

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 January 2017

Public Authority: Department of Health
Address: 79 Whitehall
London
SW1A 2NS

Decision (including any steps ordered)

1. The complainant has requested information about the Morecambe Bay Investigation. The Department of Health ('DH') has refused to comply with the requests, which it says are vexatious under section 14(1) of the FOIA.
2. The Commissioner's decision is that the two requests are vexatious and DH is correct not to comply with them. The Commissioner does not require DH to take any steps.

Request and response

3. On 6 May 2016 and 19 May 2016, the complainant wrote to request information about the Morecambe Bay Investigation (MBI). The two requests are reproduced in the appendix to this notice. The first is for a) the transcript of a particular closed interview related to the MBI and b) communications sent through a 'private website' concerning interviews related to the MBI. The second request is again for communications sent through a 'private website' concerning particular MBI interviews.
4. DH responded on 1 June 2016. It refused to comply with the requests which it said are vexatious under section 14(1) of the FOIA.

5. DH provided an internal review on 8 July 2016. It upheld its original position.

Scope of the case

6. The complainant contacted the Commissioner on 5 August 2016 to complain about the way his requests for information had been handled.
7. The Commissioner's investigation has focussed on whether the two requests can be categorised as vexatious under section 14(1) of the FOIA.

Reasons for decision

Background

8. The MBI was established by the Secretary of State for Health in September 2013 to examine concerns raised by a number of serious incidents in the maternity unit of Furness General Hospital, part of the University Hospitals of Morecambe Bay NHS Foundation Trust. The serious incidents occurred between 2004 and June 2013 and included the deaths of babies and one mother.
9. The complainant has submitted a previous request to DH for information regarding the MBI. That request related to transcripts of interviews that took place as part of the Investigation. The Commissioner's decision regarding the complainant's resulting complaint to her is detailed in FS50612651¹. The Commissioner found that the requested information did not engage the exemption under section 22 (information intended for future publication), which DH had applied to it. The Commissioner ordered disclosure of some of the information and found that the remainder could be withheld under section 40(2)(third person personal data) and section 41 (information provided in confidence).
10. In her decision in FS50612561, the Commissioner explained that the interview sessions that took place as part of the MBI were described as 'open sessions' and 'closed sessions'. During open sessions, family members affected by events at Furness General Hospital were allowed

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1625052/fs50612561.pdf>

to watch the proceedings. When it became necessary to discuss the medical history of a patient or the performance of a particular member of staff, the interview went into a closed session. During closed sessions, family members were asked to leave the room and the interview continued with just the interviewee and the investigation panel.

Section 14(1) – vexatious requests

11. Section 14(1) of the FOIA says that an authority is not obliged to comply with a request if the request is vexatious.
12. The term 'vexatious' is not defined in the FOIA. The Commissioner has identified a number of 'indicators' which may be useful in identifying vexatious requests. These are set out in his published guidance on vexatious requests. In short they include:
 - Abusive or aggressive language
 - Burden on the authority
 - Personal grudges
 - Unreasonable persistence
 - Unfounded accusations
 - Intransigence
 - Frequent or overlapping requests
 - Deliberate intention to cause annoyance
13. 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.
14. 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.
15. Where relevant, public authorities also need to take into account wider factors such as the background and history of the request.
16. In its submission to the Commissioner dated 6 December 2016, DH has drawn her attention to its response to the complainant of 1 June 2016. In this communication DH argued the following:
 - The request followed a line of requests – totalling 30 requests – since March 2014 which had all been about the same, or

substantially similar subject, namely the evidence given to the MBI.

- Each of these items of correspondence required the resource time of several members of staff of varying grades.
- DH had conducted 10 internal reviews and two matters had been the subject of a complaint to the Commissioner. There had been one appeal to the Information Tribunal, which found in DH's favour.
- The resulting financial burden to DH was estimated at more than £9,000.
- The volume of requests and follow-up requests that the complainant had submitted demonstrated a persistent pattern of behaviour such that it was reasonable for DH to regard it as extremely likely that any response DH provided would merely encourage the complainant to submit further requests.
- The requests are often repeated or rephrased and submitted prior to a response to the last request being due. The two requests that are the subject of this notice were submitted within days of each other and were all submitted prior to receiving any response from DH.
- DH considered that these requests were made in the hope of discovering information that would support the complainant's entrenched view that DH holds more information than it has stated it holds about the evidence given to the MBI. DH had repeatedly made it clear that there is no further information to provide on the MBI records of interviews and that all of the records of open interviews would be published in autumn 2016 (see paragraph 17).
- DH told the complainant that it considered that his requests were an unreasonably persistent attempt to reopen an issue that had already been comprehensively addressed by the authority. DH said it had attempted to help the complainant by providing responses to his questions about the MBI evidence (and consulting the MBI Secretariat where necessary) on numerous occasions.
- DH said it was aware that it could have invoked the section 14(1) provision earlier but chose not to do so in order to make sure the complainant was fully assisted. DH considered that that there was nothing further that it could add to the information that he had been given on several occasions.

- DH considered that the requests made accusations against DH and specific employees. An accusation that DH had retrospectively labelled some transcripts as 'closed' was one example of this. It also considered a reference, in narrative accompanying one of the requests, to the 'wily ways' of DH and the Chairman of the MBI to have been discourteous.
 - DH noted that the Commissioner's guidance states that an indicator of vexatiousness is where there is 'no obvious intent to obtain information' and the applicant is 'requesting information which the authority knows them to possess already'. DH considered that requests the complainant submitted in November and December 2015 confirmed that the complainant knew that Ann Ford had an open and closed interview, demonstrating, in DH's opinion that at least one of the requests lacks genuine purpose – the Commissioner understands this to be a reference to a separate request submitted on 30 April 2016.
 - In conclusion, DH told the complainant it considered that the number and frequency of his requests, which he often sent before DH had had the opportunity to address his earlier enquires; the costs that his requests at 1 June 2016 had incurred and the complainant's attempts to circumvent the FOIA rendered the requests as vexatious.
17. DH has confirmed to the Commissioner that since its response to the complainant of 1 June 2016, the transcripts of the MBI open sessions have been published and it has communicated this to the complainant.
18. DH has also referred to the fact that the complainant has appealed FS50612561, with a hearing expected to be listed in Spring/Summer 2017. DH says that FS50612561 concerns the same information as that requested on 19 May 2016. In the Commissioner's view, while it does concern the same interviews, FS50612561 was for the transcripts of particular interviews and the request of 19 May 2016 is for information more broadly associated with the interviews.
19. DH has concluded its submission to the Commissioner by referencing the long history relating to these requests, notably the 30 separate requests that it says it received from the complainant between March 2014 and June 2016 on the same/similar issues. DH has provided the Commissioner with a chronology of the requests, which she has reviewed. The chronology runs from 17 March 2014 to 20 October 2016 and comprises 72 pages. 26 requests appear to have been submitted from 17 March 2014 to 30 April 2016, with 25 of those submitted during 2015 and up to April 2016.

20. DH's position is that there would be a detrimental impact to it from complying with the requests in terms of the resource, time and cost. It considers that this impact would be disproportionate given that DH was preparing the information being sought for imminent publication, and had made the complainant aware of this repeatedly.
21. The Commissioner has reviewed the correspondence she has received from the complainant regarding his complaint. She notes that in the complaint form that he submitted to her in August 2016, the complainant provided a narrative to his complaint that runs to over 2000 words. He stated that this was to ensure no one within the Commissioner's Office could claim they were unaware of the details of his complaint.
22. The first half of the narrative appears to have been given by way of background to the complaint. It concerns what the complainant considers to be the Commissioner's intentional delaying of complaint cases involving University Hospitals of Morecambe Bay (UHMB); her resistance to information about UHMB and various bodies connected with UHMB being made public; and the circumstances of a particular meeting between UHMB and North Lancashire Teaching Primary Care Trust (NLTPCT), arranged in 2010.
23. In the remainder of the complaint, the complainant argues that there has been '*extraordinary secrecy*' about the MBI interviews. He refers to approximately 50 interviews that he says are not mentioned in a published MBI list of completed interviews. He says that no interview transcripts have been published (which was true at that point) and considers that a '*cover up*' is in operation. The complainant says that he considers that the MBI avoided questioning important interviewees about the suppression of concerns that NLTPCT, other bodies, and he himself had raised about UHMB, so as to allow important people and organisations to avoid blame.
24. In the following paragraph, the complainant quotes from material produced by the parent of one of the babies whose death was investigated through the MBI, and issues a warning to the Commissioner. The Commissioner does not consider that the details of this particular paragraph are relevant to the complaint and, indeed, considers this paragraph to be inappropriate.
25. The complainant goes on to acknowledge that DH may be exasperated by his requests but he considers them to be well founded and explains that they are '*extremely wordy*' to counter what he believes is DH's evasiveness.

