

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 May 2019

Public Authority: Kettering General Hospital NHS Foundation Trust

Address: Thorpe House
Rothwell House
Kettering
Northants
NN16 8UZ

Decision (including any steps ordered)

1. The complainant has requested information relating to the log of all whistleblowing incidents kept by Kettering General Hospital NHS Foundation Trust (the Trust).
2. The Commissioner's decision is that the Trust failed to respond to the complainant's request within 20 working days of receipt and has therefore breached section 10(1) of the FOIA.
3. Since the Commissioner considers that the request has now been responded to, she does not require the Trust to take any further steps in relation to this complaint.
4. The Commissioner notes that the Trust has instructed a Solicitor's firm to act on its behalf in relation to this matter. However, for ease of reference the term 'the Trust' will be used in this decision notice to collectively refer to correspondence from both the Trust itself and the Solicitor's firm on the Trust's behalf.

Request and response

5. On 27 December 2018, the complainant wrote to the Trust and requested information in the following terms:

"I formally request the following under foi.

Log of all whistleblowing incidents kept by the trust with all the incidents but including those from 2013 to the date of this email. To include incident date and description of incident. I formally request this within the timescales set and no later than 25 days from now."

6. On 4 February 2019, the complainant wrote to the Trust advising that the response to his information request was overdue. The complainant asked the Trust to send its reply by email and provided an email address.
7. The Trust responded to the complainant's request on 26 March 2019 and re-sent the response on 12 April 2019.

Scope of the case

8. The complainant contacted the Commissioner on 24 February 2019 to complain about the way his request for information had been handled.
9. The Commissioner has considered whether the Trust dealt with the request in accordance with its obligations under section 10(1) of the FOIA.

Reasons for decision

Section 10 – time for compliance

10. Section 1(1) of FOIA states any person making a request is entitled to be told whether the information they have asked for is held and, if so, to have that information communicated to them, subject to the application of any exemptions that are appropriate.
11. Section 10(1) states that a public authority shall respond to information requests promptly and in any event no later than 20 working days from receipt.
12. The request was made on 27 December 2018 and a response should therefore have been provided no later than 25 January 2019.
13. On 9 March 2019, the Commissioner wrote to the Trust advising it to respond to the request within 10 working days. She provided the Trust with a copy of the request and asked the Trust to state in its response whether or not it held the requested information and, if so, to either provide the information or issue a refusal notice in accordance with the requirements of section 17 of the FOIA. She also provided links to her Guide to Freedom of Information, and guidance issued in respect of the

time in which a response to a request for information should be provided.

14. The Trust responded to the complainant's request on 26 March 2019.
15. Having reviewed the Trust's response to the request, the Commissioner noted that it referred to a letter it sent to the complainant's daughter in December 2018, confirming that the Trust would not correspond with her by email, and that her emails to the Trust would be blocked/not responded to. However, it was unclear to the Commissioner whether the email address the complainant was using was blocked by the Trust at the time of his request of 27 December 2018.
16. The Commissioner therefore wrote to the Trust on the 29 March 2019, asking it to confirm whether or not the Trust had blocked the email address the complainant was using at the time of his request of 27 December 2018. She also asked the Trust to provide an explanation about how the blocking of emails sent to the Trust works.
17. The Trust responded to the Commissioner on 10 April 2019. It stated that the email address used by the complainant at the time of his request was blocked by the Trust on 21 December 2018. It explained that the email address was *"added to a list of blocked senders in the Trust's Sophos email appliance by the Trust's IT department (this is akin to a "spam filter"). This effectively works to compartmentalise emails and to prevent them from reaching their intended recipient's inbox."*
18. The Trust went on to explain that *"The block parameters are set centrally by the Trust's IT department and cannot be controlled or overridden by end-users, who will not themselves receive any notice that blocked emails have been sent to the Trust. As with typical spam filters, no notice is ordinarily given to the sender by the software itself that their email has been blocked, because to do so would simply encourage the sender of spam to send emails from a different account so as to circumvent the block. No regular review is undertaken of the emails that have been blocked, although there is a facility to investigate such emails and unblock accounts."*
19. The Trust is therefore of the view that the email address the complainant used at the time of his request of 27 December 2018 was already blocked and his request was therefore not received by anyone at the Trust.
20. Having considered the Trust's response, the Commissioner accepts that the Trust took steps to stop emails from the complainant's email address reaching the intended recipient's inbox, in this case the FOI inbox. However, the process used by the Trust to block email addresses does

not prevent such emails being received by the Trust itself, just the intended recipient's inbox. The Commissioner understands that the emails from blocked senders are still received onto the Trust's email server, and that the Trust has a facility to access the emails sent from email addresses that it has blocked.

