

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 February 2020

Public Authority: London North West
University Healthcare NHS Trust

Address: Northwick Park Hospital
P Block
Watford Road
Harrow
HA1 3UJ

Decision (including any steps ordered)

1. The complainant requested information from London North West University Healthcare NHS Trust ("the Trust") relating to issues arising from meetings about Cancer Services. The Trust provided some information to the complainant, but stated that the remainder of the requested information was not held.
2. The Commissioner's decision is that the Trust does not hold the remainder of the requested information. However, it failed to comply with the requirements of section 10(1) of the FOIA since, as detailed in this notice, it did not provide a response to the complainant within 20 working days of receiving his requests of 28 July 2018 and 4 January 2019, respectively.
3. The Commissioner does not require the Trust to take any steps.

Requests and responses

Request 1

4. On 28 July 2018, the complainant wrote to the Trust asking for the following information:

- 1) *"Have the staff side raised concerns via management on the above ref in the month of May/June/July 2017 on the above ref - Please answer YES or NO and if it's yes can I have all the information on this subject.*
 - 2) *Can I please have all the paperwork in regards to the End of Consultation dated 07.07.2017 until the closure and this should include minutes and attendance sheet of all the meeting.*
 - 3) *Can I please have the below information which I have requested on 05.02.2018 under the FOIA and DPA: Please can you provide me the total number of Hours of overtime done and why the staff at the Cancer Services Department during the period (01-06-2017 to 31-12-2017) in the below format [table provided]."*
5. The Trust did not initially respond to these matters and the complainant contacted the Commissioner on 23 September 2018 to complain. Following the intervention of the Commissioner, the Trust provided some information on 7 November 2018, 14 November 2018 and 16 November 2018.

Request 2

6. On 18 November 2018 the complainant wrote to the Trust to request:
- 1) *"All the 9 pages of the JNCC meeting 22/11/2017;*
 - 2) *The copy of the minutes of the JNCC meeting held after 06.07.2017 and before 22.11.2017;*
 - 3) *Copy of the minutes of the staff side meeting held from April 2017 until 31/12/2017 regarding cancer services consultation."*
7. The Trust responded to this on 17 December 2018. It provided some information falling within the scope of points 1) and 2). It stated that the minutes requested in point 3) would be provided separately.
8. On 4 January 2019, the complainant asked the Trust to carry out an internal review into its response of 17 December 2018. He stated that he had only received part of the information he had requested. He also sent a chasing email on 28 February 2019.
9. On 8 May 2019, the Trust provided the outcome of its internal review. It provided some information relevant to points 1) and 2) of Request 2. Regarding point 3) of Request 2, it explained that this information was not held as Staff Side is a *"separate organisation"*.

Request 3

10. Also on 4 January 2019, the complainant made a new request as follows:

"It says on 5.1 of the JNCC MTG 20.09.2018 [sic]¹ that [redacted] reported that she had reviewed the paper and identified a number of issues that remains outstanding. She agreed to meet with [redacted] to discuss these issues further. Action: [redacted]. Please provide all the copies and emails of all the issues that raised and concluded mentioned in serial no 2."

11. The Trust did not, at this stage, provide a response to this request.

Scope of the case

12. The complainant returned to the Commissioner on 18 June 2019, who accepted his complaint for investigation.

13. On 14 October 2019, after reviewing the responses he had received thus far, the complainant confirmed to the Commissioner that he remained dissatisfied with the Trust's responses to the following points:

- Request 1 point 2) (28 July 2018): *"Can I please have all the paperwork in regards to the End of Consultation dated 07.07.2017 until the closure and this should include minutes and attendance sheet of all the meeting."*
- Request 2 point 3) (18 November 2018): *"Copy of the minutes of the staff side meeting held from April 2017 until 31/12/2017 regarding cancer services consultation."*
- Request 3 (4 January 2019): *"It says on 5.1 of the JNCC MTG 20.09.2018 [sic] that [redacted] reported that she had reviewed the paper and identified a number of issues that remains outstanding. She agreed to meet with [redacted] to discuss these issues further. Action: [redacted]. Please provide all the copies and emails of all the issues that raised and concluded mentioned in serial no 2."*