26. The complainant concludes his complaint by saying that he made a simple preliminary request to allow DH to avoid the '*rigmarole*' of a formal FOIA request, as he considers that DH has the information he is seeking easily to hand. The Commissioner understands this to be a reference to the separate request made on 30 April 2016. Because he considers DH never responds to such questions, he has told the Commissioner that he no longer allows DH very long before he follows the question up with a '*proper*' FOIA request. The complaint says that DH amalgamated the two requests together but that the request of 6 May 2016 'was forced by the transparent evasions revealed by the refusals of the first' by which the Commissioner assumes the complainant means the request of 30 April 2016.
27. If the Commissioner has correctly understood the focus of the complainant's concerns about the MBI, he believes that the MBI was subject to a 'cover up' to protect important individuals and organisations. Central to this belief appears to be a collection of interviews that the complainant maintains has taken place. He has categorised these interviews as '*super closed*' in that not only were they 'closed' interviews, it had not even been documented anywhere that they were going to take place. The complainant has not, however, provided the Commissioner with any evidence to support this particular view.
28. The Commissioner has carefully considered both parties' submissions and all the circumstances of this complaint. She has come to the conclusion that the two requests can be categorised as vexatious for the reasons below.
29. **Burden to the authority:** DH has said that the burden of responding to the two requests is disproportionate because, at the time of the request, it was preparing the '*information being sought*' for imminent publication and had repeatedly made the complainant aware of this. In the Commissioner's view the '*information being sought*' was not transcripts of the open MBI interviews – which are what have now been published. The complainant is seeking the transcript of one particular closed interview and information concerning communications about the MBI interviews, sent through a 'private website'.
30. Nonetheless, the Commissioner is prepared to accept that complying with these two requests would be a burden to DH. She has considered the cumulative burden placed on DH by the complainant's requests to date; 27 of the requests were sent between 30 January 2015 and 19 May 2016, all of which were concerned with UHMB and MBI issues. The complainant submitted a further request in October 2016. DH has noted the time members of staff, of varying grades, have spent dealing with the requests up to 6 May 2016, and has estimated the cost of this

process to be in the region of £9,000. The requests are, indeed, generally 'extremely' wordy, like the request of 19 May 2016, and are often multi-part requests, such as the request of 6 May 2016.

31. The Commissioner considers that complying with the two requests that are the subject of this notice would be a continuation of the burden described above. She considers that this burden would, at this point, be disproportionate because: DH has already provided a large amount of information to the complainant about the MBI; a large amount of information had been published at the time of the request, with further information published subsequently; and because the complainant appears to be persisting with unfounded allegations about the MBI. This point is discussed further below and in paragraphs 38 - 39.
32. **Unfounded accusations:** As detailed above, the complainant's wider belief is that DH holds more information about the MBI than it says that it holds; that 'super closed' interviews took place during the MBI and that a 'cover up' regarding the MBI is in operation. As far as the Commissioner can see, DH has been prepared to engage in a lengthy correspondence with the complainant about the MBI and had provided responses to his numerous, earlier requests for information about it.
33. As previously mentioned however, the complainant has not provided the Commissioner with any credible evidence to support his accusations of an MBI 'cover up', of the 'private websites' referred to in his request or of 'super closed' interviews. The Commissioner has therefore not been persuaded that the complainant's accusations warrant the work that DH would need to undertake in order to comply with these two requests, with the resulting disruption.
34. **Frequent or overlapping requests:** As described above, the two requests that are the focus of this notice are a continuation of correspondence with DH about the MBI that began in 2014, with the complainant having submitted 27 requests in the 16 months up to 19 May 2016. This equates to a frequency of almost two requests per month, which the Commissioner finds to be a very high frequency. In addition however, DH has told the Commissioner that the complainant often submitted a new request before it has been able to respond to the previous request ie the requests overlapped. The Commissioner notes that the two requests in this case were submitted within days of each other.
35. The complainant himself has explained to the Commissioner that he has a strategy for submitting correspondence and requests to DH (paragraph 26) that involves sending a 'preliminary request', not giving DH very long to respond and then submitting a 'proper' FOIA request. In the Commissioner's view, this strategy; the frequency of the

complainant's requests and the fact that many requests overlap are a serious misuse of the FOIA regime.

