

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 July 2019

Public Authority: NHS Improvement
Address: Wellington House
133 – 155 Waterloo Road
London
SE1 8UG

Decision (including any steps ordered)

1. The complainant has requested information relating to University Hospitals of Morecambe Bay NHS Trust.
2. The Commissioner's decision is that NHS Improvement (NHSI) has correctly applied section 14(1) of the FOIA to this request.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Background

4. Since 1 April 2016, Monitor and the National Health Service Trust Development Authority have come together as NHSI. Both organisations continue to exist and have statutory functions. Monitor is the Independent Regulator of NHS Foundation Trusts and is responsible for considering applications for authorisation to become an NHS Foundation Trust¹.

¹Under section 33 of the National Health Service Act 2006

Request and response

5. On 4 September 2018, the complainant wrote to NHSI and made a request for information under the FOIA. The information requested was, in part, clarification of a response to a previous request.
 - *the formal official date of any and all University Hospitals of Morecambe Bay NHS Trust application(s) to Monitor for authorisation as a Foundation Trust.*
 - *the original letter referred to in the phrase "Monitor wrote to the Trust informing them that the assessment was postponed pending the outcome of the review" which is on the first extracted page. I also request any and all letter(s) sent by UHMB specifically requesting the postponement of the application and any/ all letters from Monitor to UHMB asking UHMB to apply for postponement of the application.*
 - *the full unredacted version of the 2010 emails enclosed.*
6. NHSI responded on 2 October 2018. It refused to disclose the 'unredacted' email chain and cited sections 36 and 40 of the FOIA as its basis for doing so.
7. Following an internal review NHSI wrote to the complainant on 30 October 2018 maintaining its position.

Scope of the case

8. The complainant contacted the Commissioner on 7 November 2018 to complain about the way his request for information had been handled.
9. In its submission to the Commissioner, NHSI changed its position and in the first instance sought to rely on section 14 of the FOIA. However, it also provided its arguments in support of its application of section 36(2). It would be usual practice for a public authority to advise the complainant of this change but due to the delays in this case the Commissioner has used her discretion and proceeded directly to this decision notice.
10. The Commissioner will first consider the application of section 14. In the event that she does not find this applicable she will consider the application of section 36.

Reasons for decision

11. Section 14 of FOIA states that:

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

12. The term "vexatious" is not defined within the FOIA. The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It commented that "vexatious" could be defined as the *"manifestly unjustified, inappropriate or improper use of a formal procedure"*. The Upper Tribunal's approach in this case was subsequently upheld in the Court of Appeal.

13. The *Dransfield* definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.

14. *Dransfield* also considered four broad issues: (1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the requester, (3) the value or serious purpose of the request and (4) harassment or distress of and to staff. It explained that these considerations were not meant to be exhaustive and also explained the importance of: *"...adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests."* (paragraph 45).

15. The Commissioner has published guidance on dealing with vexatious requests², which includes a number of indicators that may apply in the case of a vexatious request. However, even if a request contains one or more of these indicators it will not necessarily mean that it must be vexatious.

16. When considering the application of section 14(1), a public authority can consider the context of the request and the history of its relationship with the requester, as the guidance explains: *"The context and history in which a request is made will often be a major factor in determining whether the request is vexatious, and the public authority will need to*

² <https://ico.org.uk/media/for-organisations/documents/1198/dealing-withvexatiousrequests.pdf>

consider the wider circumstances surrounding the request before making a decision as to whether section 14(1) applies”.

17. However, the Commissioner is also keen to stress that in every case, it is the request itself that is vexatious and not the person making it.
18. In some cases it will be obvious when a request is vexatious but in others it may not. The Commissioner's guidance states: *"In cases where the issue is not clear-cut, the key question to ask is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress."*
19. NHSI considers that the request falls within section 14(1) FOI Act. It provided the Commissioner with its assessment which has taken into account the case history and the contextual background.
20. NHSI explained that since December 2012, requests by the complainant to see the withheld information have been made and considered by NHSI no fewer than five times.
21. In addition, NHSI explained that this is the second time that the requestor has referred NHSI's handling of the request to the Commissioner. The withheld information was previously considered by the Commissioner in 2013³. Having regard to all the surrounding context, including sight of the withheld information, the Commissioner concluded *'the information to be speculative in nature and particularly free and frank in the exploration of individual views and recollections of past events.'* In the ICO's view, for that small amount of information only, the public interest in avoiding the inhibiting effect of the disclosure was greater than that in transparency.
22. The complainant is now trying to reopen an issue which has had the benefit of full and detailed examination by NHSI and the Commissioner no fewer than six times, cumulatively stretching over seven years. By the time this investigation concludes, two public bodies would have considered the withheld information a total of eight times.
23. NHSI fully accept the important and necessary role that transparency plays to ensure visibility and public accountability in how it discharges its functions. However, its view is that this level of scrutiny on a single matter of this quality is unjustified.