¹ The relevant minutes are dated 20 September **2017**

14. The Commissioner wrote to the Trust asking it to confirm its position regarding these matters, on 14 October 2019.
15. On 26 November 2019, the Trust replied to the Commissioner. It also provided the complainant with some information falling within the scope of Request 1 point 2). Some of this information was redacted under section 43(2) (commercial confidentiality).
16. It stated that it did not hold any information relevant to the other two outstanding points, detailed above.
17. The complainant confirmed by telephone to the Commissioner that he was dissatisfied only with the response regarding the two outstanding points. That is, he considered that the Trust was likely to hold information falling within the scope of Request 2 point 3) and Request 3.
18. The Commissioner contacted the Trust on 7 December 2019 for further explanations, and the Trust confirmed on 30 January 2020 that it did not hold this information. It provided some further explanations of its position.
19. Although the Trust did not explicitly carry out an internal review into its handling of Request 3, the Commissioner notes that the Trust has confirmed, twice, that its position is that the information is not held, and provided explanations.
20. This decision covers whether the Trust holds any information falling within the scope of Request 2 point 3), and Request 3. It also covers the timeliness of the Trust's responses to Request 1 and Request 3.

Reasons for decision

Section 1 – what information is held?

21. Section 1(1) of the FOIA states that:

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 or her.*
22. In cases where there is a dispute over whether information is held, the Commissioner applies the civil test of the balance of probabilities in

making her determination. This test is in line with the approach taken by the Information Rights Tribunal when it has considered whether information is held in cases which it has considered in the past.

23. In this case, the complainant considered that the Trust would be likely to hold the information he had requested.
24. The Commissioner asked the Trust to provide details of the searches it carried out for information falling within the scope of the request. Her remit is not to determine whether information should be held, but only whether, on the balance of probabilities, the requested information was held by the Trust at the date of the request.
25. Specifically, the Commissioner asked the Trust to address the two outstanding matters separately: that is, how and why it had determined that it did not hold the information requested in Request 2 point 3), and Request 3.

Request 2 point 3) – Staff Side minutes

26. The Commissioner asked the Trust to explain more about the information that it had stated may be held separately by its Staff Side organisation. In particular, she wished to establish whether Staff Side is a separate entity from the Trust, whether the Trust was aware of any Staff Side meeting minutes, and if so, whether the minutes may be held by the Trust for the purposes of the FOIA.
27. The Trust explained that Staff Side is comprised of a number of recognised trade unions. It explained that there is a forum for negotiation and consultation between the Trust and Staff Side, known as the Joint Negotiation and Consultation Committee (JNCC), which provides the opportunity for discussion and debate between Staff Side and Trust management representatives "*in the development and implementation of the workforce implications of policy and working practices*".
28. The Trust confirmed that it had previously provided the complainant with minutes of two meetings of the JNCC held on 20 September 2017 and 22 November 2017 (as he had, specifically, requested).
29. The Trust's position is that it is unaware whether there are any minutes of Staff Side meetings, as requested by the complainant.
30. The Trust has explained that (as set out in its Trade Union Recognition Agreement, a copy of which has been provided to the Commissioner) its Staff Side is able to use Trust facilities including the Trust's electronic servers. However, it stated: "*it is recognised that unless otherwise*

stated, any Staff Side activity should only be accessed by recognised accredited trade union representatives”.

31. The Commissioner has published guidance² on the type of information that is held by a public authority for the purposes of the FOIA. The guidance sets out the position regarding information such as *non-official communications* which are held within a public authority. Trade union communications are given as an example of this type of information.
32. The guidance clarifies that this type of information is information which is not created by the public authority and nor is it retained by the public authority for its own purposes. It sets out that a public authority therefore holds this type of information solely on behalf of the other “person” (such as a trade union), and does not hold it for the purposes of the FOIA.
33. In this case, the Commissioner is satisfied that Staff Side is a separate legal entity from the Trust. She is satisfied that, as with trade union communications, if any minutes of Staff Side meetings were held *at* the Trust, they would be held only on behalf of Staff Side. They would not be held *by* the Trust for the purposes of the FOIA. The Commissioner would note, indeed, that a trade union would face difficulty in functioning effectively without a degree of privacy and the ability to operate away from scrutiny by the managers of the relevant public authority.
34. She is therefore satisfied that, while the Trust is unaware whether the specific requested information exists, the information, if it exists at the Trust, would not be held by the Trust for the purposes of the FOIA. She does not require the Trust to take any steps regarding this information.

