

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 25 October 2010

Public Authority: The Royal Berkshire NHS Foundation Trust
Address: The Royal Berkshire Hospital
London Road
Reading RG1 5AN

Summary

1. The complainant requested information about doctors who worked for the public authority. The public authority confirmed that it did not hold some of the requested information and explained where the information might be. It also disclosed some information and withheld some information under section 40(2). Subsequently during the internal review, the public authority cited section 12 as a reason to withhold information.

The Commissioner is satisfied that it would exceed the cost limit under section 12 of the Act for the public authority to comply with the request. However he identified procedural shortcomings in the way in which the public authority handled the request.

The Commissioner's Role

2. 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

3. The complainant requested information relating to doctors who worked for the public authority and had been reported to the Chief Executive

and/or suspended. There was some confusion about what time period this involved. The complainant clarified that it was for the longest time period before July 2006 and that she was not interested in information after July 2006.

The Request

4. On 12 December 2008 the complainant submitted the following request:

'I am writing to request the following information and statistics to be sent to me under the Freedom of Information Act within the next 7 days.

- 1. Statistical make up of all doctors who have applied for PMETB before July 2006.*
- 2. Their background/race/nationality.*
- 3. Were references given.*
- 4. By whom.*
- 5. Focus on [named person] and [named person] consultants in obstetrics and gynaecology.*

1. Details of all doctors who have been reported to the chief executive;

details of all doctors who have been suspended:

- a. their race/nationality/colour*
- b. the reasons for suspension*
- c. the period of suspension; period of review and other details*
- d. the result of any investigation/disciplinary hearing*
- e. details of any doctor who has been ordered to undertake training elsewhere as a condition to returning to work.'*

5. On 16 January 2009 the public authority issued a refusal notice. It explained that it did not hold some of the requested information (i.e. the first part of the request regarding statistical make up of doctors who applied for PMETB) and advised the complainant where she might be able to get it. It also provided some of the requested information and explained it was withholding personal information about the doctors in question under the section 40(2) exemption. It also explained that although the rest of the information was exempt under the section 30 exemption, it felt that the public interest would be best served by disclosing that information.

6. It went on to explain that the requirement to report to the Chief Executive did not arise until March 2006 by virtue of the implementation of the Trust Policy for Maintaining High Professional Standards in the Modern NHS (Capability). As the complainant had not specified which particular period of time she was interested in, the public authority explained that it understood that her query related to reports made to the Chief Executive since March 2006.
7. On 27 January 2009 the complainant requested an internal review and also submitted a new request for information. Along with the new request for information the complainant provided a list of questions that were meant to clarify the request of 12 December 2008 rather than to be answered in their own right – see appendix 2 for a list of the questions. On 29 January 2009 the public authority responded confirming that it would respond by 23 February 2009 which would be 20 working days from the date of receipt of complainant's request for an internal review.
8. On 24 February 2009 the public authority confirmed it had carried out an internal review. It explained that it could not disclose information relating to race, nationality or certain other matters relating to any person who is or may be identifiable from that information and reiterated that it was withholding this information under the section 40(2) exemption.
9. It also explained that it would be relying upon section 12 and explained how this section worked generally. However it did not explain how or clarify that it was applying section 12 to this particular complaint. The public authority also mentioned section 14 but again did not apply it to this particular complaint.
10. The public authority also advised the complainant that she might want to consider identifying specific categories of information or documents within a specified period of time which did not relate to protected information.

The Investigation

Scope of the case

11. On 4 March 2009 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

- The public authority had not carried out an internal review
12. With regard to the further question submitted by the complainant on 27 January 2009, the Commissioner has reviewed this. He agrees with the public authority that it constituted a new request for information; therefore he will deal with that request separately and will only be dealing with the 12 December 2008 request in this decision notice.
 13. During the initial stage of the Commissioner's investigation the public authority stated that it did not hold any relevant information in relation to the period of time clarified by the complainant. Subsequently however the public authority clarified that it did not think it held any of the information in question but in order to be certain it would have to carry out a search. It explained that the cost to carry this out would exceed the cost limit and that it was therefore applying section 12. The Commissioner has therefore initially focussed his investigation on the public authority's application of section 12

Chronology

14. On 30 November 2009 the Commissioner contacted the public authority. He explained that he considered the request for information of 27 January 2009 to be a new request for information and this would be considered separately. He confirmed that he was dealing with the request for information of 12 December 2008.
15. The Commissioner also spoke to the complainant who explained that she wanted statistical information not the names of doctors. She wanted the public authority to confirm whether it had suspended any doctors and if so whether the doctors were British or not.
16. On 1 April 2010 the public authority contacted the complainant explaining that it did not hold information in relation to the period of time in question i.e. before July 2006.
17. On 8 April 2010 the Commissioner contacted the public authority and asked several questions about the requested information. The public authority responded explaining that although it was sure it did not hold the requested information it could not confirm this definitely. It explained that the cost of ascertaining whether it held the information or not would exceed the cost limit. The Commissioner asked for clarification of this.

18. On 26 April 2010 the public authority contacted the complainant and explained why it had applied section 12. The complainant forwarded this to the Commissioner.
19. On 4 May 2010 the complainant contacted the Commissioner stating that she felt that the public authority was deliberately withholding the requested information from her. The Commissioner explained that this was a very serious allegation and that it would mean that her complaint would have to be referred to his investigation team. This was because the Commissioner considered that the complainant was implying that an offence had been committed under section 77.
20. Section 77 provides that where a public authority prevents information from being disclosed in response to a request for information by altering, defacing, blocking, erasing, destroying or concealing it, it is guilty of a criminal offence.
21. On 15 June 2010 the investigations team contacted the complainant explaining that a member of the team would be interviewing both her and the public authority about her allegation.
22. On 28 June 2010 the investigating officer contacted the complainant with his findings. He confirmed that he had interviewed the public authority and viewed a number of relevant files held by it. He explained that based on the public authority's calculations and his own observations it was his opinion that compliance with the request would exceed 18 hours. He also provided the complainant with a link to the Commissioner's guidance on this matter.
23. On 29 June 2010 the complainant contacted the Commissioner asking what would happen now. The Commissioner contacted the complainant explaining that given that her complaint had been investigated by his investigations team as well, he was satisfied that there was no evidence that the public authority had deliberately withheld information from her. Further he was satisfied that the public authority was entitled to apply section 12. The complainant remained dissatisfied with the outcome.

Analysis

Substantive Procedural Matters

Section 12 Cost of compliance exceeds appropriate limit

24. Section 12(1) states:

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.

25. 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.

26. Section 12(3) states 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.

27. Section 12(1) provides that a public authority is not obliged to comply with a request for information if it estimates that to do so would exceed the appropriate cost limit. Section 12(2) removes the requirement to comply with section 1(1)(a) i.e. being informed in writing whether a public authority holds the requested information, if the cost of doing so would exceed the appropriate limit.

28. The appropriate cost limit is currently set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Regulations). The Regulations state that the cost limit is £600 for central government, legislative bodies and the armed forces and £450 for all other public authorities. When considering the present complaint the Commissioner also noted the decision in the Information Tribunal (IT) decision of *Fitzsimmons v Information Commissioner & Department for Culture, Media and Sport (EA/2007/0124)* which considered the question of multiple requests within a single item of correspondence and regulation 5 of the Fees Regulations. It made the following general observation at paragraph 43:

“The test in Regulation 5 of the Fees Regulations seems to us to be very wide; the requests need only relate **to any extent** to the same or **similar** information [Tribunal emphasis]”.

29. The Commissioner notes that in the present case the complainant has made more than one request within a single item of correspondence. Section 12(4) of the Act provides that, in certain circumstances set out in the Fees Regulations, requests can be aggregated so that 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. Regulation 5 of the Fees Regulations sets out the relevant condition in this case and provides that multiple requests can be aggregated in circumstances where the two or more requests relate to any extent, to the same or similar information. Although this test is very broad, it is possible that one or more requests may not meet this test and the Commissioner has therefore considered whether he is satisfied that the requests relate to the same or similar information. In this particular case the Commissioner is satisfied that the requests do relate to similar information as the complainant is looking for information about doctors.
30. In this case, the £450 cost limit applies. Therefore if the public authority estimates that complying with the request would exceed 18 hours or £450 then section 12(1) provides that it may be refused.
31. Regulation 4(3) of the Fees Regulations provides that a public authority must only take the following into account when estimating the cost of compliance:
 - determining whether it holds the requested information,
 - locating the information, or a documents which may contain the information,
 - retrieving the information, or a documents which may contain the information,
 - extracting the information from a document containing it.
32. The Information Tribunal (the Tribunal) considered what constituted a reasonable estimate in its decision in *Alasdair Roberts v The Information Commissioner (EA/2008/0050)*. In paragraphs 9-13 the Tribunal made the following points:
 - “only an estimate is required” (i.e. not a precise calculation)
 - the costs estimate must be reasonable and only based on those activities described in regulation 4(3)
 - time spent considering exemptions or redactions cannot be taken into account

- estimates cannot take into account the costs relating to data validation or communication
 - the determination of a reasonable estimate can only be considered on a case-by-case basis
 - any estimate should be *“sensible, realistic and supported by cogent evidence”*.
33. The public authority explained to the complainant how it had estimated the cost of compliance. It clarified that the information in question was not held centrally or electronically and that this type of information would be held in individual paper personnel files. It went on to explain that it was not aware of doctors being reported before July 2006 but in order to confirm this indisputably, a review of all of personnel files would have to be undertaken.
34. The public authority also explained that there were 250 files per annum and that from 2004 to mid July 2006 this would involve approximately 625 files. To review each file the public authority estimated it would take 3-5 minutes per file. This would take between 31 – 52 hours and that at an average of 40 hours at £25 per hour would cost £1,000.
35. The Commissioner notes that the estimated time for complying with the request is approximately double of the ‘appropriate cost limit’. He has considered the volume of files caught by the request and how these are held and is satisfied that the costs limit would be exceeded in order to determine whether the information is held and to establish the location of this information. Therefore the Commissioner considers that section 12(1) is engaged in this case. He has therefore not gone on to consider the public authority’s application of section 40 (2).

