Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 11 January 2011

Public Authority: Heart of England NHS Foundation Trust
Address: Birmingham Heartlands Hospital
Bordesley Green East
Birmingham
B9 5SS

Summary

The complainant made a request to the Heart of England NHS Foundation Trust (the 'Trust') for the full names and registration numbers of the nurses who were working on a specific ward during the hospitalisation of her mother up until she passed away. Owing to its context and history, the Trust refused to comply with the request on the grounds that it was vexatious for the purposes of section 14(1) of the Freedom of Information Act 2000. The Commissioner has investigated and, although conscious of the sensitivity attached to the history of the request, he has found that the Trust was entitled to rely on section 14(1) and has therefore not upheld the complaint.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. In 2007 the complainant's mother was treated on a specific ward during her hospitalisation at the Heart of England NHS Foundation Trust (the 'Trust'). Unfortunately, the complainant's mother passed

away while on the ward. The complainant has since questioned whether the care and attention given to her mother was appropriate.

The Request

3. On 29 March 2010 the complainant wrote to the Trust to submit the following information request:

"Further to our telephone conversation of last October, I am writing to formally request the information I discussed with you. In outline, reference the full names and nursing registration numbers of nursing staff.

Please provide the full names and nursing registration numbers for the following nursing personnel, who were working on [a specified ward] *during my mother's hospitalisation on the ward…"*

4. The Trust issued a refusal notice on 28 April 2010. This stated that the Trust considered the request to be vexatious and was therefore subject to the exclusion contained at section 14(1) of the Act.

5. The complainant subsequently wrote to the Trust on 12 May 2010 to ask that it review its refusal. In correspondence of 11 June 2010 the Trust advised the complainant that a review had been carried out which upheld the Trust's original application of section 14(1).

The Investigation

Scope of the case

6. On 26 July 2010 the complainant contacted the Commissioner to complain about the Trust's decision to refuse her request under section 14(1) of the Act.

Chronology

7. In correspondence of 1 October 2010 the Commissioner asked the Trust to demonstrate in greater detail why section 14(1) would apply. The Trust responded on 20 October 2010, enclosing evidence that it considered supported its position.

8. The Commissioner telephoned the Trust on 27 October 2010 to seek clarification on the information that had previously been supplied. The Trust emailed the Commissioner later the same day with its submissions.

9. On 4 and 5 November 2010, the Commissioner spoke with the complainant about the reasons why she considered section 14(1) could not be claimed in this instance. The complainant subsequently wrote to the Commissioner on 11 November 2010 to confirm the points she thought should be considered by the Commissioner when making his determination.

Analysis

Substantive Procedural Matters

10. In determining this case, the Commissioner has taken into account the submissions of both the public authority and the complainant. The legal provisions relevant to the decision are set out in the Legal Annex to the Decision Notice.

Section 14(1) – vexatious request

11. Section 14(1) provides that a public authority does not have a duty to comply with a request where it may be considered vexatious. As a general principle, the Commissioner considers that this section of the Act is designed to protect public authorities against those who do not use the right to seek information in the manner intended.

12. In approaching the application of section 14(1), the Commissioner has had regard to the Tribunal's decision in *Hossack v Information Commissioner* (EA/2007/0024). In that case, the Tribunal accepted that the consequences of deeming a request vexatious were not as serious as those which arose from a finding of vexatious conduct in other circumstances. Therefore, the Tribunal considered that the threshold for vexatious requests need not be set too high. Nevertheless, taking the lead from the Tribunal's comments in *Rigby v Information Commissioner* (EA/2009/0103), the Commissioner understands that section 14(1) should not be used to unfairly constrain the legitimate rights of individuals to access information.

13. The Commissioner has also acted on the basis that deciding whether a request is vexatious is essentially a balancing exercise. When weighing up the issue of vexatiousness, and in keeping with the structure of

previous decisions concerned with the application of section 14(1), the Commissioner has considered the following questions instructive:

- Could the request fairly be seen as obsessive?
- Is the request harassing the authority or causing distress to staff?
- Would complying with the request impose a significant burden in terms of expense and distraction?
- Is the request designed to cause disruption or annoyance?
- Does the request lack any serious purpose or value?