36. Furthermore, the background and history of these two requests persuade the Commissioner that if DH was to comply with them, it would not be the end of the matter but would encourage the complainant to submit further requests.
37. **Unreasonable persistence:** The Commissioner has noted that, during the course of its lengthy correspondence with him, DH has repeatedly told the complainant that there is no further information to provide on the MBI records of interviews. DH has also told him that there was nothing it could add to the information he has been given on several occasions. It has also told the complainant that it considered that his requests are an unreasonably persistent attempt to open an issue that had already been comprehensively addressed. The Commissioner agrees with this assessment of the situation at this stage.
38. The concerns about Furness General Hospital were thoroughly investigated through an independent public inquiry: the Morecambe Bay Investigation. The inquiry's damning report was published in May 2015 and the transcripts of the open interviews carried out during the Investigation have now also been published. The events at Furness General Hospital and the resulting MBI and report have had significant media coverage and the Commissioner is not aware of any wider concerns about how the MBI was conducted. It appears to her that the complainant is persisting with beliefs and accusations about the MBI and DH, for which he has not provided any supporting evidence. The Commissioner considers that this persistence can therefore be categorised as unreasonable.
39. To conclude, the Commissioner considers that DH has put forward sufficiently strong arguments for the requests in this case being vexatious. These have included the complainant's long correspondence with DH and the frequency of his previous and current requests. In addition, responding to the current requests may or may not cause a serious distraction to DH. The requests are, however, the latest in a series of requests on broadly the same subject. Cumulatively, the Commissioner considers these requests to have placed a significant burden on DH. The Commissioner's view is that this burden has become disproportionate because, as far as she is aware, the complainant's requests have not uncovered any evidence that the MBI, or DH's involvement in the MBI, has been improper. The complainant has made particular allegations about the MBI but has not provided the Commissioner with any evidence to support his allegations, such that it would justify DH being required to carrying out the work needed to respond to these two requests.

40. Having considered her guidance on vexatious requests and all the circumstances of this case, the Commissioner is satisfied that the requests are vexatious and that DH is correct not to comply with them under section 14(1) of the FOIA.

Right of appeal

41. 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

42. 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.
43. 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
Information Commissioner's Office
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SK9 5AF

APPENDIX

Individuals named in the request are identified in the Report of the MBI as having been interviewed and therefore it is appropriate to include their names in the two requests.

Request 1 – 6 May 2016

- 4. Therefore, the first part of this FoI request is for the full transcript of Ann Ford's first interview as described in Para. 1 above, in electronic form. No paper copy requested.*
- 5. The second part of this FoI request is for electronic copies of all the letters and/ or emails and/ or copies of any corresponding pages on any 'private website' which the families were enabled to view (no matter when they were actually sent or placed on this putative website which not have existed at all) sent out to the 'Furness Families' as a whole relating to attendance at interviews held in the weeks beginning Monday 15th, Monday 22nd and Monday 29th September 2014. If the information was provided to the families by telephone, then it must have been from a computer page or other document and my request applies equally to that form of the information requested. It is obvious that such communications had to be sent, as the details of who was being interviewed were not placed on the website until the Friday of the week before the interviews took place, or sometimes even later. It would not have been reasonable for the families to be expected to arrange to travel from the Barrow in Furness region to Preston if only told of the interview sessions on the preceding Friday or Saturday. I am not requesting copies of communications sent to any individual family, unless it was merely an automated copy of a generalised communication which was individually addressed but where the text below the addressee name was the same for all, in which case I am requesting it.*

Request 2 – 19 May 2016

- 1. These people were interviewed on the dates stated by Dr Kirkup's panel on behalf of the Morecambe Bay Investigation:*

Tony Halsall 15.12.14

Peter Dyer 9.10.14

Eddie Kane 16.7.14

Roger Wilson 15.7.14

Steven Vaughan 2.10.14

Jacqueline Holt 15.7.14

Janet Soo-Chung 29.9.14

2. *This FoI request is for electronic versions (no paper documents requested) of the letters/ documents/ emails/ text on the pages of any private website or page available to each of these 7 interviewees describing, negotiating and arranging the conditions under which their interview **on the stated dates** (I am **not** requesting information specifically referring to earlier projected interview dates which were cancelled/ postponed unless it is explicitly or implicitly referred to in documents relating to the interview on **the stated dates**) would be held: the date, time and expected duration of the interview; whether the interview would consist of 'closed' (Furness Families **not** permitted to be present or to view the video and/ or transcript of the interview) and 'open' sections (Furness Families permitted to attend the interview and view video and/ or transcript); any information regarding the fate of the interview video and transcripts once the Investigation was closed; the Investigation's intentions regarding future Freedom of Information requests and the maintenance of secrecy about part/ all of the interview and the length of time this secrecy was expected to be maintained.*
3. *I am not requesting the purely routine information such as details of the rail and road connections, arrangements for transport from the station to the Investigation HQ in Preston, arrangements for refreshments etc. However, I appreciate that these details may be incorporated within the requested information and should then **not** be edited out or redacted.*
4. *I appreciate that the Investigation had many interviews to conduct and that the requested information may have been in the form of identical information sent out or available to each interviewee, either with the name changed using word processing technology or simply in a global 'Dear Interviewee' form. In that case I only request one version of each of the information bundle types (for instance, there could have been one type available to an interviewee with only an 'open session' and another type for those with both 'open' and 'closed' interview sessions) and a list showing which interviewee 'received' which version. Alternatively, if separating this out involves more rather than less work for you, then just send out everything for all 7 interviewees. I can cope.*