

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 March 2012

Public Authority: Dr Barbara Allan
'The Docs'

Address: 55-59 Bloom Street
Manchester
M1 3LY

Decision (including any steps ordered)

1. The complainant has requested when an individual Doctor at the 'the Docs' practice was absent between two dates.
2. The practice (on its doctors' behalf) replied that it consider that the request was vexatious and applied section 14(1) to it. The complaint was made to the Commissioner. During the course of his investigation, the practice also applied section 40(2) [third party personal data].
3. The Commissioner finds that section 14(1) was applied inappropriately and that a reasonable public authority could not find the request vexatious.
4. However, he has found that section 40(2) [third party personal data] was appropriately applied in this case. He has also found procedural breaches under section 17(1) and 17(1)(b).
5. He requires no remedial steps to be taken in this case because they are not possible to remedy through remedial steps.

Request and response

6. On 31 March 2011, the complainant requested:

'I wish to request under the freedom of information act for the dates that Dr [A redacted] was absent from work between January 2010 and August 2010.'

7. On 3 May 2011 the practice responded. It explained that it considered that the request was vexatious and that it was excluded from FOIA by virtue of section 14(1). It provided detailed reasons about why it had this view and these will be discussed in the 'reasons for decision' part of this notice. It explained that it did not offer an internal review in the circumstances of this case.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. The Commissioner firstly considered other requests that the complainant made under his duties found in section 42 of the Data Protection Act 1998 (DPA). The complainant received his assessment under the DPA on 24 November 2011. This is a separate legal process and forms no part of this Notice.
9. On 30 November 2011 the complainant agreed with the Commissioner that his FOIA investigation would cover the following four points:
 - Whether the doctors at the practice are public authorities for the purpose of FOIA (not all doctors are);
 - If so, whether or not the practice was right that section 14(1) [vexatious requests] can be relied on by it in relation to the request dated 31 March 2011;
 - If not, whether the practice can rely on any other exemptions under FOIA, or whether the information should be disclosed to the public; and
 - To consider any other procedural issues in relation to the practice's compliance under FOIA.
10. In relation to the first point, the Commissioner notes that a medical practice itself is not for the purposes of FOIA a public authority. Rather, each GP who provides primary medical services is a public authority themselves and has a duty to reply to a request in accordance with section of FOIA.
11. In this case all three doctors have contracts to provide primary medical services and so are public authorities in their own right. The Commissioner has therefore been required to issue separate Decision Notices for each of the GPs at the practice in this case.
12. However, the Commissioner acknowledges that when an applicant makes a freedom of information request to a medical practice it is

reasonable to expect that the practice will act as the single point of contact and process the request on the doctors' behalf.

Reasons for decision

13. Section 14(1) of FOIA states that:

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

14. When assessing vexatiousness the Commissioner adopts the view of the Information Tribunal's (the 'Tribunal') decision in *Ahilathirunayagam v Information Commissioner's Office* (EA/2006/0070) (paragraph 32); that it must be given its ordinary meaning: would be likely to cause distress or irritation. Whether the request has this effect is to be judged on objective standards.

15. The Commissioner also endorses paragraph 21 of the Information Tribunal's decision *Mr J Welsh v the Information Commissioner* (EA/2007/0088) ('Welsh') (paragraph 21) where it stated:

'In most cases, the vexatious nature of a request will only emerge after considering the request in its context and background. As part of that context, the identity of the requester and past dealings with the public authority can be taken into account. When considering section 14, the general principles of FOIA that the identity of the requester is irrelevant, and that FOIA is purpose blind, cannot apply. Identity and purpose can be very relevant in determining whether a request is vexatious. It follows that it is possible for a request to be valid if made by one person, but vexatious if made by another; valid if made to one person, vexatious if made to another.'

16. The Commissioner will consider the context and history of the request as well as the strengths and weaknesses of both parties' arguments in relation to some or all of the following five factors to reach a reasoned conclusion as to whether a reasonable public authority could refuse to comply with the request on the grounds that it is vexatious:

- whether compliance would create a significant burden in terms of expense **and** distraction;
- whether the request is designed to cause disruption or annoyance;
- whether the request has the effect of harassing the public authority or its staff;