21. The Commissioner is therefore satisfied that, at the time of the request, the Trust received the complainant's request of the 27 December 2018.
22. On 4 April 2019, the complainant confirmed to the Commissioner that he had still not received a response from the Trust by email, and asked the Commissioner to escalate the matter.
23. The Commissioner responded to the complainant on 10 April 2019. She explained to the complainant that the Trust responded to his request by post on 26 March 2019.
24. In response to the complainant's concern about the Trust not responding to him by email, the Commissioner explained to the complainant that a public authority should send the information requested by whatever means is most reasonable. For example, if the requester has made their request by email, and the information is an electronic document in a standard form, then it would be reasonable for the public authority to reply by email and attach the information.
25. Requesters have the right to specify their preferred means of communication in their initial request. The provisions of section 11 concern how information requested under the FOIA is to be provided to the requester where the requester has expressed a particular preference. Section 11(1)(a) provides for the requester to be provided with a copy of the information in permanent form. A requester may express a preference for the information in a particular form e.g. electronic or hard copy.
26. However, a public authority is only obliged to comply with a requester's preference if the requester expresses it when they make their FOIA request, and even then only where the request is reasonable. The public authority does not have a duty to comply with any expressed preference if the requester expresses it later, either after the public authority has started to deal with the request or after it has provided the information.
27. In this case, the complainant did not express a preference for the means of communication when he made his information request to the Trust on 27 December 2018. The Trust is therefore not obliged to comply with the preference the complainant expressed in his follow up letter to the Trust on 4 February 2019.

28. On 10 April 2019, the complainant responded to the Commissioner and stated that he had not received the Trust's letter dated 26 March 2019 by email. The complainant also wanted proof that the letter was received, as he stated that he had not received the Trust's letter dated 26 March 2019 by any means of communication. The complainant reiterated that his preferred method of communication was by email. The complainant requested the Commissioner issue a decision notice in relation to his information request.
29. The Commissioner contacted the Trust on 12 April 2019 to clarify if it had any proof of postage for the letter that it sent to the complainant on the 26 March 2019.
30. On 14 April 2019, the complainant wrote to the Commissioner confirming that he had still not received the requested information from the Trust. He advised that he is "*prepared for delivery via email and have written to [the Trust's Solicitors] to confirm arrangements if they have to send via letter.*" The complainant also suggested resubmitting his request and stating that the information has to be received by email.
31. The Trust wrote to the Commissioner on 17 April 2019 and advised that the response sent to the complainant by post on 26 March 2019 was sent by normal post (i.e. unrecorded). The Trust confirmed that it re-sent this response to the complainant by special delivery on 12 April 2019, and that the recipient refused delivery. The Trust provided evidence that the recipient refused delivery and advised that it was of the view that it had reasonably complied with its obligations.
32. The complainant wrote to the Commissioner on 24 April 2019, again requesting a decision notice be issued.
33. The Trust wrote to the Commissioner on 25 April 2019, providing a copy of the complainant's letter to it stating his preferred arrangements for the Trust's communications (explained in more detail in paragraph 36 of this decision notice).
34. The Commissioner responded to the complainant on 2 May 2019, advising him of the Trust's response as explained in paragraph 31 of this decision notice.
35. In response to the complainant's suggestion about resubmitting the request stating that the information has to be received by email, the Commissioner advised the complainant that he may wish to do this. However, she reminded the complainant that a public authority only has to comply with a preference "so far as is reasonably practicable".
36. With regards to the complainant's letter to the Trust stating his preferred arrangements if the Trust had to send the response by letter,

the Commissioner understands that these arrangements involved the Trust calling the complainant prior to any communications being sent. The Commissioner advised the complainant that she appreciates that there is background history with regards to the complainant and his daughter's relationship with the Trust that may cause him to want the Trust to communicate with him in a certain way. However, when handling an FOIA request a public authority would not be required to comply with such an arrangement and it would be entirely at their discretion.

Conclusion

37. The Commissioner is satisfied that the Trust received the complainant's information request of 27 December 2018, and the Trust's responses of the 26 March 2019 and 12 April 2019 are clearly outside the required 20 working days stipulated in section 10(1) of the FOIA.
38. It is therefore clear to the Commissioner that, in this case, the Trust had failed to respond to the request in accordance with the legislation.
39. However, as the Trust has now demonstrated that it sent the response to the complainant, the Commissioner is satisfied that the Trust has now complied with its obligation under the FOIA. The fact that the complainant refused delivery does not affect this. The Commissioner therefore does not require the Trust to take any further steps.

Other matters

40. The Commissioner understands that there may be situations where the Trust has to prevent emails sent from certain email addresses from reaching particular inboxes, in order to effectively manage its contact with particular individuals. However, the Trust will need to have a process in place to regularly check the emails that have been re-directed to ensure that they do not contain an information request.

Right of appeal

41. 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@justice.gov.uk

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

42. 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.
43. 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

Gemma Garvey
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF