

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 27 October 2009

Public Authority: NHS Northamptonshire
Previously: Northamptonshire Teaching Primary Care Trust
Address: Francis Crick House
Moulton Park
Summerhouse Road
Northamptonshire
NN3 6BF

Summary

The complainant asked the public authority how many individuals employed by a specific company were working for it and their ethnic background. The public authority informed the complainant that there were 23 individuals employed at the date of the request and that it did not hold the information about their ethnic background. It confirmed its position in its internal review. The Commissioner has investigated whether relevant recorded information was held for the second part and has determined that the public authority was correct that it did not hold this information. The Commissioner has determined that the public authority has complied with section 1(1)(a) of the Act. He has also determined that the information was not held by another person on the public authority's behalf and that it has complied with 16(1) of the Act. However, he did find a breach of section 10(1) of the Act as the notice was not issued within the statutory timescales. He does not require any remedial steps to be taken in this case.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 18 February 2009 the complainant requested the following information in accordance with section 8 of the Act. The Commissioner accordingly understands that he wanted to be provided the information in line with section 1(1) of the Act:

'1. Could you please let me know how many people who are employed by UHUK or as a consultant under UHUK working at Northamptonshire PCT (figures only)

2. Can I also have the ethnic background of these people employed by UHUK or as a consultant under UHUK as directed by the Equality and Human Rights Commission.'

3. On 20 March 2009 the complainant contacted the public authority and informed it that it had exceeded the time limits in this case. On the same day the public authority apologised that it had failed to meet the 20 working day deadline.
4. On 24 March 2009 the complainant asked the public authority to conduct an internal review into the handling of the information request. On 26 March 2009 the public authority provided a detailed explanation about the delays.
5. On 14 April 2009 the public authority communicated its response to the complainant. In relation to question one it informed the complainant that it had 23 such employees. In relation to question two it informed the complainant that it was unable to provide the ethnic background of those individuals because it was informed by the company that it did not hold this information to provide a breakdown at the level of detail requested. It also stated that it believed it could rely on the Re-Use of the Public Sector Regulations 2005 in this instance.
6. On 14 April 2009 the complainant requested an internal review into the handling of his request. He believed that the public authority did hold the information for question 2 and that it was incorrect to mention the Re-Use of the Public Sector Regulations 2005.
7. On 27 April 2009 the public authority communicated the result of its internal review to the complainant. It explained that it was only obliged to provide information which it held or which was being held on its behalf by the contractor. It explained that it had already provided the information for question one and explained that the company had informed it that it did not hold the information that was requested in question two. It explained that the complainant might want to consider contacting the company directly, although the company was not a public authority for the purposes of the Act. It explained that it did not feel that there would be any purpose in conducting a further review and that the complainant had the right to appeal to the Commissioner.

The Investigation

Scope of the case

8. On 8 June 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - Whether he was entitled to receive the information concerning the breakdown of ethnicity of UHUK staff?
 - Whether the public authority is allowed to use the Re-Use of the Public Sector Information Regulations 2005 in this case?
 - Whether the public authority has complied with its obligations under section 16(1) of the Act?
9. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this Notice:
 - Question 1 of the request was answered by the public authority and was not part of the complaint. The Commissioner has not considered question 1 further.
 - The Commissioner explained to the complainant on the telephone that he did not have the remit to consider the issue about the Re-Use of the Public Sector Information Regulations 2005 on 10 September 2009. He explained that this was an issue that could be considered by Office of Public Sector Information. He confirmed this in an email of the same date. The complainant confirmed that he understood this was the case on 28 September 2009 and the Commissioner regards this issue as resolved.

Chronology

10. On 10 September 2009 the Commissioner telephoned the complainant to explain his remit and his preliminary view of the case. In light of these comments he asked the complainant to consider whether he was prepared to withdraw his complaint.
11. On 23 September 2009 the complainant replied to the Commissioner and informed him that he wished for the investigation to continue. On 29 September 2009 the complainant also presented submissions about why the requested information should be held and provided.
12. On 29 September 2009 the Commissioner wrote to the public authority and made detailed enquiries about whether or not it held the relevant information.
13. On 15 October 2009 the Commissioner received detailed responses to his enquiries. It also provided evidence of the enquiries it had made to the company and explained its policies in this area. He confirmed receipt on the same day.

Analysis

Substantive Procedural Matters

Is relevant recorded information held in this case?

14. An important initial point to make is that the Commissioner is limited to considering whether or not recorded information exists at the time of the request for information. This is the only information that a public authority is obliged to provide. This is made clear in section 1(4) of the Act. The time of the request was 18 February 2009 in this case.
15. In investigating cases involving a disagreement as to whether or not information is in fact held by a public authority, the Commissioner has been guided by the approach adopted by the Information Tribunal in the case of *Linda Bromley & Others and Information Commissioner v Environment Agency* (EA/2006/0072). In this case the Tribunal indicated that the test for establishing whether information was held by a public authority was not one of certainty, but rather the balance of probabilities. The Commissioner will apply that standard of proof to this case.
16. The complainant presented evidence that the company itself acquired the information when recruiting individuals. He illustrated this by providing his application form. He explained that it was not possible to acquire this information from any other party and that it is was important that the numbers were transparent. He explained that he believed that there was a duty imposed to ensure that there was Diversity and Equality for Opportunity for all staff and this meant that it should hold the information.
17. The Commissioner asked the public authority to explain what its obligations were under Diversity and Equality regulations and whether it believed it was required to hold this information for its contractors. The public authority explained that it did monitor the ethnic origin of its own workforce. It explained that the complainant was asking for information about an organisation that was supplying it services under a contract and that it was not obliged to gather this information in relation to its contractors. It explained that it believed that it would not be correct to do so and that it did not collect or monitor information relating to staff recruited and employed by other organisations. It explained that it does not hold this sort of information for any organisation that supplies services under contract.
18. It also explained that there is a major distinction between contractors who provide services on a temporary basis and employees who have a contract of service and work on an open-ended contract. It explained that it did not have a direct employment relationship with this contractor and that it only provided services on a temporary basis for it. The individuals work only work for a finite period of time and on a temporary and rotating basis. It explained that it believed it was the contractor's responsibility to maintain records for its own employees. It explained that it would be far too onerous for it to do so where there was no requirement that it did.

19. The public authority explained that it would be futile to search the records it had because it knew that it did not hold the information that was relevant to the request.
20. The public authority also explained that the recruitment form belonged to the contractor and it was unaware of what it contains. It explained that it had consulted with the contractor and that it was unable to help because it did not collect the information by project.

Is this information held by the contractor on behalf of the public authority?

21. Section 3(2)(b) of the Act provides that information is held by a public authority when it is held by another person on behalf of the authority.
22. The Commissioner has therefore also focussed this investigation on whether the information can be said to be held by the contractor on behalf of the public authority at the date of the request 18 February 2009. This issue is a question of fact.
23. The public authority believes that the contractor does not hold the information on its behalf. It explained that it did not believe that given the nature of the contractor that it had any obligation to know this information and that it did not believe that it would be correct for it to know.
24. The Commissioner has considered these arguments and confirms that he is satisfied that the contractor does not hold the information on behalf of the public authority. Instead the contractor holds the overall information (the information about all of its employees not broken down by workplace) on its own behalf.
25. The Commissioner has considered the evidence above and is satisfied that on the balance of probabilities the public authority did not hold the relevant recorded information that was requested. It has therefore complied with section 1(1)(a) in correctly denying that it held the relevant information.

Procedural Requirements

Section 10(1)

26. Section 10(1) requires that a public authority issues a response that complies with section 1(1) within twenty working days. In this case the public authority took more than twenty working days to issue a response. The Commissioner finds one breach of section 10(1) in respect to question 2 as it failed to deny that it held recorded information within the statutory timescales.

Section 16(1) (Advice and assistance provided by the public authority)

27. The complainant made a number of complaints about the lack of advice and assistance in this case. The Commissioner has therefore investigated whether the public authority has complied with Section 16 of the Act.

28. Section 16(1) (a full copy is in the legal annex attached to this notice) provides an obligation for a public authority to provide advice and assistance to a person making a request, so far as it would be reasonable to do so. Section 16(2) states that a public authority is to be taken to have complied with its section 16 duty in any particular case, when it satisfies the requirements of the Section 45 Code of Practice.
29. The request that the complainant has made to the public authority was clear in scope and the Commissioner is satisfied that no further clarification was needed. Additional assistance as outlined in paragraphs 8 to 11 of the Code was not required in this case.
30. The request also did not attract the fees limit. Additional assistance as outlined in paragraphs 13 to 15 of the Code was not required in this case.
31. The Commissioner has therefore concluded that it would not have been reasonable to expect the public authority to have provided further advice and assistance to the applicant in order to meet the requirements of section 16(1), and therefore the public authority did not breach section 16(1). Advice and assistance was not required to satisfy the Section 45 Code of Practice as none of the provisions were relevant in the circumstances of this case.

The Decision

32. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
 - o It correctly advised the complainant that it did not hold relevant recorded information for question 2 and it therefore complied with section 1(1)(a).
 - o Advice and assistance was not required to satisfy the Section 45 Code of Practice as none of the provisions were relevant in the circumstances of this case. The public authority therefore complied with section 16(1).
33. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - o It failed to deny that it held relevant recorded information, as required by section 1(1)(a), within twenty working days. It therefore breached section 10(1).

Steps Required

34. The Commissioner requires no steps to be taken.

Right of Appeal

35. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 27th day of October 2009

Signed

**Lisa Adshead
Senior FOI Policy Manager**

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

Legal Annex

The Freedom of Information Act 2000

Section 1 - General right of access to information held by public authorities

- (1) 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.
- (2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
- (3) Where a public authority—
- (a) reasonably requires further information in order to identify and locate the information requested, and
 - (b) has informed the applicant of that requirement,
- the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

...

