

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 November 2018

Public Authority: NHS England
Address: 2N22 Quarry Hill
Quarry Hill
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant made a freedom of information request to NHS England for the minutes of a meeting concerning his deceased partner's treatment and other related matters. He received no response.
2. When contacted by the Commissioner to ask why there had been no response, the public authority initially informed her that it had not received the request she had attached. At a later date NHS England explained that it had in fact received a request on the same day.
3. NHS England explained that it had made clear in a previous response to the complainant when it had applied section 14(1) that it would not respond to further similar requests. Therefore, it did not consider itself obliged to respond when it received such requests and would not do so.
4. The Commissioner's decision is that NHS England correctly applied section 14(1) to refuse the complainant's request and she requires no steps to be taken. She has also decided that NHS England was not obliged to issue a refusal notice in respect of the request, in accordance with section 17(6) (refusal of request) of the FOIA.

Request and response

5. On 28 February 2018, the complainant wrote to NHS England and requested the following information:

'The minutes of the Meeting of the Performance Screening Group of **[date redacted]**, which discussed,

"The matter relates to the primary care treatment of **[deceased partner's name redacted]** and her final illness".

I enclose again the document that confirms that I am the Representative of **[deceased partner's name redacted]** and her estate.

I now request a copy of any minute of that meeting on **[date redacted]** and or any other document that noted any details of the primary care treatment of **[deceased partner's name redacted]** and her final illness discussed in that meeting.'

The public authority does not dispute that it received the first part of the request as set out above. In the version sent to the Commissioner, the complainant requested again some information he had previously requested on 11 February 2018:

'I, as the official Representative of the Estate of **[deceased partner's name redacted]** request the following Freedom of Information Requests:-

- a) Did the Performance Screening Group have any knowledge of the results of the GMC's Report and their Experts' Reports, when discussing on **[date redacted]** the matter relating, "to the primary care treatment of **[deceased partner's name redacted]** and her final illness"?
 - b) Has the Performance Screening Group at any time interviewed or taken a statement from **[name of doctor redacted]** of **[name of practice redacted]** on the primary care treatment of **[deceased partner's name redacted]** and her final illness?
 - c) Has NHS England received a copy of the GMC Report with the GMC's Expert's Reports concerning **[name of doctor redacted]** of **[name of practice redacted]** and his "shortcomings" in his treatment of **[deceased partner's name redacted]** at any time?"
6. NHS England believes that it only received the first page of this request and did not respond because it had previously stated on 28 November 2018 in response to a different request for information that it would not respond to any similar requests. The internal review of 6 December 2018 reaffirmed this position:

"The section 14(1) refusal issued to you in response to **[reference redacted]** and referred to in this letter will apply to any further correspondence which we receive which relates to your previous FOI requests, your complaint, or any other

related matter. Such correspondence will be logged accordingly but will not be responded to."

7. When the Commissioner wrote to the public authority on 14 May 2018 the text of the request as sent to the Commissioner was enclosed but the view of NHS England, as explained in its initial response, is that this request which revisits the same matters that it had applied section 14(1) to previously would not have been responded to any more than the version it had received.
8. As the public authority did not feel obliged to respond to the request it also did not feel obliged to conduct a review.

Scope of the case

9. The complainant contacted the Commissioner on 7 April 2018 to complain about the way his request for information had been handled.
10. The Commissioner considers the scope of this case to be whether NHS England was entitled to rely on section 14(1) of the FOIA in refusing this request as vexatious and consequently whether NHS England was entitled to rely on section 17(6) of the FOIA in not issuing a refusal notice.

Reasons for decision

11. Section 1(1) of the FOIA provides a general right of access to recorded information that is held by public authorities. Section 14(1) of the FOIA states the following:

"Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious."
12. The FOIA does not define the term "vexatious". The Upper Tribunal (UT) considered the issue of vexatious requests in *The Information Commissioner vs Devon County Council & Dransfield* [2012] UKUT 440 (AAC), (28 January 2013). The UT decided that the dictionary definition had limited use and that it depended on the circumstances surrounding the request. The UT defined it as a "...manifestly unjustified, inappropriate or improper use of a formal procedure." (paragraph 27). The approach in this case was subsequently upheld in the Court of Appeal.

