

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 November 2013

Public Authority: Department of Health
Address: 79 Whitehall
London
SW1A 2NS

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the Department of Health (DoH) for information regarding confidentiality agreements and information relating to the United Lincolnshire Hospitals Trust and the Staffordshire Hospitals Trust. The DoH refused the request under section 12 of FOIA on the grounds that the cost of complying with the request would exceed the appropriate limit.
2. The Commissioner's decision is that the DoH was not obliged to comply with the request as the cost would exceed the appropriate limit under section 12 of FOIA. The Commissioner also found that the DoH complied with the duty to provide advice and assistance in accordance with section 16 of FOIA. The Commissioner requires no steps to be taken.

Request and response

3. On 18 February 2013 the complainant made a request to the DoH for the following information:
 - 1) All documents relating to Confidentiality Agreements ("Gagging or Super-Gagging Clauses") in the NHS including your policy and practice guidance.
 - 2) All documents, correspondence and e-mails relating to Confidentiality Agreements at the United Lincolnshire Hospitals Trust and the Staffordshire Hospitals Trust.

- 3) All correspondence and e-mails between the Department and the United Lincolnshire Hospitals Trust for the period 2008 – 2010 concerning all issues of management at the said Trust.
4. The DoH responded to the request on 7 March 2013 when it explained that the cost of complying with the request would exceed the appropriate limit and therefore the request was refused under section 12 of FOIA. The complainant was invited to narrow his request.
5. On 7 March the complainant agreed to refine parts 2 and 3 of his request to the period 1 July 2009 to 3 February 2010. For part 1 of the request he asked that he be supplied with a summary list of documents so that he could refine this part of the request. The Commissioner is treating the complaint as relating to the refined request.
6. The DoH issued a further refusal notice on 4 April 2013 when it said that the refined request would also exceed the appropriate limit and so was refused under section 12. For part 1 of the request it provided a summary list of documents relating to confidentiality clauses which it said was to enable the complainant to refine this part of his request.
7. The complainant expressed dissatisfaction with the DoH's handling of his request which the DoH took to be a request for an internal review. The DoH presented the findings of its internal review on 2 May 2013 when it upheld the decision to refuse the request under section 12 of FOIA.

Scope of the case

8. On 25 May 2013 the complainant contacted the Commissioner to complain about the decision to refuse to comply with the request.
9. The Commissioner has confirmed with the complainant that the scope of his investigation will be to consider whether the DoH was correct to refuse to comply with the second, refined request and to consider whether the DoH satisfied the duty to provide advice and assistance under section 16 of FOIA.

Reasons for decision

Section 12 – Cost of compliance exceeds appropriate limit

10. Section 12 of FOIA allows a public authority to refuse a request if it estimates that the cost of complying with it would exceed the appropriate limit, which is set at £600 for central government departments. The costs that a public authority may take into account when producing its estimate are set out in the Freedom of Information and Data Protection (Appropriate Limit and fees) Regulations 2004 or “the fees regulations”.
11. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the costs it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
12. A public authority should calculate the time spent on the permitted activities at the flat rate of £25 per person, per hour.
13. To discover the amount of information which would potentially fall within the scope of the refined request (questions 2 and 3) the DoH carried out a search of the information it holds on its electronic file system in the areas of NHS Pay, NHS Pensions, NHS Employment Services, Workforce Capacity and Funding and Professional Standards. It used the following search terms:
 - i) “United Lincolnshire Hospitals Trust confidentiality agreement”
 - ii) “Staffordshire Hospitals NHS Trust confidentiality agreement”
 - iii) “Staffordshire Hospitals Trust”
 - iv) “Mid-Staffs”
 - v) “Mid-Staffordshire”
14. This search produced 694 documents of which many contained additional attachments. At the suggestion of the Commissioner the DoH has carried out a sampling exercise to determine how long it would take to review each of the documents to locate, retrieve and extract any information falling within the scope of the request.
15. From this it estimates that it would take on average 5 minutes to review each of the documents which gives a figure of approximately 58 hours of

staff time to comply with the request and which well exceeds the appropriate limit. The documents vary in size from 4 pages up to 52 pages and themselves include additional attachments. For example, one document contains 44 separate attachments which would also need to be searched to recover any relevant information. Therefore the Commissioner is satisfied that this figure of 5 minutes per document is a reasonable one and it may in fact be a conservative estimate of the time needed to search through the information.

16. In reaching his decision the Commissioner is mindful that the complainant's request is very broad, does not ask for specific information and would clearly capture a very significant number of documents from various areas across the DoH that would then have to be searched to determine if they contain information falling within the scope of the request. In his view the DoH has made a reasonable estimate that the request would exceed the appropriate limit and in doing so only took into account relevant costs. The estimate is not mere assertion but was instead based on a sampling exercise of the information it held and relied on the quickest method of gathering the requested information – i.e. electronic databases were used to search for relevant information.
17. For these reasons the Commissioner has decided that the request would exceed the appropriate limit and that therefore it was correct to refuse the request under section 12 of FOIA.

Section 16 – duty to provide advice and assistance

18. Section 16 places a duty on public authorities to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made requests for information to it. Under section 16(2) a public authority is considered to have met that duty if it follows the section 45 code of practice. The section 45 code of practice is guidance, produced by the Secretary of State, on how public authorities should deal with information requests. It includes what is expected from a public authority in terms of advice and assistance when a request is refused under section 12.
19. Paragraph 14 of the section 45 Code of Practice states that where a public authority is not obliged to comply with a request because it would exceed the appropriate limit to do so, then it:

"...should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee."

20. The complainant argues that the DoH has failed to comply with its duty to provide advice and assistance and that it ought to have informed him what information could be provided within the appropriate limit.
21. In response to this the DoH has said that it considers that it has provided the complainant with adequate advice and assistance. For instance in its internal review it offered the following advice in relation to that part of the request which asked for information about confidentiality agreements and Staffordshire Hospitals NHS Trust.

"In order to assist you in obtaining this information it might be helpful if the terms of your search were more specific. For example, a search under 'gagging clause' included documents on responses to Parliamentary Questions; general correspondence, media enquiries and documents relating to the development and maintenance of this policy area."

22. In a further response sent to the complainant on 7 June 2013 it explained that with regard to that part of the request which asked for correspondence and emails with the United Lincolnshire Hospitals Trust for the period 1 July 2009 to 3 February 2010 concerning all issues of management, it would be helpful if the complainant could provide details of what particular aspect of management he was interested in. It further explained that this would enable it to narrow its search so that it could identify files relating to the relevant aspects of management which it said could include finance, human resources etc.
23. The DoH also explained that there were limits to the advice and assistance it could offer. It could not, it said, say exactly what information could be provided within the appropriate limit as it did not know exactly how long it would take to locate, retrieve and extract any relevant data from a set of records until it had executed this task.
24. Whilst the complainant believes that the DoH ought to have told him what information could be supplied and that it has breached section 16 by failing to do so, it is important to note that the duty to provide advice and assistance is expressly qualified by the words *"only in so far as it would be reasonable to expect the authority to do so."* This means that although compliance with the section 45 code is likely to mean the public authority has complied with section 16; it does not necessarily mean that a failure to meet the requirements of the Code will inevitably lead to a breach of section 16 if it was not reasonable to provide advice and assistance.

25. Clearly in this case, given the way the request is phrased, the only way the DoH would be able to say exactly what information could be provided within the appropriate limit would be to search through the documents it had found when using the search terms referred to at paragraph 13. It is unreasonable to expect the DoH to do this as this would defeat the object of a public authority being able to refuse a request under section 12 of FOIA. In the Commissioner's view the DoH instead took reasonable steps to suggest to the complainant how he might refine his request. Therefore the Commissioner has decided that the DoH acted in accordance with section 16 in its handling of the request.

Right of appeal

26. 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

27. 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.
28. 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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