- whether the request can otherwise fairly be characterised as obsessive or manifestly unreasonable; and
 - whether the request has any serious purpose or value.
17. It is not necessary for all five factors to be engaged, but the Commissioner will reach a decision based on a balance of those factors which are applicable, and any other relevant considerations brought to his attention. He generally considers that where two or more factors are satisfied in his guidance that this provides a good guide as to when a request is vexatious.
18. When considering the public authority's reliance upon section 14(1), the Commissioner has had regard to paragraph 26 of *Welsh*. In that case, the Tribunal spoke of the consequences of determining a request vexatious. It pointed out that these are not as serious as those of finding vexatious conduct in other contexts and therefore the threshold for vexatious requests need not be set too high. The Commissioner also notes that it is the request, not the requester, which can be refused as vexatious.
19. The Commissioner has considered the following evidence in this case:
- the practice's refusal notice;
 - the complainant's counterarguments; and
 - the further submissions from the parties.
20. The Commissioner will consider each of the factors in his guidance in turn. However, he has kept in mind the Information Tribunal's view that a consideration of a refusal of a request as vexatious may not necessarily lend itself to an overly structured approach. He has therefore considered these tests 'in the round'.

*Whether compliance would create a significant burden in terms of expense **and** distraction*

21. When considering this factor the Commissioner endorses the Tribunal's approach in *Welsh* (in paragraph 27). It stated that whether a request constitutes a significant burden is:

"...not just a question of financial resources but also includes issues of diversion and distraction from other work..."

22. The Commissioner therefore expects a public authority to show that complying with the request would cause a significant burden both in terms of costs and also diverting staff away from their core functions.
23. The Tribunal in *Gowers* emphasised that previous requests received may be a relevant factor (at paragraph 70):

'...that in considering whether a request is vexatious, the number of previous requests and the demands they place on the public authority's time and resources may be a relevant factor'

The public authority has confirmed that considering the request isolated from its context would not cause a significant burden in terms of expense or distraction. The complainant has explained to the Commissioner his belief that members of staff have acted inappropriately and the burden of these three requests is very mild.

24. The Commissioner initially agreed that the burden of the request dated 31 March 2011 on its own is not great.
25. However, the public authority believes that their context and history are crucial to consider in this case. It explained that the burden in terms of expense and distraction in relation to its previous interaction with the complainant was so great that it was reasonable to say that the request caused a significant burden within its context.
26. The public authority asked the Commissioner to take into account the following arguments about the request's context, which the Commissioner considers to be relevant to the burden of this request:
 - The request is part of the complainant's interaction with the practice which is within the context of a general complaint about it;
 - It has already considered the substantive complaint through its complaint process and the request appeared to want to reopen that complaint;
 - It had already addressed previous requests that were useful to enable the complainant to pursue his overall complaint through the correct channels and the information that has now been requested is not so required;
 - The request was the third in a sequence and it considers the request within the context of the previous communications to cause it a significant distraction from providing primary care to its patients;
 - It considers the request is part of the pressure applied by the complainant which appears to aim to persuade the practice to deal

- with his complaint differently. It provided a detailed chronology of all of its interaction with the complainant between 18 June 2009 and the date of the request to illustrate where the request fits within the context;
- The pressure of the request was enhanced by the complainant visiting it frequently despite not being its patient and being asked not to do so; and
 - Since the original complaint, the complainant has instructed six organisations to assist him, all of which required responses.
27. The public authority acknowledged that dealing with complaints is a core function of running a successful practice. However, it explained that it should be entitled to deal with complaints in a manner that is fair and efficient. It explained that it would provide the regulator in this area, the Parliamentary and Health Service Ombudsman (PHSO), with any data that it considered it required when considering how the complainant's complaint was handled.
28. The complainant argued that the request cannot be said to have caused a significant burden in terms of either expense or distraction. He argued that:
- he requires the information to pursue his complaints, but he has only made three requests for information and has only requested what he needs;
 - he doesn't consider that the request can be said to amount to pressure that amounted to a campaign against the practice;
 - the practice invited him to make further requests where he had questions in their earlier letter dated 4 November 2010; and
 - the practice failed to address his questions about matters of concern informally, leading to him making the request for information.
29. The Commissioner has considered that the arguments are finely balanced in this case. He considers that the complainant has been persistent with his complaints and has chased up his requests with a determination that has unsettled the practice. However, overall he does not consider that the request even taking into account its context can be said to cause a significant burden in terms of either expense or distraction.
30. While it is acknowledged that the doctors' priorities must be to treat their patients, Parliament decided that they are to be caught by FOIA. It

follows that they must discharge their responsibilities in the same way as any other public authority. The Commissioner considers that the request is not burdensome. It is focussed on one issue that would be relatively easy to answer and similarly the previous requests are also well focussed and an organised practice should have been able to answer them with little difficulty.

