

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 5 January 2011

Public Authority: Torbay NHS Care Trust
Address: Bay House
Riviera Park
Nicholson Road
Torquay
Devon
TQ2 7TD

Summary

The complainant requested information about Torbay NHS Care Trust (the Trust) panel meetings. The Trust disclosed part of the information and relied on section 14 and section 38(1)(a) to withhold the remainder of the information. The Commissioner finds that the Trust was correct to rely on section 14 and has therefore not gone on to consider the application of section 38. The Commissioner does not require the Trust to take any further steps.

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 14 October 2009 the complainant submitted a request to Torbay NHS Care Trust (the Trust) for:

"My questions concern Panel hearings staged by Torbay Care Trust, to consider individual claims for NHS Continuing Healthcare funding."

- 1) *From 1st January 2008 to 1st September 2009, how many Panels did Torbay Care Trust convene to consider claims for NHS Continuing Healthcare funding.*
- 2) *Of those Panels given as the answer to question (1), at how many of them was [named individual] present, to take the minutes?"*
3. On 27 October 2009 the Trust wrote to the complainant and provided the information in relation to part 1 of the request (above). The Trust told the complainant that 103 panels had been convened. However in relation to part 2 of the request the Trust told the complainant that it did not hold the information about who took the minutes of the panel meetings. The Trust did record who was present at these meetings, but advised that this information was exempt under section 14(1) and section 38(1)(a) of the Act.
4. The complainant requested an internal review of the decision on 30 December 2009. In this request for internal review the complainant clarified that in respect of part 2 of his request he was now only requesting the number of meetings that the named individual had attended. The Trust wrote to the complainant on 3 February 2010 with the outcome of the review. The Trust told the complainant that it was maintaining its decision to apply sections 14(1) and 38(1)(a) to this information.

The Investigation

Scope of the case

5. On 5 March 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
6. During the course of the Commissioner's investigation the Commissioner was informed by the complainant that he had in fact received the information in respect of part 2 of his request. As the Commissioner seeks to resolve complaints informally where possible, he invited the complainant to withdraw his complaint on the basis that he had now received all of the information he requested.
7. The complainant remained of the view that the Trust had acted incorrectly in refusing his request. On 1 November 2010 the complainant wrote to the Commissioner and insisted that the Commissioner uphold his complaint specifically in relation to the Trust's application of the exemption at section 38(1)(a).

8. However, the Commissioner notes that the Trust applied both sections 14(1) and 38(1)(a) in relation to the requested information. Therefore the scope of the Commissioner's investigation was to consider whether the Trust correctly refused the request under either of these provisions, focussing initially on its application of section 14(1).

Chronology

9. Owing to the volume of complaints received, there was a delay before the complaint could be allocated to a complaints officer. The Commissioner wrote to the Trust on 3 September 2010 to ask for additional information about how it handled the request under the Act.
10. The Trust responded to the Commissioner on 8 October 2010 and provided a detailed submission in relation to its handling of the request.
11. The Commissioner sought further information from the Trust on 27 October 2010, and received a response on 28 October 2010.

Analysis

Substantive procedural matters

Section 14: Vexatious and repeated requests

12. Section 14(1) states:

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

13. The Commissioner's approach to considering whether section 14 has been applied correctly can be summed up by assessing the following statements in relation to the request:

- It would create a significant burden in terms of expense and distraction
- It is designed to cause disruption or annoyance
- It has the effect of harassing the public authority
- It can otherwise fairly be characterised as obsessive or manifestly unreasonable
- It clearly does not have any serious purpose or value

14. The Commissioner will also consider the context and history of the request as well as the strengths and weaknesses of the parties' arguments in relation to some or all of the above factors.
15. It is not necessary for all of the above criteria to be satisfied in order for a request to be deemed vexatious. Indeed a strong argument in one may outweigh weaker arguments in the others. As the Information Tribunal commented in the case of *Coggins v the Information Commissioner* (EA/2007/0130):

"a decision as to whether a request is vexatious within the meaning of section 14 is a complex matter requiring the weighing in the balance of many different factors. The Tribunal is of the view that the determination whether a request was vexatious or not might not lend itself to an overly structured approach..." (paragraph 20)."

Would it create a significant burden in terms of expense and distraction?

16. In line with the Commissioner's guidance determining whether responding to a request would create a significant burden involves more than the cost of compliance, it requires a public authority to consider whether responding would divert or distract its staff from its usual work. The Trust told the Commissioner that whilst complying with this specific request in isolation would not have imposed a significant burden on the Trust, the outcome of providing the information would be likely to have opened another avenue for dialogue. The Trust provided the Commissioner with evidence to support its view that corresponding with the complainant tended to result in further, frequent correspondence. The Trust believed that the cumulative effect of this correspondence would be further distraction from the Trust's core duties.
17. The Commissioner has carefully considered the information provided by the Trust, and considers that a response to this particular request would be unlikely to satisfy the complainant and would be likely to result in continued requests and pursuance of the Trust's complaints process. It seems likely that further correspondence, further requests and possibly complaints against individual staff members at the Trust would be forthcoming. The Commissioner has taken this view in the context of previous correspondence between the complainant and the Trust which demonstrates a pattern of behaviour that places a burden on staff in handling such correspondence. In this sense the Commissioner considers that the request would be likely to impose a significant burden on the Trust.
18. However, the Commissioner notes that the Trust has put in place agreed procedures for handling correspondence from the complainant. The

Commissioner considers this to be a reasonable approach in terms of dealing with the complainant, but it also indicates that the Trust is able to manage and limit the administrative burden caused by the volume of correspondence. Therefore in light of the Trust's response the Commissioner has afforded limited weight to this argument.

Was the request designed to cause disruption or annoyance?

19. The Commissioner's published guidance on vexatious requests states that:

"As this factor relates to the actual intention of the requester, it can be difficult to prove. Cases where this is a strong argument will be rare. However, if a requester states that the request is actually meant to cause maximum inconvenience, the request will almost certainly be vexatious."

20. The Trust provided the Commissioner with evidence of the volume of correspondence which it believed demonstrated a history of the complainant constantly challenging the Trust on its processes, systems and decisions. The Trust said the time spent by staff in handling such volumes of correspondence takes time away from other duties and causes disruption and annoyance.

21. The Commissioner has considered the volume, nature and language contained in correspondence with the Trust and notes that it could be considered as part of an overall intention to disrupt or annoy the Trust. However in the absence of any explicit evidence to indicate this was the intention of the complainant the Commissioner considers that there are no clear grounds to conclude that the request was designed to cause disruption or annoyance.

Did the request have the effect of harassing the public authority or causing distress to staff?

22. This is an objective test, based on whether a reasonable person would be likely to regard the request as harassing or distressing. When considering this factor the Commissioner has once again taken note of his published guidance on vexatious requests which states that when considering this factor:

'The request must be likely to harass a reasonable person. It is the request itself that is relevant rather than any potential embarrassment resulting from disclosure. Relevant issues here could include a very high volume and frequency of correspondence, the use of hostile, abusive or offensive language, an unreasonable fixation on an individual member of staff, or mingling requests with accusations and complaints.'

23. In weighing up whether this factor could reasonably be found to apply, the Commissioner has also been guided by the Tribunal in *Michael Jacobs v Information Commissioner* (EA/2010/0041), in which it stated that a public authority should expect to be exposed to an “*element of robust and persistent questioning, sometimes articulated in fairly critical tones.*”
24. The Trust told the Commissioner that the nature and content of the correspondence from the complainant has often included accusations and complaints about individual members of staff, which have caused offence, distress and upset to those members of staff. The Commissioner notes that, regardless of the complainant’s intentions with this specific request and taking into account the previous requests and based on the evidence he has seen that there is no doubt that this request has had the effect of causing distress to staff and in particular the member of staff named in the request.
25. The complainant has expressed a desire to establish whether the named person in his request made unlawful decisions. The complainant has argued that these decisions will be subject to scrutiny as part of judicial review procedures relating to a claim for retrospective NHS Continuing Healthcare funding. The Commissioner has considered the language used by the complainant in previous correspondence with the Trust, where he has singled out members of staff and made accusations likely to cause distress. Based on that previous correspondence the Commissioner agrees with the Trust that the request in this case does have the effect of harassing or causing distress to staff.

Could the request be seen as obsessive?

26. The Commissioner acknowledges that there will often be an element of overlap between various vexatious criteria. For example where a request is considered to harass a public authority or cause distress to staff it may also be seen as obsessive. In assessing whether a request can be deemed obsessive or manifestly unreasonable, a public authority may take into account previous knowledge it has of the requester as well as previous grievances, disputes or complaints involving the requester. In this case the volume and frequency of correspondence in the wider context of the request have been considered by the Commissioner to determine whether this request could reasonably be regarded as obsessive.
27. The Trust has provided the Commissioner with a file of correspondence issued by the complainant going back to 2006. This comprises approximately 50 communications, each generating additional items of correspondence and all relating in some way to the complainant’s continuing healthcare and retrospective care. The Commissioner is

satisfied that the Trust has demonstrated a pattern of correspondence, where responses have led to further requests.

28. The Commissioner draws comparisons in this case with the case of *Betts v Information Commissioner EA/2007/0109*, where there had been a dispute between the Council and the requester which had resulted in ongoing information requests and persistent correspondence over two years. The complainant had made numerous requests relating the inspection of a road, work instructions and repairs to the road, information as to traffic flows, highway inspections and risk assessments. The correspondence continued despite the Council's disclosures and explanations. Although the latest request was not vexatious in isolation, the Tribunal considered that it was vexatious when viewed in context. The Tribunal's finding in *Betts* supports the Trust's application of Section 14(1) in this case as the complainant has followed a similar pattern of correspondence which can be considered obsessive.
29. In reaching its decision to apply section 14(1) the Trust took into account the fact that the complainant had been in correspondence with them for many years, and that the majority of the letters had been dealt with outside of the Act. The Trust said that it had tried to provide answers and information on those issues raised with them by the complainant, it had not refused to respond to any of the complainant's correspondence until now.
30. The Commissioner is persuaded by the arguments of the Trust that the request is part of a general approach by the complainant that could be considered as obsessive. The Commissioner notes the Trust's efforts to answer the complainant's correspondence, and accepts that the complainant has demonstrated obsessive behaviour through the nature and frequency of his correspondence.

Does the request lack any serious purpose or value?

31. The Commissioner notes that the complainant considers his request to have a serious purpose because he believes that unlawful activity has occurred in respect of decisions made during NHS Continuing Healthcare Funding panels that breach National Guidelines for carrying out such panels and in particular in his own case. The complainant has commented on his ongoing legal action against the Trust which includes his belief that the named individual in his request should not have been a part of the panel which made the decision on his individual case for NHS Continuing Healthcare Funding. The Commissioner understands that the subject of personal healthcare is an emotive and very personal issue to an individual. However there comes a point when the serious

purpose of a matter is outweighed by the obsessive and burdensome nature of correspondence and requests covering similar points.

32. The Commissioner is mindful that this request was for how many NHS Continuing Healthcare Funding panels a named individual member of staff had attended. The Trust also said that it did not believe that the request had serious purpose or value as other members of staff were in attendance at those panel meetings and one person in isolation could not have affected any decisions or outcomes. The Trust told the Commissioner that it believed the purpose of the request was to obtain information to base further accusations and complaints against that individual. It is also the view of the Trust that knowing how many of the 103 panels that the named individual had attended would not provide any further understanding of the continuing healthcare process, change the outcome or enhance the quality of discussions and decision making generally. The Trust also told the Commissioner that it has already clearly explained its processes to the complainant.
33. Although the Commissioner accepts that there can be a thin line between obsession and persistence, each case must be determined on its facts. In this case the Commissioner has considered the context within which this request was made about the Trust's handling of NHS Continuing Healthcare Funding panels. The Commissioner understands that the complainant is pursuing legal proceedings about a claim for retrospective care. In that context the complainant has stated that the claim includes the scrutiny of the manner in which the Trust conducted its panel hearings and has also commented that he is aware that the named individual was involved in his own case. The Commissioner is therefore not convinced that the request for information about how many other panels a certain member of staff took part in has serious purpose or value.

Conclusion

34. The Commissioner has considered the arguments put forward by the complainant for his actions in submitting this request and has balanced these with the arguments made by the Trust. He has also taken into account the wider context in which this complaint was made. The Commissioner recognises that there is a fine balancing act between protecting a public authority from vexatious applications and the promotion of transparency in the workings of an authority. Having weighed all of the factors considered above the Commissioner has found that the arguments in favour of the application of section 14(1) by the Trust are of sufficient weight to support the engagement of section 14.
35. For the reasons set out above, the Commissioner finds that the Trust correctly applied the exclusion at section 14(1) of the Act. Therefore the

Commissioner finds that the Trust was not obliged to comply with the request.

Exemptions

Section 38

36. As the Commissioner finds that the complainant's request was correctly refused under section 14(1) he has not gone on to consider the Trust's application of section 38.

The Decision

37. The Commissioner's decision is that the public authority dealt with the following element of the request in accordance with the requirements of the Act:

- That the request was correctly refused under section 14(1) of the Act.

Steps Required

38. As the Commissioner finds that the request was correctly refused he requires no steps to be taken.

Right of Appeal

39. 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

40. 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.
41. 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 5th day of January 2010

Signed

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

Legal Annex

Section 14 Vexatious or Repeated Requests

Section 14(1) provides that –

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

Section 14(2) provides that –

'Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with a previous request and the making of the current request.'

Section 38 Health and Safety

Section 38(1) provides that –

Information is exempt information if its disclosure under this Act would, or would be likely to –

- (a) endanger the physical or mental health of any individual, or
- (b) endanger the safety of any individual.