14. In establishing which, if any, of the above factors apply, the Commissioner will consider the history and context of the request. This follows the observation by the Information Tribunal in *Welsh v Information Commissioner* (EA/2007/0088) that "in most cases, the vexatious nature of a request will only emerge after considering the request in its context and background. As part of that context, the identity of the requester and past dealings with the public authority can be taken into account." The Commissioner recognises, however, that it is the request and not the requester that must be vexatious for the exclusion to be engaged.

15. A significant feature of the Trust's arguments for the application of section 14(1) concern the complainant's alleged attempts to revisit issues, namely the circumstances around the treatment of the complainant's mother and the Trust's subsequent handling of her complaint, that it believes have already been considered.

16. In contrast, the complainant has suggested that the request in question represents a separate strand of a complaint against the Trust. The complainant has therefore contended that the background to the request, specifically the previous communications exchanged between the parties, should be discounted.

17. The Commissioner, however, does not accept the complainant's analysis. This is because the Commissioner considers that the request directly arises from the complainant's desire that the Trust be held to account for the alleged shortcomings in the care it had provided to her mother. It is therefore the Commissioner's view that the request can reasonably be viewed as forming part of the complainant's wider grievance against the Trust.

18. The complainant has also directed the Commissioner to the fact that, as referred to in the wording of her request, she had telephoned the Trust in October 2009 to inform it that she intended to make a request for the information. As the Trust had not, at that time, indicated that it

would consider refusing the request under section 14(1), the complainant has argued that it was unreasonable for the Trust to cite the exclusion when the request was formally received.

19. Again, the Commissioner does not agree with this line of reasoning. Ultimately, when a request is received, a public authority has the opportunity to consider in depth whether it should comply with a request; an opportunity that may not be available when a request has yet to be made but is simply being discussed. Consequently, the Commissioner is satisfied that the Trust's previous conversations with the complainant would not necessarily preclude it from later relying on section 14(1).

Could the request fairly be seen as obsessive?

20. An obsessive request is often a strong indication of vexatiousness. The Commissioner accepts that, at times, there is a thin line between obsession and persistence. Although each case turns on its own facts, the Commissioner considers that an obsessive request can be most easily identified where a complainant continues with a request despite being in possession of other independent evidence on the same issue, or where there is a clear intention to use the request to reopen issues that have already been debated.

21. As drawn attention to in his decision involving Blackpool, Fylde and Wyre Hospitals NHS Trust (FS50234985)[1], the Commissioner appreciates that the death of a close family member will always be traumatic and will often lead to questions about the quality of healthcare offered to that individual. The Commissioner further accepts that the complainant has serious concerns about her mother's treatment while she was in the care of the Trust. However, the Commissioner also acknowledged in the above decision that there must be a limit to such enquiries.

22. The Commissioner understands that, in line with the NHS Complaints Policy, the Trust carried out an extensive review of a significant number of issues raised by the complainant in relation to the care afforded to her mother and the subsequent handling of her complaint. The findings of this review were sent to the complainant on 18 September 2008.

23. Owing to her continued dissatisfaction with the response of the Trust, the complainant went on to seek an independent assessment by the Parliamentary Health Service Ombudsman (PHSO). In his letter to the

[1] http://www.ico.gov.uk/~/media/documents/decisionnotices/2009/FS_50234985.ashx

Trust of 1 December 2009, which summarised his findings, an Assessor at the PHSO acknowledged that the complaint represented a challenge for the Trust due to the volume of concerns raised. While the Assessor found some instances of service failure, he advised that the PHSO had decided not to investigate the complaint. The Assessor added that the Trust's final response to the complainant seemed more than reasonable.

24. By using the Act to force the Trust to revisit an issue it has already considered, the Commissioner considers that the complainant has stepped over the thin line between persistence and a request being obsessive. To echo the Tribunal in *Rigby:*

"…FOIA is not a panacea for problems that have not been resolved through other channels. In our view, the on-going requests…after the underlying complaint had been investigated, went beyond the reasonable pursuit of information, and indeed beyond persistence. They indicate an obsessive approach to the Appellant's grievances about the underlying complaint."

