

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 July 2017

Public Authority: Cardiff & Vale University Health Board
Address: University Hospital of Wales
Heath Park
Cardiff
CF14 4XW

Decision (including any steps ordered)

1. The complainant requested the number of employees of Cardiff & Vale University Health Board (CAVUHB) who sat as lay panel members of the Employment Tribunal, together with details of employees who are trained investigating officers and the number of disciplinary and appeal hearings a list of specified staff sat in, or chaired, since 2012.
2. In respect of part 1 of the request CAVUHB confirmed that it does not hold the information. In respect of parts 2 and 3 of the request the Board confirmed that the information was held, however refused the request, citing the exemption under section 12 of the FOIA.
3. The Commissioner's decision is that CAVUHB does not hold information in direct response to the complainant's question as contained in part 1 of her request. In relation to parts 2 and 3 the Commissioner is satisfied that CAVUHB was correct in refusing the request in reliance on section 12 of the FOIA.
4. The Commissioner does not require CAVUHB to take any steps.

Request and response

5. On 23 August 2016, the complainant wrote to CAVUHB and requested information in the following terms:

"1. How many staff members employed by Cardiff and Vale University Health Board are Lay Members of Cardiff (and any other) Employment Tribunal from 2010 until present (2016)?"

Please list the names of the said employees and how many Tribunals they have attended.

2. How many staff members are trained Investigating Officers presently employed by Cardiff and Vale University Health Board from 2010 until present?

(a) Please list their names, job title, how many investigations they have undertaken and nature of their training.

IF - staff members are not 'trained' investigating officers - please provide data listed in 2 (a).

3. How many Disciplinary and Appeal Hearings have the following staff members of Cardiff and Vale University Hospital sat in/chaired since 2012?

[list of names redacted]

6. CAVUHB responded on 20 September 2016 (reference FOI/16/271). In respect of part 1 of the request it advised that it did not hold the requested information. In respect of parts 2 and 3 it advised that the information was held but was not centrally recorded within a register, and as the costs of complying with the request would exceed the appropriate limit, it refused the request in reliance upon section 12 of the FOIA.
7. The complainant replied on 22 September 2016, raising concerns as to why CAVUHB were unable to disclose the requested information and asking for a review of its decision. Whilst the complainant made reference in her email to a subject access request under the Data Protection Act 1998, it is clear from the contents of her letter that she was in fact referring to her request under the FOIA dated 23 August 2016.
8. CAVUHB responded on 23 September 2016 acknowledging receipt of her email dated 22 September 2016; however it appears that the review undertaken related to a previous FOIA request made by the complainant in July 2016 (Reference FOI/16/237). In November 2016 the complainant contacted the Commissioner to raise her concerns in relation to the handling of this request. As it was unclear whether CAVUHB's review related to her request of 23 August 2016 the Commissioner wrote to CAVUHB on 8 December 2016 to ask it to conduct an internal review of this request if it had not already done so.
9. The complainant contacted the Commissioner again on 8 and 13 January 2017 to advise that despite further writing to CAVUHB on 1 January

2017 it had still not conducted an internal review of her request Fol/16/271 and raising a complaint about the handling of her request. The Commissioner accepted the case for formal consideration on 20 January 2017.

Scope of the case

10. The complainant contacted the Commissioner on 13 January 2017 to complain about the way her request for information had been handled and asked the Commissioner to encourage CAVUHB to provide the requested information. In particular she was concerned about CAVUHB's refusal of parts 2 and 3 of the request on the basis that the cost of compliance would exceed the appropriate cost limit. Later, on 6 April 2017, the complainant clarified that she also wished the Commissioner to investigate CAVUHB's assertion that it did not hold information within the scope of part 1 of her request.
11. The Commissioner considers that the scope of the case is whether CAVUHB holds the information requested in part 1 of the request, and whether it was correct in its application of section 12 of the FOIA to parts 2 and 3 of the request.

Reasons for decision

Part 1 (number of staff who also sit as lay members of Tribunal)

Section 1

12. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information within the scope of the request, and if so, to have that information communicated to him.
13. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-Tier Tribunal decisions, applies the civil standard of the balance of probabilities.
14. In other words, in order to determine such complaints the Commissioner must decide whether, on the balance of probabilities, a public authority holds any information which falls within the scope of the request (or was held at the time of the request).

