Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 02 May 2019

Public Authority: Great Ormond Street Hospital for Children NHS Foundation Trust

Address: Great Ormond Street
London, WC1N 3JH

Decision (including any steps ordered)

1. The complainant made a request for a copy of a draft report. Great Ormond Street Hospital for Children NHS Foundation Trust (the Trust) initially refused the request as vexatious under section 14(1) of the FOIA. The Trust later cited section 21 (available by other means) as the final report had been published. The Commissioner's decision is that the Trust has failed to supply any evidence to support any exemption to refuse to disclose the requested information.

2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

   - To disclose the RCPCH's first draft report into the Gastroenterology Service.

3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 21 February 2018 the complainant made a request under the FOIA:

   'Please supply the RCPCH's first draft report into the Gastroenterology Service following its visit in July 2017.'

5. The Trust responded on 8 March 2018 and cited section 14(1) (vexatious request) as it '*deemed your request has been submitted*

solely designed for the purpose of 'fishing' for information without any idea of what might be revealed.'

6. The complainant requested an internal review on 20 March 2018. He argued that his request was not an inappropriate use of FOIA as other requests for draft reports revealed important facts that were in the public interest but were not in the official version of the report. He referred to newspaper articles to support this. He also indicated that the request was not a fishing exercise as he '*had very specific information from a source that the Trust was unhappy with the initial draft version of the report and some of the criticisms it contained and that some of these criticisms may have been removed from the final version that was released'*.

7. On 20 May the complainant chased the Trust for a response to the request for an internal review. On 21 May 2018 the Trust confirmed that the appeal remained under consideration. The complainant chased again on 20 June and then on 19 July 2018 the Information Commissioner chased the Trust for a response to the request for an internal review.

Scope of the case

8. The complainant contacted the Commissioner on 28 June 2018 to complain about the way his request for information had been handled. The complainant confirmed on 13 August 2018 that he had not received a response to his request for an internal review. The complaint was accepted by the Commissioner on 23 August 2018 and both parties were informed.

9. The Commissioner considered the scope of the case to be whether the Trust is entitled to rely on the vexatious provision at section 14(1) of the FOIA.

Reasons for decision

Section 14 – Vexatious requests

10. Section 14(1) of FOIA states that section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious. There is no public interest test.

11. The term vexatious is not defined in the legislation. In Information Commissioner vs Devon County Council & Dransfield[1] the Upper Tribunal concluded that 'vexatious' could be defined as the "…manifestly unjustified, inappropriate or improper use of a formal procedure.' The decision clearly establishes that the concepts of 'proportionality' and 'justification' are central to any consideration of whether a request is vexatious.

12. In the Commissioner's view, the key question for public authorities to consider when determining if a request is vexatious is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.

13. The Commissioner has identified a number of "indicators" which may be useful in identifying vexatious requests. These are set out in her published guidance on vexatious requests[2]. 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. On 20 November 2018, following her usual procedure, the Commissioner contacted the Trust for supporting evidence to explain why in the circumstances of this case the Trust had relied on section 14(1) to refuse the request. To date the Commissioner has not received any evidence to support the citing of the exemption of section 14.

15. On 18 December 2018 the Trust responded that it had conducted an internal review of the request and cited section 21 (information reasonably accessible by other means) to refuse the request. In the email to the Commissioner, the Trust provided links to [1] the publication of a statement giving an update on the completion of the final stage and [2] to the full follow-up review given to the Board in March 2018.[3]

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[1] UKUT 440 (AAC) (28 January 2013)

[2] https://ico.org.uk/media/1198/dealing-with-vexatious-requests.pdf

[3] https://www.gosh.nhs.uk/news/update-review-gastroenterology-service-great-ormond-street-hospital

https://www.gosh.nhs.uk/about-us/who-we-are/our-organisational-structure/trust-board/trust-board-meetings

16. The Trust also stated that it would not have published earlier drafts of the report as they were superseded by the final version.

17. The Trust stated that it had '*deemed the request to be vexatious on the grounds of receiving several requests relating to the same nature from various individuals within a consecutive period…'* and *'remains of the view that Section 14 exemption was correctly applied at the time of receiving the original request. However, we subsequently published the final version of the report. The request is therefore exempt under Section 21…'*

18. On 6 February 2019 the Commissioner asked the Trust to confirm that the complainant had also been informed of the application of section 21. She noted that the complainant may continue with the complaint to the Commissioner as he had specifically requested '*the RCPCH's first draft report into the Gastroenterology Service following its visit in July 2017'* rather than the final report. Therefore the Commissioner would need supporting evidence in support of the Trust's position.

19. On 27 February 2019 the Trust informed the complainant of the application of section 21. The Trust explained to the Commissioner that there had been a misunderstanding and the response had not been sent to the complainant in December 2018.

20. On 4 March 2019 the Commissioner contacted the Trust by telephone. The Commissioner noted that although the Trust had published the final report in March 2018 (after the date of the FOIA request) it had not disclosed the requested draft report and therefore section 21 was highly unlikely to apply. The Commissioner asked the Trust to confirm that it held the draft report and, if held, to confirm what exemptions would apply. On 19 March the Trust confirmed that it holds a copy of the draft report produced by the College (RCPCH) on behalf of the Trust (ie an invited review of their service) but has asked for a copy of the confidentiality agreement from the College to the Trust which was signed at the time. It would then consider any exemptions.

21. On 19 March 2019 the complainant contacted the Commissioner to question the application of section 21 and confirming that he had requested the draft report and not the final report.

22. On 22 March the Trust updated the Commissioner that it was still waiting for a copy of the confidentiality agreement. On 1 April the Trust informed the Commissioner of a change of FOIA staff.

23. On 10 April the Commissioner contacted the new member of FOIA staff at the Trust. She briefly summarised the case to date and asked for action to be taken: '*as yet the Trust has not provided any evidence to*

the Commissioner to support the withholding of the requested information. Therefore, please now disclose the first draft of the report to the complainant with a copy to the ICO for our records.'

24. On 12 April 2019 the Trust responded:

'We managed to obtain a Deed of Indemnity that would have been signed at the time of the RCPCH review however. We are holding an extraordinary meeting with our Executive and Legal team on Monday the 15th April to interpret the clause that covers disclosure of the report externally.

I appreciate that this has taken over a year to resolve and I do apologise to you and the applicant that it has taken this amount of time. I can assure you that we will have a position by Monday.'

25. To date (2 May 2019) the Commissioner has not received any further update.

The Commissioner's decision

26. The Commissioner has allowed the Trust many opportunities since her initial investigation letter of 20 November 2018 to explain its position. However, the Trust has not provided the Commissioner with any evidence to support the application of section 14 or any other exemption to refuse to provide the requested draft report to the complainant. Therefore, the Commissioner upholds the complaint.

Other Matters

27. The Commissioner has previously discussed with the Trust its poor engagement with the FOIA process and in its letter of 26 September 2018, the Trust apologised to the Commissioner and endeavoured to make improvements. It is evident from this case that improvements on the understanding of the FOIA process, timeliness of responses and engagement with the Commissioner have not been made.

Right of appeal

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: 0870 739 5836
    Email: GRC@hmcts.gsi.gov.uk
    Website: http://www.justice.gov.uk/tribunals/general-regulatory-chamber

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
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF