

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 July 2018

Public Authority: NHS Commissioning Board (NHS England)
Address: 4N22
Quarry House
Quarry Hill
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant has requested information relating to an investigation into the source of the figure for excess deaths as the result of patients being admitted to hospitals at weekends used by the Secretary of Health (now Secretary for Health and Social Care) in a speech on 16 July 2015. NHS England refused the request under section 14(1) of the FOIA on the basis that it was vexatious.
2. The Commissioner's decision is that NHS England has correctly applied section 14(1) to refuse the request.
3. The Commissioner does not require the public authority to take any action in this matter.

Request and response

4. On 12 October 2017, the complainant wrote to NHS England and requested information in the following terms:

"I understand that after the 16/7/15 speech an investigation was done to find out where this 6,000 figure came from.

Please can you give me any information from this investigation?
Whether or not an investigation was done, please can you give me any information you hold detailing the source of the 6000 figure and/or

how it was transmitted to the Department of Health/the Secretary of State?

Please provide all attachments with emails. Please provide any copies of presentations or slidepacks that are referred to in emails/communications.”

5. On 9 November 2017 NHS England responded. It refused to comply with the request on the basis that it was vexatious under section 14 of the FOIA.
6. The complainant requested an internal review on the same day, 9 November 2017. NHS England sent him the outcome of the internal review on 22 November 2017. It upheld the original position.

Scope of the case

7. The complainant contacted the Commissioner 23 November 2017 to complain about the way his request for information had been handled. The complainant accepts he has made a number of requests about the source of the 6,000 figure used in the speech delivered by the Secretary of State, but argues that the information disclosed in response to those requests has allowed scrutiny of both NHS England and the Department of Health and Social Care. He believes that the disclosure of any information captured by his current request would serve the public interest in a similar way.
8. The Commissioner considers that the matter to be decided is whether the request is vexatious and that therefore NHS England are entitled to refuse it under section 14(1).

Reasons for decision

Section 14(1) - vexatious requests

9. Section 14(1) of the FOIA states that a public authority is not obliged to respond to a request for information if the request is vexatious.
10. The term ‘vexatious’ is not defined in the FOIA. The Commissioner has identified a number of ‘indicators’ which may be useful in identifying vexatious requests. These are set out in her published guidance on vexatious requests. In short they include:
 - Abusive or aggressive language
 - Burden on the authority
 - Personal grudges

- Unreasonable persistence
 - Unfounded accusations
 - Intransigence
 - Frequent or overlapping requests
 - Deliberate intention to cause annoyance
11. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is vexatious.
 12. The Commissioner's guidance suggests that if a request is not patently vexatious the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. In doing this the Commissioner considers that a public authority should weigh the impact of the request on it and balance this against the purpose and value of the request.
 13. Where relevant, public authorities may also need to take into account wider factors such as the background and history of the request.
 14. NHS England has argued that the complainant is acting in concert with another individual and that between them they have submitted 59 requests (including the current one) for information about the new contract for junior doctors, the justification for a seven day National Health Service and the source of the claim that there were 6,000 excess deaths a year due to patients being admitted at weekends. These requests were made between August 2015 and the date of the current request, a period of just over two years. The public authority argues that the cumulative burden of dealing with this volume of requests is such that it renders the current request vexatious.
 15. It is not clear to the Commissioner whether the two applicants, who are, or were, both junior doctors, were acting in concert when they first started making their requests, but certainly the Commissioner is satisfied that they are known to one another and that their requests have come to be designed to complement one another's. They have come to work together in challenging the grounds for introducing the new junior doctors' contract and the basis of the claim that there is an excess of 6,000 deaths per year due to weekend admissions. As evidence of their close association, the public authority has provided a letter of complaint it received from a number of medical professionals about the figure of 6,000 extra deaths. The primary author is the complainant and the first co-signatory is the other applicant.
 16. NHS England has estimated that when it first started to receive requests from the complainant and the other applicant, two full days' work per week was dedicated by multiple members of staff at various levels

across its organisation in responding to those requests. Although the requests became more focussed as time went on and it became easier to locate relevant information due to the experience gained from handling previous requests, a significant amount of work was still required to deal with the requests. NHS England estimates that throughout 2016 and 2017 it was still spending between one and two days of staff time per week on the requests. It has emphasised that it considers these estimates to be very conservative ones. The Commissioner accepts that the need to assign this level of resources to dealing with the requests does place a significant burden on the public authority.

17. In addition to the resources spent on dealing with the actual requests, further time was required to deal with eleven internal reviews and five substantive complaints to the Commissioner. NHS England consider this latest request to be a continuation of this pattern of request making. The Commissioner accepts that the volume of requests submitted by the complainant and the other applicant is a weighty indicator that the current request is vexatious.
18. NHS England has provided the Commissioner with a spreadsheet detailing the history of those 59 requests. According to that spreadsheet twenty one requests were either complied with, or complied with apart from redactions required to remove the personal data of officials. A further ten requests sought information that was not held and eleven were refused on the basis that the cost of compliance would exceed the cost limit established by section 12 of the FOIA. NHS England claims exemptions (other than section 40 – personal data) were applied in only six cases; those exemptions being section 36 – prejudice to conduct of public affairs, and section 43 – prejudice to commercial interests. Another request was responded to with a request for clarification, another was deemed a repeat request and refused under section 14(2). Three of the requests, including the current one, have been refused under section 14(1) on the basis that they were vexatious. The remaining requests were responded to by disclosing some of the requested information and explaining that the other information was not held.
19. Out of the 59 requests referred to above twenty were made by the complainant himself. Of which nine were complied with (apart from redactions for personal data), four exceeded the cost limit, in two cases the requested information was not held, three were refused in full, one was refused in part and only the current request was deemed vexatious.
20. These statistics have been provided by NHS England to demonstrate it has provided information when it has considered it possible to do so and has continued to engage constructively with the complainant and the other applicant over the last two years and has only sought to refuse

requests as being vexatious from November 2017. Although the Commissioner accepts this general point she notes that one of the requests shown on the spreadsheet as being complied with apart from redactions made under section 40, did in fact have one of its elements refused under section 36 – prejudice to public affairs. This resulted in a complaint to Commissioner and a decision notice (FS50XXXXXX).

21. Nevertheless the Commissioner does accept the general point that the complainant has made a large number of requests which collectively have a relatively narrow focus. This number is swollen when account is taken of the requests made by the other applicant. Despite the volume of requests NHS England has responded to the majority of them up until recently when it drew the conclusion that the pattern of request making rendered this latest request vexatious.
22. NHS England has argued that the complainant's requests frequently overlap in that one is made before the public authority has had the opportunity to respond to the previous request. The complainant has countered that if some of his requests overlap others, this is because NHS England takes so long to respond requests. The Commissioner notes that she has had to issue six decision notices against NHS England finding that it breached section 10 of the FOIA by failing to respond to the complainant's requests within the statutory time limit before the complainant actually received a response. However looking at the public authority's spreadsheet the Commissioner notes it shows two of the complainant's requests were made on consecutive days in November 2015, three requests were made by him within eight working days the following month, including two made the same day. In March 2016 two requests were received within five working days. More recently two requests were made only eight working days apart in May and June 2017. Therefore the Commissioner does give some weight to the public authority's argument that the complainant's requests do overlap.
23. NHS England also argued that the complainant's requests often seek very similar information. By way of example NHS England has said that his requests include five separate requests for what has become known by the parties as the 'Deloitte slide pack'. Having looked at the requests identified by the public authority the Commissioner accepts that the recorded information required to answer the requests may have been held within the slide pack. However she notes that the requests are all phrased differently and it is not clear that the complainant would have recognised he was seeking information from that slide pack at the time he was making them. Equally it is conceivable that having had one request refused, the complainant was simply exploring whether information he thought would be of use to him could be extracted from an alternative document.

24. NHS England reminded the Commissioner that she has investigated complaints about its refusal to disclose the slide pack, one from the complainant and two from the other applicant, and on all three occasions the Commissioner has upheld its use of section 36 to refuse the request. This may be so, but the fact that ultimately the Commissioner found that the public authority was entitled to withhold the slide pack under section 36 carries no weight in terms of being evidence that the complainant was persisting to make requests for information which he knew was likely to be exempt. This is because the Commissioner's decisions were issued after the five requests were made.
25. NHS England considers that a response to one request simply leads to follow-up requests for similar information. The Commissioner considers there will be situations where the information disclosed in response to a request will open up a fresh avenue of enquiry for an individual to pursue, or a response that information, which an applicant expected a public authority to have, is not held, may lead him to explore other avenues for obtaining the answers he seeks. This is particularly true where an applicant is determined to get to the bottom of what they consider to be an important issue. Furthermore the Commissioner recognises that eleven of the 59 requests, including four directly from the complainant, were refused under section 12 on the basis of costs. If the public authority had complied with the duty to offer advice and assistance under section 16 which often arises in these situations, it is quite reasonable for the complainant, or the other applicant, to make a refined request. Therefore although the Commissioner considers that the number of requests submitted by both applicants over the last two years demonstrates a degree of persistence this has to be balanced against the nature of the complainant's enquiries; his attempts to piece together the public authority's evidence in support of its position in relation to the reform of the National Health Service. This reduces, but does not undermine completely, the weight the Commissioner attributes to this indicator that the request is vexatious.
26. It has also been claimed by NHS England that although the complainant's requests all relate to the same broad issues, their focus can drift, in that whenever the involvement of another member of staff is revealed in response to one request, or another item of correspondence, or piece of work is revealed, the complainant proceeds to make requests for information in relation to that individual, that communication, or that piece of work. It has described this as a 'scattergun' approach. It has also pointed to other requests made by the complainant, via the WhatDoTheyKnow website, to other public authorities for information on the same themes and argues this too supports a claim that the complainant has adopted a scattergun approach.

27. The Commissioner acknowledges she has identified a scattergun approach as being one of the potential indicators that a request is vexatious. However in her guidance the Commissioner describes a scattergun approach as being one where the requestor appears to be making completely random requests, that lack any clear focus, or seems to be simply fishing for information without any idea as to what might be revealed. The Commissioner is not satisfied that the complainant's requests can be characterised in this way. It appears to the Commissioner that, on the face of it, the requests do have the very deliberate purpose of tracking down the source of NHS England's evidence in support of the new contract and the figure of 6,000 additional deaths due to weekend admissions. Therefore an alternative interpretation of the pattern of request making is that the complainant is just following new leads as they are revealed.
28. It may however be that some requests are more speculative than others. It is not possible to say with certainty that some requests revisit previous topics simply in an attempt to 'mop up' (as NHS England describe it) any information which may have been missed by the terms of an earlier request, without any firm expectation that further information is held. This would erode the value of those requests.
29. NHS England has provided further arguments relating to the purpose of the requests. On the face of it the complainant's requests, together with those of the other applicant, appear to have a serious purpose and are being made to serve the public interest in better understanding and scrutinising the grounds for introducing a new seven day National Health Service. However NHS England argue that there are grounds for considering there is a more personal motivation behind the requests. It has suggested that clutches of requests from the complainant and the other applicant are triggered by developments in the Department of Health and Social Services' negotiations on the new contract for junior doctors and its implementation of a seven day National Health Service. NHS England considers this demonstrates the requests are the result of the complainant feeling personally aggrieved as a result of the proposed changes and that he and the other applicant are seeking information either as a means of attempting to undermine the position of the Department of Health and Social Services, and by extension the position of NHS England, and/or in order to be disruptive to both itself and the Department in retaliation for the changes to the contract.
30. Looking at the pattern of request making, as described by NHS England, it does appear that the higher level of requests coincide with developments in the proposed changes to the contract for junior doctors. However NHS England's argument that the two applicants are seeking to undermine its position could equally be described as simply an attempt by the complainant and the other applicant to challenge the grounds for introducing the changes. This is more characteristic of

requests that have a serious purpose rather than of ones that are vexatious. Nor is the Commissioner satisfied that the pattern of requests necessarily indicates the complainant and the other applicant are pursuing personal grievances. To some extent it is understandable that developments in the contract negotiation and other changes to the National Health Service would prompt their desire to access information while the issues they are concerned about are still live.