13. The Dransfield judgment 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. It explained that these considerations were not meant to be exhaustive and also explained 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" (paragraph 45).
14. The emphasis on protecting public authorities' resources from unreasonable requests was acknowledged by the UT when it defined the purpose of section 14 as being -

"...concerned with the nature of the request and ha[ving] the effect of disapplying the citizen's right under Section 1(1)...The purpose of Section 14...must be to protect the resources (in the broadest sense of that word) of the public authority from being squandered on disproportionate use of FOIA..." (paragraph 10).

The Commissioner's guidance¹ explains that the UT's decision established that the concepts of 'proportionality' and 'justification' are central to any consideration of whether a request is vexatious.

15. There are a number of 'indicators' that the Commissioner has identified which are useful in identifying vexatious requests. These are set out in her published guidance on vexatious requests. They include (amongst others):
- the burden on the authority;
 - personal grudges;
 - unreasonable persistence;
 - unfounded accusations;
 - intransigence;
 - frequent or overlapping requests; and
 - deliberate intention to cause annoyance.

The complainant's view

¹ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

16. The complainant's view as expressed to the Commissioner in his complaint, dated 7 April 2018, is that NHS England has not provided him with information to which he is entitled as executor of his late partner's estate and her appointed representative.
17. On 9 May 2018 in response to a letter from the Commissioner asking for further documents, the complainant made it clear that he was aware that NHS England would not respond to future similar requests such as the request that is the subject of this decision notice, because he quotes directly from the NHS England letter of 28 November 2017 that contained that warning. He also enclosed this same letter to the Commissioner.
18. The complainant does not accept that NHS England is entitled to refuse his requests and he has written to many different individuals outlining his view that NHS England has a 'duty of candour' to provide him with everything he requests as his late partner's representative. He has argued that the Performance Screening Group whose minutes he was requesting is secretive and that the evidence it hears and its findings are difficult to discover.

NHS England's view

19. NHS England in its response to the Commissioner provided a narrative of the complainant's correspondence with the public authority since his first request in March 2017. It was explained that the complainant's requests all relate to a complaint from 2011 about a medical practice where his partner had been a patient.
20. On 19 October 2016 NHS England had received a formal complaint letter about a senior member of staff whom the complainant had been in contact with regarding his original complaint about his late partner's surgery. On 16 March 2017 the complainant was sent a letter by the relevant regional team with its final response to this complaint. This letter outlined the original complaint process that had taken place, including the fact that the complainant had already gone to the Parliamentary and Health Service Ombudsman (PHSO) which had carried out an investigation and made recommendations and the General Medical Council. After outlining the copious correspondence and finding that there was nothing further that could be done that hadn't already been done, NHS England said that the complaint case would be closed and any further communication declined. This did not apply to FOIA requests.
21. On 15 March 2017 (received by the public authority on 16 March 2017) the complainant had made an FOI request about the handling of his complaint by NHS England about the senior member of staff.

22. NHS England responded fully (albeit late) to the complainant's 16 March 2017 request. When another request was received on 27 April 2017 it was refused under section 14(1). The public authority explained that matters that had been concluded were being revisited and that the file held 250 pieces of correspondence relating to his complaint which would need to be reviewed and redacted. NHS England believe that this was an attempt to reopen the complaint via freedom of information legislation. The complainant followed up this refusal notice with a review request.
23. The public authority highlighted to the Commissioner that it had been in "almost constant correspondence" either with the complainant or with the ICO regarding his complaints since March 2017. It further explained that responding to these requests across multiple channels (complaints and FOI) would be very time-consuming. The reviewing that would need to be carried out (given the nature of the content) could not be included in any calculation under section 12(1) due to the restrictions, though it would involve a "significant time burden".
24. To support its arguments NHS England then addressed some of the Commissioner's guidance in order to provide context to this refusal. The public authority also provided a quantity of correspondence between it and the complainant to reinforce those arguments.
25. The local complaints team believe that the complainant's interactions with staff have now moved beyond vexatious. The complaint directed at the senior member of staff emerged because that person had responded to him about his 2011 complaint and thus became the focus of complaints herself. Staff members consider that FOI legislation was then utilised in an inappropriate and unacceptable manner.
26. The root of this ongoing correspondence is the original complaint in 2011. There has been a thorough investigation by the relevant regulatory authorities and the matter was concluded late in 2013. The complaint procedure with NHS England has been exhausted. NHS England feels that reopening these matters under the FOIA is an attempt to usurp the complaint procedure and is an inappropriate use of the legislation.
27. NHS England highlights the scatter-gun approach outlined in the Commissioner's guidance and adopted by the complainant. He has written to the Chief Executive of NHS England and the Department of Health and Social Care in an attempt to elicit a response and reopen what is now a closed matter.
28. The public authority states that the complainant has adopted an entrenched position. Whilst going through the complaint system and attending meetings with the GP practice and the regional team, he has continued to submit FOI requests. NHS England feel that he is

continuing to pursue matters by means of an alternative and inappropriate access scheme and the public authority believes that it has reached the point where making requests for information has become an end in itself and that correspondence merely generates further requests.

29. Finally, NHS England acknowledges that the complaint and the FOI requests may be of specific interest to the complainant. However, it considers that there is no public interest in continuing to respond to his requests as there is no ongoing risk. Recommendations from the PHSO and the General Medical Council have been complied with. Consequently these requests have limited purpose and value when set against the impact on NHS England's time and resources.

The Commissioner's view

30. On 3 July 2018 the Secretary of State for Health and Social Care at the time, Jeremy Hunt, was copied into the complainant's correspondence about NHS England to the ICO. He sent a direct letter to Jeremy Hunt copying in another MP, Norman Lamb, the Freedom of Information Corporate Communication Team, the Chief Executive of NHS England and the Commissioner. On 2 August 2018 he wrote to the new Secretary of State for Health and Social Care, Matt Hancock, including his previous letters to Jeremy Hunt and copied in the same list of people excluding Jeremy Hunt (as he no longer had the health brief) and the FOI Corporate Communication Team. On 10 September 2018 the complainant wrote to Matt Hancock and various copied in parties. On 15 September 2018 he wrote again to Matt Hancock copying in various parties.
31. The Commissioner considers that continually writing in this way causes confusion for all the parties concerned. For example, the request that is the subject of this complaint has two versions – the one that the complainant sent to the Commissioner has the same first page but a different second page from the one held by the public authority that it has provided to the Commissioner. How this occurred cannot really be determined now. However, it is possible that it is the inevitable outcome of producing several copies of letters and putting together different versions to different parties.
32. Within these letters the complainant sometimes reverts to earlier or different requests that make comprehending exactly what is being requested at any one time difficult and is an example of frequent/overlapping requests that is one of the indicators of a vexatious request. The Commissioner accepts that the context and history of these requests demonstrate a level of persistence in trying to obtain information by means of deluging the various parties closely or distantly concerned. Though there is no doubt that this stemmed from a

serious purpose there would seem to be no ultimate purpose in using inappropriate legislation over matters that could only ever be properly addressed through the appropriate complaint procedure.

33. The complainant has adopted a scattergun approach over the last few years regarding his complaint and the ensuing mass of correspondence generated from that complaint. The Commissioner considers that the complainant is locked into a cycle of complaint that generates further complaints and requests for information. Copying in an increasing list of individuals seems to be an attempt to canvass more people's views and reopen a complaint that has already reached a formal conclusion. This is not an appropriate use of the legislation as the FOIA was never meant to perpetuate complaints that are more properly dealt with by alternative complaint procedures.
34. The Commissioner has considered NHS England's application of section 14(1) to the complainant's request. The Commissioner has seen no evidence that would make her disagree that the request displays several of the indicators that have been identified as characteristic of a vexatious request – unreasonable persistence, intransigence and overlapping requests. This has inevitably led to a burden on the authority that is no longer justified or proportionate.
35. For the reasons given above, the Commissioner is satisfied that NHS England was entitled to apply section 14(1) of the FOIA to refuse to comply with these requests.
36. Section 17(6) of the FOIA allows a public authority to refuse to issue a refusal notice when -
 - (a) *the public authority is relying on a claim that section 14 applies,*
 - (b) *the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and*
 - (c) *it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.*
37. The Commissioner would normally expect a public authority to issue a refusal notice except when she considers it would be unreasonable to do so. She accepts that NHS England gave the complainant warning that any future requests that revived the same issues would not be responded to. Therefore it was not obliged to issue a further notice when a request that did cover the same ground was made.
38. NHS England in its review on 6 December 2017 of a refusal notice for a previous request upheld the application of section 14(1) and reiterated

the warning that had been given in the refusal notice (see paragraph six). This warning was repeated on 20 December 2017 in response to another request. Though section 17(6) was not cited it was made clear that section 14(1) applied both to that request and any future requests that were received on the same theme.

39. In view of the explicit warnings provided by NHS England to the complainant, the Commissioner accepts that it was reasonable for the public authority to apply section 17(6) to this request as it did clearly revisit the matters that NHS England had refused to deal with further.

Right of appeal

40. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

41. 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.
42. 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

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