³ https://ico.org.uk/media/action-weve-taken/decision-notice/2013/880976/fs_50481462.pdf

24. NHSI further explained that its view was that this unrelenting persistence is without merit and unreasonable not only because of the number of times that the request has been considered afresh but also having regard to the nature of the withheld information and the value that public disclosure would bring.
25. Specifically, the complainant originally requested a wide range of NHSI Board Minutes relating to various hospitals, not just Morecambe Bay Trust, which had applied for Foundation Trust status. He also complained that publication of NHSI Board minutes was generally slow and expressed a desire to understand why the minutes relating to a particular Board meeting were published, subsequently removed from NHSI's website, amended and republished.
26. In the decision of FS50481462, the Commissioner remarked that any significant retrospective changes to the published minutes of the Board's discussions on the topic of granting Foundation Trust status to Morecambe Bay given significant concerns at the time about its quality of care and the important scrutiny role of NHSI as a healthcare regulator would understandably lead to public curiosity about the reasons behind those changes and disclosure of the email chain would help give transparency on those reasons.
27. In the light of the Commissioner's finding, NHSI provided the complainant with all the material in the email chain save for the withheld information which is the subject of this decision notice. On that basis, NHSI consider that the complainant's objective to understand was met and that disclosure of the withheld information would offer no further elucidation to the explanation already given. In the context of his broad request for Board Minutes and his narrower request relating to the amended Board minutes, the withheld information is inconsequential. It is therefore neither material nor pertinent to his purpose and it is of no value to the complainant or the wider public to see the withheld information.
28. NHSI stated that it has considered whether there are counterbalancing factors. While it is the case that NHSI's original decision that the section 36(2)(b) and (c) exemptions applied to the email chain and other material requested by the complainant was largely overturned by the Commissioner in FS50481462, as stated above, the Commissioner also found that the public interest was best served by protection of the withheld information.
29. NHSI further stated that it is mindful that NHSI has made corrections to some of its previous information responses to the complainant. However, they do not relate to this email chain and in the context of the number and frequency of requests made by the complainant to NHSI over an extended period, the instances are in its view negligible.

30. NHSI explained that a third relevant consideration is the additional complaint about how long it takes it to publish Board minutes. It further explained that there was an undeniable delay of many months between taking down the minutes from its website, amending them, and republishing them, which should have been attended to more quickly in the interests of transparency and public confidence in it. However, there is no suggestion of any serious NHSI failings or cover-up, nor is there any legitimate grievance by the complainant against NHSI.
31. NHSI acknowledged the unusual nature of the facts of this request. However, this is the first time that it has concluded that a request is so manifestly unreasonable as to be vexatious. However, it is mindful that the Commissioner's guidance states that public authorities should not consider section 14(1) as only applying in the most extreme circumstances or as a last resort.

The Commissioner's decision

32. The Commissioner considers that NHSI has provided her with sufficient evidence to indicate that the complainant is using the FOIA as a means to re-open and re-visit matters which have already been dealt with several times over a number of years.
33. It is difficult to see the 'overriding public interest' in this particular request. The Commissioner is happy to accept that the complainant himself has an interest, and that historically, the public interest was greater, she takes the view that this is now negligible and outweighed by the ongoing burden to NHSI in dealing with the requests.
34. The events surrounding Morecambe Bay took place several years ago and have been subjected to in-depth investigation and scrutiny resulting in a report published in 2015 and subsequently numerous articles in the media. The withheld information in this case is highly unlikely to add anything of significance or aid understanding of the events that occurred.
35. The Commissioner therefore concludes that initially, the complainant's earlier requests may not have been without merit, this is no longer the case. Consequently, the Commissioner has determined that this request is vexatious and NHSI is not obliged to comply with it.

Right of appeal

36. 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

37. 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.
38. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF