

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 January 2017

Public Authority: NHS Improvement
Address: Wellington House
133-155 Waterloo Road
London
SE1 8UG

Decision (including any steps ordered)

1. In a three part request, the complainant has requested information about a report into Royal Wolverhampton Hospitals NHS Trust. NHS Improvement (NHSI) released information with regard to the first two parts. It refused to comply with the third part of the request under section 12(1) of the FOIA; it said to do so would exceed the appropriate cost limit.
2. The Commissioner's decision is that:
 - NHSI is correct to apply section 12(1) to part 3 of the request.
 - NHSI breached section 16(1) of the FOIA as it did not give the complainant adequate advice and assistance with regard to this part of the request at the time it responded to the request.
3. The complainant has now received advice as to how part 3 of the request might be refined and he has the option of submitting a new request to NHSI if he so wishes. As a result, the Commissioner does not require NHSI to take any steps.
4. NHS Trust Development Authority ('NHS TDA') and Monitor are now operating as a single integrated organisation known as NHS Improvement, although both statutory organisations remain in existence. NHS Improvement has taken on responsibility for dealing with FOIA matters for both NHS TDA and Monitor. In this decision notice, references to NHSI are references to NHS TDA.

Request and response

5. On 27 October 2015, the complainant wrote to NHS TDA and requested information in the following terms:

"1. Can I request, using the freedom of information act, a copy of the Scott Moncrieff report into Royal Wolverhampton Hospitals which I understand was completed in or around September 2014.

2. Can I also request any correspondence regarding this report between the NHS TDA and the Department of Health using the Freedom of Information Act.

3. Can I request, using the Freedom of Information Act any communications between the NHS TDA and the Royal Wolverhampton Hospitals regarding this report."

6. NHS TDA's non-response to this request was the subject of the Commissioner's decision in case reference FS50610920, served on 9 February 2016.

7. As a result of the Commissioner's decision, NHSI provided a response to the request. The complainant has not provided the Commissioner with a copy of the response but she understands that the complainant received the response in March 2016.

8. Following an internal review of the response, NHSI wrote to the complainant on 8 June 2016. It provided the complainant with a copy of the report requested at part 1 of the request, which had been published in the interim. NHSI released information within the scope of part 2 of the request, with some personal information redacted under section 40(2) of the FOIA.

9. With regard to part three of the request, NHSI asked the complainant to narrow down the scope of this part. NHSI did not refer to section 12 of the FOIA, but may have done in its original response. It did not suggest specific ways in which this part might be refined.

Scope of the case

10. The complainant contacted the Commissioner on 21 June 2016 to complain about the way part 3 of his request for information had been handled; disputing the amount of time NHSI was suggesting it would take to identify and retrieve information within the scope of this part.

11. The complainant argues that NHSI had told him that it had originally taken it a long time to provide a response to the request because it wanted to be sure it had found all the relevant information. This suggested to the complainant that it should therefore already have identified information relevant to part 3 of the request. The complainant also did not consider that it would take a long time or cost over £450 for the individuals concerned to carry out an electronic search.
12. During the Commissioner's investigation, NHSI suggested how part 3 of the request might be refined so as to bring it within the cost/time limit. On the basis of this, the Commissioner advised the complainant that he might want to submit a new request to NHSI, and withdraw the current complaint regarding his request of 27 October 2015. The complainant preferred to progress this complaint
13. The Commissioner's investigation has focussed first on NHSI's response to part 3 of the request; that it is whether it is correct not to comply with this part as the cost limit exceeds the appropriate limit under section 12(1) of the FOIA. The Commissioner has also considered whether the advice and assistance NHSI offered to the complainant was adequate and complied with section 16(1).

Reasons for decision

Section 12 – appropriate limit

14. Section 12(1) of the FOIA allows a public authority to refuse to deal with a request where it estimates that it would exceed the appropriate limit to:
 - either comply with the request in its entirety, or
 - confirm or deny whether the requested information is held.
15. The estimate must be reasonable in the circumstances of the case. The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. Public authorities can charge a maximum of £25 per hour to undertake work to comply with a request; 18 hours work in accordance with the appropriate limit of £450 set out above, which is the limit applicable to NHSI. If an authority estimates that complying with a request may cost more than the cost limit, it can consider the time taken to:
 - (a) determine whether it holds the information
 - (b) locate the information, or a document which may contain the information
 - (c) retrieve the information, or a document which may contain the

- information, and
- (d) extract the information from a document containing it.
16. Where a public authority claims that section 12(1) of the FOIA is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit – in line with section 16 of the FOIA.
 17. In its submission, NHSI has told the Commissioner that the information requested in part 3 – that is, communications between NHS TDA and Royal Wolverhampton Hospitals about the report in question – was held on the email systems of NHS TDA. The initial investigation identified that there would be at least 18 individuals who would potentially have relevant emails.
 18. NHSI says that at the time the emails in question were sent/received, NHS TDA worked on an email system used by many other NHS bodies, known as NHS mail version 1. This had a very limited mail box size (400 emails). The result of this limitation was that in order to avoid their mailbox freezing, many staff, particularly senior staff who received a large volume of email traffic with substantial attachments, had to delete emails from their mailbox on a regular basis, albeit the emails were archived and retained centrally on computer disk.
 19. As a result, given the scope of the request, NHSI has explained that it would have to conduct a central search of the archive disks for relevant deleted emails (rather than being able to ask individual staff to search their own mailboxes).
 20. NHSI says it has performed this task previously in relation to an internal disciplinary investigation. The process for obtaining the disks from storage, completing relevant forms and procedures to comply with individual governance requirements, took three hours. The search for each account then took approximately one hour. Based on that previous case, and the need to search 18 individual accounts, NHSI estimates that the process would take substantially more than 18 hours and that therefore the cost limit under section 12(1) of the FOIA would be exceeded.
 21. The complainant's request concerns a report by Lucy Scott-Moncrieff into Royal Wolverhampton Hospitals NHS Trust. The complainant has argued that NHSI would hold a file relating to Scott-Moncrieff's investigation in which any related correspondence would be held. He considers it would therefore be straightforward to retrieve any correspondence from such a file. He has noted that the report was published in May 2016 and considers that consequently, NHSI would still have been able to retrieve any correspondence in response to the

Commissioner's decision in FS50610920, which was served in February 2016, with NHSI providing a response in March 2016. The Commissioner's view is that the Scott-Moncrieff report may have been published in May 2016 but that a number of months are likely to have passed between evidence for the report being gathered and considered, and the publication of the final version of the report.

22. Under the FOIA, NHSI is only obliged to consider any relevant information it held at the time of the request; that is on 22 October 2015. NHSI has not referred to any ongoing investigation file in its submission to the Commissioner. Its explanation regarding any correspondence it held at 22 October 2015 is as detailed in paragraphs 17 to 20. With regard to this explanation, at the time of the request in October 2015, NHSI *might* (or might not) have been able to access any relevant communications it held within the cost/time limit as some or all email correspondence may still have been in the relevant individuals' mailboxes. At the point that it provided a response to the request however, which may have been some five months after the request was received, it considered that it was not obliged to respond to part 3 for the reasons given above.
23. This is one of the reasons why it is important for public authorities to respond to requests for information within 20 working days, as required by section 10(1) of the FOIA. Failure to do so risks eroding an applicant's confidence in the public authority and its response.
24. The Commissioner is prepared to accept that, given the time that had elapsed between NHS TDA receiving the request and NHSI responding to it, NHSI would have to carry out the activities detailed above in order to identify and retrieve any information relevant to part 3 of the request. She is satisfied that to do this would exceed the appropriate cost and time limit under section 12(1) of the FOIA. The Commissioner is therefore satisfied that NHSI can rely on section 12(1) with regard to part 3 of the complainant's request.

Section 16 – advice and assistance

25. Section 16 of the FOIA imposes an obligation on public authorities to provide advice and assistance to a person making a request, so far as it is reasonable to do so. Section 16(2) says 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 in relation to the provision of advice and assistance.
26. Paragraph 14 of Section 45 of the Code of Practice says that where a public authority is not obliged to comply with a request because it would exceed the appropriate limit to do so, then it:

"...should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or refocusing their request, information may be able to be supplied for a lower, or no, fee."

27. In its submission, NHSI has told the Commissioner that it provided advice and assistance to the complainant in an email dated 18 February 2016. In that email, NHSI says it suggested that he could narrow the request by shortening the time frame or specifying a particular topic he was interested in, or specifying communications between particular officials.
28. NHSI acknowledged to the Commissioner that, given the reasons for the time estimate (the need to search archived emails), it would have been more helpful if it had specified that the last option (communications between named officials) would have been the most practical way to narrow the search. This is because narrowing the time frame or topic may not, in the circumstances, have made much difference to the time it would take to carry out the search.
29. NHSI has also told the Commissioner that, on further consideration, it also notes that it may be possible to limit the search to a particular number of individuals, without the complainant identifying the specific individuals concerned – for example, limiting it to officials of a certain level of seniority in order to reduce the number of accounts to be searched.
30. These possible refinements were communicated to the complainant on 23 November 2016.
31. NHSI has noted that it has not identified, collated or reviewed any emails concerned and is not in a position to determine whether, if the scope of the request were narrowed to bring it within the 18 hour limit, any exemptions apply to that information. It considers that section 31(1)(g) (prejudice to regulatory functions), section 36(2) (prejudice to effective conduct of public affairs) or section 41 (information provided in confidence) may apply to any information requested in part 3 of the request, if held.
32. The Commissioner notes that NHSI says it did offer the complainant some advice and assistance in February 2016. Because, on reconsideration, NHSI has now identified ways of refining the request that may have been more helpful to the complainant, the Commissioner must find that NHSI breached section 16(1) when it originally provided a response to the request.

Right of appeal

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

34. 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.
35. 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
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