

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 17 August 2017

**Public Authority:** Lancashire Teaching Hospitals NHS Foundation Trust

**Address:** Preston Business Centre  
Sharoe Green Lane  
Fulwood  
Preston  
PR2 8DY

### Decision (including any steps ordered)

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1. The complainant has requested information relating to a clinical incident he witnessed on 17 August 2016.
2. The Commissioner's decision is that Lancashire Teaching Hospitals NHS Foundation Trust ("the Trust") has correctly applied section 14(1) of the FOIA (vexatious request).
3. The Commissioner does not require the public authority to take any steps.

### Request and response

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4. On 16 May 2017, the complainant wrote to the Trust and requested information in the following terms:

*"I am making a Freedom of Information Request for a copy of the Datix regarding the clinical Incident that occurred on the 17th August 2017 with the last elective case that became critical, unwell when being transferred of the Operating table to their own bed in Longton Day Case Theatre/Recovery, then transferred ¼ of a mile to Main theatres Recovery, where the Patient was stabilised an then Transferred next door to the I.C.U/H.D.U Unit.*

*The reason for my request is I was part of the team involved in the care of that patient when the Patient Arrived from Longton Day Case theatre*

*at 19:30 pm and transferred the Patient with the on/call O.D.P, Team Leader."*

5. In additional correspondence sent to the Trust on the same day, the complainant states the incident date is 17 August 2016.
6. The Trust responded on 24 May 2017 and refused to comply with the request, citing section 14(1) of the FOIA (vexatious request).
7. The Trust then conducted an internal review and wrote to the complainant on 15 June 2017.

### **Scope of the case**

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8. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of her investigation to be to determine whether the Trust has appropriately applied section 14(1) of the FOIA when refusing to comply with the request.

### **Background**

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10. The Trust explained that the complainant is a former employee and since 2015 there have been a number of employment related issues raised by him and/or involving him. This includes issues with wages as well as an incident with a colleague.
11. The Trust has explained that since 2015 when there has been an employment related issue with the complainant this has been followed by numerous requests for information from him. Although the Trust recognises that requests made under the FOIA are applicant blind, the complainant's repeat behaviour when processing his requests in its view can be collectively viewed as a campaign against the Trust.

### **Reasons for decision**

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12. Section 14(1) of FOIA states:

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

13. The term “vexatious” is not defined in the FOIA. In the Information Commissioner v Devon CC & Dransfield (2013)<sup>1</sup>, the Upper Tribunal commented that the dictionary definition of the word vexatious is only of limited use and that the question of whether a request is vexatious ultimately depends upon the circumstances surrounding the request. The Tribunal concluded that ‘vexatious’ could be defined as the

*“..manifestly unjustified, inappropriate or improper use of a formal procedure”.*

14. The decision establishes that the concepts of ‘proportionality’ and ‘justification’ are central to any consideration of whether a request is vexatious.

15. The Upper Tribunal also considered four broad issues:

(1) the burden imposed by the request (on the public authority and its staff);

(2) the motive of the requester;

(3) the value or serious purpose of the request; and

(4) harassment or distress of and to staff.

The Upper Tribunal cautioned that these considerations were not meant to be exhaustive. Rather, it stressed the importance of:

*“adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests”*

16. The Commissioner therefore needs to consider whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress in relation to the serious purpose and value of the request.

17. The Commissioner has identified a number of “indicators” which may be useful in identifying vexatious requests. These are set out in her

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<sup>1</sup> <http://www.osspsc.gov.uk/Aspx/view.aspx?id=3680>

published guidance on vexatious requests<sup>2</sup>. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is vexatious.

### The Request

18. The Commissioner notes that the complainant initially requested information contained in a 'Datix' relating to the 'clinical incident' in an email to the Chair of his appeal hearing on 27 April 2017, and that the Trust responded to him on 28 April 2017 confirming that it will conduct a search for the information.
19. However, as well sending an email to the Chair on 16 May 2017 chasing a response, the complainant also sent a FOI request on the same day for the same information (which is the subject of this Decision Notice) to his single point of contact at the Trust.
20. The Chair responded to the complainant on 18 May 2017 (in relation to his request of 27 April 2017) confirming that a Datix could not be traced. However, the complainant then sent his single point of contact an email on 24 May 2017 in relation to the FOI request.

### **Was the request vexatious?**

#### Burden on the authority

21. The Commissioner has considered the Trust's submissions relating to the 'burden on the authority' set out in her guidance. This is where the effort required to meet the request will be so grossly oppressive in terms of strain on time and resources, that the authority cannot reasonably be expected to comply, no matter how legitimate the subject matter or valid intention of the requester.
22. In this case, the Commissioner considers the complainant's requests have led to additional Trust time and resources being utilised in dealing with the request. Any further time and resources required to process the request would therefore be a further burden on the Trust.
23. The Trust explained that between 14 May 2017 and 12 July 2017 the complainant sent 75 emails relating to various requests he had made.

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatiousrequests.pdf>

The Trust further explained that this figure/list of emails is system generated and is therefore not exhaustive and unlikely to include all communications the Trust has received from him. The Trust also says that the figure does not include *"internal communications or those with outside bodies."*

24. The Trust has provided the Commissioner with evidence to demonstrate the burden imposed on it and although this is not just in relation to FOI requests, it clearly demonstrates the repeated behaviour of the complainant.
25. The Trust further argued that it estimates that to date it has spent £17,672 in staff costs within its Information Governance and Human Resources teams to specifically deal with all the work associated with the complainant's requests. It says this figure does not take into account its every dealing with the complainant, e.g. his contact with other employees and the time spent locating documents he claims exists. The Trust also says that after exhausting all avenues to process the complainant's requests it can no longer continue to apportion valuable resources to process additional correspondence relating to his further requests.
26. It is further noted that dealing with the complainant's requests, at times, involves clinical staff which are taken away from their medical duties.

Purpose and value of the request

27. In relation to the serious purpose and value of the request, the Commissioner notes that at the time of the request the information was being sought for the purpose of the complainant's appeal hearing which has since taken place. The complainant informed the Commissioner on 10 August 2017 that the information is now required for an Industrial Tribunal. However, the Commissioner also notes that the Trust has already confirmed to the complainant in its response to his request for the same information of 27 April 2017 that this information is not held.
28. The Trust acknowledges that a requestor's motive is generally irrelevant when making a request under the FOIA and in isolation the complainant's requests may not appear vexatious.
29. Initially it appears that the request has purpose and value to the individual. However, the Trust has informed him that the information is not held and yet he persists in his attempts to obtain it.
30. Having considered the Trust's submissions the Commissioner's view is that this request is a continuation of the complainant's repeated and excessive contact with the Trust. This includes his significant additional

contact such as raising issues about responses before they have been provided, chasing responses before deadlines for compliance, his unwillingness to co-operate and not using his allocated single point of contact. In context, the request therefore appears to be of little purpose.

31. The Commissioner further considers that if such information was required for an Industrial Tribunal it would be made available to the panel upon request.

#### Overlapping requests

32. The Commissioner considers that the Trust's explanations and the examples provided can be viewed as 'overlapping requests' as set out in her guidance. This is where the requester sends in a new request before the public authority has had an opportunity to address their earlier enquiries.
33. For example, the complainant sent the Trust a request for information on 16 May 2017. The Trust confirmed it would undertake a search for the information however the complainant chased for an update before the statutory timeframe for compliance had elapsed.
34. The Commissioner also notes that the complainant made a Subject Access Request (SAR) under the Data Protection Act to the Trust on 3 May 2017. The Trust responded on 17 May 2017 confirming it would undertake searches and provide its response by 12 June 2017, within the statutory timeframe of 40 calendar days.
35. However, the complainant sent an email to the trust on 24 May 2017 chasing the requested information and the Trust responded the same day reiterating its previous response. The complainant emailed the Trust again the next day as he considered that he should not have to wait until the final day before receiving any personal data held and that data could be sent as and when it was retrieved.
36. The Trust explained that the extra correspondence it receives whilst processing the complainant's requests has resulted in further work in terms of responding to both his further communications/requests as well as his original request(s).
37. In relation to a SAR the Trust received from the complainant on 20 December 2016, the Commissioner notes the Trust wrote to him on 6 and 24 January 2017 asking him to clarify the search criteria of the request. The complainant responded on 8 February 2017 but did not provide the requested clarification instead asking questions in relation to an additional SAR he had made.

38. The Trust then wrote to the complainant again on 13 February 2017 chasing the requested clarification to process the SAR of December 2016. The complainant responded on 27 February 2017, again he did not provide the requested information and again asked the Trust questions in relation to the additional SAR. The Trust further chased the complainant for the requested clarification on 6 and 13 March 2017 and it was finally provided on 16 March 2017.
39. The Trust explained that the complainant's further requests ultimately become part of an 'indefinite chain' and focus on process rather than substance, as they become far removed from the original request/issue, where the object of requiring a response from the Trust becomes an end in its self. It says that the complainant is unlikely to regard any response from it as adequate.

#### Intransigence

40. The Commissioner considers that the Trust's explanations and the examples above are indicative of an intransigent attitude from the complainant. This is where the requester takes an unreasonably entrenched position, rejecting attempts to assist and shows no willingness to engage with the authority. In this case, the Commissioner considers the complainant's continual refusal to confine his communications and contact with the Trust to his allocated single point of contact as well as his previous refusal to attend meetings to discuss his employment related issues all demonstrate an intransigent attitude.

#### Harassment or distress of and to staff

41. The Trust also explained that the complainant has a history of 'harassing' its staff in relation to issues and requests relating to his employment. It says that those who have had contact with him find his approach confrontational and the tone of his communications to be aggressive. Consequently they feel harassed by him and are therefore apprehensive in dealing with him. In one case an additional display phone was provided in order to prevent him calling individual staff directly.
42. Despite being allocated and asked to use a single point of contact within the Trust which would also ensure a coordinated response is provided, the complainant has continually failed to do so.
43. The Commissioner notes that in its letter to the complainant dated 4 May 2017, the Trust advised him to use the allocated single point of contact and this is reiterated in further correspondence dated 12 and 17 May 2017 and 20 June 2017.

44. The Trust has already spent a disproportionate amount of additional time and resources in dealing with the complainant's requests. In spite of this the complainant has continued to cause disruption within the Trust and distress to its staff.

### **The Commissioner's view**

45. In her guidance, the Commissioner recognises that the FOIA was designed to give individuals a greater right of access to official information with the intention of making public bodies more transparent and accountable. She also recognises that public authorities must keep in mind that meeting their underlying commitment to transparency and openness may involve absorbing a certain level of disruption and annoyance.
46. While most people exercise this right responsibly, she acknowledges that a few may misuse or abuse the FOIA by submitting requests which are intended to be annoying or disruptive or which have a disproportionate impact on a public authority.
47. In addition, the Commissioner also recognises that dealing with unreasonable requests can place a strain on public authorities' resources and get in the way of delivering mainstream services or answering legitimate requests. Furthermore, these requests can also damage the reputation of the legislation itself.
48. The Commissioner has considered the Trust's evidence but has not received any further submissions from the complainant.
49. The Commissioner considers that, viewed in isolation, the request in this case may not seem to impose an unreasonable burden. However, when considered in the context and history of the complainant's contact with the Trust, the Commissioner does not consider that the purpose of the request justifies the disproportionate effect on the authority.
50. Furthermore, the Commissioner considers that responding to the request is likely to cause disruption, harassment and distress to staff, particularly as the Trust has already confirmed in response to his previous overlapping request that the information is not held. This can be considered as an inappropriate use of information rights under the FOIA.
51. The Commissioner has seen no evidence to suggest that if the information was held, providing it would satisfy the complainant or bring an end to his correspondence with the Trust about its handling of the request.



