

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 March 2021

Public Authority: Tavistock and Portman NHS Foundation Trust

Address: 120 Belsize Lane

London

NW3 5BA

Decision (including any steps ordered)

1. The complainant has requested information from the Tavistock and Portman NHS Foundation Trust ("the Trust"), regarding written communications between it and the Health Research Authority ("HRA") in relation to a specific investigation carried out by the HRA.
2. The Commissioner's decision is that on the balance of probabilities, the Trust does not hold information in relation to the request.
3. The Commissioner does not require the Trust to take any steps as a result of this decision.

Request and response

4. On 17 October 2019, the complainant wrote to the Trust and requested information in the following terms:

"The Health Research Authority has recently undertaken a review of concerns relating to a research study hosted by UCL and involving the Tavistock and Portman NHS Trust (IRAS 38588, REC 10/H0713/79). The HRA reported its findings in a document titled "Investigation into the study 'Early pubertal suppression in a carefully selected group of adolescents with gender identity disorders.'" The report is published on the HRA website.

Would you kindly share with me any written communications (including documents and emails) sent by the Tavistock and Portman NHS Trust to the Health Research Authority, in respect of the HRA's investigation, between 1 August 2019 and 15 October 2019?"

5. The Trust responded on 5 November 2019. It explained that it does not hold any correspondence material to the HRA's investigation for the period specified. It also explained that only emails between the Trust's Communications department and the HRA Communications Department, were sent during that time.
6. On the same date, the complainant wrote to the Trust explaining that they had requested "*any communication between the Trust and the HRA*" and that since it had confirmed some information was held, even though it was outside the scope of the request, would the Trust reconsider its response, before an internal review was sought.
7. The complainant wrote to the Trust again on 5 November 2019, advising that they had become aware that the communications between the Trust and the HRA had been during July 2019, rather than from the 1 August 2019 to 15 October 2019.
8. On 4 December 2019, the Trust replied to the complainant's email of 5 November 2019, advising that it did hold information relevant to the request, but it was applying the following exemptions of the FOIA: Section 36(2)(b)(i) – prejudice to the effective conduct of public affairs; Section 41 information provided in confidence; and Section 40(2) personal information.
9. Following an internal review the Trust wrote to the complainant on 24 January 2020. The Trust explained that it was incorrect to state that it did not hold information that was *material* to the HRA's investigation. However the Trust confirmed that it did not hold correspondence with the HRA relating to their investigation process about the 'Early Pubertal Suppression in a Carefully Selected Group of Adolescents with Gender Identity Disorder Study'. As such, the Trust upheld its original position of 5 November 2019, advising that it does not hold the requested information.

Scope of the case

10. The complainant contacted the Commissioner on 10 June 2020 to complain about the way their request for information had been handled.
11. During the investigation, the Commissioner asked the Trust to clarify the responses it had made to the complainant, as it was unclear if it had

treated the requests as two separate requests for information, or as one clarified request.

12. The Trust explained that a new reference number was provided to the second request from the complainant, as the dates had been changed and this would allow for a further 20 working days to respond.
13. The Trust advised that it responded to the request with the broader dates, explaining that it was applying Sections 36, 40 and 41 of the FOIA to some information that it considered to fall within the scope of the request.
14. The Commissioner also asked the Trust to clarify which of the requests the internal review was in reference to. It advised that it had included both requests within the internal review response and that as it had now found that the correspondence didn't fall within the scope of the request. Therefore the exemptions applied, were no longer being considered.
15. The Commissioner considers that that the scope of the case is to determine if the Trust is correct when it says that it does not hold any information in relation to the request.

Reasons for decision

Section 1 general right of access

16. Section 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."

17. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First Tier Tribunal decisions, applies the civil standard of the balance of probabilities.
18. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

19. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also consider the searches carried out by the council and other information or explanation offered by the council which is relevant to her determination.

The complainants view

20. The complainant has explained that the Trust advised that it does not hold information that is material to the request. However, due to the way in which the Trust responded to their requests, they believe that information is held.
21. They have explained that the Trust originally advised that it did not hold information that was material to the request, but upon review, it decided it did hold information but applied Sections 36, 40 and 21 of the FOIA to it. The Trust then advised that the information was not material to the complainant's request and therefore did not hold the requested information.
22. The complainant says that they feel that the Trust has not responded to their request sufficiently due to the different responses provided.

The Trust's response

23. The Trust has explained that when it received the original request, it advised that it did not hold information that was material to the request. However, it did hold some information but as it was between the Trust's communications team and the HRA's communications team, it considered that it did not fall within the scope of the request.
24. It also explained that when the second request was made by the complainant, which broadened the dates, it considered that the information was material to the request but applied exemptions to it, as it believed these were applicable.
25. The Trust explained that upon completing the internal review, it found that the correspondence it had advised was withheld, did not actually fall within the scope of the complainant's request for information. This is because the complainant's request was for information that is specific to the investigation itself and the information the Trust holds is not specific to the investigation.

Conclusion

26. The Commissioner asked for the withheld information, that had been referred to in the refusal notice of 24 January 2020. The Commissioner reviewed this information to establish if any of it fell within the scope of the requests of 17 October and 5 November 2019.

27. The Commissioner understands why the complainant believes that further information is held within the scope of their request, given the Trusts interpretation of the request in its refusal notice of 4 December 2019. However, the Trust has corrected this interpretation in their internal review and, having viewed the withheld information, the Commissioner is satisfied that the withheld information does not fall within the scope of the complainant's request.
28. Based on the information provided, the Commissioner is satisfied that on the balance of probabilities, the Trust does not hold information that falls within the scope of the complainant's request. She is therefore satisfied that the Trust has complied with the requirements of section 1 of the FOIA in this case.

Other matters

29. The Commissioner would recommend the Trust reviews its records management practice relating to generating references numbers for requests for information.
30. In the circumstances of this case, the complainant was provided with three different reference numbers, which has caused some confusion. As the Trust had created a third reference number within a response to acknowledge an internal review had been requested, it was unclear which of the two requests the Trust was responding too. It has only been on further correspondence with the Trust, that the Commissioner established that the internal review response was for both requests.
31. The Trust should clearly state which reference number, or numbers if there are multiple cases, they refer to in corespondence. This will provide clarity in further correspondence and make the process easier for both the complainant and the Trust.

Right of appeal

32. 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

33. 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.
34. 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

Phillip Angell
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