

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 December 2020

Public Authority: University Hospitals of Derby and Burton NHS Foundation Trust

Address: Royal Derby Hospital
Uttoxeter Road
Derby
DE22 3NE

Decision (including any steps ordered)

1. The complainant has requested a series of documents about the Derbyshire vascular services network. The University Hospitals of Derby and Burton NHS Foundation Trust ("The Trust") refused the request as vexatious.
2. The Commissioner's decision is that the Trust has not demonstrated that the request was vexatious and was therefore not entitled to rely on section 14(1) of the FOIA to refuse the request. As the Trust failed to respond to the request within 20 working days, it also breached section 10 of the FOIA.
3. The Commissioner requires the Trust to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response, to the request, which does not rely on section 14(1) of the FOIA.
4. The Trust 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

5. On 6 November 2019, the complainant wrote to the Trust and requested information in the following terms:

"Regarding your annual self-assessment for the specialised vascular surgical services via the Quality Surveillance Programme survey/self-declaration (form) "Arterial at Royal Derby Hospital". I would like to request electronic copies of the evidence documents regarding the following indicators, all of which you answered "YES" to in your submission and as such declared that you met the outlined requirement.

"Below are the indicators and your declarative responses in respect to the aforementioned completed declaration form, along with my requests for the declared evidence documentation.

1. With regards to indicator: 170004S-001- There is an agreement outlining the network configuration.

You stated "YES" in the self-declaration, Evidence documents: "Operational Policy"

"I would like an electronic copy of this evidence document/operational policy that was in place/use during the time period of the self-assessment.

2. With regards to indicator: 170004S-005 - "There is a weekly MDT Meeting".

You stated "YES" in the self-declaration, Evidence documents: "Annual report including attendance record"

"I would like electronic copies of these evidence documents/annual report including attendance record.

Nb. If you have concerns for personal information i.e. names of consultants that are not publicly listed in GMC records/web sites, your own website/NHS consultant lists etc. then you can exclude/redact the attendance record part.

3. With regards to indicator: 170004S-012 - "There is an vascular outpatient clinic"

You stated "YES" in the self-declaration, Evidence documents: "Operational Policy"

"I would like an electronic copy of this evidence document/operational policy that was in place/use during the time period of the self-assessment.

4. With regards to indicator: 170004S-016 - "The hospital has a policy whereby patients are managed in line with the Seven Day Services Clinical Standards policy."

You stated "YES" in the self-declaration, Evidence documents: "Operational Policy"

"I would like an electronic copy of this evidence document/operational policy that was in place/use during the time period of the self-assessment."

5. With regards to indicator: 170004S-017 - "There are patient pathways in place"

You stated "YES" in the self-declaration, Evidence documents: "Operational policy including pathways"

"I would like electronic copies of these evidence documents/operational policy that was in place/use during the time period of the self-assessment including the pathway(s) for Peripheral Arterial Disease."

6. With regards to indicator: 170004S-021 - "There are clinical guidelines in place"

You stated "YES" in the self-declaration, Evidence documents: "Operational policy including guidelines"

"I would like electronic copies of these evidence documents/operational policy that was in place/use during the time period of the self-assessment including the guideline(s) for vascular injuries only."

6. The Trust responded on 9 December 2019. It refused the request as vexatious. The Trust noted that the complainant had submitted a very similar request earlier in the year and he had already been informed that the information was not held. It considered that, by continuing to re-open a previously-settled matter, the request was vexatious.
7. The complainant sought an internal review on the same day. He noted that the Trust's statement that it held no information appeared to conflict with information published by NHS England and that he had made enquiries with NHS England prior to making the request.
8. Following an internal review the Trust wrote to the complainant on 30 January 2020. It upheld its previous position.
9. When the complainant continued to argue that the information should be readily available, the Trust issued a further response on 4 February 2020. It now admitted that it had provided incorrect information to NHS England in its submission.

10. The two parties continued to exchange correspondence during February 2020. The complainant continued to draw attention to the conflict between the Trust's position in relation to the information it held and that which it had declared to NHS England. The Trust, for its part, recognised that a mistake had been made but noted that it did not hold recorded information and wished to stand by its previous response.