52. Conversely, she considers that the complainant may use the requested information to create further points of dispute. The Commissioner can understand how responding to this request, when coupled with previous dealings on the same matter, would cause a disproportionate or unjustified level of disruption, irritation or distress.
53. Furthermore, the Commissioner has taken into consideration the fact that this is a hospital providing medical care and its medical obligations are clearly of utmost importance. The Commissioner considers the Trust was correct to deem the request as vexatious and that section 14(1) of the FOIA is engaged.

## Other matters

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54. The complainant has raised a number of additional issues which are addressed below.

### **Section 10 – time for compliance**

55. The complainant says that the Trust failed to process his request within the statutory timescale set out in section 10 of the FOIA.
56. The complainant also says that the Trust failed to process his internal review request within the required timescale.
57. Section 10(1) states a public authority must respond to a request promptly and in any event no later than 20 working days after the date of receipt of the request.
58. The complainant made his request on 16 May 2017 and the Trust responded on 24 May 2017. The Commissioner therefore considers that the Trust has complied with section 10(1) of the FOIA.
59. The FOIA does not require a public authority to conduct a review of its handling of a request in response to any complaint it receives, and so does not specify a timescale within which a public authority ought to respond to such complaints. However, in section 84 of the Commissioner's 'Section 45 - Code of Practice – request handling' guidance, the Commissioner provides advice on how public authorities should deal with complaints and reviews, she states that where a public authority has a complaints procedure "In any event an internal review should take no longer than 20 working days in most cases, or 40 in exceptional circumstances."
60. The complainant requested that the Trust review its response on 26 May 2017 and the Trust responded with the outcome of its review on 15 June

2017. The Commissioner therefore considers that the Trust has complied with section 84 of her Code of Practice.

### **Section 17 – Refusal notice**

61. The complainant says that the FOI Team and not [single point of contact] should have responded to his request and also that he is entitled to an explanation as to why he is 'vexatious'.

Section 17(1) of the FOIA states:

62. "A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—
- (a) states that fact,
  - (b) specifies the exemption in question, and
  - (c) states (if that would not otherwise be apparent) why the exemption applies."
63. The Trust's initial response to the complainant's request was sent on 24 May 2017 from a Freedom of Information Officer (in its Information Governance Team) via the single point of contact it allocated to the complainant.
64. The response states that the Trust it is not obliged to comply with the request, that it has engaged the exemption under section 14 of the FOIA, and also that it considers the request vexatious. The Commissioner therefore considers that the Trust has complied with the requirements set out in section 17(1) of the FOIA.

### **The Trust's review**

65. The complainant says that the Trust's review is 'contrived' and 'false' because it is not clear from the signature on it who the signatory is and that the address implies that it has been carried out by a member of the Trust's Information Governance Team and not a member of its Freedom of Information team.
66. It is quite usual for a FOI Team to sit within the function of Information Governance. Lack of clarity of the signature on the response is not an indication of falsification. It is clear from the Trust's review and its correspondence with the Commissioner during her investigation that the

review was conducted by the Trust and therefore she considers no further action required by it.

67. Neither the FOIA nor the Commissioner's 'Section 45 - Code of Practice – request handling' guidance requires a public authority to conduct a review of its handling of a request in response to any complaint it receives, and so do not specify who within a public authority should conduct reviews in response to such complaints.

**Information not held**

68. The complainant has provided the Commissioner with information which he says demonstrates the requirements under which a Datix should be completed and that this applies to the 'clinical incident' he was present at on 17 August 2016. Therefore it is his view the information ought to be held by the Trust.
69. The Commissioner's remit nor the FOIA extends to what a public authority *should* hold only the information it *does* hold. In any event the Commissioner's decision is that section 14(1) of the FOIA has been applied correctly in this case and therefore it is not necessary for her to consider whether the information is held.

## Right of appeal

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70. 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: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

71. 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.
72. 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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