

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 December 2011

Public Authority: University Hospitals Coventry and Warwickshire
NHS Trust ('the Trust')

Address: Clifford Bridge Road
Walsgrave
Coventry
CV2 2DX

Decision (including any steps ordered)

1. The complainant requested 13 years' worth of anonymised information about complaints received about Senior Managers (including ethnicity, gender and rank/position of the complainant and manager, the procedures applied and their outcomes).
2. The Trust explained that it held the information, but that it would take work beyond the costs limit to find all the information requested in that period. It therefore applied section 12(1) to that request.
3. The complainant requested an internal review and also submitted a refined request. The Trust explained that section 12(1) could be applied to the modified request and confirmed its position for the original request.
4. The Commissioner's decision is that the Trust applied section 12(1) appropriately both to the original request and the modified request. He also finds that the Trust complied with its obligation to provide advice and assistance in this case. He requires no more information to be provided and no remedial steps to be taken in this case.

Request and response

5. On 1 September 2010, the complainant requested the following information from the Trust:

'Under the Freedom of Information Act I would therefore like to request information on all complaints against senior managers at UHCW since 1997, including those involving bullying, victimization, harassment and discrimination, with the exact number of complaints, the ethnicity, gender and rank/position of the complainant and manager, the procedures applied (including disciplinary action) and most importantly the outcomes of these complaints. I do not need to know names or the specific details of the complaint.'

6. On 28 September 2010, the Trust issued its response. It explained that the costs limits would be exceeded and that it was therefore applying section 12(1) of FOIA.
7. On 12 October 2010 the complainant requested an internal review. She raised relevant issues about whether the information had already been compiled in accordance with its Equality scheme. She also made a modified request for information:

'I am after anonymised data and for the information to be given to me in any form possible and convenient to you. I am not interested in details of the people involved or of the complaints, just the number of complaints of harassment, bullying, victimisation and discrimination against senior management and outcomes of these complaints, by gender and race.'

8. On 9 November 2010 the Trust communicated its response. It upheld its position and explained that section 12(1) could be applied to both the original request and modified request. It explained that it had only gathered some of the information requested from 2007. It offered this information in line with its duty to provide advice and assistance.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
10. The Commissioner agreed with the complainant that he would consider the handling of both the original request dated 1 September 2010 and the modified request dated 12 October 2010 and he has done so.
11. An initial issue in this case was that the Trust had a problem understanding what the complainant believed constituted a Senior Manager. During the course of the Commissioner's investigation, it agreed to consider the request on the basis of the complainant's definition that she provided to the Commissioner which was:

'A senior Manager would be the Executive Team and any Heads of Department, eg Board Members and Clinical Directors, Nurse Managers etc'

12. The Trust explains that this assisted it because it meant that the request embraced everyone on the Trust's Executive Board and anyone that reports directly to a member of that Board. The Commissioner has considered this case on the same basis.
13. The complainant also clarified an ambiguity in the requests and explained that she expected the rank, gender and ethnicity of both the complainant and the alleged perpetrator and the Commissioner has considered the requests on that basis.

Reasons for decision

14. Section 12(1) of FOIA 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.'

15. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Regulations") provide that the cost limit for non-central government public authorities is £450. This must be calculated at the rate of £25 per hour, providing an effective time limit of 18 hours.
16. If a public authority estimates that complying with a request would exceed 18 hours, or £450, section 12(1) provides that the request may be refused.
17. The Commissioner's analysis into the operation of section 12(1) will have two parts, which are:
 1. To explain the Trust's relevant estimate for each of the requests; and
 2. To consider whether that estimate only related to the relevant prescribed activities and whether it is reasonable.

18. The Commissioner will consider each part in turn:

What was the Trust's relevant estimate?

19. The Trust explained that it understood that it could only include in its estimate the work that was outlined in Regulation 4(3) of the Fees

Regulations, which allows only the following four activities to be considered:

“(a) determining whether it holds the information,

(b) locating the information, or a document which may contain the information,

(c) retrieving the information, or a document which may contain the information, and

(d) extracting the information from a document containing it.”

20. It also understood that the onus was on it to prove that the work required to process the request would take longer than 18 hours and provided the Commissioner with a detailed explanation about what work would need to be done for each of the two requests.

The original request dated 1 September 2010

21. The Trust explained that the first stage in finding this information would be to identify the relevant 'Senior Managers'. It explained that this was not as easy as identifying all people on higher pay levels because it also employed a number of scientists who were paid that much, but were not senior managers (as they did not have any managerial responsibilities).
22. The Trust explained that it was relatively easy for it to locate the information for the years 2007 – 2011 because it kept the majority of the information in one place in accordance with its Single Equality Scheme. However, to find out the information about the disciplinary procedures and the rank of the complainant would require checking the information that it now produces along with both its records of the complaints and the personnel files of the complainant.
23. The Trust explained that it was much more difficult to identify the requested information for the earlier years, because the staff did not remain consistent throughout the 13 year period (its turnover rate was about 7%) and there were a number of restructures during that time period. It also provided the Commissioner with an estimate of the number of staff that it employed for each year and the approximate numbers of Senior Managers:
- 2011 – 92 out of 6790 staff.
 - 2010 – 108 out of 6830 staff.
 - 2009 – 107 out of 6592 staff.
 - 2008 – 101 out of 6004 staff.

- 2007 – 98 out of 6193 staff.
 - 2006 – 103 out of 6978 staff.
 - 2005 – 97 out of 6211 staff.
 - 2004 – 73 out of 5444 staff.
 - 2003 – 60 out of 4660 staff.
 - 2002 – 53 out of 4027 staff.
 - 2001 – 44 out of 3543 staff.
 - 2000 – 45 out of 3142 staff.
 - 1999 – 41 out of 2815 staff.
 - 1998 – 34 out of 2518 staff.
 - 1997 – 27 out of 2293 staff.
24. The Trust explained that due to the large numbers of staff and the difficulty that it would have in working out who all of the Senior Managers were (particularly in the earlier years) it considered that it would need two days (or 15 hours' work) just to identify all the Senior Managers for the 13 year period that is covered by both of the requests.
25. The Trust said that the only place where the information may be held (between 1997 and 2007) would be on the personnel files of the Senior Managers and/or the personnel files of the members of staff who made the complaint.
26. However, the Trust also explained that its standard practice was to remove unsubstantiated allegations from the files and also not to retain other information beyond the time that it was relevant for its business purposes. The Trust would therefore have the information in the event that the individual was dismissed, but would be less likely to have information in the event that it was less serious and even less likely to have information in the event that the complaints were unsubstantiated. This was because it would only have that information in the event that its policy had not been applied correctly at that time.
27. It may be necessary to check the staff files to see if the records of the staff complaining were noted on them. The Commissioner considers that given the number of staff employed, it would not be feasible for the Trust to check all of these files and has focussed his investigation on the checking of the Senior Manager's files.

28. The Commissioner has continued his investigation on the basis that the complainant would seek the components that are held by the Trust, even if they would not constitute a complete record and that she would settle for information solely from the Senior Manager's files.
29. After having identified the Senior Managers, the Trust explained that the next step would be necessary to obtain and check the personnel files of those individuals. It explained that for the earlier years (where the individual did not remain employed by it) the information was held off site and it would require it to contact the company that looks after its archives to request the information and this would take more time.
30. The Trust provided the Commissioner with the estimated time that it would take to find the files, locate and extract the relevant information for five files. The Commissioner considers that the estimates the Trust provided were too high. However, from experience, he still considers that it would take considerable time to undertake the work that would need to be done and he has therefore considered the minimum estimates from other cases where he has considered similar information previously and considered whether the work could be done within the costs limits based on those minimum estimates.
31. For the staff that are still employed by it, the Commissioner considers that a reasonable estimate in this case would be that it would take 3 hours to locate the all the relevant files and 30 minutes a file to locate and extract any relevant information from those files (including the time spent reading them).
32. For the staff that are not still employed by it, it would need to contact its offsite storage specialist and from experience the Commissioner would allow 30 minutes to contact the company and 5 minutes per file for the company to retrieve each file. It would then take 30 minutes a file to locate and extract any relevant information from those files (including the time spent reading them).
33. Making an estimate on the best possible scenario (that there was no turnover in staff and that all the files were kept on site) would lead to the following minimum work being required:

$$[3 \text{ hours locating the files}] + ([103 \text{ staff} - \text{those employed in 2006}] \times [30 \text{ minutes checking each file}]) = \mathbf{54.5 \text{ hours work.}}$$
34. Adding this to the 15 hours' work gives a realistic minimum estimate of **69.5 hours work**. This is well in excess of the 18 hour limit. This does not include the extra work in retrieving information off site, or the probable need to check over 10,000 staff files to enable the most complete record to be obtained.

The modified request dated 12 October 2010

35. The modified request does not ask for the disciplinary procedures that were used by the Trust. It is therefore easier to answer than the original request. However, it still seeks 13 years' worth of data.
36. As this is so, the Commissioner considers that the Trust would need to do the same amount of work as it would to answer the original request and therefore its minimum estimate would also be **69.5 hours work**.

Was the estimate reasonable?

37. The issue of what constitutes a reasonable estimate was considered in the Tribunal case *Alasdair Roberts v the Information Commissioner* [EA/2008/0050] and the Commissioner endorses the following points made by the Tribunal at paragraphs 9 -13 of the decision:
 - *"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; and
 - Any estimate should be *"sensible, realistic and supported by cogent evidence."*
38. Following those points, the Commissioner is satisfied that the Trust has only included the activities that are specified in Regulation 4(3) in its estimate. He is also satisfied that it hasn't included any time for considering redactions or any time taken to consider validating the information.
39. He is satisfied that the estimate is based on the circumstances of this case. The Commissioner has disallowed some of the original estimate, but finds that even the minimum amount of work allowed would exceed the costs limit. The Commissioner has also considered whether or not there are reasonable alternatives in this case.
40. When considering this issue the Commissioner has been guided by the Information Tribunal in the case *Alasdair Roberts v the Information Commissioner* [EA/2008/0042] which provided some general comments on alternative methods of extraction such as whether there is an alternative so obvious to consider that disregarding it renders the estimate unreasonable.

41. The Commissioner has therefore considered whether such alternatives exist in this case. The complainant made three main arguments:
 1. That it was no trouble for another Trust to provide her with what was requested;
 2. The Trust's Equality and Diversity – Race Equality Scheme required it to monitor this sort of information and thus it should hold it; and
 3. Section 71(1) of the Race Relations Act (2000) imposes an obligation on the Trust to eliminate unlawful discrimination, promote equality of opportunity and good race relations and this indicates that they should hold the relevant information.
42. The Commissioner has considered the other Trust's response. It does not provide a full record of the whole 13 years. Instead, it provided the information that was readily available. He does not consider that this partial response undermines the Trust's position in this case. It does not reflect how the Trust in question holds its records or how it operates.
43. The Commissioner has also considered the Trust's Equality and Diversity scheme. While the complainant is right in stating that such monitoring is required, it only came into operation in 2007. The Trust was not keeping the same information before then and had no obligation to do so. It explained that it started keeping these records in 2007 and that while it kept central records of external complaints before then, it never kept central records of internal complaints about its staff.
44. The Commissioner has also considered the statute that was cited by the complainant. He considers that it imposes positive obligations on the Trust to operate in a certain way, but is not prescriptive about how it would go about doing so. The Commissioner is satisfied that the Trust does not hold further relevant recorded information that has been created as a result of this obligation.
45. The Trust also could not provide the complainant with all of the HR information for her to do the work herself. The release of all of the information would be a contravention of the Data Protection Act and would not answer the request because it asked for anonymised information.
46. The Trust also did not have a computer system that could reduce the work required in any meaningful way. It also didn't hold a central record of complaints from which the information could be found. In short, it did not record the information in the way that the complainant wanted it and the Commissioner considers that it has evidenced why this is so.

47. Having considered all the relevant evidence above, the Commissioner is satisfied that there are no reasonable alternatives to checking all the records that may contain relevant information in this case and extracting them manually.
48. He is satisfied that the Trust has evidenced that to answer either the original or modified request would take it more than 18 hours' work.
49. The Commissioner is satisfied that this estimate is based only on a reasonable assessment of the activities that are allowed by Regulation 4(3) of the Fees Regulations. He is satisfied that this estimate is *'sensible, realistic and supported by cogent evidence.'* He accepts the estimate in this case and determines that section 12(1) was applied correctly in this instance to both the original and modified requests.

Procedural Requirements

Section 16(1)

50. Section 16(1) imposes an obligation for a public authority to provide advice and assistance to a person making a request, so far as it would be reasonable to do so. Section 16(2) states that a public authority is to be taken to have complied with its section 16 duty in any particular case if it has conformed with the provisions in the Section 45 Code of Practice in relation to the provision of advice and assistance.
51. Whenever the cost limit has been applied correctly, the Commissioner must consider whether it would be possible for the Trust to provide advice and assistance to enable the complainant to obtain information without attracting the costs limit in accordance with paragraph 14 of the Code. In this case the Commissioner has considered whether it would have been reasonable for the Trust to have advised the complainant further about reducing the scope of her request.
52. The Trust explained that it considered that it had done everything possible in this case to enable the complainant to receive some of the information that was readily available. It explained to the complainant the difficulties of extracting what was requested and also stated that the figures from 2007 were now kept centrally and would be possible to provide partially and offered those figures. It then provided those figures to the complainant during the course of the Commissioner's investigation.
53. The Commissioner's view is that the Trust did offer all reasonable advice and assistance in this case. He considers that given how the records are held that there was no possibility in providing the quantity of information requested within the costs limit.

54. To further support this analysis, the Commissioner asked the complainant whether she would narrow the time period of her request. The complainant told the Commissioner that 10 years worth of information was the minimum amount that she would accept. As 10 years information would take the substantially the same amount of work as 13 years' worth of information, this adds further support to the Trust's argument that it was not possible to provide further advice and assistance in this case that would enable the complainant to get what she wanted in the costs limit.
55. He therefore considers that the Trust also complied with its obligations under section 16(1).
56. He has therefore found that the Trust complied with all of its obligations under the Act and requires no further information to be provided to the complainant.

Right of appeal

57. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

58. 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.
59. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

**Pamela Clements
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