Scope of the case

11. The complainant first contacted the Commissioner on 20 December 2019 to complain about the way his request for information had been handled. This was before the Trust had completed its internal review.
12. The Commissioner considers that the scope of this notice is to determine whether or not the request was vexatious.

Reasons for decision

Section 14 - Vexatious

13. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*

14. Section 14 of the FOIA states that:

Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

15. The term "vexatious" is not defined within the FOIA. The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It commented that "vexatious" could be defined as the "manifestly unjustified, inappropriate or improper use of a formal procedure". The Upper Tribunal's approach in this case was subsequently upheld in the Court of Appeal.

16. The *Dransfield* definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
17. *Dransfield* also considered four broad issues: (1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the requester, (3) the value or serious purpose of the request and (4) harassment or distress of and to staff. It explained that these considerations were not meant to be exhaustive and also explained the importance of: "...adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests." (paragraph 45).
18. The Commissioner has published guidance on dealing with vexatious requests¹, which includes a number of indicators that may apply in the case of a vexatious request. However, even if a request contains one or more of these indicators it will not necessarily mean that it must be vexatious.
19. When considering the application of section 14(1), a public authority can consider the context of the request and the history of its relationship with the requester, as the guidance explains: "*The context and history in which a request is made will often be a major factor in determining whether the request is vexatious, and the public authority will need to consider the wider circumstances surrounding the request before making a decision as to whether section 14(1) applies*".
20. However, the Commissioner is also keen to stress that in every case, it is the request itself that is vexatious and not the person making it.
21. In some cases it will be obvious when a request is vexatious but in others it may not. The Commissioner's guidance states: "In cases where the issue is not clear-cut, the key question to ask is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress."

The Trust's position

22. At the outset of her investigation, the Commissioner wrote to the Trust. She asked it to reconsider if it still wished to rely on section 14(1) of the

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

FOIA to refuse the request and, if it did, to provide its submission as to why the request was vexatious.

23. In seeking a submission, the Commissioner noted that the Trust would need to weigh what it saw as the futility of the request against the fact that the request had apparently exposed an error. She also noted that previous responses by the Trust might inadvertently have provided a misleading picture.
24. In response, the Trust provided a short submission. It accepted that an it had made a mistake, but noted that it had admitted the mistake and apologised.
25. In addition, the Trust noted, the assumption that information should be held was based on a premise (that the Trust was part of a vascular services network) which was, despite the information published by NHS England, simply not true. As no formal network existed, there was no requirement to for the Trust to possess the paperwork sought by the request and the complainant had been advised about this on numerous occasions.
26. Whilst the Trust noted that it had an informal arrangement with Chesterfield Royal in respect of vascular services, it argued that this did not constitute the sort of formal arrangement envisaged by the request.
27. The Trust pointed out that it had offered the complainant the opportunity to attend a meeting with clinicians to discuss the matters raised by the request – an offer which had been declined.
28. In the absence of a dialogue with the complainant, the Trust argued, there was nothing further it could do to conclude or advance the underlying matter and it therefore saw no value in responding to the request.

The complainant's position

29. The complainant provided a detailed background to his complaint, prior to the formal investigation beginning. The Commissioner did not therefore seek a further formal submission from him.
30. [Redacted]. As this hospital (and the NHS Trust it is part of) works in collaboration with the Trust, he began making FOI requests to both trusts (and to others), to help educate himself about the various procedures and policies involved with vascular services. He said that he wished to use the information provided to help challenge what he saw as the "issues" at the Chesterfield Royal.

31. The complainant noted that responses to some of his FOIs had shown that the two trusts in question cooperated closely in respect of vascular services. He believed that the two trusts had created a Derbyshire Vascular Services Network to support each other and share expertise. He noted that the Trust, as the larger organisation of the two, was being funded to provide vascular services and should therefore be part of a formal network to provide those services.
32. If a formal network was in existence, the complainant argued, the Trust should be complying with the requirements of NHS England to have created and made open for inspection, certain documents setting out the policies of the network.
33. When the Trust initially said that it held no relevant information, the complainant said that he had contacted NHS England which had confirmed that the Trust had provided a submission stating that it met the requirements of a vascular services network – including the requirements to have documents in place. When the complainant drew NHS England's attention to the potential error, NHS England had apparently responded to say that:

"NHS England can confirm that we have contacted the Trust and they have confirmed that their June 2019 position is correct and that there is an agreement network in place between University Hospitals of Derby and Burton NHS Foundation Trust and Chesterfield underpinned by a signed SLA. There is also a named clinical lead. This seems to be in conflict with the information you have received."

34. The Commissioner is also considering a simultaneous complaint from the complainant in respect of a different Trust. In respect of that particular complaint, he appears to consider it unlikely that that organisation holds relevant information – but that it *ought* to hold the information. He therefore argued that if the information that *ought* to be held *wasn't* held, there was a public interest in placing that fact on record. The Commissioner considers that this argument would apply equally to the present complaint.

The Commissioner's view

35. Section 14(1) of the FOIA relieves a public authority of both its obligation to provide requested information and its obligation to establish what information it might hold. It therefore follows that a public authority should need to meet a reasonably high bar to be able to apply this exemption and should be able to support its position with evidence.

36. Whilst the Commissioner appreciates that the Trust feels that it has already provided the information it holds, in her view, the Trust did not provide a strong argument as to why this particular request would engage the exemption. Furthermore, its submission did not demonstrate that the Trust had made a candid assessment of its own mistakes and how those mistakes might have contributed to the correspondence.
37. The question which the Commissioner must consider in this case is not whether the Trust holds information within the scope of the request, how NHS England came to be provided with incorrect information or even whether a Derbyshire Vascular Services Network exists (the Commissioner expresses no view on either point), the question is whether responding to the request would cause an unjustified and disproportionate burden upon the Trust.
38. The Commissioner notes that the complainant originally requested information about the Trust's vascular policies and procedures in April 2019. The Trust provided some information but stated that this was all it held – despite queries from the complainant. The complainant then corresponded with NHS England and established that the Trust had made a submission apparently declaring that it met numerous criteria in relation to vascular services networks – including having documented policies in place to support the network. Having received this information from NHS England (even if it was incorrect), the Commissioner does not consider it unreasonable for the complainant to have asked the Trust to provide the evidence it had apparently declared to NHS England that it possessed.
39. For what it is worth (and in the absence of contrary evidence), the Commissioner accepts, at face value, the Trust's assertion that its submission to NHS England was incorrect. However, she notes that this mistake not only appears to have come to light *because* the complainant made his request, but that the mistake only came to light *after* the Trust had provided its initial response.
40. Therefore, the Commissioner considers that, given the circumstances, it would be unfair to accuse the complainant of pursuing the matter unreasonably by making the request when that request was attempting to resolve a clear conflict between the information he was being provided with by two different organisations – both of whom were claiming that their information was correct.
41. The request that forms the basis of the decision notice was tightly worded to link the information requested to the submission the Trust had provided to NHS England. The Commissioner considers that the request was therefore focused and, whilst still relating to the same underlying matter, did not simply repeat previous requests. She does

not therefore accept that the complainant was simply seeking to re-open or re-litigate matters that had already been determined.

42. The Commissioner also looked for other factors which might have rendered the request vexatious, but found none. Whilst there has clearly been a degree of back-and-forth in relation to both the present and previous requests, the Commissioner does not consider that the frequency or volume of correspondence was excessive. Whilst the tone of the complainant's correspondence has occasionally been exasperated or robust, it has not become abusive or threatening.
43. Furthermore, the Commissioner agrees with the complainant that, even if the Trust does not hold information within the scope of the request, there is value in that fact being placed in the public domain. The way in which vascular services are configured in the area in question is likely to affect hundreds of thousands of people and therefore there is a public interest in knowing what information is and is not available.
44. Whilst it is possible that, in the future, the point at which the complainant's pursuit of this matter becomes unreasonable may be reached, the Commissioner is not satisfied that that point had been reached when the request was made. She therefore finds that the request was not vexatious and thus the Trust was not entitled to rely on section 14 to refuse it.

Section 10 – Timeliness

45. Section 10 of the FOIA states that responses to requests made under the Act must be provided "*promptly and in any event not later than the twentieth working day following the date of receipt.*"
46. From the evidence presented to the Commissioner in this case, it is clear that, in failing to issue a response to the request within 20 working days, the Trust has breached section 10 of the FOIA.

Right of appeal

47. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

48. 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.
49. 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

Phillip Angell
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