

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 24 November 2008

Public Authority: Maidstone & Tunbridge Wells NHS Trust
Address: Maidstone Hospital
Hermitage Lane
Maidstone
Kent
ME16 9QQ

Summary

The complainant made a request under the Freedom of Information Act 2000 (the "Act") to the Maidstone & Tunbridge Wells NHS Trust (the "Trust") for information relating to how many cases involving the Kent & Sussex Hospital were referred to the North West Kent Coroner's office between April 2004 and September 2006 and the proportion of those cases that were actually found against the hospital. The Trust ultimately refused the complainant's request as to provide the information would exceed the cost limit as set out by section 12 of the Act. Upon intervention by the Commissioner the Trust was able to provide some of the requested information up to the £450 cost limit. The Commissioner upheld the Trust's refusal to provide any further information as it would exceed the cost limit as set out by section 12 of the Act. The Commissioner does however consider that the Trust failed under section 16(1) of the Act to provide the complainant with appropriate advice and assistance as to what information it would be able to provide to the complainant prior to the Commissioner's intervention. Further more as the Trust did not state its reliance upon section 12 with the time limit, the Commissioner also considers that the Trust breached section 17(5) of the Act.

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.

The Request

2. On 21 January 2008 the complainant made a request to the Trust for the number of cases involving the Kent and Sussex Hospital that were referred to the North

West Kent coroner's office between April 2004 and September 2006 and the proportion of those cases that were actually found against the hospital.

3. On 5 February 2008 the Trust responded to the complainant's request for information. It explained that during the period of the request, April 2004 to September 2006, the Trust did not keep a database of cases passed to the coroner and more specifically which coroner may have handled a case. It clarified that it would therefore be unable to assist with the request. Furthermore it also advised that even if such information were held by the Trust it would be unable to release it without prior permission from the coroner as any information relating to the coroner or any other court is subject to the exemption contained at section 32 of the Act.
4. On 12 February 2008 the complainant wrote to the Chief Executive of the Trust to request that an internal review be carried out. On 3 April 2008 the Trust wrote back to the complainant to divulge the result of the internal review that had been carried out. The Trust reiterated its earlier refusal and confirmed the reasoning given within the letter from the Trust to the complainant dated 5 February 2008. It did however go on to concede that the Trust's database did show that for the period in question, April 2004 to September 2006, 1,715 patients died at the Kent & Sussex Hospital. However it clarified that the records do not show which deaths were referred to the coroner. Without retrieving individual patient records from archive and reviewing each file, which the Trust explained would be extremely time consuming and costly, there is no method by which the Trust could provide the complainant with the information requested.

The Investigation

Scope of the case

5. On 7 April 2008 the complainant made a formal complaint to the Commissioner as he was dissatisfied with the Trust's responses to his request for information. The Commissioner considered that the requested information was held by the Trust under section 1(1)(a) of the Act and therefore the investigation has focused upon whether providing that information to the complainant would exceed the cost limit as set out by section 12 of the Act.
6. The Commissioner has also considered whether the Trust complied with its obligations under sections 16(1) and 17(5) of the Act.

Chronology

7. The complainant contacted the Commissioner on 23 June 2008 in response to a letter from the Commissioner to him which had set out the scope of the investigation and explained the implications of the fees limit set out by section 12 of the Act. The complainant explained to the Commissioner that he was willing to fund his request if it exceeded the cost limit of £450. The Commissioner agreed to put this to the Trust but explained that if the cost limit was exceeded the Trust

were under no obligation to comply with the request any further notwithstanding the complainant's offer to pay the fee.

8. The Commissioner contacted the Trust on 24 June 2008 in order to discuss its handling of the complainant's request. The Commissioner asked the Trust to respond to a number of queries, in particular the Commissioner noted that the Trust indicated in its letter of 12 February 2008 that the task of retrieving the information would be time consuming and costly. The Commissioner therefore asked the Trust to provide him with a detailed explanation of why complying with the complainant's request would exceed the cost limit as set out by section 12 of the Act. The Commissioner asked the Trust to break down the cost and time implications into the following categories:-

- Determining whether the Trust holds the information.
- Locating the information, or a document which may contain the information.
- Retrieving the information, or a document which may contain the information.
- Extracting the information from a document containing it.

The Commissioner also brought to the Trust's attention the complainant's offer to fund the request in so far as to comply with it would exceed the cost limit of £450.

