

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 November 2016

Public Authority: Lancashire Teaching Hospitals
NHS Foundation Trust

Address: Royal Preston Hospital
Sharoe Green Lane
Fulwood
Preston PR2 9HT

Decision (including any steps ordered)

1. The complainant has requested information concerning communications Lancashire Teaching Hospitals NHS Foundation Trust ('the Trust') had with the NHS Staff Council. Having initially responded to the request, the Trust subsequently categorised it as vexatious under section 14(1) of the FOIA.
2. The Commissioner's decision is that the complainant's request of 28 October 2015 cannot be categorised as vexatious under section 14(1). However, the Commissioner is prepared to accept that, under section 1(1) of the FOIA, the Trust does not hold the information that has been requested. The Commissioner does not require the Trust to take any steps.

Request and response

3. On 28 October 2015, the complainant wrote to the Trust and requested information in the following terms:

"... for [1] the paper or electronic copies of the advice sought from and received from the NHS Staff Council, for clarity can you please [2] confirm who contacted the NHS Staff Council, [3] when the NHS Staff Council was contacted, and [4] a copy of that response, can I also have

the [5] name of the NHS Staff Council member or members contacted please... I simply would like to have [6] information received from the NHS Staff Council which is mentioned in both letters."

4. The Trust responded on 23 November 2015. The Trust said that it does not hold information with regard to part [1], part [2], part [4] and part [6]. It provided information with regard to part [3]. The Trust said that the information the complainant requested at [5] is exempt from disclosure under section 40(2) because it is the personal data of a third party. The Trust provided the complainant with the contact details of NHS Employers and the NHS Staff Council.
5. The complainant requested an internal review on 16 December 2015. The Trust provided a review on 19 January 2016. It confirmed that it had supplied the complainant with all the written information that it holds regarding correspondence relating to any of his previous queries, and that the information requested at part [5] of the current request would be exempt under section 40(2) of the FOIA.
6. Further correspondence followed. On receipt of a request from the complainant for a further review, on 15 February 2016 the Trust invoked section 14(1) and refused to correspond with the complainant further.

Scope of the case

7. The complainant contacted the Commissioner on 23 May 2016 to complain about the way his request for information had been handled.
8. The Commissioner has focussed her investigation on whether the request of 28 October 2015 can be categorised as vexatious under section 14(1) of the FOIA.

Reasons for decision

9. Section 14(1) of the FOIA says that a public authority is not obliged to comply with a request for information if the request is vexatious.

The term 'vexatious' is not defined in the FOIA. The Upper-Tier Tribunal considered the issue of vexatious requests in the case of the Information Commissioner and Devon County Council vs Mr Alan Dransfield (GIA/3037/2011) (Dransfield) and concluded that the term could be defined as "*manifestly unjustified, inappropriate or improper use of a formal procedure*".

The *Dransfield* case identified four factors that may be present in vexatious requests:

- the burden imposed by the request (on the public authority and its staff)
- the motive of the requester
- harassment or distress caused to staff
- the value or serious purpose of the request.

The Commissioner has identified a number of 'indicators' which may also be useful in identifying vexatious requests. These are set out in her published guidance on vexatious requests¹. In short they include:

- abusive or aggressive language
- burden on the authority
- personal grudges
- unreasonable persistence
- unfounded accusations
- intransigence
- frequent or overlapping requests; and
- deliberate intention to cause annoyance.

The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is vexatious.

10. The Commissioner's guidance suggests that, if a request is not patently vexatious, 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. In doing this the Commissioner considers that a public authority should weigh the impact of the request on it and balance this against the purpose and value of the request.
11. Where relevant, public authorities also need to take into account wider factors such as the background and history of the request. However, it is important to recognise that one request can in itself be 'vexatious' depending on the circumstances of that request.

