

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 22 February 2011

Public Authority: Camden and Islington Foundation NHS Trust
Address: St Pancras Hospital
4 St Pancras Way
London
NW1 OPE

Summary

The complainant contacted the public authority and requested copies of the signed Directors' Codes of Conduct since November 2007 and related information such as emails, letters and reports. The public authority provided the current post holders' Codes of Conduct but stated that previous post holders' Codes of Conduct could not be located. It did not deal with the second part of the request for the related information. The Commissioner is satisfied that the public authority has provided copies of the current Codes of Conduct. He considers that, on the balance of probabilities after nine searches for the information, it is likely that the previous post holders' Codes of Conduct are not held by the public authority. With regard to the request for the related information, the Commissioner requires the public authority to either disclose or withhold the information by virtue of a valid refusal notice under section 17 to comply with the Act. The public authority also breached its procedural obligations under 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 10 November 2009 the complainant contacted the public authority to request the following information.

“Under provisions in the Freedom of Information Act, please send me copies of all the signed Code of Conduct documents for directors of the Trust since November 2007 for current and previous post holders. Where no signed Code of Conduct exists for particular directors, please inform me of its absence under the duty to confirm or deny. Please also send me copies of all emails, reports, letters and all other documents relating to the directors’ Code of Conduct.”

3. The complainant chased a response from the public authority on 10 December 2009 and subsequently contacted the Commissioner to complain about a lack of a response on 15 January 2010.
4. The ICO contacted the public authority on 26 January 2010 to make it aware of the complaint and ask it to respond to the complainant.
5. On 27 January 2010 the public authority responded to the complainant and provided a copy of the Directors’ Code of Conduct along with nine back pages signed individually by the current Directors. The public authority stated that after a considerable search had been carried out copies of previous post holders’ Codes of Conduct could not be found. The public authority did not address any other part of the request.
6. On 4 March 2010 the complainant requested an internal review of the public authority’s decision.
7. On 1 April 2010 the public authority provided 14 full copies of the current individual Codes of Conduct to the complainant but did not state that the previous Codes of Conduct had been located. It did not address any other part of the request or complaint.

The Investigation

Scope of the case

8. On 2 April 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the fact that copies of the Codes of Conduct signed by previous post holders had not been provided to him, and the delay in the response to the request. He also complained that the second part of his request for related information had not been responded to and that the Codes of Conduct were not published on the public authority’s website.

Chronology

9. On 14 May 2010 the Commissioner wrote to the public authority to investigate whether information pertaining to the request was held and seek clarification as to the status of the unanswered part of the request for related information.
10. On 18 June 2010, after contacting the Commissioner to inform him additional searches were being carried out, the public authority responded to the Commissioner providing details of the relevant searches for the remaining information. It stated manual searches for the information had been undertaken in the Board Secretary's Office.
11. On 30 June 2010 the Commissioner sought clarification as to whether the details of searches included those undertaken to locate the related information.
12. On 1 July 2010 the public authority telephoned the Commissioner and confirmed that the second part of the request had not been dealt with nor did it state that any further copies of the Codes of Conduct had been found. It informed the Commissioner that it would provide written clarification as soon as possible.
13. On 13 July 2010 the public authority wrote to the Commissioner providing some further clarification of matters surrounding the missing Codes of Conduct stating that no-one could locate the previous Codes of Conduct. It stated that it had provided all copies of the Codes of Conduct that it held however agreed to carry out another search for the previous post holder's copies. It also provided newly located information pertaining to the second part of the request. The public authority gave no indication as to whether it had provided, or intended to provide, this information to the complainant.
14. The Commissioner chased a response from the public authority several times and on 5 October 2010 wrote again to the public authority repeating the required matters of clarification which remained outstanding.
15. On 5 October 2010 the public authority telephoned the Commissioner to discuss the case. It explained searches were still underway for the missing information and it confirmed that no further information had been provided to the complainant. It confirmed that it had not found the previous Codes of Conduct. The Commissioner advised the public authority that it should make the complainant aware of the newly located information and inform him whether it intended to disclose it. The Commissioner also informed the public authority that he would need more substantive evidence than that which had been already provided in

order for him to make an informed decision as to whether information was held.