15. In its response to the complainant, CAVUHB advised her that the information was not 'centrally recorded'. It suggested that the complainant contact the Employment Tribunal to obtain this information directly.
16. The complainant informed the Commissioner that she had contacted the Employment Tribunal, who told her that it too did not hold the requested information. In any event the complainant stated she was concerned that CAVUHB did not hold information or details about senior staff members who also sit as lay members of Employment Tribunal/s. She explained that the crux of her complaint was that a particular staff member who conducted a disciplinary proceeding involving herself then chaired her Appeal hearing at the Employment Tribunal without declaring a conflict of interest.
17. The complainant found it inconceivable that senior staff in receipt of a substantial salary, who would be absent from their substantive posts, potentially for several days, would not have to account to CAVUHB for their absence.
18. The Commissioner wrote to CAVUHB on 18 April 2017 asking a number of questions in order to investigate whether information within the scope of part 1 of the complainant's request was held.
19. CAVUHB explained to the Commissioner that there is no business requirement to hold this information and accordingly it has no records which directly indicate the number of staff who are also lay Tribunal panel members.
20. In response to the complainant's comments regarding accountability for absence from a staff member's substantive post, the Commissioner was advised that if a staff member takes time off work, all absences are recorded on the ESR system. This has a 'drop down' list of categories for recording reasons for absence. In the event of absence due to attendance at a Tribunal, there is no category for this specific circumstance, and any such absence would be recorded as "other". CAVUHB did qualify this explanation by confirming that there is an option to add further notes onto the ESR and accordingly it would be feasible for detail such as attendance at a Tribunal to be recorded on the system.
21. The Commissioner enquired whether CAVUHB held any policy which would require a staff member to declare any secondary employment and which may result in the requested information being held. It responded by advising that the relevant policy would be its Standards of Behaviour Framework Policy Incorporating Declarations of Interest, Gifts, Hospitality and Sponsorship which requires certain information regarding

secondary employment to be communicated. The Commissioner was provided with a link to the policy. Furthermore, CAVUHB referred the Commissioner to a relevant clause in its employment contract which states "if you wish to engage in secondary employment, you must first discuss and agree it with your manager. Permission will not be reasonably withheld. This will ensure that your position in the Cardiff and Vale University Health Board is not compromised". CAVUHB confirmed that there is no requirement for such permission to be recorded.

22. The Commissioner notes in this case that part 1 of the complainant's request is a question, to which the response will be a specific number. The FOIA only requires a public authority to provide copies of information in response to a question if the answer to that question is held in recordable form. The FOIA does not require a public authority to create new information in order to respond to a question. Having considered CAVUHB's responses to her enquiries the Commissioner is satisfied on the balance of probabilities that it does not hold the answer to the complainant's question in recordable form. Whilst she considers it is possible that CAVUHB may hold information relating to specific staff member/s sitting as lay members of a Tribunal panel, a review of any such information would be required to establish if it contains information from which an answer to the complainant's question can be formulated. The FOIA does not in the Commissioner's view require CAVUHB to undertake such a task.
23. The Commissioner understands the reasons why the complainant considers the information may be held, but the Commissioner can only consider what is actually held. It is outside the Commissioner's remit to determine if it should be held, and even if it should be, she cannot require a public authority to create the information under the FOIA.
24. On the basis of the above, and having considered CAVUHB's responses to the Commissioner's questions, the Commissioner is satisfied that, on the balance of probabilities, it does not hold any recorded information which provides a direct response to the complainant's question.
25. As the Commissioner's decision is that the information is not held, the Commissioner does not require CAVUHB to take any steps.

Parts 2 and 3 (details of staff trained as investigating officers and number of hearings attended)

Section 12

26. Section 12(1) provides that:

"Section 1(1) does not oblige a public authority to comply with a

request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."

27. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Regulations") sets the appropriate limit at £450 for the public authority in question. Under the Regulations, a public authority may charge a maximum of £25 per hour for work undertaken to comply with a request. This equates to 18 hours work in accordance with the appropriate limit set out above.
28. A public authority is only required to provide a reasonable estimate or breakdown of costs and in putting together its estimate it can take the following processes into consideration:
 - Determining whether it holds the information;
 - Locating the information, or a document which may contain the information;
 - Retrieving the information, or a document which may contain the information;
 - Extracting the information from a document containing it.
29. In response to enquiries raised by the Commissioner, CAVUHB maintained its reliance upon section 12 of the FOIA in refusing the request.
30. CAVUHB explained that at the time of the request there was not a specific position entitled 'Investigating Officer'. Furthermore, it did not hold a central register of staff who had received formal investigation training for the period in question (2010 – 2016). Whilst it does hold a central register of the mandatory training staff are required to undertake, this category does not fall within the scope of the complainant's request and therefore the Electronic Staff Record (ESR) will not centrally capture this data.
31. More recently, and since the time of the request, CAVUHB does have a formal job title 'Investigating Officer', however this role is not exclusive and other staff may still be charged with the task of investigation.
32. CAVUHB explained that at the time of the request it was feasible for any staff member to be involved in an investigation of another at a lower grade, hence the number of potential investigating staff records to be searched appears high. This is necessary to enable a full and accurate response to the complainant's request to be provided. The person charged with investigating would be coached and supported by HR which is in effect a form of 'training' and so this information would fall within the scope of the complainant's request.

