

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 22 September 2011

Public Authority: Newcastle Upon Tyne Hospital NHS Foundation Trust

Address: Freeman Hospital
Freeman Road
High Heaton
Newcastle Upon Tyne
NE7 7DN

Summary

On 28 February 2011 the complainant made a request under the Freedom of Information Act 2000 (the 'Act') to Newcastle Upon Tyne Hospital NHS Foundation Trust ('the Trust') for the number of people who had been dismissed annually over the last three financial years. The Trust applied section 21(1) explaining that the complainant could request the information through his own Employment Tribunal case and therefore that the information was reasonably accessible to him through other means. It upheld its position through an internal review.

During the course of his investigation, the complainant did receive the requested information through the route the Trust identified. However, he asked the Commissioner to make a decision about the operation of section 21(1) of the Act.

The Commissioner finds that section 21(1) was not applied appropriately by the Trust, and that consequently there were a number of procedural breaches. As the complainant has received the withheld information, he has not ordered 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 Act. This Notice sets out his decision.

Background

2. The complainant and the Trust were involved in an ongoing Employment Tribunal case at the time of the request.

The Request

3. On 28 February 2011 the complainant requested the following information under the Act:

'May I have the following information please.

How many staff have been dismissed under the disciplinary process in the year 2010 – 2011 (so far)

How many staff were similarly dismissed in the years 2008 – 2009 and 2009 – 2010.'

4. On 15 March 2011 the Trust issued its response. It explained the Trust held the information, but was refusing to provide it by virtue of section 21(1)¹. This was because there was an on-going Employment Tribunal case and it advised the complainant to make an application for disclosure to the Tribunal as part of it.
5. On 17 March 2011 the complainant requested a review. He explained that he doubted requiring someone to go "to court" meant that the information was reasonably accessible. He also explained that the Trust's policy required it to be held in an easily accessible format.
6. On 19 March 2011 the Trust communicated the results of its internal review. It maintained its position. It explained that it believed that the information can be acquired by the complainant by making an application to the Employment Tribunal in his ongoing case under Rule 10(2)(d) of Schedule One of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004.

¹ A full copy of all the provisions of the Act that are stated in this Notice can be found in the Legal Annex.

The Investigation

Scope of the case

7. On 29 March 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider the following points:
 - he challenged the application of section 21;
 - he believed that the request for information was entirely unconnected to the Tribunal; and
 - the use of section 21 was an excuse for further delay and there was no date at that time set for the Tribunal, which adds to his argument that the information wasn't reasonably accessible.
8. During the course of the Commissioner's investigation, the Trust provided the information to the complainant on 14 April 2011 as part of the Tribunal case. The complainant confirmed receipt of the information but still asked the Commissioner to come to a conclusion about the original application of section 21(1).
9. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

10. On 11 April 2011 the Commissioner wrote to the complainant and the Trust to confirm that he had received an eligible complaint. He asked the Trust to provide him with a copy of the withheld information.
11. On 20 April 2011 the Trust confirmed that it had supplied the complainant with the information he requested in his Tribunal case. It asked the Commissioner whether he still required a copy of it.
12. On 17 June 2011 the Commissioner contacted the complainant to confirm whether he had received the information and if so, whether he wanted the case to continue. On the same day, the complainant confirmed that he did want the case to continue because he was still dissatisfied with the original application of the exemption.
13. The Commissioner decided it was proportionate to come to a verdict about the academic application of the exemption without obtaining further arguments from the Trust.

Findings of fact

14. The relevant parts of paragraph 10 of Schedule One of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2004 state the following:

10.—(1) Subject to the following rules, the chairman may at any time either on the application of a party or on his own initiative make an order in relation to any matter which appears to him to be appropriate. Such orders may be any of those listed in paragraph (2) or such other orders as he thinks fit...

(2) Examples of orders which may be made under paragraph (1) are orders ...

(a) as to the manner in which the proceedings are to be conducted, including any time limit to be observed;

(b) that a party provide additional information;

(c) requiring the attendance of any person in Great Britain either to give evidence or to produce documents or information;

(d) requiring any person in Great Britain to disclose documents or information to a party to allow a party to inspect such material as might be ordered by a County Court (or in Scotland, by a sheriff);

Analysis

Exemptions

15. Section 21(1) states that information is exempt from disclosure if it is reasonably accessible to the applicant by other means. The purpose behind the exemption is that if there is alternative route by which a requester can obtain information, there is no need for the Act to provide the means of access.
16. The task for the Commissioner here is, therefore, to consider whether the information falling within the scope of this request can be fairly characterised as reasonably accessible to the applicant.
17. As noted above, the Trust explained that it believed the complainant would be able to access this information through making an application for disclosure in his ongoing Employment Tribunal case.
18. The complainant explained that information cannot be said to be reasonably accessible when an individual must make an application to the Tribunal to receive it. This is particularly so when the information was easy to find and available to anyone else who asks for it. He

explained that he would be prejudiced for asserting his employment rights.

19. The Commissioner has carefully considered the Rule, set out above, that the Trust said would allow the complainant to access the information. He notes that the Rule provides no guarantee that the complainant would have been able to access the requested information in this case. The discretion lies with the chairman (now Employment Judge) of the Tribunal and he must decide whether it would be appropriate for an order to be made.
20. As there would be no guarantee that the information could be provided to the complainant through the other means, the Commissioner finds that section 21(1) was not applied appropriately by the Trust. This is because the Trust could not have been sure what the chairman of the Employment Tribunal would conclude.
21. The Commissioner therefore finds in favour of the complainant.

Procedural Requirements

22. Section 1(1)(b) requires that a public authority communicates the information to the complainant if it is not exempt. As the Trust failed to provide this information by the date of its internal review, it breached section 1(1)(b).
23. Section 10(1) (full wording in the legal annex) requires that section 1(1)(b) is complied with in 20 working days. The failure to communicate the information at the time of compliance was also a breach of section 10(1).

The Decision

24. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act. In particular:
 - It incorrectly applied section 21(1) as the information was not reasonably accessible to the complainant;
 - It breached section 1(1)(b) because it failed to provide the complainant with the information that he was entitled to by the time of its internal review; and
 - It breached section 10(1) because it failed to comply with section 1(1)(b) in 20 working days.

Steps Required

25. The Commissioner requires no steps to be taken. This is because the complainant has already received the requested recorded information.

Right of Appeal

26. 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: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

27. 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.
28. 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 22nd day of September 2011

Signed

**Faye Spencer
Group 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 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.

(4) The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with, the regulations.

(5) Regulations under subsection (4) may—

(a) prescribe different days in relation to different cases, and

(b) confer a discretion on the Commissioner.

(6) In this section—

• “the date of receipt” means—

(a) the day on which the public authority receives the request for information, or

(b) if later, the day on which it receives the information referred to in section 1(3);

• “working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the [1971 c. 80.] Banking and Financial Dealings Act 1971 in any part of the United Kingdom

...

Section 21 - Information accessible to applicant by other means

(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)—

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.

(3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.