16. The Commissioner chased responses from the public authority before attempting for a final time to obtain clarification after reviewing the case in its entirety.
17. On 6 January 2011 the public authority stated it would carry out a final search for the remaining Codes of Conduct.
18. On 17 January 2011 the public authority informed the Commissioner that a missing Code of Conduct for a current post holder had been located and that it held no further copies past or present. The public authority stated that it now considered that all the information pertaining to the request had been provided to the complainant.

Analysis

Substantive Procedural Matters

Section 1 – General Right of Access

19. Section 1 states that on receipt of a request for information a public authority should respond to the applicant indicating whether information is held and, if so, make it available to them.
20. In this case the public authority made a proportion of the information, namely nine copies of the current post holders' Codes of Conduct, available to the complainant in its first response to the request. However, it also stated that copies of previous post holders' Codes of Conduct could not be found and omitted to address the request for related information.
21. In answer to the complainant's request for an internal review further copies of current Codes of Conduct were located and provided, meaning that 14 in total had been provided to the complainant by 1 April 2009; however, the request for related information was not dealt with in the correspondence.
22. The Commissioner's investigation, therefore, has centred on whether the information that could not initially be located – the missing Codes of Conduct - was in fact held by the public authority, and whether any information in relation to the second part of the request was held and should be provided.
23. In scenarios where there is some dispute regarding the amount of information located by a public authority and the amount of information

a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.

24. In other words, in order to determine such complaints the Commissioner must decide, on the balance of probabilities, whether a public authority held, at the time of the request, any information which falls within the scope of the request.
25. In order to determine this, the Commissioner has a series of questions he can put to a public authority concerning the type and quality of searches for the information it carried out, how the information would be likely to be recorded and filed, whether any information had been deleted or destroyed and the retention policy of the public authority. He put these questions to the public authority in this case in his initial correspondence.
26. The public authority told the Commissioner that all the requested information was held in paper form and that it had carried out manual searches of its paper files in order to locate the information. It clarified that it had no record of the information's destruction and that its retention policy included a *"provision for appraisal and the permanent preservation of records with archival value"*. The public authority explained that the Codes of Conduct would be held for the purpose of *"Corporate Governance procedures"* and that they were signed by Board Members to ensure the terms and conditions of the post were understood by all. The public authority has not made it clear to the Commissioner, however, whether this meant that it expected to retain the information or for how long.
27. The Commissioner accepts that the Codes of Conduct were held in paper form and therefore manual searches would need to be carried out to locate and retrieve the information. However, the second part of the request detailed *"copies of emails, reports, letters and all other documents relating to the Codes of Conduct"*, and he would expect that, if information of this nature existed, some or all of it would be held in the form of electronic records. The public authority's correspondence failed to address this issue. The Commissioner was also left in some doubt as to whether copies of all the previous post holders' codes of conduct since November 2007, as stated in the request, had been located.
28. The Commissioner sought clarification on the matters above, and he asked the public authority to specifically address the second part of the request regarding whether information was held. He also questioned why previous Codes of Conduct could not be located when no

information pertaining to the request had been recorded as being deleted or destroyed.

29. The public authority confirmed to the Commissioner that the second part of the request had not been dealt with. It had now conducted electronic and manual searches for the information and had located a number of emails which it provided to the Commissioner. It did not state that the information had been made available to the complainant and in fact confirmed in later communication that it expected the Commissioner to pass the information on.
30. The public authority went on to state that all signed copies of the Codes of Conduct had now been sent to the complainant. This implied that the copies located in April 2010 after the internal review constituted the last of the information pertaining to the request. However, the Commissioner finds it contradictory for the public authority to go on to state:

"at present no one can locate the previous Directors' Code of Conduct...I have requested that the Interim Board Secretary arrange a search and retrieval of the previous Directors' Code of Conduct. I will let you know the results of the search once it has been completed."
31. Throughout the investigation the Commissioner has attempted to ascertain whether the previous Codes of Conduct were held by the public authority due to the contradictory nature of some of the correspondence received from the public authority. He has had to recommend on several occasions that searches for the missing information be carried out. The evidence provided during the investigation appears to show that it would be reasonable to expect that all of the previous post holders' Codes of Conduct would be held by the public authority. All Board Members are expected to sign a copy of the Code of Conduct, and no records of the information's destruction were found by the public authority. Moreover, shortly before drafting this Notice the Commissioner was made aware that a further copy of a missing signed Code of Conduct was located and subsequently provided to the complainant.
32. During its initial handling of the request and the Commissioner's investigation, the public authority made a total of nine separate searches for the information. Although the Commissioner is not fully satisfied that no further information is held, he does take that view on the balance of probabilities. In its correspondence of 27 January 2010 the public authority explained that after a considerable search the previous Codes of Conduct could not be located. It stated this had been logged as a formal incident to be investigated. The Commissioner is aware that the public authority has since reviewed its freedom of

information policy and a new policy has been put in place to prevent further incidents of this nature.

Procedural Matters

Section 10 – Time for Compliance

33. Section 10(1) of the Act states that a public authority should respond to a request for information in line with section 1 within 20 working days from receipt.
34. From the correspondence provided to the Commissioner in this case it is evident that the public authority responded outside the statutory time period. It admitted and apologised that this was the case, owing to the fact that the request had been received but not acknowledged or passed to the relevant member of staff until 2 December 2009.

The Decision

35. The Commissioner's decision is that the following elements of the request were not dealt with in accordance with the Act:
 - section 1 – the public authority breached sections 1(1)(a) and 1(1)(b) by failing to inform the complainant whether all the information pertaining to the request was held, and by failing to provide to him the information held which was not exempt, by the time of the internal review;
 - section 10 – the public authority breached section 10(1) by failing to comply with these section 1 obligations within the statutory 20 working days.

Steps Required

36. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - disclose the related information to the complainant or withhold the information by virtue of a valid refusal notice under section 17 of the Act.
37. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

38. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

39. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, no internal review appears to have been completed other than the further information being located and provided, despite the publication of his guidance on the matter.
40. The code of practice issued under section 46 of the Act (the "section 46 Code") sets out the practices which public authorities should follow in relation to the creation, keeping, management and destruction of their records. During the course of the Commissioner's investigation the public authority confirmed that it was unable to either locate certain Codes of Conduct or to demonstrate that they had been destroyed in accordance with a disposal schedule. The Commissioner expects that, in future, the authority will ensure that its records are retained in accordance with its own records management policy and that it will have due regard for the recommendations of the section 46 Code. The section 46 Code is published online at this address:

<http://www.justice.gov.uk/guidance/docs/foi-section-46-code-of-practice.pdf>

Section 19 – Publication Schemes

41. The Act as whole involves a presumption in favour of disclosure. The duties to disclose and to confirm or deny are expressed in general terms so that, unless there is a relevant exemption, these duties will operate. In other words, the 'default setting' in the Act is in favour of disclosure. Section 19 requires public authorities to adopt and maintain publication schemes and makes reference to *"the public interest in allowing public access to information held by the authority"*.
42. As part of his complaint to the Commissioner the complainant wrote:
- "In their acknowledgment of 5 March, the Trust promised to upload the individual copies [of the Codes of Conduct] on their website...as part of the Trust's Publication Scheme...The Trust have not made the documents available to the public via their Publication Scheme as the Information Commissioner expects them to. The website storing the documents is not referenced at all on the Trust's website...furthermore the Trust's website does not contain a search facility to find documents..."*
43. The Commissioner has investigated and considers that there are no significant section 19 matters in this case. He is satisfied that the public authority has adopted the model publication scheme and it is quite sufficient for this to be a link to the scheme document on the ICO's website. The Commissioner notes that the public authority's scheme has a 'guide to information' which appears to meet the requirements laid down in his guidance. The ICO's definition document is not overly prescriptive and nowhere does it state that the public authority must make the Code of Conduct documents available as part of the publication scheme.

Right of Appeal

44. 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 22nd day of February 2011

Signed

**Jon Manners
Group Manager
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."

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Publication Schemes

Section 19(1) provides that –

"It shall be the duty of every public authority –

- (c) to adopt and maintain a scheme which relates to the publication of information by the authority and is approved by the Commissioner (in this Act referred to as a "publication scheme"),
- (d) to publish information in accordance with its publication scheme, and
- (e) from time to time to review its publication scheme."