33. CAVUHB explained to the Commissioner that at the time of the request it had a total of 14,000 staff of which approximately more than half could be required to potentially undertake investigations. To obtain information on training for these staff would require a manual exercise to locate and retrieve the information from every individual's personal file. It was explained that staff personal files are not held centrally but are retained by the relevant line managers across every site over the whole of the organisation. This includes nine hospital sites and several other external sites which are not clinical in nature. Once the files are retrieved they would then need to be physically reviewed to identify the pertinent information to be extracted.

34. To complete this work CAVUHB has estimated that it would take approximately 3,500 hours calculated as follows:

Travel (per file) – between 10-30 minutes

Retrieval per record – 5 minutes

Review of each record - 10 minutes

Extracting per record – 5 minutes.

CAVUHB has averaged the total time per record of 30 minutes to compensate for the difference in travel time between all sites. This has been calculated as an average on the basis that some staff work on the University Hospital of Wales site whilst others work at sites which take between approximately 15-30 minutes to travel to.

35. On the basis that there would be approximately 7000 staff potentially eligible to undertake investigations the calculation is as follows:

$7000 \text{ staff} \times 30 \text{ minutes per record} = 210,000 \text{ minutes or } 3,500 \text{ hours.}$

$3,500 \text{ hours @ } £25.00/\text{hour} = £87,300.$

36. The Commissioner has noted that CAVUHB has estimated travel time on a 'per file' basis in its average total time of 30 minutes per file. However the Commissioner considers that CAVUHB could make one journey to each site to locate and retrieve the relevant records held by each respective site, which would significantly reduce the travel time involved. For instance, if one journey to each of the nine hospital sites was made at an average of 20 minutes per journey this would total three hours (plus a similar amount for other non-clinical sites) as opposed to an average 10 minutes for each of the 7000 records claimed (some 1,166 hours).

37. In respect of the number of staff files to be located, the Commissioner is satisfied, given CAVUHB's explanation in paragraphs 32 and 33 of this decision, that the number submitted by CAVUHB (7,000) would need to be searched in order to provide a full response to the complainant's request. This, in the Commissioner's view was the position at the time of the request, although she appreciates that since the date of the request a formalised position title of 'Investigating Officer' has been created.
38. In respect of the time taken to locate, retrieve and extract the relevant information from each file the Commissioner considers this to be a reasonable estimate and so she accepts that it would take 20 minutes per file x 7000 (2,333 hours). Even halving the time taken to locate retrieve and extract the information would far exceed the appropriate cost limit without taking into account any travel time, and so the Commissioner accepts that in respect of part 2 of the request CAVUHB was correct to refuse the request on the basis of section 12 of the FOIA.
39. CAVUHB has provided the Commissioner with an estimate of the time it would take to comply with part 3 of the request, however as the Commissioner is satisfied that complying with part 2 alone would significantly exceed the cost limit she has not found it necessary to consider those calculations in any detail.
40. In conclusion the Commissioner is satisfied that the aggregated cost of complying with parts 2 and 3 of the request would exceed the appropriate cost limit and that CAVUHB was correct to refuse parts 2 and 3 of the complainant's request.

Other matters

Section 45 (internal review)

41. There is no obligation under the FOIA for a public authority to provide an internal review process. However, it is good practice to do so, and where an authority chooses to offer one the section 45 code of practice sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
42. In this case the complainant requested an internal review on 22 September 2016, but did not receive a response. She contacted the Commissioner and on 8 December 2016 the Commissioner asked CAVUHB to complete the review. CAVUHB did not do so, and explained to the Commissioner that a previous request by the complainant

(reference FoI/16/237) dated 23 July 2016 was refused under section 14 of the FOIA on the basis that it was considered vexatious, and accordingly CAVUHB refused to correspond further with the complainant from 20 September 2017 on the same subject, hence why it did not conduct an internal review in this case.

43. The Commissioner observes that despite an earlier request considered by CAVUHB to be vexatious, it chose to provide the complainant with a refusal notice in respect of this request in which it did not rely upon section 14, but other grounds for refusal. She considers that CAVUHB should have complied with the complainant's request for an internal review, and in failing to do so within the times scales set out above, has not conformed with the section 45 code.

Right of appeal

44. 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

45. 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.
46. 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
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