9. On 27 June 2008 the Trust responded to the Commissioner. It explained that in order to determine whether the Trust holds the information requested by the complainant the Trust would need to identify each patient who died at the Kent & Sussex hospital in the time period requested (April 2004 to September 2006), total 1,715 patients. Having identified each patient the Trust would then need to make a request to retrieve the closed medical records from archive. The cost to the Trust of retrieving the files from archive would be £3,219. The Trust went on to explain that a member of staff would then need to peruse each set of those notes to ascertain whether the patient death was referred to a coroner and if so which coroner. The Trust estimated that it would take approximately 15 minutes to peruse each set of patient notes equating to a time requirement of 428 hours and 45 minutes. Furthermore having ascertained which cases were referred to the coroner the Trust would then need to cross check against legal services files for inquest outcomes. Again the Trust explained that those files are archived and would need to be retrieved and perused for the information requested. The Trust asserted from its above explanation that it would cost the Trust more than £450 to comply with the request and therefore applied section 12 of the Act to justify withholding this information.
10. On 2 July 2008 the Commissioner wrote to the Trust again to ask some further questions as part of the investigation. The Commissioner first asked the Trust to provide him with a more detailed analysis of how it had calculated the cost of £3,219 to retrieve the 1,715 patient files from archive. Furthermore the Commissioner asked how the Trust had come to the estimate of a time of approximately 15 minutes to peruse each file. He also questioned whether referrals to a coroner were easily identifiable within a patient file. The Commissioner also noted that the Trust had referred to cross checking the

relevant patient files with legal services files. The Commissioner therefore questioned whether it was possible to bypass the stage of perusing the patient files and obtain the information just through legal services files. Finally the Commissioner used this opportunity to remind the Trust of its obligations under section 16(1) of the Act to provide the complainant with appropriate advice and assistance, in particular it should consider what information, if any, it would be able to provide to the complainant within the cost limit.

11. On 8 July 2008 the Trust responded to the Commissioner's further questions. It explained that the cost of retrieving the documentation from archive would be £1.20 per set of patient records and a 68p administration cost per set of records. This equates to £1.88 per set of records and the Trust had identified 1,715 records. It clarified that from previous investigations that have required medical notes to be reviewed the Trust is aware that it takes approximately 15 minutes to undertake an assessment of records to ascertain whether the information sought is contained within the notes.
12. The Trust did however concede that it could undertake a review of the legal files for the time period in question (April 2004 to September 2006) without carrying out the search of the 1,715 individual patient files. It explained that it is possible to identify 33 cases linked to coroner inquiries from the legal services database. It further explained that the Trust is however aware that prior to October 2007 this database was not robust and has since taken steps to improve records management. The search through all of the 1,715 patient files would have to be undertaken to ensure that all cases referred to the North West Kent coroner were captured. It further clarified that not all coroner inquiries pass through the legal services department and therefore for any given period reference to legal files alone would not be sufficient to ensure that all coroner referrals and inquiries had been captured. The Trust acknowledged that it did not advise the complainant that it would be able to retrieve and review the 33 legal cases within the £450 cost limit.
13. On 4 August 2008 the Trust contacted the Commissioner to make him aware that it had now collated the requested information from the 33 legal files and was now in a position to provide this information to the complainant with an explanation as to the accuracy of this information in the context of the request. The Trust explained to the Commissioner that of the 33 legal files, 9 files were identified related to inquests held by the West Kent coroner (not the North West Kent coroner) and were therefore discounted. Of the remaining files that were referred to the North West Kent coroner, for 20 of those files the verdict was accidental death or natural causes. As those findings were not negative those cases were also excluded. There were four remaining cases which were referred to the North West Kent coroner and for which one of those cases is still awaiting a hearing, for one of those cases the cause of death was found to be bilateral pneumonia and perforated oesophagus, for one of those cases the cause of death was found to be acute pulmonary injury and nodular sclerosing hodgkinson's disease and for the final case the cause of death was found to be asphyxiation and alcohol intoxication.

14. The Commissioner then wrote to the complainant on 4 August 2008 to endeavour to resolve the case informally in light of the Trust's provision of information up to the £450 cost limit. The Commissioner reported to the complainant on the investigation that had been conducted. He explained the extent of information which the Trust had now concluded it would be able to provide within the cost limit in light of the Commissioner's intervention. The Commissioner asked the complainant to confirm whether or not he was satisfied with the Trust's disclosure taking into account that under section 12 the Trust is not obliged to provide any information which exceeds the cost limit.
15. On 13 August 2008 the complainant confirmed that he was dissatisfied with the Trust's disclosure as he had offered to fund his request in so far as it exceeded the cost limit.

Analysis

Procedural matters

Section 12

16. Section 12(1) of the Act states that:

"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 Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 set the appropriate limit at £450 for the public authority in question.
18. To determine whether the Trust applied section 12 of the Act correctly the Commissioner has considered the Trust's response as set out at paragraphs 8, 9, 11, 12 and 13 above.
19. The Commissioner notes that the Trust indicated that to retrieve the 1,715 individual patient files from archive would cost £3,219. The Commissioner wishes to emphasise that the costs estimated must be in line with section 4(4) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. In particular how to charge for work carried out by outside contractors such as an off-site or privately managed archive in complying with a request. Whilst a public authority can take into account the time taken by an outside contractor in complying with a request and charge up to £25 per hour for the amount of time spent, it cannot take into account any other charge imposed upon it by the outside contractor. Therefore the Commissioner has not taken the costs in relation to retrieving the files from archive into account.
20. The Commissioner accepts that the Trust has now provided the complainant with the information that it holds relevant to the request within the £450 cost limit. To

provide any further information the Trust would need to sift through 1,715 manual patient files (once those files had been retrieved from archive). The Commissioner accepts the Trust's estimation that it would take approximately 15 minutes per file to sift through each of the 1,715 patient files. The Commissioner considers that it is reasonable to include the search of these manual files within the cost limit as it was likely that a substantial amount of the information would still be held outside the legal services department database. This amounts to a time implication of 428 hours and 45 minutes. Under the Act the Trust is able to calculate the costs at £25 per hour for this work. The Commissioner therefore considers that this task would vastly exceed the £450 cost limit as set out at section 12 of the Act.

21. The Commissioner is aware that the complainant has offered to fund his request in so far as it exceeds the cost limit however the Trust has not accepted this offer. Section 12 clearly states that once the cost limit is exceeded there is no obligation to comply with a request. The Commissioner considers that this is so notwithstanding such an offer of funding.

Section 16

22. Section 16(1) of the Act requires a public authority to provide reasonable advice and assistance to persons who make a request. Section 16(2) outlines that any public authority which, in relation to the provision of advice and assistance in any case, conforms with the code of practice under section 45, is to be taken to comply with the duty imposed by section 16(1).
23. The code of practice outlines that where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying would exceed the "appropriate limit" (i.e. cost threshold) the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focusing their request, information may be able to be supplied for a lower or no fee.
24. The Trust did not advise the complainant as to the extent of information it would be able to provide within the scope of the request within the £450 cost limit. The Trust only considered this upon the Commissioner's intervention. The Trust was therefore in breach of section 16, as it failed to provide advice and assistance to the complainant at the time the request was made.

Section 17

25. Section 17(5) of the Act requires the public authority, when relying upon an exception such as section 12, to give the applicant a notice stating that fact.
26. The Trust did not state its reliance upon section 12 with 20 working days of the complainant's request.

The Decision

27. The Commissioner has decided that the Trust correctly applied section 12 to the complainant's request and was therefore not obliged to comply with section 1(1)(b) of the Act.
28. The Commissioner considers that the Trust breached its obligation under section 16(1) of the Act as it did not provide the complainant with the appropriate advice and assistance as to what information it could provide within the cost limit relevant to the request prior to the Commissioner's intervention.
29. Furthermore the Commissioner has decided that the Trust has breached its obligations under section 17(5) of the Act as it did not provide adequate explanation of its application of section 12 prior to the Commissioner's intervention.

Steps Required

30. The Commissioner requires no steps to be taken.

Right of Appeal

31. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

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

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

Dated the 24th day of November 2008

Signed

Steve Wood
Assistant Commissioner

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

General Right of Access

Section 1(1) provides 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.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

Exemption where cost of compliance exceeds appropriate limit

Section 12(1) provides that –

“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.”

Section 12(2) provides that –

“Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.”

Section 12(3) provides that –

“In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.”

Section 12(4) provides that –

“The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

- (a) by one person, or
- (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.”

Section 12(5) – provides that

“The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are estimated.

Duty to provide Advice and Assistance

Section 16(1) provides that -

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it”.

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt

information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(2) states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 17(4) provides that -

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

Section 17(6) provides that –

“Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

Section 17(7) provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”