

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 8 December 2010

Public Authority: Southampton University Hospitals NHS Trust
Address: Mailpoint 18
Southampton General Hospital
Tremona Road
Southampton
Hampshire
S016 6YD

Summary

The complainant requested that the public authority provides him with information about how many children born at the hospital in the ten year preceding period had DNA samples stored. The public authority responded that it held no central record, but explained its policy and advised that another public authority may hold the requested information. The complainant complained to the Commissioner.

The Commissioner has considered this case carefully. He disagrees with the public authority that obtaining the information from the individual patient files would involve the creation of new information and therefore finds a breach of section 1(1)(a). He finds that there were further procedural breaches of section 10(1) and 17(5).

However, he has found that the work that would be required to obtain the requested information would exceed the costs limit and that the public authority was correct in relying on section 12(1). He has also found that the public authority has complied with its obligations under section 16(1) in providing all the advice and assistance that could be reasonably expected of it when processing the request. The Commissioner requires no 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 28 May 2010 the complainant requested from Southampton University Hospitals NHS Trust (the 'public authority') the following information:

'How many DNA samples were taken and stored from Children born at your hospital in the last ten years?'

3. On 7 June 2010 the public authority issued a response. It explained that the information was not held as a central record. However, it confirmed that DNA is not routinely taken and stored at birth. Instead it would only be taken for a specific reason, such as to test for a disease that was suspected. It explained that the information would be noted in the individual patient files and that it did not do paternity testing. Finally, it said that the Wessex Regional Genetic Laboratory in Salisbury provides the region's testing. It explained that it was part of Salisbury NHS Foundation Trust, which the complainant may wish to contact (as it may hold the information that he seeks) and provided its contact details.
4. On 8 June 2010 the complainant requested that an internal review was conducted by the public authority as he considered that the response did not answer his question.
5. On 24 June 2010 the public authority communicated the result of its internal review. It explained that the information requested was not held and could not be provided to the complainant. It said that it had conducted a thorough investigation and provided appropriate advice and assistance in this case.

The Investigation

Scope of the case

6. Also on 24 June 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

7. The complainant also raised other issues that are not addressed in this notice because they are not requirements of Part 1 of the Act. The Commissioner cannot adjudicate on the position of Trusts in deciding its policy about DNA testing of children. The remit of the Commissioner only allows him to consider how the Act operates on the circumstances of this case.

Chronology

8. On 9 and 16 July 2010 the complainant asked the Commissioner to acknowledge receiving his complaint.
9. On 21 July 2010 the Commissioner contacted both the complainant and the public authority. He asked for the public authority to explain its position more fully as regards why it considered the information was not held.
10. On 28 July 2010 the Commissioner telephoned the complainant to confirm the scope of his investigation and to clarify how the Act operated. He explained to the complainant that having considered the public authority's responses he considered that the information requested was held but that it was highly likely that this would be a costs issue because of the way in which the information was held and how it was stored. The complainant was dissatisfied with this view and requested that the Commissioner confirmed his view in writing. The Commissioner also telephoned the public authority on the same day and asked for the number of babies born over the ten year period.
11. On 29 July 2010 the Commissioner called the public authority. He explained that in light of information provided by the public authority he considered the information was likely to be held albeit in the individual patient files. In light of this he asked whether the public authority had considered the costs limit in responding to the complainant's request, and if so to provide an appropriate estimate. He therefore asked the public authority for the number of files falling within the request, the retention period of them and how long an average file would take to check.
12. On 3 August 2010 the public authority provided the Commissioner with the information that he requested. It explained that it was still of the view that the obtaining of the information from all the individual files would amount to the generation of new recorded information. However, it confirmed that should it be wrong, then it would rely on section 12(1).

13. On 3 August 2010 the Commissioner also wrote a detailed letter to the complainant. He explained that his preliminary verdict was that section 12(1) had been applied appropriately. He suggested that the complainant considers writing to Salisbury NHS Trust where the information may be held. He asked the complainant to confirm whether in light of this position he still wanted the case to continue.
14. The Commissioner also wrote to the public authority. He acknowledged the assistance that he had received and explained his view about the differences between the collation of existing information and the creation of new information.
15. On 6 August 2010 the complainant responded to the Commissioner. He explained that he wanted the case to continue. He stated this was so because 'such important information should be collected on an accessible database by those who may well be unlawfully obtaining DNA from vulnerable mothers babies.'
16. The Commissioner replied on the same day. He explained that he would begin drafting a decision notice. He confirmed that he could only consider information actually held by the public authority and advised the complainant that he should consider writing to Salisbury NHS Trust as it may be able to provide the information that he wants in a consolidated form.
17. On 11 August 2010 the Commissioner wrote to the public authority. He explained that a formal decision was now required by the complainant and to support this, the Commissioner needed it to clarify its relationship with Wessex Regional Genetic Laboratory. He was particularly interested in funding arrangements and to ascertain whether the information could be generated through invoices or something similar that the public authority may hold.
18. On 17 August 2010 the public authority responded to his enquiries. It confirmed that it did not pay for the DNA tests because the genetics lab is funded through specialist commissioning. It explained that Salisbury NHS Trust is expected to provide a service to the patients who live in the Wessex area.