31. NHS England's arguments that the cumulative effect of the requests made by the complainant and the other applicant places an unjustified burden of it have already been discussed. Its final ground for considering the request is vexatious relates to the impact dealing with this specific request would have. NHS England believes the request is very broad in its scope. In particular NHS England has pointed out that the request seeks 'any' information in relation to an investigation, 'any' information on the source of the 6,000 figure, 'any' information on how the figure was communicated to the Department of Health and Social Services and copies of 'any' presentations or slide packs. It argues that the use of the term 'any' means that this request is very likely to capture a large volume of information. The burden of dealing with this request is compounded by the fact that there are no time parameters on it.
32. In the Commissioner's experience it is quite common and understandable for an applicant to request 'any' or even 'all' information on a particular subject, unless of course they are seeking information from a very specific document which they know exists. This is in part a result of an applicant not knowing for certain what information may be held and their natural desire not to inadvertently narrow the scope of their request in such a way as to exclude information that may be of interest to them. The most appropriate way to deal with such an issue would be for the public authority to have a meaningful dialogue with the applicant. Such a dialogue may follow the public authority's application of section 12, which provides that a request can be refused on the basis that locating and retrieving the requested information would exceed the statutory cost threshold. Often the application of section 12 would then trigger an obligation to provide advice and assistance under section 16. The Commissioner notes that when seeking an internal review the complainant offered to work with the public authority to narrow the scope of his request and clarified that his intention was for it to capture any information that summarised the findings of the investigation in to the source of the 6,000 figure.
33. NHS England has stated that it could not rely on section 12 in this case due to the limitations of that provision, which the Commissioner assumes to be a reference to the restrictions on the tasks that can be taken into account when estimating how much it would cost to comply with a request. Those tasks include the time taken to locate the

information, to retrieve a document containing the information and the time taken to extract that information from such a document. Collectively this covers the practicalities of collating the requested information.

34. Some of NHS England's arguments as to why this request would be particularly burdensome appear to relate to these tasks. For example NHS England has argued that the use of the term 'any' in several parts of the request means it would be required to follow each email trail to ensure it captured any off shoot conversation that may include information relevant to the request.
35. NHS England has also argued that once it had collated all the necessary information, it would then need to cross reference that information with that captured by any previous request so that it could check what information had been withheld in the past. However one could equally argue that the fact that the public authority may have already considered the sensitivity of such information would actually speed up the request handling process. This is particularly the case when it is remembered that, according to the public authority's own figures, it would only have to refer the six previous requests where it had applied exemptions (other than s40 – personal data).
36. NHS England has argued that cross referencing would also be necessary to identify any information which had already been released. Such information could then withheld under section 21 – information accessible to the applicant by other means. Regarding the need to consider the application of section 21, the Commissioner notes that the public authority is not obliged to apply the exemption and if it would in fact be more efficient to simply supply the information again, it could choose to do so.
37. Although the Commissioner recognises that the request adds to the cumulative impact that the overall volume of requests has placed on the public authority and that this request may involve its own complications, for example the potential need to liaise with the Department for Health and Social Services in respect of any information that may be held on how the 6,000 figure was passed to it, she considers the burden of dealing with this request on its own has been overstated by NHS England. In many respects it focusses on quite specific issues. One being an investigation which the complainant believes was conducted into the source of the 6,000 figure. If such an investigation took place one would expect the public authority to be easily able to identify the investigation and the information it generated. The request does not appear particularly burdensome on its own.
38. The complainant set out his grounds for believing the request should not be considered vexatious in his letter asking NHS England for an internal

review. As well as offering to narrow the scope of his request if this would overcome the problem, he argued that his requests served a serious public interest. He said that the twenty requests he made over the last two years have to be seen in the context of, what is known as, the 'Freemantle 2015' research paper.

39. In broad terms this research found that there was an increased risk of death associated with patients being admitted to hospital at weekends. Whether the findings of that research were used by the Department of Health and Social Services to support changes to the National Health Services before they were peer reviewed and published has been the subject of some controversy. There have been particular concerns expressed about the use of the 6,000 figure in a speech delivered by Secretary of State on 16 July 2015 to the Kings Fund. This speech was given several weeks before the 2015 research was peer reviewed and published. The Commissioner understands that the figures used by the Secretary of State in that speech originated from (but are not necessarily contained in) an earlier research paper (Freemantle 2012). There is therefore still some controversy over the robustness of the figures relied on by the government. There was also some debate over what conclusions can be drawn from the Freemantle 2015 research and questions were raised about the independence of that research. Certainly both pieces of research have helped inform government policy on major reforms to the National Health Service. Such changes will impact on the quality of health care in the country for many years to come. It is therefore a very significant piece of government policy.
40. The independence of Freemantle 2015 was debated in the public domain. The complainant considers the information released in response to his requests has fed into that debate and he states the paper now contains a correction to help address any conflict of interest involved in its creation.
41. Furthermore, the Commissioner understands the complainant's position to be that analysis from that research was shared with the pay review body for doctors, the Department of Health and Social Care, the private management consultants, Deloitte and was used to brief ministers and inform government policy in this very important area. It is understood the complainant's request seeks information that would reveal how that analysis was used and interpreted. His concern is that this very influential material is not available for public scrutiny in the same way the main, published, research from Freemantle 2012 and 2015 is. The complainant notes that the UK Statistics authority has written to the doctors' pay review body about the use of unpublished figures. This lends support to the complainant's concerns. He argues his requests are aimed at allowing greater scrutiny of the figures that the government is relying on to justify its policy on the National Health Service. He

considers the government and NHS England are trying to evade this scrutiny.

42. Finally, in support of his argument that the requests have a serious purpose and serve the public interest he has said that the information released in response to previous requests has directly led to parliamentary questions being asked of the prime minister.
43. The government's reform of the National Health Service is a major piece of policy. It is therefore important that the statistics used to inform those policies and to justify major changes to the way in which our health services are delivered are properly scrutinised. This would allow anyone wishing to challenge the proposals to do so from a well-informed position, or alternatively scrutiny would promote confidence in the policies being adopted. The Commissioner is therefore satisfied that complainant's request, and his previous requests, have a serious purpose. She is not persuaded by NHS England's argument that they are motivated by the complainant feeling personally aggrieved by the new contract for junior doctors.
44. The Commissioner accepts that the information provided in response to some of the complainant's requests have informed the public debate on these policy changes. She also recognises that the complainant has had to show a degree of tenacity when investigating the source and reliability of the figures used by the government when formulating this policy.
45. In light of the above the request when looked at in isolation is not patently vexatious. However the request has to be seen in the context of both the other requests made by the complainant himself and those of the other applicant identified by NHS England. The Commissioner accepts that the cumulative impact of these 59 requests has placed a significant burden on the public authority. As explained earlier, NHS England had to devote a considerable amount of staff time to dealing with the requests of 2015 and continued to spend between one and two days of staff time on the requests throughout 2016 and 2017. In total this would equate to roughly between 128 to 220 days of staff time. Even if only the complainant's requests were taken into account this would equate to between 43 and 75 staff days. The Commissioner is satisfied that this would impact on its ability to manage request from other applicants and disrupt the work of those in the policy and business areas responsible for the issues which the requests relate to. This together with the fact that the making of a request often overlaps with the time allowed for dealing with a previous request, including on one occasion two requests being made the same day, is indicative that the current request is vexatious. This is compounded by the fact that a response to one request may simply spawn a fresh request and the possibility that an occasional request may be a speculative, 'mopping up'

request. Therefore the Commissioner finds that although the request does serve a serious purpose, it is part of a pattern of request making that has placed an unjustified burden on NHS England. The request is vexatious and the public authority is entitled to rely on section 14(1).

Right of appeal

46. 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

47. 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.
48. 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

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