

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 6 February 2024

**Public Authority:** St George's University Hospitals NHS Foundation Trust

**Address:** Blackshaw Road  
Tooting  
London  
SW17 0QT

#### **Decision (including any steps ordered)**

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1. The complainant has requested information from St George's University Hospitals NHS Foundation Trust (the Trust) about applicants for jobs. The Trust refused to provide the information, initially citing section 22 (future publication) of FOIA but later withdrew that exemption and cited section 12 (cost exceeds limit) of FOIA.
2. The Commissioner's decision is that the Trust has cited section 12(1) of FOIA appropriately. He also accepts that the Trust could not offer any meaningful advice and assistance, given the context of the request. However, the Trust breached sections 1(1), 10(1) and 17(1) of FOIA in terms of the timeliness of its response.
3. The Commissioner does not require further steps.

## Request and response

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4. The complainant wrote to the Trust and requested information about job applicants. The request was received by the Trust on 23 June 2022. The request is too lengthy to include here but appears in an annex at the end of this decision notice.
5. The Trust responded on 19 August 2022 and refused to provide the requested information, citing section 22 of FOIA. The Trust stated that it intended to publish the information within six months.
6. On 20 November 2022 the complainant asked the Trust to direct them to the requested information. Although the complainant did not specifically request an internal review, the Trust should have taken this to be an internal review request.
7. Almost ten months later, on 12 September 2023, the complainant wrote again to the Trust to ask where the published data could be located.

## Scope of the case

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8. The complainant contacted the Commissioner on 28 September 2023 to complain about the way their request for information had been handled.
9. On 9 October 2023 the Commissioner wrote to the Trust to say that he was accepting the complaint without an internal review. The Trust then said that it intended to carry out a review. The Commissioner emphasised that any review needed to be carried out as soon as possible, given the passage of time.
10. After the Commissioner began his investigation, the Trust wrote to the complainant on 3 November 2023 to say that it was checking the data and would respond by 8 November 2023.
11. Despite the Commissioner chasing a response, the Trust provided another date of 1 December 2023 for when it would respond. This was later postponed until 12 December 2023.
12. The Trust provided its internal review to the complainant on that date. It withdrew its reliance on section 22 of FOIA, instead citing section 12 of FOIA because it believed that it would exceed the cost limit to provide the requested information. The Trust also accepted that it had breached the legislative timeframe by responding late and that its internal review took too long to provide.

13. In light of this, the Commissioner asked the complainant if they were content. The complainant was not content and asked that the Commissioner continue his investigation. The complainant provided further supporting argument to the Commissioner on 4 January 2024. Having received this further argument, the Commissioner went back to the Trust on 26 January 2024 with a further query about whether it used Trac data to provide information to NHS England. Trac is an online recruitment management system.
14. The Trust responded to the Commissioner on 30 January 2024 with further argument.
15. The Commissioner considers that the scope of his investigation is to decide whether the Trust has cited section 12 appropriately and to look at any procedural issues.

## Reasons for decision

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### Section 12 – cost of compliance exceeds the appropriate limit

16. Section 12(1) of FOIA states that:

“(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

17. The appropriate limit is set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations'). The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour. This means that in practical terms there is a time limit of 18 hours in respect of the Trust. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) of the Fees Regulations states that an authority can only take into account the costs it reasonably expects to incur during the following processes:

- determining whether it holds the information;
- locating the information, or a document containing it;
- retrieving the information, or a document containing it; and

- extracting the information from a document containing it.
18. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be “sensible, realistic and supported by cogent evidence”<sup>1</sup>.
19. The Commissioner has underpinned the reasons for this decision with the analysis in his recent decision notices, [IC-261370-F4T1](#) and [IC-261362-W9S9](#) as they are closely linked cases. Some of the argument reflects these two previous decisions. The Trust is part of the South West London Health and Care Partnership (SWL).

### **The complainant’s view**

20. The complainant points out that the Trust has “decided to give the same response” as other Trusts in SWL. They ask that the Commissioner notes that section 22 was withdrawn in favour of section 12 of FOIA, after a significant wait.
21. The complainant does not accept the Trust’s reasoning or accept that “sufficient evidence” has been provided. They contend that the Trust “has not provided a substantial enough reason for the request to be refused” or for the Commissioner to find in its favour. The complainant argues that -

“there is independent evidence which shows that St Georges NHSFT are using the same system they claim to be inaccurate to produce data for their own use and to meet their obligation to report this data to NHS England”.

22. They go on to provide reasons to support their view. The complainant explained that the Trust was aware of their research and had provided a data set in 2021. Even though the Trust had provided data to the complainant for 2020-21, the Trust had later asked where the complainant had obtained the data from, stating that it was inaccurate. The complainant did not accept this. The complainant told the Trust that

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<sup>1</sup> <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf>  
(para 12)

"if this was the case I would expect to be contacted by the FoI team and provided with a correct set of data". The Trust repeated its request that the data be removed. The complainant heard nothing further and was not informed about any issues with Trac "or been told by the FoI team that the data they provided me with for 20-21 was inaccurate". The complainant cannot understand why, in view of this, the "21-22 data request" was not dealt with "in an appropriate and timely way".

23. The complainant takes issue with the internal reviewer concerning their comments about "completed campaigns" as "I have never asked for information about completed campaigns as this is not necessary for my research".
24. Equally, the complainant had not asked for "information about all recruitment campaigns and would have been happy to discuss this issue and clarify my request with the trust".
25. There was no "specific information about the approximate percentage of HCAs and Nurses etc recruited outside the TRAC system or" explanation "why, as a result of these two groups, they cannot provide information for the other categories requested". Having done this work themselves, the complainant states that "there are very quick and easy ways to (eg) bulk remove overseas recruited B5 nurses from the final numbers by using ESR starter reporting". The complainant could have advised on this but, instead the Trust cited section 22, "leading me to believe that I would receive the data but at a later date".
26. The complainant states that Trac information "differs significantly from new starter data on ESR". Another "moot point" that the complainant highlights is that they had not asked for "numbers of new starters" but "numbers of offers" which can be significantly different.
27. They suggest that the reason for citing section 12 is because the data is "so inaccurate" that it would require "between 300 and 2,400 hours" to provide accurate figures. The complainant argues that the Trust "states that the data cannot be disaggregated between the three Trusts" without providing "any further evidence for this assertion". The complainant contends that,

"St George's (along with Kingston and Epsom & St Helier) are using the same Trac data for their own publicly available reporting and to fulfil their obligation to provide data to NHS England for inclusion in national Workforce Race Equality Standard [WRES] reporting."

However, the complainant attached copies of a publicly available internal document from a related Trust and pointed to the relevant part of the national WRES data document,

“for the 21-22 year which uses the same disaggregated Trac data they would use to fulfil my request, and which they claim it is impossible to produce without hundreds/thousands of hours of work”.

The Commissioner asked the Trust about this specific argument and its response is set out in paragraphs 34 and 35.

28. The complainant queries the deletion of the data for the period requested whilst citing section 22 which would have involved providing this data at a later date. They suggest that the Trust had “never intended to provide the information at a later date”.

### **The Trust’s view**

29. The Trust explained the context in which it had changed its response and why it could not rely on section 22 of FOIA any further. The Trust had received “Subsequent advice received from the SWL Recruitment Hub as well as senior members of Staff within the Trust’s People Directorate...” who “highlighted the inadequacies of the TRAC applicant tracking system for providing the information...”

30. The Trust itemised the following reasons

“1. TRAC reporting will include all open campaigns during a requested period and will not differentiate between complete and incomplete campaigns. An incomplete campaign will not record data for each of the stages of a recruitment campaign.

2. TRAC reporting does not cover all recruitment activity. This includes all international recruitment campaigns; recruitment events; and agency managed recruitment. As a result, TRAC data does not include a significant volume of recruitment activity particularly for the recruitment of HCAs and nursing staff.

3. Reporting Equality data from TRAC is significantly different when compared to the new starter data on the NHS Electronic Staff Form (ESR). The SWL Recruitment Hub is currently undertaking work to understand the variance in reporting.”

31. The Trust explained that Trac can produce reports but that it has “legitimate concerns over the accuracy and functionality of its reporting”. For this reason it would be necessary for the staff to manually intervene “to undertake the necessary rigorous interrogation of data and subsequent analysis”.

32. The Trust takes part in "wider SWL recruitment campaigns" and these are "managed outside of TRAC which would require the disaggregation of..." the other Trusts supported by the Hub. The functionality of Trac does not allow scrutiny of the captured data for reporting purposes. The data would need to be extracted from Trac and other sources before it would need to be manually analysed in order to produce the report.
33. The data on Trac is only retained for 400 days so it cannot report figures for the period April 2021 to March 2022. The Trust explained that there are approximately 100 new starters at the Trust each month and around 1200 recruitment campaigns annually. It estimates that it would take between 15 minutes and two hours to review each campaign. The total time it estimates is between 300 and 2,400 hours. This is well beyond the fees limit as set out in section 12 of FOIA.
34. Responding to the complainant's comments about its publication of the WRES data (paragraph 27) the Trust stated the following:

"The data from TRAC that the Trust uses for its WRES submission is for a one year period. The data is included in Trust submissions and is published on our website at <https://www.stgeorges.nhs.uk/about/living-our-values/equality-diversity-and-inclusion/wres/> and therefore, is available in the public domain. We are unable to provide the information requested as to do so would require extensive manual manipulation to include quarterly data related to full campaigns as this is not currently captured in TRAC. In addition, we have also been advised by the South West London Recruitment Hub that there are a number of system limitations in TRAC which impede the production of reliable quarterly reports, these are:

- a) The report relies on the status of both applicants and a vacancy to be "Outcome recruited," which can cause issues. This is especially true in cohort recruitment, where the vacancy is never closed off. If there are many applicants for one vacancy, only a few may be moved to "Outcome recruited" in the set period.
- b) The report will not include offline campaigns or international recruitment. Applicants with notice periods of eight weeks or more will not be included in the data, even for quarterly data sets.
- c) The report will not allow for like for like comparison because it does not include complete campaigns in the period. The appointed numbers will be too low compared to other stages of the recruitment process due to notice period issues."

35. The Trust noted that the system was not restricted to the SWL Trusts or its Recruitment Hub but that “it is experienced by all TRAC users which would cover the majority of NHS Trusts as it dominates the market”.

### **The Commissioner’s view**

36. The Commissioner understands the frustration the complainant feels at the delays regarding this request. It is not clear how or when the Trust first realised that it could not provide the requested information due to the reasons provided earlier in this decision. It is clear that this caused a significant problem for the complainant who had based their research on figures that the Trust subsequently considered to be inaccurate. This would clearly have implications for any future research.
37. At the time the request was made the data was held, even if the Trust’s calculation is that it was beyond the fees limit to provide it, and any decision has to be based on the situation at the time. The fact that the data is no longer held for the April 2021-March 2022 period makes any analysis of whether it was subject to section 12 somewhat academic. It cannot now be provided, two years later, whatever the Commissioner’s decision.
38. There have been many delays and failures in communication in the Trust’s responses. The complainant has argued that the Trust has made certain suppositions about what data was required rather than what had actually been requested eg they did not ask for “completed campaigns” or “all recruitment campaigns” or “numbers of new starters”. The complainant also explained that their own knowledge of Trac meant that they could explain how to remove overseas B5 nurses from the final numbers. They have also suggested that the Trust’s data can be disaggregated in order to provide the WRES data.
39. Better engagement with the complainant might have meant that the issues pointed out regarding the scope of the request in the previous paragraph could have led to a clearer understanding of what was being requested and potentially less manual intervention. There seems to have been a reluctance on both sides to accommodate the other’s position. Ultimately, the arguments of the Trust and those of the complainant regarding what data can be provided from Trac are disputable. However, the Commissioner has accepted that the technical limitations of the Trac system mean that providing the requested information (if that was still possible) would exceed the fees limit of 18 hours, even if the actual figure cannot be accurately calculated due to the various permutations.



## Procedural matters

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40. Section 16 of FOIA requires a public authority to provide advice and assistance where it is reasonable to do so. The section 45 FOIA Code of Practice states that a public authority's advice and assistance obligation will be triggered when it relies on section 12 to refuse a request. If there is no reasonable way in which the request could be refined, the public authority should inform the requester that the request cannot be meaningfully refined.
41. The Trust had firstly cited section 22 of FOIA and had not needed to offer advice and assistance. It did not cite section 12 of FOIA until December 2023, 18 months after the request was received. The Trust did not offer advice or assistance but did set out the reasons why it was not able to provide the requested information.
42. Although the Trust had clearly breached FOIA in the length of time it took to cite section 12, the Commissioner accepts that, as a result, the Trust was not able to provide meaningful advice and assistance to the complainant, not least because the information is now not held. Additionally, though indicating a willingness to clarify, the complainant does not agree that the information cannot be provided from the Trac system for the reasons cited in paragraphs 20-28.
43. Section 1(1) of FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them. The Trust failed to confirm whether the information was held by the time for statutory compliance.
44. The Commissioner is also concerned that the Trust no longer holds the requested information and about its initial reliance on section 22. It is unclear when the Trust first realised that it could not rely on the information from Trac and consequently section 22. The length of time taken to establish this and the lack of communication with the complainant meant that the data was deleted in line with the Trust's retention period and cannot now be provided. This should not have happened, though the Commissioner considers that it was due to the overly slow recognition by the public authority that Trac data could not be interrogated without error in the way it had previously thought.
45. Where a public authority considers the information or some of the information is exempt from disclosure, section 17 of FOIA requires it to issue a refusal notice, explaining why.
46. Section 10(1) of FOIA requires these actions to be taken and compliance with section 1(1) within 20 working days of receipt of the request.

47. The Trust issued a refusal notice, indicating it held the requested information outside the 20-working day requirement and so breached sections 1(1), 17(1) and 10(1) of FOIA.

## Other matters

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48. Firstly, despite the fact that the Trust withdrew its application of section 22 of FOIA, the Commissioner is concerned that it did not specify earlier that it was no longer relying on it. There had, by then, been many months to reconsider its position. This has had implications for the complainant and will continue to do so as they have an ongoing need for this data, unless some solution can be arrived at.

49. The Commissioner would like to remind the Trust of his guidance:

“A general intention to publish some information will not suffice. It is not enough for the public authority to note that it will identify some, but not all, of the information within the scope of the request for future publication.

**The information that the public authority intends to be published must be the specific information the applicant has requested.”<sup>2</sup> [Commissioner’s emphasis]**

50. Secondly, the section 45 Code of Practice<sup>3</sup> recommends that public authorities complete the internal review process and notify the complainant of its findings within 20 working days, and certainly no later than 40 working days from receipt.
51. In this case the specific time that a request for a review was made is unclear but the complainant’s dissatisfaction was evident in November 2022. The Trust did not provide the review until December 2023. This is more than 12 months beyond the maximum recommended timeframe of 40 working days and the Commissioner considers it to be unacceptable. He has recorded this delay for monitoring purposes.

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<sup>2</sup> [information-intended-for-future-publication-and-research-information-sections-22-and-22a-foi.pdf \(ico.org.uk\)](#)

<sup>3</sup> [CoP FOI Code of Practice - Minor Amendments 20180926 .pdf \(publishing.service.gov.uk\)](#)

## Right of appeal

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52. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

53. 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.
54. 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 .....**

**Janine Gregory**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**

## Annex

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55. Under the Freedom of Information Act, please provide me with the following:

### Part One

Numbers of Job Applicants, Applicants Shortlisted for Interview, and Applicants Offered a position after interview, by ethnicity and for the following groups of staff, for the period 1 April 2021 to 31 March 2022 (2021-or, if not available, the most recent 12-month period – in which case please state which period the data is for):

1. All AfC Roles at bands 1 – 8b
2. All AfC Roles at 8c and above
  
3. All Registered Nursing Roles at Band 5
4. All Registered Nursing Roles at Band 8c and above
  
5. All Registered Midwives at Band 5
6. All Registered Midwives at Band 6
  
7. All Allied Health Professionals
8. All Occupational Therapists
9. All Physiotherapists
10. All Dieticians
11. All Radiographers
  
12. All SAS Roles
13. All Medical Consultant Roles
  
14. All Band 5 Bank Registered Nurse recruitment

Please supply the numbers of candidates (not the %) for the following Ethnicity Descriptors:

- Asian (including Chinese)
- Black
- Mixed (including Arab)
- Other
- White
- Unknown (including do not wish to say)

The above categories mirror the 2021 Census categories, please refer to the attached document setting out these category descriptors if further guidance is needed. If you use Trac please ensure that the Vietnamese, Japanese, Filipino, and Malaysian descriptors are included in the Asian category. Please note in particular that Chinese is listed as Other on Trac & should be re-classified as Asian in line with the 2021 census categories. This request is part of a larger research project. In order to avoid transcription errors please send the data as an Excel file in the following format:

Ethnicity	Number of Applicants	Number Shortlisted for Interview	Number Offered the Position
Asian			
Black			
Mixed			
Other			
White			
Unknown			

**Part 2**

Please provide the level of expenditure in the 2021-22 financial year on the recruitment of overseas nurses.

This request is part of a larger research project. In order to avoid transcription errors, please use the following format and send as an Excel file:

Number of Nurses Recruited in 21-22	Funding allocated to the trust for this purpose by NHSEI	Total cost to the trust (excluding NHSEI funding) of overseas nurse recruitment. This should include all associated expenses such as trust staff costs, Agency costs, flights, accommodation, etc. "	Total