individual requests made by the complainant, when taken together over the years, it has become apparent that no response is deemed good enough by the complainant despite the professional qualifications, independence or credibility behind the information being used to respond to the requests. It went on to explain that it considers that the complainant is trying to keep the issue running, irrespective of the evidence presented by the Trust or others and despite the level of independent scrutiny histopathology has been subject to. It therefore concluded that the complainant has taken an entrenched position and is unwilling to engage constructively with the Trust.
21. 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**

22. 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.
23. The Trust has explained that as previously outlined, it has provided responses to information requests relating to the Bristol Histopathology Inquiry and also the subsequent transfer of Breast Services to Southmead. It reiterated that this has amounted to over 100 separate requests for information to the Trust. It said that many of the requests involve a series of separate detailed questions. It provided an example of a request made by the complainant on 26 April 2011 which consisted of 48 separate questions with an appendix containing a further 30

questions relating to histopathology. It confirmed that a response was provided at the time by the then Chief Executive.

24. It said that the current request is for information which predates the Histopathology Inquiry and also relates to the historic actions of personnel who are no longer employed by the Trust. It confirmed that the issues raised by the current request were covered by the Inquiry.
25. 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.
26. 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.
- 27.** 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. The Commissioner also recognises that the Trust did reply in full to earlier requests which were very detailed and time consuming. It decided to apply section 14 at the point when the complainant persisted to make requests on the same issue and they became duplicative as set out in detail in the Decision Notice for case reference FS50462149. 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. He considers that his decision in this case is supported by the recent Tribunal decision EA/2012/0262 in which the Tribunal commented that the simple question in such cases as this was whether "when all the evidence is weighed and circumstances investigated – is the burden which dealing with the request places on the public body disproportionate to the public good which flows from the disclosure of the material" and the Tribunal concluded that in that case the request was in fact a gross misuse of FOIA.

## Right of appeal

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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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://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 .....**

**Pamela Clements**  
**Group Manager, Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**