

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 November 2023

Public Authority: University Hospitals of Derby and Burton
NHS Foundation Trust

Address: Royal Derby Hospital
Uttoxeter Road
Derby
DE22 3NE

Decision (including any steps ordered)

1. The complainant has requested from University Hospitals of Derby and Burton NHS Foundation Trust (the Trust) information relating to section 47 child protection investigations.
2. The Trust initially applied section 12 of the FOIA (cost exceeds appropriate limit) to refuse the request. However, during the course of the Commissioner's investigation, the Trust revised its position and denied holding information within the scope of the request.
3. The Commissioner's decision is that the Trust has not conducted adequate searches to determine if it holds the requested information and has failed to comply with section 1(1) of the FOIA by failing to issue the complainant with an appropriate refusal notice.
4. The Commissioner requires the Trust to take the following steps to ensure compliance with the legislation.
 - Conduct a fresh search for information within the scope of the request, and issue a fresh response to the request confirming whether or not it holds the information. If the information is held it should either be disclosed or the Trust must provide an adequate refusal notice.

5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 2 May 2023, the complainant wrote to the Trust and requested information in the following terms:

“Please provide the below information, as Derby City Council have stated that the NHS conduct child protection medicals and therefore should have the data.

The number and proportion of section 47 enquiries where a examination of a child’s body is undertaken, What was the ethnic or religious make up of those, and how does this compare to the population of Derby?

The number and proportion of section 47 enquiries which stop at the viewing of a child’s body when no injuries are found, What was the ethnic or religious make up of those, and how does this compare to the population of Derby?

The number and proportion of section 47 enquiries which ask for blood tests to be taken, What was the ethnic or religious make up of those, and how does this compare to the population of Derby?

The number and proportion of section 47 enquiries which stop once blood tests were undertaken, What was the ethnic or religious make up of those, and how does this compare to the population of Derby?

The number and proportion of section 47 enquiries which ask for a full skeletal xrays and CT scans, What was the ethnic or religious make up of those, and how does this compare to the population of Derby?

The number and proportion of section 47 enquiries where full skeletal xrays and CT scans are undertaken and nothing is found. What was the ethnic or religious make up of those, and how does this compare to the population of Derby?”

7. On 2 June 2023, the Trust responded to the request. It refused the request citing section 12 of the FOIA (cost of compliance exceeds appropriate limit) as its basis for doing so. It said the information could

only be obtained via a manual review of individual records and this would exceed the cost limit.

8. On 7 June 2023, the complainant wrote to the Trust and asked it to carry out a review of its handling of the request.
9. On 7 July 2023, the Trust carried out a review and wrote to the complainant maintaining its original decision. It said that section 47 investigations are requested by 'Derby City Council Local Authority' and other authorities, that three Trusts perform the examinations across Derbyshire, and that the data held by the three Trusts is not linked or held in a way that is easily indexed. It would have to manually retrieve the information and this would exceed the cost limit.

Scope of the case

10. On 14 August 2023, the complainant contacted the Commissioner to complain about the way their request for information had been handled.
11. The Commissioner's investigation initially set out to determine whether or not the Trust was entitled to rely on section 12 to refuse the request. However, during the course of the Commissioner's investigation, the Trust revised its position and denied holding information within the scope of the request.
12. The Commissioner has considered whether the Trust has identified all the information it holds within the scope of the request and issued an appropriate response under the FOIA.

Reasons for decision

13. 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."
14. When a public authority receives a request for information it has two obligations under section 1(1) of FOIA. Firstly it must explicitly confirm or deny whether it holds the information in question. Secondly, if it does hold that information, it must either provide a copy to the requester or issue a refusal notice. If it receives a request that contains multiple

elements, its response must be clear about which information it holds and which it does not.

15. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's arguments. He will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, he will consider any reason why it is inherently likely or unlikely that information is not held.
16. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

The complainant's position

17. The complainant believes that as the Trust conducts section 47 investigations, the ethnicity and religion of the individuals who were subject to these investigations is likely collected as part of the investigation process, and therefore the Trust is likely to hold the information within the scope of the request.

The Trust's position

18. The Trust confirmed that the data held is 'purely a local copy' of work undertaken on the request of another public authority under their statutory powers in accordance with section 47 of the Children Act 1988.
19. The Trust said that it does not hold data about 'all' section 47 investigations and that the investigations it does undertake 'rarely' contain information about religion or ethnicity. It said that this information is held by the local authority. It said that it does not hold information about the ethnicity and religion of the individuals who were the subject of investigations in comparison to the population of Derby.
20. The Trust said that the information is not held because section 47 investigations are requested by 'Derby City Council' and other local authorities, that three Trusts perform the examinations across Derbyshire, and that the data held by the three Trusts is not linked or held in a way that is easily indexed. It initially thought it would take an excess of 18 hours to 'piece together information' as it not held in a central location at the Trust.
21. During the course of his investigation, the Commissioner asked the Trust a number of times to clarify how exactly the information is held by three Trusts and not itself, including seeking clarity on how the information is

linked or not easily indexed over three Trusts and would need to be 'pieced together'. However, the Trust was unable to provide any explanation or clarity about this, it was given additional time to make enquiries to provide this clarity but ultimately responded that it didn't know.

The Commissioner's view

22. The Commissioner notes that although it is the Trust's position that it does not hold the requested information, it simultaneously confirmed that it holds 'a local copy' of information undertaken in relation to section 47 investigations. He does not agree that the requested information which relates to information that the Trust is likely to have created, e.g., information about examinations, blood tests, x-rays etc would not also be held by the Trust.
23. The Commissioner notes that the requester has not asked for information about 'all' section 47 investigations but rather information about investigations at certain stages, and the ethnicity and religion of those concerned. He also notes that that Trust said that information about investigations 'rarely' contain information about religion or ethnicity, and therefore its position (that the information is not held) is not certain or definitive. He does however acknowledge that it would be unlikely that the Trust would hold the ethnicity and religion of the individuals who were the subject of investigations in comparison to the whole population of Derby.
24. The Commissioner notes that the request was made specifically to the Trust for information that it holds about section 47 investigations it has carried out, not information about investigations carried out by two other Trusts. He also notes that the Trust is unable to provide a clear explanation about how the information is held between three Trusts and not just itself, why information held by two other Trusts is relevant, and how the information is not 'linked' or 'held' in a way that is easily indexed and how it would need to be 'pieced together'. He notes that based on its explanation and even without the clarification sought, the Trust appears to be confirming that the information is likely to be held but that the work involved to identify / extract the information may in fact exceed the cost limit.
25. The Commissioner also notes that the Trust has provided a similar rationale for the information not being held that it initially provided when applying section 12 of the FOIA to the request, e.g., that the information is not linked or held in a way that is easily indexed.

26. The Commissioner also notes his decision in IC-247570-W5W7. The case involved a complaint about the Trust's handling of a request for information where it said that part of the information was publicly accessible. He found that the Trust's response was also 'ambiguous' and when he sought clarification about this "the answer given was no clearer than the first", the Trust also failed to acknowledge that it had not in fact answered the question asked by the requester. The Commissioner's decision was that the Trust had failed to comply with its duty under section 1(1) of the FOIA and was asked to provide the complainant with the information or issue a refusal notice citing a valid exemption.
27. It is therefore the Commissioner's view that the Trust has failed to provide clarity about whether it holds or does not hold the requested information. He does not accept that appropriate searches have been carried out to identify any recorded information that may be held. Therefore the Trust is required to carry out the steps set out in paragraph 4 of this decision notice.

Right of appeal

28. 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

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

29. 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.

30. 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
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Wilmslow
Cheshire
SK9 5AF**