Procedural Matters

Section 16

36. Section 16(1) of the Act provides that a public authority should provide advice and assistance to an applicant as far as it would be reasonable to do so. Section 16(2) of the Act states that a public authority, in relation to the provision of advice and assistance, will have complied with the requirements of section 16(1) of the Act if it has conformed with the code of practice issued under section 45 of the Act. Paragraph 14 of the section 45 code of practice sets out what advice and assistance should be offered to applicants whose requests are refused on the basis of section 12(1) of the Act. This paragraph suggests that public authorities should consider providing an indication of what information is available within the cost limit and also consider advising the applicant

that by reforming or re-focussing their request, information may be available within the cost limit.

37. The Commissioner notes that the public authority did explain to the complainant that reporting directly to the Chief Executive had only been in place from March 2006. He further notes that in its internal review the public authority advised the complainant to consider identifying specific categories of information or documents within a specified period of time which did not relate to protected information.
38. Although the public authority acknowledged that the complainant had not specified a period of time, it did not help the complainant to try and narrow this down. On the basis of the information provided to him the Commissioner therefore considers that the public authority has breached section 16(1) of the Act.

Section 17(5)

39. Section 17(5) of the Act provides that where a public authority relies upon either section 12 or section 14 of the Act, it should inform the applicant of this within 20 working days of receipt of the request.
40. Given that the public authority did not inform the applicant it was relying upon section 12 within 20 working days of receipt of the request, the Commissioner finds that it is in breach of section 17(5) of the Act.

The Decision

41. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
 - Application of section 12.
42. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - Section 16: The public authority failed to provide advice and assistance to the complainant regarding the relevant period of time she was interested in.
 - Section 17(5): The public authority did not inform the applicant that it was relying upon section 12, within 20 working days of receipt of the request.

Other matters

43. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following:

- The Commissioner notes that the complainant pointed out that the public authority had not carried out an internal review. However he notes that the public authority did carry out an internal review although it stated that it would inform the complainant of the outcome by 23 February 2009 but informed the complainant of the outcome on 24 February 2009. When a public authority carries out an internal review the Commissioner expects it to be completed within 20 working days of receipt of the request for an internal review. If a public authority provides a date for which it will inform the complainant of the outcome, he would expect a public authority to make every effort to stick to this or if not provide a date when it can. However he notes that in this case the public authority did provide the complainant with the outcome on the 20th working day.
- The Commissioner notes that there was confusion about whether the public authority held the outstanding information in question or not. He would expect public authorities to be clear about whether they actually hold information or not and if they do not, to inform the applicant promptly.
- The Commissioner notes that the complainant had asked for information about race/nationality/colour. The Commissioner considers this type of information to be sensitive personal data. He would only expect such information to be disclosed under exceptional circumstances.
- The Commissioner notes that although the public authority mentioned both section 12 and section 14 in its internal review, it did not apply section 12 to this particular complaint until the Commissioner's investigation. If a public authority informs a complainant that it is going to use either of these sections it should give a notice to that effect.

Right of Appeal

44. 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.
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 25th day of October 2010

Signed

**Pamela Clements
Group Manager**

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

Appendix 1

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.

Section 77

Section 77(1) Where –

- (a) a request for information has been made to a public authority, and
- (b) under section 1 of this Act or section 7 of the Data Protection Act 1998, the applicant would have been entitled (subject to the payment of any fee) to communication of any information in accordance with that section,

any person to whom this subsection applies is guilty of an offence if he alters, defaces, blocks, erases, destroys or conceals any record held by the public authority, with the intention of preventing the disclosure by that authority of all, or any part, of the information to the communication of which the applicant would have been entitled.

(2) Subsection (1) applies to the public authority and to any person who is employed by, is an officer of, or is subject to the direction of, the public authority.

(3) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(4) No proceedings for an offence under this section shall be instituted-

- (a) in England or Wales, except by the Commissioner or by or with the consent of the Director of Public Prosecutions;

- (b) in Northern Ireland, except by the Commissioner or by or with the consent of the Director of Public Prosecutions for Northern Ireland.

Appendix 2

1. For that period (*Before July 2006*) how many doctors were reported to the Chief Executive of Trust?
2. What were the reasons for referrals?
3. What was their Nationality/race/background?
4. Were they excluded? (Total exclusion/suspension or restriction) for how long?
5. What were the outcomes?
6. Were any grievances submitted by these doctors?
7. What were the grounds for their grievances?
8. How many doctors lodged an employment tribunal claim for this period?