Section 3 - Public Authorities

- (1) “in this Act “public authority” means –
- (a) subject to section 4(4), any body which, any other person who, or the holder of any office which –
 - (i) is listed in Schedule 1, or
 - (ii) is designated by order under section 5, or
 - (b) a publicly-owned company as defined by section 6.
- (2) For the purposes of this Act, information is held by a public authority if –
- (a) it is held by the authority, otherwise than on behalf of another person,
or
 - (b) it is held by another person on behalf of the authority.

Section 10 - Time for compliance with request

- (1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
- (2) Where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.

(3) If, and to the extent that—

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

...

Section 16 – Duty to provide advice and assistance

(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case

Relevant parts of the Section 45 Code of Practice

Introduction

1. This Code of Practice provides guidance to public authorities as to the practice which it would, in the opinion of the Secretary of State for Constitutional Affairs, be desirable for them to follow in connection with the discharge of their functions under Part I (Access to information held by public authorities) of the Freedom of Information Act 2000 ("the Act").
2. Words and expressions used in this Code have the same meaning as the same words and expressions used in the Act.

II The provision of advice and assistance to persons making requests for information

3. The following paragraphs of this Code apply in relation to the provision of advice and assistance to persons who propose to make, or have made, requests for information to public authorities. They are intended to provide guidance to public authorities as to the practice which it would be desirable for them to follow in the discharge of their duty under section 16 of the Act.

Advice and assistance to those proposing to make requests:

4. Public authorities should publish their procedures for dealing with requests for information. Consideration should be given to including in these procedures a statement of:

- what the public authority's usual procedure will be where it does not hold the information requested (see also III - "[Transferring requests for information](#)"), and
 - when the public authority may need to consult other public authorities and/or third parties in order to reach a decision on whether the requested information can be released (see also IV - "[Consultation with third parties](#)"),
5. The procedures should include an address or addresses (including an e-mail address where possible) to which applicants may direct requests for information or for assistance. A telephone number should also be provided, where possible that of a named individual who can provide assistance. These procedures should be referred to in the authority's publication scheme.
6. Staff working in public authorities in contact with the public should bear in mind that not everyone will be aware of the Act, or Regulations made under it, and they will need where appropriate to draw these to the attention of potential applicants who appear unaware of them.
7. Where a person is unable to frame his or her request in writing, the public authority should ensure that appropriate assistance is given to enable that person to make a request for information. Depending on the circumstances, consideration should be given to:
- advising the person that another person or agency (such as a Citizens Advice Bureau) may be able to assist them with the application, or make the application on their behalf;
 - in exceptional circumstances, offering to take a note of the application over the telephone and then send the note to the applicant for confirmation (in which case the written note of the telephone request, once verified by the applicant and returned, would constitute a written request for information and the statutory time limit for reply would begin when the written confirmation was received).

This list is not exhaustive, and public authorities should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant.

Clarifying the request:

8. A request for information must adequately specify and describe the information sought by the applicant. Public authorities are entitled to ask for more detail, if needed, to enable them to identify and locate the information sought. Authorities should, as far as reasonably practicable, provide assistance to the applicant to enable him or her to describe more clearly the information requested.
9. Authorities should be aware that the aim of providing assistance is to clarify the nature of the information sought, not to determine the aims or motivation of the applicant. Care should be taken not to give the applicant the impression that he or she is obliged to disclose the nature of his or her interest as a precondition to exercising the rights of access, or that he or she will be treated differently if he or she does (or does not). Public authorities should be prepared to explain to the applicant why they are asking for more information. It is important that the

applicant is contacted as soon as possible, preferably by telephone, fax or e-mail, where more information is needed to clarify what is sought.

10. Appropriate assistance in this instance might include:

- providing an outline of the different kinds of information which might meet the terms of the request;
- providing access to detailed catalogues and indexes, where these are available, to help the applicant ascertain the nature and extent of the information held by the authority;
- providing a general response to the request setting out options for further information which could be provided on request.

This list is not exhaustive, and public authorities should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant.

11. In seeking to clarify what is sought, public authorities should bear in mind that applicants cannot reasonably be expected to possess identifiers such as a file reference number, or a description of a particular record, unless this information is made available by the authority for the use of applicants.

Limits to advice and assistance

12. If, following the provision of such assistance, the applicant still fails to describe the information requested in a way which would enable the authority to identify and locate it, the authority is not expected to seek further clarification. The authority should disclose any information relating to the application which has been successfully identified and found for which it does not propose to claim an exemption. It should also explain to the applicant why it cannot take the request any further and provide details of the authority's complaints procedure and the applicant's rights under section 50 of the Act (see "[Complaints Procedure](#)" in section VI).