25. In finding the request obsessive, the Commissioner has borne in mind the following counter-arguments presented by the complainant:

- That, irrespective of their findings, the complaints to the Trust and the PHSO were only the first stage of the complainant's strategic approach. As the request in question therefore represents a different line and direction in her approach, the complainant opposes the Trust's view that the request is reopening issues that have already been debated.

- That the views of the Assessor were not strictly those of the PHSO and that, in any event, the complainant was currently seeking to appeal against the way in which the PHSO had handled her complaint.

26. Regarding the first point, the Commissioner has not seen any evidence to suggest that the Trust was aware of the strategic approach of the complainant. In any case, the Commissioner considers that the Trust could legitimately consider its review of September 2008 to represent its final word on the issues raised by the complainant. This followed extensive contact with the complainant dating back from at least mid-2007.

27. The Commissioner considers it unreasonable to expect a public authority to engage necessarily in further dialogue about an underlying issue, irrespective of what steps had already been taken in response to

that issue. Indeed, to do so would seem to defeat the purpose of having a complaints procedure and the opportunity of recourse through an independent body as it would diminish the possibility that a sense of finality could ever be achieved.

28. Turning to the second point, the Commissioner does not agree that the Assessor's decision not to proceed to a full investigation of her complaint would affect whether the Trust was entitled to rely on section 14(1). The Commissioner considers that the important point for this decision is that the complainant had the opportunity to have her complaint looked at by an independent body; not what the independent body's decision was with respect to the complaint.

29. Based on the above, the Commissioner observes that there are cogent arguments for finding the request obsessive and, as such, considers this factor supports the Trust's application of section 14(1).

Does the request have the effect of harassing the public authority or causing distress to staff?

30. In his published guidance on vexatious requests[2], the Commissioner states that when considering this factor:

"The focus should be on the likely effect of the request (seen in context), not on the requester's intention. It is an objective test – a reasonable person must be likely to regard the request as harassing or distressing."

31. In weighing up whether the factor could reasonably be found to apply, the Commissioner has also been guided by the Tribunal in *Michael Jacobs v Information Commissioner* (EA/2010/0041), in which it stated that a public authority should expect to be exposed to *"an element of robust and persistent questioning, sometimes articulated in fairly critical tones."*

32. The Commissioner has considered the increasingly antagonistic relationship between the complainant and the Trust, which has resulted in the complainant questioning the objectivity and competence of the officials charged with dealing certain parts of her complaint. The Commissioner also understands that as recently as October 2009 the Trust has had to instruct the complainant to put all concerns or queries in writing due to the abuse that staff felt they were receiving from the complainant by telephone.

[2]http://www.ico.gov.uk/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/VEXATIOUS_AND_REPEATED_REQUESTS.ashx

33. In arguing that this factor applies, the Trust has referred to the significant volume of correspondence that has been received from the complainant. This has led to more than 30 members of the Trust's staff becoming involved in the investigating of, and responding to, the complaint of the complainant. Furthermore, the Trust found:

"…the frequency and volume of letters that were sent to various people difficult to manage and our investigations were continually adjusted to address the increasing complexity of the complaint."

34. On the other hand, the complainant has argued that the generation of the amount of correspondence cited by the Trust was largely due to the 'dilatory' approach taken by the Trust itself in response to its handling of her complaint.

35. While the Commissioner has not seen any clear evidence to support the complainant's accusation of dilatoriness on behalf of the Trust, he does consider that the high volume of concerns raised would naturally result in a high level of accompanying correspondence. In addition, the Commissioner recognises that, by its very nature, the complaint would be emotive. It is therefore understandable why, at times, the engagement between the parties may have become difficult.

36. Nevertheless, given the length of time that the Trust has been dealing with the complaint and the fact that the Trust has produced the findings of its review, the Commissioner believes it reasonable to conclude that the effect of the request would be to harass the public authority.

Would complying with the request impose a significant burden in terms of expense and distraction?

37. When considering whether this factor applies, the Commissioner would expect a public authority to be able to show that complying with the request would cause a significant burden both in terms of cost and in diverting staff away from their core functions. In *Welsh* the Tribunal agreed with the Commissioner that whether a request constitutes a significant burden is:

"…not just a question of financial resources, but includes issues of distraction and diversion from other work."