¹ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

12. In its submission to the Commissioner, the Council has provided a background to the request, which it considers is relevant to its application of section 14(1).
13. The Trust says that the complainant is an employee of the Trust. In 2015 he requested two separate payments of £15, which he considered he was entitled to following two occasions when his shift was changed. According to the Trust, whether the complainant is entitled to these payments is determined by the NHS Terms and Conditions; those applicable to the complainant are known by the shorthand of 'Agenda for Change'. With regard to the payments sought by the complainant, the eligibility for the same under the 'Agenda for Change' terms is dependent on whether the Trust operates a 'prospective pay' system or a 'retrospective pay' system. The Trust says it operates a retrospective pay system and, on its reading of the 'Agenda for Change' terms, the complainant is not entitled to the payments sought, as this was not available under retrospective pay systems.
14. The Trust informed the complainant of this. In light of further challenge by him, the Trust says it sought further assurance that its view was correct from two advisory bodies with expertise in the NHS employment terms and conditions: NHS Employers and the NHS Staff Council.
15. The Trust says that it sought advice from NHS Employers by email and sought advice from the NHS Staff Council by telephone. These two organisations confirmed the Trust's interpretation of the 'Agenda for Change' terms and the Trust informed the complainant of this.
16. On 22 September 2015, the complainant sought copies of the information and advice the Trust's payroll manager had sought from NHS Employers and the NHS Staff Council. The Trust responded on 20 October 2015. It released the copies of the Trust's email exchanges with NHS Employers, which the Commissioner has seen. That exchange appears to support the Trust's position regarding the two payments. On receipt of this response, the complainant submitted the request that is the subject of this notice, and the correspondence referred to above followed.
17. For clarity, the Trust has confirmed to the Commissioner during her investigation that it does not hold any of the information requested on 28 October 2015. This is because it contacted the NHS Staff Council by telephone and no information regarding this phone call was recorded. However, although the Trust initially responded to this request, it retrospectively considers the request to be vexatious under section 14(1).

18. The Commissioner notes that the Trust did not tell the complainant in its correspondence of 23 November 2015 and 19 January 2016 what it subsequently told the Commissioner; namely that it does not in fact hold the information requested at part [5] of the request. In this correspondence, the Trust indicated that it held this information and that it was exempt under section 40(2) of the FOIA.
19. However, in support of its retrospective application of section 14(1) to the complainant's request, the Trust has referred to the following factors:
20. **Disproportionate burden to the Trust:** The Trust has summarised the history of the complainant's FOIA requests above. It considers that the complainant is using the Act to pursue a wider campaign against the Trust in relation to his perceived entitlement to the two payments of £15 that he considers is payable to him as a result of two shift changes. The Trust has referred to its explanation of this matter at paragraph 17. It says that it has no discretion in the interpretation of the rules in question but had sought advice from the two organisations referred to. The Trust says that engaging with the complainant about this issue has itself required a substantial amount of staff time. It says it has offered the complainant a meeting to discuss the matter and that the complainant has not taken up this offer.
21. The Trust considers that the complainant is using the FOIA regime as a tool in his dispute with it and that each request for information spawns further requests. The Trust has explained its position regarding the two payments but says that from its experience with the complainant, no response or explanation from the Trust will satisfy him; further responses from the Trust will generate further enquiries from the complainant. Consequently, in addition to the staff time spent on deal with the complainant's underlying complaint, the Trust argues that dealing with this ongoing correspondence takes up further staff time. It says that the amount of time the Trust is expending is out of all proportion to the significance and complexity of the issue the complainant seeks to pursue.
22. **Unreasonable persistence:** The Trust has referred to the background above. It says the complainant has had a full explanation of its decision regarding the two payments and full disclosure of all the information it holds regarding the assurance it sought from NHS Employers and the NHS Staff Council (ie it has disclose its email correspondence with NHS Employers). It considers the complainant is now seeking to pursue the issue beyond the point which would objectively be considered reasonable.