Findings of fact

19. The Commissioner has copied a table of the annual number of births in the relevant hospital below:

Year	Births (babies born)
2000	4449
2001	4345
2002	4669
2003	4880
2004	5005
2005	5172
2006	5296
2007	5703
2008	5977
2009	5905
Total	51,401

20. The public authority explained that it kept individual records for each child born there.
21. The public authority also confirmed that it complies with the Department of Health "Records Management NHS Code of Practice", which states the following retention schedules for the files that would be likely to contain the relevant information:
- "Maternity records (all obstetric and midwifery records, including those of episodes of maternity care that end in stillbirth or where the child later dies); 25 years after the birth of the last child"
 - "Children and young people records (all types of records relating to children and young people); retain until the patient 25 years old, (26 if young person was 17 at the conclusion of treatment) or 8 years after their death. If the illness or death could have potential relevance to adult conditions or have genetic implication, the advice of clinicians should be sought as to whether to retain the records for a longer period".
22. Wessex Regional Genetic Laboratory was operational for the whole of the ten year period.

Analysis

Substantive Procedural Matters

Is the relevant recorded information held?

23. The public authority argued that it did not hold the relevant recorded information in this case. Its main argument was that the information was not held centrally and the only way it could obtain the information would be to check every one of its individual files. It explained that it believed that this amounted to the creation of new information and was not required by the Act.
24. The issue is therefore whether the holding of the building blocks amounts to the holding of the relevant recorded information under the Act. It is noted that the legislation requires public authorities to consider the release of information they hold. If information is contained in individual files, it is clearly held. If it is held, it can be extracted.
25. The Commissioner's view is that a public authority does hold relevant recorded information where it holds the building blocks of it, even where those building blocks are distributed across a large number of files. The only time when this would not be so is where the acquisition of the information would require considerable judgment and it is that input which would mean that new information was being created.
26. The Commissioner has carefully considered this case. He is satisfied that the building blocks were held (in the maternity files) and that the adding up of DNA tests from the maternity files would take very limited skill or judgment. On that basis, it is the Commissioner's view that the information is held. In coming to that view the Commissioner has taken into account the Information Tribunal decision in the case of *Johnson v ICO and MOJ* [EA/2006/0085]¹ which supports the above analysis.
27. It follows that the public authority in incorrectly denying that it held relevant recorded information has breached section 1(1)(a).
28. However, the Commissioner accepts that in this case a considerable amount of work will be required to gather all the building blocks together (and, indeed, that the cost of carrying out that process may

¹ This judgment can be found at the following link:
http://www.informationtribunal.gov.uk/Documents/decisions/mljohnson_v_InfoComm_MoJ_13jul2007.pdf

be such as to allow the Trust to apply Section 12). The Commissioner will consider the operation of the costs limits below.

Exclusion

Section 12(1)

29. Section 12(1) provides a costs threshold for the Act. As long as the public authority can prove that its estimate of the work required to answer a request for information is reasonable and exceeds the statutory limit, then it is not required to provide any information in respect to the request.
30. The Commissioner has attached a legal annex to the bottom of this decision notice which lists all the relevant statutory provisions in full.
31. The Information Tribunal in *Quinn v Information Commissioner & Home Office* [EA/2006/0010] explained this point in this way:

'The fact that the rules drafted pursuant to s.12 have the effect of defining what is a reasonable search and the amount of time and money that a public authority are expected to expend in order to fulfil their obligations under the Act, serves as a guillotine which prevents the burden on the public authority from becoming too onerous under the Act.'

(Paragraph 50)

32. The public authority has argued that in the event the Commissioner finds that it did hold relevant recorded information then the work required to gather it together would considerably exceed the costs limit. It would therefore rely on section 12(1) to exclude it from any obligation to provide the information.
33. The complainant has argued that it is important that the public authority holds relevant recorded information about this matter in a single place as it is a matter of significant public concern.
34. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Regulations") states that the cost limit for non-central government public authorities is £450. This must be calculated at the rate of £25 per hour, providing an effective time limit of 18 hours. If a public authority estimates that complying with a request would exceed 18 hours, or £450, section 12(1) provides that the request may be refused.

35. Section 12(1) is not qualified, therefore has no public interest component that can be considered. This means the costs limit can be relied upon irrespective of whether the public interest would have favoured the disclosure of the information.
36. The Commissioner must determine whether the estimate provided by the public authority was reasonable. The issue of what constitutes a reasonable estimate was considered in the Tribunal case *Alasdair Roberts v the Information Commissioner* [EA/2008/0050] and the Commissioner endorses the following points made by the Tribunal at paragraphs 9 -13 of the decision:
- *"Only an estimate is required"* (i.e. not a precise calculation);
 - The costs estimate must be reasonable and only based on those activities described in Regulation 4(3);
 - Time spent considering exemptions or redactions cannot be taken into account;
 - The determination of a reasonable estimate can only be considered on a case-by-case basis; and
 - Any estimate should be *"sensible, realistic and supported by cogent evidence."*
37. The above extract references Regulation 4(3), which states that the only activities that are allowed to be considered are those where it is:
- "(a) determining whether it holds the information,*
- (b) locating the information, or a document which may contain the information,*
- (c) retrieving the information, or a document which may contain the information, and*
- (d) extracting the information from a document containing it."*
38. The public authority has provided the Commissioner with a detailed and reasoned estimate about why it believed that the processing of this particular request would exceed the costs limit.
39. It explained that the only way that it could find this information would be to check through all its maternity records. This would avoid the possibility that some information was destroyed if a child had died within their early years and fell at the beginning of the sample.

40. It explained that it had 51,401 sets of relevant maternity records (one for each birth). It also held other maternity records that would not be relevant themselves but would be held along with the relevant records.
41. It estimated that it would take five minutes to view each and every record.
42. It therefore said that its estimate would amount to approximately 4,283 hours. It calculated that this time would amount to approximately 571 working days (not allowing for weekends and Bank Holidays). The Commissioner has checked the sums and agrees it is correct. This estimate far exceeds the 18 hour limit.
43. However, as noted above, it is important that the Commissioner is convinced that the estimate is reasonable and he has considered this in two parts. The first part will be to ascertain whether there are any reasonable alternatives to the process outlined above. The second part will be to consider the estimate provided in this case and to conclude whether it was reasonable and related to the activities that are allowed to be included.

Were there reasonable alternatives in this case?

44. In the *Alasdair Roberts* case, the complainant offered a number of suggestions as to how the requested information could be extracted from a database. The Tribunal concluded that none of the ways suggested would have brought the request under the costs limit. However the Tribunal also made the following more general comments on alternative methods of extraction:

"(a)...the complainant set the test at too high a level in requiring the public authority to consider all reasonable methods of extracting data;

(b) that circumstances might exist where a failure to consider a less expensive method would have the effect of preventing a public authority from relying on its estimate..." (para 15).

45. Those circumstances were set out at paragraph 13 where it was said:

"...it is only if an alternative exists that is so obvious to consider that disregarding it renders the estimate unreasonable that it might be open to attack. And in those circumstances it would not matter whether the public authority already knew of the alternative or had it drawn to its attention by the requestor or any other third party..."

46. In order to ensure that it was reasonable to base its estimate on checking through each and every maternity file, the Commissioner has carefully considered how the Trust holds the relevant information.
47. The complainant argued that in his view it was totally unacceptable that the public authority did not hold the information in one place. It was important this information was collated for reasons of civil liberty.
48. The public authority explained to the Commissioner that it has no business purpose to hold the information independently in one place. It explained that it only carried out DNA tests on babies when there was a clinical need. It did not conduct paternity tests. The public authority therefore dealt with every baby on a case by case basis. It is therefore logical that the information was held in the individual files, as this is what would be referenced when considering its contact with patients.
49. The public authority also explained that it did not process the DNA tests itself. Instead it sent the samples to the Wessex Regional Genetic Laboratory owned by a different Trust. It would not therefore need to keep an overall breakdown of the numbers separately.
50. The Commissioner also notes there was no legal obligation to generate this information over the time period covered by the request.
51. In response to the Commissioner's enquiries, the public authority also confirmed that:
 1. It holds no central record of the number of DNA tests it commissioned on babies;
 2. It cannot obtain this data through any electronic database; and
 3. It cannot access this data through the accounting information. The public authority has confirmed to the Commissioner that it does not pay for the tests from its budget.
52. From this information, the Commissioner is satisfied that there are no reasonable alternatives outside of checking all the maternity files. He is therefore satisfied that the activities that the public authority has identified would need to be done to generate the relevant recorded information to answer this request for information are correct.

Is the estimate submitted only for the relevant activities, reasonable and in excess of the costs limit?

53. The Commissioner has carefully considered the activities that are mentioned in paragraphs 40 and 41 above. He is satisfied that these activities are covered by subsection (b) and (c) of Regulation 4(3). These can therefore be taken into account when estimating the costs of complying with the request.
54. He has also checked the time estimate attributed to each activity. He is satisfied that the time submitted is reasonable. In this case the cost limit is exceeded by many times and in his view it would not be possible to improve the time taken to a sufficient extent by expertise and repetition.
55. It follows that the total reasonable estimate is **4,283** hours.
56. The Commissioner therefore accepts a reasonable estimate of the work required to process this request was **4,283** hours. This is in excess of the threshold of 18 hours. He is therefore satisfied that the costs limits would be exceeded in this case and that the estimate is '*sensible, realistic and supported by cogent evidence*'. He is therefore content that section 12(1) has been applied correctly by the public authority.
57. The Commissioner has however noted that the public authority has breached section 17(5) in this case. This is because it failed to specify that it was entitled to rely on section 12(1) in 20 working days.

Section 16(1)

58. Section 16(1) (full copy in the legal annex) 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 if it has conformed with the provisions in the Section 45 Code of Practice (the 'Code') in relation to the provision of advice and assistance in that case.
59. The Commissioner has therefore considered whether it would be possible for the public authority to provide advice and assistance to enable the complainant to submit a new information request without attracting the costs limit in accordance with paragraph 14 of the Code.
60. The public authority explained that it had offered some advice and assistance in this case. It explained that it sincerely believed that

Salisbury NHS Trust may hold the relevant information that the complainant sought and has advised the complainant accordingly.

61. The public authority also told the complainant that he was welcome to request his own family's personal data under the Data Protection Act from the public authority. The complainant has acknowledged to the Commissioner that he is aware of his right to do so.
62. The Commissioner, having considered the circumstances of this case, considers that the public authority offered the only reasonable advice and assistance possible and that was to ask Salisbury NHS Foundation Trust and/or explain that the data of data subjects would be available under the Data Protection Act. In the Commissioner's view providing any smaller sample that would fall within the costs limits would not serve the purpose for which the complainant wanted the information. He has therefore found that the public authority has not breached section 16(1) of the Act in this instance.
63. However, he notes that it is always open for the complainant to make the modified request in light of the contents of this Decision Notice, should he wish to.

Section 10(1)

64. Section 10(1) requires that a public authority correctly confirms or denies that it holds relevant recorded information in 20 working days (subject to a number of exemptions none of which are relevant in this case). The public authority incorrectly denied that it held relevant recorded information and so breached section 10(1) in failing to comply with section 1(1) in 20 working days.

The Decision

65. The Commissioner's decision is that the public authority dealt with the following items in accordance with the requirements of the Act:
 - It applied section 12(1) correctly as the work that would be required to process this request would have exceeded the costs limit; and
 - It provided the only advice and assistance that was reasonable in this case and therefore complied with its obligations found in section 16(1).

66. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- It wrongly denied that it held relevant recorded information and therefore breached section 1(1)(a);
 - It failed to comply with section 1(1) within 20 working days and breached section 10(1); and
 - It failed to state that it was applying section 12(1) in 20 working days and therefore breached section 17(5).

Steps Required

67. The Commissioner requires no steps to be taken.

Other matters

68. Although it does not form part of this decision notice, the Commissioner wishes to note the following point to explain what is expected in the future from the public authority.

Section 12 – costs breakdowns

69. It is noted that in this case the public authority did not believe it held the requested information and only applied the costs limit in the event that the Commissioner considered it did hold it. However, the result of this meant that the public authority did not provide the complainant with any breakdown of the estimated costs of complying with the request in the refusal notice. Although the Act does not require a public authority to provide a costs breakdown when refusing a request under section 12, the Commissioner considers that it is good practice to do so. He would advise the public authority that including a costs breakdown in a section 12 refusal notice is likely to make it easier to comply with the section 16 duty to advise and assist an applicant on what could be provided within the cost limit.

Right of Appeal

70. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 sent.

Dated the 8th day of December 2010

Signed

**Pamela Clements
Group Manager, Complaints Resolution
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 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 12 – Exemption where cost for compliance exceeds the appropriate limit

(1) 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.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.

(3) In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.

(4) The Secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority—

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.

(5) The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are to be estimated.

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.

Section 17 - Refusal of request

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

(2) Where—

(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—

- (i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
- (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

(6) Subsection (5) does not apply where—

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(7) A notice under subsection (1), (3) or (5) must—

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.