31. The Commissioner has also considered the reasoning in the Tribunal decision of *Coggins v Information Commissioner* [EA/2007/0130] (*'Coggins'*) about what constitutes *'a significant administrative burden'* which said that dealing with the requests would need to have contributed to a *'significant distraction from its core functions'* (paragraph 27). The Commissioner does not consider that this request has such a widespread effect.
32. It follows that he finds this factor in favour of the complainant and that this factor does not evidence that this request is vexatious.

Whether the request is designed to cause disruption or annoyance;

33. In its refusal notice, the practice argued that the further correspondence after the complaint being finalised in March 2010 appears to it to be an attempt to cause ongoing disruption and annoyance.
34. It provided further arguments to the Commissioner. It explained that it failed to see how the information would enable the complainant to understand why his complaint was not resolved locally and considers that its sole purpose was to cause annoyance and disruption. It explained that the persistence of the complainant in chasing the response up has created a further and disproportionate amount of work for the practice.
35. The complainant contended that at the date of the request that he required the information in order to explain the nature of his complaint to the PHSO. While the PHSO has taken on his complaint without the information, he considered that the information he has asked for is crucial to corroborate the practice's position.
36. The complainant contends that his concern was obtaining the information and his intention was to make the complaint using the information.
37. The Commissioner considers that this factor is most difficult to satisfy because it requires the public authority to illustrate the applicant's subjective intention. The Commissioner finds the complainant's own evidence most convincing and considers that the request was not made with the intent to cause disruption or annoyance. He also finds this

factor in favour of the complainant and that this factor does not evidence that this request was vexatious.

Whether the request has the effect of harassing the public authority or its staff;

38. The complainant contends that there is no evidence of this request harassing the public authority or its staff, other than correctly holding it accountable for its actions. Instead, he believed it was important that the information held was out in the open so that the public authority's actions were open to scrutiny.
39. The practice considers that the request as it singles out one individual demonstrates an unreasonable fixation on one member of staff and that objectively that member of staff would consider it distressing.
40. The complainant explained that he only singled out the individual because the practice sent a letter to a third party which explained that that individual's absence led there to be a failure to have a case conference as expected. He asked for the information for accountability about whether or not there was any time where the case conference could be done.
41. The practice offered further arguments about why it considered that the request in its context should be viewed as being harassing:
 - The previous interactions and their nature meant that already the individual had an expectation that their personal data would be protected from the complainant;
 - These interactions have had the effect of harassing and distracting the practice from their primary business – in particular, the reception staff have felt under significant pressure;
 - The complainant has been particularly stringent about imposing deadlines on the practice and this has added to the pressure experienced;
 - In addition, the practice Manager has noted that her other priorities have not been recognised by the complainant who tended to insist on her immediate presence; and
 - The practice tried to mitigate the pressure by restricting contact into writing, but this did not change the complainant's behaviour.
42. The Commissioner appreciates that to harass is a strong verb and emphasises that it is the effect of the requests and not the requester

that must be considered. It is an objective test: so a reasonable person must be likely to regard the request as harassing or distressing.

43. The Commissioner's guidance states that the features that could make a request have the effect of harassing the public authority or its staff are:
 - The volume and frequency of correspondence;
 - The use of hostile, abusive or offensive language;
 - An unreasonable fixation on individual members of staff; and
 - The mingling of requests with accusations and complaints.
44. The Commissioner considers that the effect of the complainant's interaction with the practice has led to it considering that it has been harassed. The Commissioner is satisfied that the public authority has been placed under real pressure and its efforts to reduce that pressure have not been successful.
45. However, the Commissioner considers that the balance once again favours the complainant. The correspondence has not been frequent nor voluminous, has not exhibited hostile abusive or offensive language nor mingled requests with accusations.
46. The practice has not offered the Commissioner any convincing evidence that the request can be seen as being harassing either.
47. The Commissioner also on balance prefers the complainant's view that the information is focussed on a member of staff because he wants to consider the accountability of that person.
48. He also finds this factor in favour of the complainant and that this factor does not evidence that this request was vexatious.

Whether the request can otherwise fairly be characterised as obsessive or manifestly unreasonable;

49. The practice did not rely on this factor and therefore the Commissioner has not considered this in evidencing whether this request was vexatious.

Did the request have value and/or a serious purpose?

50. The practice argued that the request did not have value or a serious purpose. It explained that it considered that the information was irrelevant to the complainant's complaints and thus the information had no value.
51. It complemented its arguments by explaining that the PHSO had taken on the complaint without the information and thus it wasn't necessary

when using the necessary channels for communication. The Commissioner however must consider the situation at the date of the request which was the 31 March 2011 and thus cannot consider activities that occurred afterwards.

52. The complainant argued he had a serious purpose for requesting this information. He needed the information to consider whether there was a possibility to have a case conference about his care and the failure to have one has had a real impact on his health.
53. The Commissioner is satisfied that there was a serious purpose to this particular request for information at the time it was made. The Commissioner recognises that there is an assumption built into the FOIA that disclosure of information by public authorities on request is in the public interest in order to promote transparency and accountability in relation to the activities of public authorities. He has therefore found that this factor also favours the complainant.

Could a reasonable public authority refuse to comply with the request on the grounds that it was vexatious?

54. The Commissioner recognises that there is sometimes a fine balancing act between protecting a public authority from meritless applications and the promotion of the transparency in the workings of the authority.
55. The Commissioner has considered all the evidence presented in this case, including the history and context of the request. The Commissioner is satisfied that the request had a serious purpose and does not satisfy any of the factors that would render the request vexatious. He therefore finds that the practice was not entitled to find the request vexatious. He emphasises that this determination was made on the circumstances as they existed on 31 March 2011.
56. The public authority has therefore inappropriately relied on section 14(1).

Section 40(2)

57. The practice argued that in the event the Commissioner found against the request being vexatious, that the requested information was exempt by virtue of section 40(2) [third party personal data].
58. The Commissioner has therefore gone on to consider the operation of this exemption to the information withheld.
59. Section 40(2) ['the third party personal data exemption'] of the FOIA states that:

'Any information to which a request for information relates is also exempt information if –

- (a) It constitutes personal data which do not fall within subsection 40(1); and*
- (b) Either the first or the second condition below is satisfied.'*

60. In summary, the conditions specified are either that disclosure would contravene one or more data protection principles, or that the information would not be available to the data subject if he made a Subject Access request under the Data Protection Act ('DPA') for it.

Is the information personal data?

61. 'Personal data' is defined by section 1(1) of the DPA. The information does constitute each of the data subject's personal data because it relates to an identifiable living individual and is intimately about their life. The information also does not constitute the complainant's own personal data. Section 40(2)(a) is therefore satisfied.

Is the information sensitive personal data?

62. The DPA also provides additional safeguards for sensitive personal data which is defined in section 2 of the Act. Section 2 states that personal data relates to, amongst other things, a data subject's physical or mental health or condition. While the practice did not specifically state the information was sensitive personal data to the complainant, the Commissioner considers as a matter of fact that it is. He considers that data about absence indicates that an individual may not be fit enough to work and this concerns their physical and/or mental health and the public authority holds this information to keep a record about the health of the partners. The Commissioner is aware that there is knowledge that the individual was ill sometime during the period and this offers further support that the data in its context constitutes sensitive personal data.

Should the information be disclosed to the public?

63. In relation to section 40(2)(b) the practice's main arguments have been focussed on why disclosure would contravene the first data protection principle and this is what the Commissioner has focussed on.

64. For sensitive personal data, the first data protection principle has four components. They are that the disclosure of the information to the public must be:

- fair to the data subject;

- in accordance with one or more conditions in Schedule 2 of the DPA;
- lawful to the data subject; and
- in accordance with one or more of the conditions found in Schedule 3 of the DPA.

65. Every condition must be satisfied for the first data protection principle not to be contravened and the exemption not to apply. If even one condition is not satisfied, the first data protection principle would be contravened and the exemption would be applied correctly.
66. The Commissioner will firstly consider whether the disclosure of this information is fair to the data subject.

Is the disclosure of the information unfair to the data subject?

67. In accordance with his decision issued in **FS50286813** (Stroud District Council), the Commissioner has looked to balance the consequences of any release of personal data and the reasonable expectations of the data subject with general principles of accountability and transparency.
68. To do so, he has specifically borne in mind the following factors:
- Why the practice holds the information;
 - What are the reasonable expectations of the individual in relation to the handling of their personal data?

Including:

- What was the person told about what would happen to their personal data?; and
 - How the fact that the individual was paid from the public purse influences those expectations.
- Whether disclosure would cause any unnecessary or unjustified damage to the individual; and
 - The legitimate interests of the public in knowing the withheld information and understanding who was responsible for medical treatment at a set time.
69. The practice has explained that it holds information about an individual's absences in order to ensure that it provides a complete service to its patients. It explained that even during the absence of the doctors, any patient who wishes to be seen by a doctor will be.

70. As noted above, the information constitutes sensitive personal data. Sensitive personal data by definition constitutes the most private information about an individual and consequently attracts a general expectation of privacy.
71. The Commissioner considers that the individual would have the expectation that information about their historical absences would be kept private. The information is used by the practice to monitor its staff and the expectation would be that it would be held privately as HR information and not disclosed into the public after time has passed by. The Commissioner notes that analogous information about the health and wellbeing of doctors is kept confidentially by the General Medical Council and he considers that the expectations of the doctors about this sort of information are coherent and consistent.
72. The disclosure of the information would be likely to have four adverse effects. Firstly, it would erode their trust and confidence in their fellow partners doing what it said it would with their personal HR data. Secondly, it would reveal information from which one can derive information about the health or otherwise of the individual and where the default expectation is that health data would be kept confidential, the individual would have their expectations not recognised. Thirdly, the practice considered that the data subject would not expect that this information would be provided to enable the complainant to pursue them further. Fourthly, the practice explained that it was based in a small community and the wider dissemination of the information could lead to speculation about the doctor's Fitness to Practice, whether accurate or not. The Commissioner considers that the third and fourth adverse effects have less weight, but overall he considers that the disclosure of the historical information would fail to accord with the reasonable expectations of the doctor.
73. The Commissioner accepts that the doctor was paid from the public purse, but does not feel this has any impact on his expectations in relation to private information. The Commissioner accepts that information about potential sickness is inherently private and in fact amounts to sensitive personal data. He is satisfied that the disclosure of this information has the potential to cause unnecessary and unjustified damage to the doctor. He notes that the individual has been consulted and has objected to their personal data being disclosed into the public domain. The practice explained that it considered that the release of the data in these circumstances would prejudice the doctor's right to private life.
74. When considering the legitimate interests of the public, the Commissioner accepts that public sector employees would generally expect information to be available to service users about when they

were working. This is because those employees would be available on those certain days and would have contact with the public. However, he considers that this expectation does not extend retrospectively to information about when and why people are absent. He has considered the practice's policy of covering those staff and the way that the service is run independently of the presence of the individual doctors.

75. Furthermore, the Commissioner understands that there is a public interest in accountability and transparency. Indeed these concepts form the cornerstones of the FOIA. However, the disclosure of this data would not increase transparency and accountability to a great degree in this case because there is only very limited public interest in the disclosure of the information.
76. The Commissioner does appreciate that the disclosure may assist the complainant with his complaint privately. However, it must be noted that the PHSO to whom he has made his complaint can compel the information to be provided to it should they consider it material to his complaint. Should the PHSO exercise its discretion, this information would be kept private and would be used by the appropriate regulator to consider matters of concern. The Commissioner considers that this channel is better suited to enable the information to be used for the correct purposes rather than a disclosure of the same information into the public domain. The Commissioner does not consider on the facts of this case that the complainant's private interest amounts to a public interest in ensuring the transparency of the requested information.
77. Overall, the Commissioner considers that the disclosure of this information to the public would amount to an unwarranted and unjustified disclosure of the personal data of the data subject. In the Commissioner's view the disclosure of this information would be unfair and contravene the first data protection principle. As this is so, the public authority was entitled to withhold it under section 40(2).
78. Additionally, the Commissioner does not consider that any of the conditions in Schedule 3 of the DPA could be satisfied in disclosing this information to the public. This alone means the exemption has been applied appropriately.
79. The Commissioner does not need to consider any of the other conditions of the first data protection principle because only one needs not to be satisfied and he is satisfied that at least two are in this case.
80. He also notes that the practice argued that the third data protection principle would not be satisfied through the disclosure of this information. The Commissioner has not been required to consider this principle because he has found that the first data protection principle

has not been satisfied and the consideration of further data protection principles would be merely academic.

Procedural matters

Section 17(1)(b)

81. Section 17(1)(b) of FOIA requires a public authority to explain to the complainant what exemption it is relying on when relying on an exemption under FOIA.
82. The public authority failed to tell the complainant that it was applying section 40(2) and so breached 17(1)(b) of FOIA.

Section 17(1)

83. Section 17(1) of FOIA requires a public authority to issue a correct refusal notice in 20 working days. The public authority failed to do so and also breached section 17(1).
84. These procedural breaches concern the time taken to do certain activities. The Commissioner considers that there is no way to remedy these breaches and this Notice explains what exemption has been relied upon and why it is appropriate. As this is so, he has not required any remedial steps to be taken in this case.

Right of appeal

85. 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

86. 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.
87. 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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