23. The Trust notes that the complainant has not taken up the Trust's offer to meet with him to address his underlying concern regarding the £15 payments. It has told the Commissioner that the Trust does not regard as determinative the fact that the total sum at the root of the complainant's behaviour is £30. However it says that in its view, that the complainant has engaged in such an extensive and persistent correspondence on the issue that it could be objectively categorised as unreasonable.
24. **Futile request:** The Trust confirmed that it has previously explained to the complainant why he is not entitled to the payment of £30 in total that he seeks, and that his requests relate to the assurance the Trust sought that it was applying the national terms and conditions correctly. The Trust has told the Commissioner that the responses do not take the complainant any further on in his challenge to the Trust's decision regarding the two payments.
25. The Trust has told the Commissioner that the complainant's most recent challenge to the Trust's response (the Commissioner assumes this refers to the response of 20 October 2015) appears to be based on the fact that the Trust's disclosure did not include documents previously sent to him, and which he therefore already possesses. The Trust says that, in these circumstances, it reasonably interpreted the request as being for the source documentation. As such it considers any challenge to the Trust's disclosure decision on the basis that it did not disclose particular information to be futile. This is because the Trust had provided this information to the complainant previously.
26. To conclude its submission to the Commissioner, the Trust says that it is faced with someone who does not accept that the Trust is not liable to pay him two payments of £15 for shift changes. It says the complainant is seeking careful and detailed explanations of the Trust's position, supported by information disclosed through previous FOIA requests. He does not accept that the Trust has no further record of a telephone conversation with the NHS Staff Council. The Trust's attempts to explain this to him have been met with increasing requests for further information. The Trust says these requests have become less connected to the original information request and appear to be further requests simply for their own purpose. The Trust has stated to the Commissioner that it cannot produce documentation that does not exist.
27. In the circumstances, the Trust is of the view that no response that it provides to the complainant will be regarded as sufficient by him and that the already significant staff resources devoted to dealing with this concerns (and therefore not available to deal with the Trust's other

work) will only increase. The Trust considers there is ample evidence that the complainant's request is both disproportionate and unjustified and that it engages the exemption at section 14(1).

28. The Commissioner has reviewed correspondence between the Trust and the complainant going back to June 2015. She has noted the Trust's correspondence dated 20 October 2015. This was a response to an earlier FOIA request in which the complainant had requested information regarding the Trust's contact with NHS Employers and the NHS Staff Council. The Trust disclosed the email correspondence between it and NHS Employers, explaining why some of this information had been redacted under section 40(2) of the FOIA as it is the personal data of third parties. The Trust did not address the second element of the complainant's earlier request, which was for information regarding communications with the NHS Staff Council. This resulted in the complainant's request of 28 October 2016, which is the subject of this notice.
29. In the Commissioner's view, the Trust should have regarded the correspondence of 28 October 2015 as a request for an internal review of its response of 20 October 2015, rather than a new request. As it is the Trust then provided a response on 23 November 2015 in which it said it did not hold information relating to four parts and that one part was exempt under section 40(2), i.e. it seemed to suggest it held information relating to this part (part 5). It confirmed this position in its further communication to the complainant of 19 January 2016.
30. The Commissioner considers that, on this occasion, the complainant's request cannot be considered to be vexatious under section 14(1). This is because through this correspondence the complainant was simply requesting a response to an element of the earlier request of 22 September 2015 that the Trust had not addressed. The Trust's subsequent responses seemed to suggest some information was held regarding the NHS Staff Council and further correspondence followed, until the Trust invoked section 14(1) on 15 February 2016.
31. The Commissioner reminds the Trust that under the FOIA, a public authority should provide a clear response to *all* elements of a request in its first correspondence. The authority should then recognise an expression of dissatisfaction with the response as a request for an internal review. If the applicant remains dissatisfied following a review of the response, it may sometimes be more appropriate for the authority simply to direct the applicant to submit a complaint to the Commissioner at that point rather than engage in further correspondence about the response. In its correspondence with the Commissioner the Trust has acknowledged that there were shortcomings in its correspondence with the complainant. It has told her that it will review the way it handled

this request and put procedures in place to make sure it does not happen again.

32. During the Commissioner's investigation, the Trust confirmed that its communication with the NHS Staff Council was by telephone and that, at the time of the original request of 22 September 2015 and the current request, it did not hold any recorded information falling within the scope of any part of the complainant's requests for this particular information. On the balance of probabilities, the Commissioner is prepared to accept this is the case. The Commissioner notes that the Trust has released to the complainant the information it holds regarding its contact with NHS Employers i.e. the email exchange. The two elements of the complainant's request of 22 September 2015 have therefore now been addressed.
33. The Commissioner assumes that the complainant's priority is to clarify the situation regarding the two £15 payments that he considers the Trust should pay him. The Trust has provided the complainant with the contact details of both NHS Employers and the NHS Staff Council, from which it has sought advice. Seeking advice from these organisations himself, or taking up the Trust's offer of an informal meeting, would seem to the Commissioner to be appropriate ways for the complainant to resolve his principal concern, at this stage.

Right of appeal

34. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. 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.
36. 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

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