Request 3 – information relating to “outstanding issues”, as referred to on 20.9.17

35. The complainant requested this information since, having read the minutes of the JNCC meeting dated 20 September 2017, it was his understanding that follow-up action would be taken regarding specific outstanding issues, and he expected the Trust to hold information, such as emails, relating to this.

² https://ico.org.uk/media/for-organisations/documents/1148/information_held_by_a_public_authority_for_purposes_of_foia.pdf

36. The Commissioner notes that the complainant has provided examples to her of emails which suggest that concerns were raised prior to the meeting.
37. The Commissioner asked the Trust for details of the searches and enquiries it carried out to determine whether or not any relevant information was held.
38. The Trust confirmed that an email search had been performed by the two members of staff named in Request 3, to establish if there was any subsequent email trail, or if any meeting had been held, following on from the JNCC meeting. The Trust stated: *"In this instance, both staff members have found no evidence of any correspondence or meetings subsequent to the noted JNCC meetings"*.
39. The Trust has conceded that information could have been deleted from its email servers during the time that elapsed between the relevant meeting on 20 September 2017 and the date of the request (4 January 2019). However, it comments that neither staff member has any recollection of any discussions having taken place. It has also stated that, for the avoidance of doubt, it is unaware of anything having been deleted subsequent to the date of the request.
40. On the balance of probabilities, the Commissioner is satisfied that the requested information is not held, and she does not require the Trust to take any steps.

Section 10(1) – time for compliance

41. As set out above, section 1(1) of the FOIA requires a public authority, on receiving a request for information, to inform the requester if the information is held, and if so, to provide him with the information (subject to any exemptions).
42. Section 10(1) of the FOIA requires that a public authority complies with section 1(1) promptly, and *"in any event not later than the twentieth working day following the date of receipt"*.
43. From the evidence in this case, the Commissioner is satisfied that the Trust failed to comply with section 10(1) in its handling of Request 1 (dated 28 July 2018) and Request 3 (dated 4 January 2019) respectively, since it failed to provide a response to either of these requests within 20 working days.
44. Since a response has now been provided, she does not require the Trust to take any steps in respect of these matters.

Other matters

45. The Commissioner is concerned by the delays in the Trust responding to the complainant in this case. While she is aware that the complainant made a number of related requests to the Trust, including subject access requests, she is of the view that, had his requests been responded to promptly and thoroughly, any resulting confusion could likely have been avoided; indeed he may not have considered that he needed to submit several requests. She would remind the Trust to respond promptly to all parts of any information requests, and to carry out a full consideration of what information is held.
46. The Commissioner also notes the significant delay when the Trust was asked to carry out an internal review on 4 January 2019 but did not provide the outcome until 8 May 2019. While this is not a statutory breach, the Commissioner considers that public authorities should comply with the section 45 Code of Practice³ and carry out internal reviews within a maximum of 40 working days.
47. The Commissioner notes that delays were also occasioned in responding to her own letters of enquiry. Specifically, her letter of investigation dated 14 October 2019, which asked for a response by 11 November 2019, was not responded to by the Trust until 14 November 2019 and only then to admit to difficulties in separating out the complainant's requests; a full response was not issued until 26 November 2019. The Commissioner wrote a further letter of investigation to the Trust on 6 December 2019, requiring a response by 8 January 2020, which was responded to on 30 January 2020. The Trust is reminded to engage promptly with her and her officers throughout the course of an investigation.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Right of appeal

48. 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@justice.gov.uk

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

49. 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.
50. 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

**Ben Tomes
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SK9 5AF**