38. In *Coggins v Information Commissioner* (EA/2007/0130), the Tribunal found that a "significant administrative burden" was caused by the

length of time that the complainant had been in correspondence with the public authority.

39. The Commissioner considers that, on the surface at least, there would appear to be grounds for the Trust to argue that complying with the request would have imposed a significant burden. Leading on from the decision in *Coggins*, the Commissioner notes that although compliance with a request may not be resource-intensive when considered in isolation, a request may nevertheless be perceived as imposing a significant burden when taking into the account the history of the request.

40. However, as the Trust has not argued that this factor would weigh in favour of its application of section 14(1), the Commissioner has not deemed it necessary to explore this factor in any depth.

Was the request designed to cause disruption or annoyance?

41. To refer to the Commissioner's published guidance:

"As this factor relates to the requester's intention, it can be difficult to prove. Cases where this is a strong argument are therefore likely to be rare. However, if a requester explicitly states that they want to cause maximum inconvenience, the request will almost certainly be vexatious."

42. The Trust considers, and the Commissioner is inclined to agree, that there are no clear grounds to conclude that the request was designed to cause disruption or annoyance.

Does the request lack any serious purpose or value?

43. The Commissioner is aware that, in principle, the freedom of information legislation is not concerned with the motives of an applicant but in promoting transparency for its own sake. Nevertheless, the arguments for the application of section 14(1) may be strengthened where a public authority can demonstrate that a request has no value or purpose.

44. In referring to this factor in his vexatious guidance, the Commissioner informed public authorities considering the application of section 14(1) that:

"It is not appropriate to use lack of value as an argument simply because you cannot imagine what the value might be. You must demonstrate that a request has no purpose or value, rather than

simply suggest that because the requester did not provide a reason there cannot be one.

On the other hand, if a request does have a serious purpose or value, this may be enough to prevent it being vexatious, even if it imposes a significant burden and is harassing or distressing your staff. If the request forms part of a wider campaign or pattern of the requests, the serious and proper purpose must justify both the request itself and the lengths to which the campaign or pattern of behaviour has been taken."

45. The Trust has argued that it has fully considered all aspects of the complaint made by the complainant and, furthermore, has conducted a review of the complaint to ensure that everything reasonable had been done to address the issues raised. The Trust also referred to the findings of the Assessor at the PHSO who concluded that, in the main, the complaint was well managed by the Trust.

46. The Commissioner has taken the Trust's argument to mirror the observation of the Tribunal at paragraph 25 of its decision in *Coggins.* Although the Tribunal in that case accepted that the Appellant's original agenda had a serious purpose, there came a point *"when the Appellant should have let the matter drop…In the Tribunal's view* [the Appellant] *was not justified in the circumstances to persist with his campaign".*

47. The Commissioner would agree that, to a degree, the serious purpose the request does hold has been undermined by other factors, in particular the obsessive nature of the request. However, drawing from the complainant's submissions, the Commissioner is not convinced that the Trust has demonstrated that the request lacks serious purpose or value.

Conclusion

48. On the basis of the circumstances of the case, the Commissioner has determined that a reasonable public authority would find the complainant's request of 29 March 2010 vexatious.

49. In coming to his decision, the Commissioner has recognised the importance of the subject-matter to the complainant. The Commissioner is also prepared to accept that the complainant has genuine, ongoing concerns about the treatment given to her mother by the Trust.

50. However, although the issue of vexatiousness is not clear-cut, the Commissioner has decided that the arguments in favour of section

14(1) are of sufficient weight to deem the request vexatious. In particular, the Commissioner is persuaded by the Trust's claim that, taking into account its context, the request can reasonably be deemed obsessive which would in turn have led to the effect of harassing the Trust.

The Decision

51. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

52. The Commissioner requires no steps to be taken.

Right of Appeal

53. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 11th day of January 2011

Signed ……

Pamela Clements
Group Manager, Complaints Resolution

Information Commissioner's Office
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Cheshire
SK9 5AF

Legal Annex

Section 14 - Vexatious or repeated requests

Section 14 of the Act provides that:

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

(2) Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.