

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 June 2020

Public Authority: Kingston Hospital NHS Foundation Trust

Address: Kingston Hospital
Galsworthy Road
Kingston upon Thames
Surrey
KT2 7QB

Decision (including any steps ordered)

1. The complainant has requested information in relation to the medication Midazolam and serious incident reports. Kingston Hospital NHS Foundation Trust (the Trust) considers the request to be vexatious under section 14(1) of the FOIA.
2. The Commissioner's decision is that the Trust has correctly cited section 14(1) of the FOIA in response to the request.
3. The Commissioner does not require any further steps to be taken as a result of this decision notice.

Request and response

4. On 18 October 2018, the complainant wrote to the Trust and requested information in the following terms:

"As Midazolam is in the Kingston formulary stating sub cut use is only for palliative care

Please advise in relation to that palliative care usage

Who are the manufacturers of the Midazolam used by the trust for the above purpose

What size ampoules used on ward

What dilution/strength of ampoules are used on ward

Who is responsible for raising serious incidents reports re drug related incidents

*How many drug related serious incident reports were raised in 2016
And how many reports were made to the yellow card scheme re
adverse drug reactions in 2016"*

5. The Trust responded on 15 November 2018. It refused to comply with the request under section 14 of the FOIA as it considered the request to be vexatious. It stated that the complainant had made frequent and overlapping requests under the FOIA, data protection legislation, Access to Health Records Act and the Trust's own complaints procedure in relation to the same subject, which it stated had placed a considerable burden on the Trust. The Trust advised the complainant to raise any remaining concerns around the subject with the Parliamentary and Health Service Ombudsman.
6. The complainant responded to the Trust on 20 November 2018, challenging the Trust's decision that her request was vexatious. The complainant stated to the Trust that she had repeatedly requested this information since 2016, and the Trust had been ignoring her questions. The complainant asked the Trust to raise the matter as an internal review and asked it to clarify its position.
7. The complainant followed up her internal review request with the Trust on 2 February 2019, 14 March 2019, and 2 April 2019.

Scope of the case

8. The complainant contacted the Commissioner on 12 April 2019 to complain about the way her request for information had been handled.
9. It is noted that the Trust has not carried out an internal review in this case. The Commissioner does have discretion to accept a complaint for full investigation without an internal review and she has exercised her discretion in this case. This is because the Commissioner believes in this case that there would be no benefit in asking the complainant to start the process again.
10. The Commissioner considers the scope of this case is to determine whether the Trust has correctly applied section 14(1) of the FOIA to the request for information.

Reasons for decision

Section 1 – general right of access

11. Section 1(1) of FOIA says that an individual who asks for information from a public authority is entitled to; (a) be informed whether the authority holds the information and (b) if the information is held, to have that information communicated to them.

Section 14 – vexatious and repeat requests

12. Section 14(1) of the FOIA states that “section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.” There is no public interest test.
13. The term “vexatious” is not defined in the FOIA. The Upper-Tier Tribunal considered the issue of vexatious requests in the case of the Information Commissioner and Devon County Council vs Mr Alan Dransfield (GIA/3037/2011) (Dransfield) and concluded that the term could be defined as “manifestly unjustified, inappropriate or improper use of a formal procedure”.
14. The Dransfield case identified four factors that may be present in vexatious requests:
 - the burden imposed by the request (on the public authority and its staff)
 - the motive of the requester
 - harassment or distress caused to staff
 - the value or serious purpose of the request.
15. The Upper Tribunal did, however, also caution 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” (paragraph 45).
16. In the Commissioner’s view, the key question for public authorities to consider when determining if a request is vexatious is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.

17. The Commissioner has identified a number of 'indicators' which may also be useful in identifying vexatious requests. These are set out in her published guidance on vexatious requests¹. In short, they include:
- abusive or aggressive language
 - burden on the authority
 - personal grudges
 - unreasonable persistence
 - unfounded accusations
 - intransigence
 - frequent or overlapping requests
 - deliberate intention to cause annoyance.
18. 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.
19. Where relevant, public authorities also need to take into account wider factors such as the background and history of the request when this is relevant. However, it is important to recognise that one request can in itself be 'vexatious' depending on the circumstances of that request.

The Trust's representations

20. In its submission to the Commissioner, the Trust has reiterated what it had stated in its section 14 refusal notice; that the complainant's request follows on from frequent and overlapping requests and complaints in her campaign regarding the medical care of one of her close relatives. The Trust stated that it was seeking to rely on the wider context of communications with the complainant and the repetitive nature of her requests.
21. In support of its position, the Trust provided the Commissioner with a timeline of communications with its submission which included FOIA

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

requests, subject access requests (SARs), Access to Health Records (AHRA) requests, and Patient Advice and Liaison (PAL) concerns and complaints. The Trust also submitted to the Commissioner the correspondence in relation to the timeline which included details of requests submitted to the Trust after the Commissioner received this complaint.

22. With regards to the following parts of the complainant's FOIA request –

*"As Midazolam is in the Kingston formulary stating sub cut use is only for palliative care
Please advise in relation to that palliative care usage
Who are the manufacturers of the Midazolam used by the trust for the above purpose
What size ampoules used on ward
What dilution/strength of ampoules are used on ward"*

The Trust has stated that these points were answered and raised. The Trust referred the Commissioner to a summary of a telephone conversation that it had with the complainant. The Trust explained that many of the points the complainant had raised during the telephone conversation had already been answered as part of the SARs and AHRA requests, which the Trust stated that the complainant acknowledged through an FOIA request for the Medicines Management Policy.

23. With regards to the questions relating to Midazolam, the Trust has stated that these were also answered in the first, second, third and fourth responses to the complainant's PALS complaint about her close relative's treatment. The Trust has referred specifically to the fourth response which it says references the telephone conversation detailed in the previous paragraph and states the size and concentration of ampoules used on the ward.

24. With regards to the following parts of the complainant's FOIA request

*"Who is responsible for raising serious incidents reports re drug related incidents
How many drug related serious incident reports were raised in 2016
And how many reports were made to the yellow card scheme re adverse drug reactions in 2016"*

The Trust has stated that it views these parts of the request as unjustified given the rest of the correspondence and stated that providing the information could serve no reasonable purpose.

The complainant's representations

25. The complainant explained in her initial correspondence to the Commissioner that she has been seeking similar information about the drug the Trust uses since 2016 and the Trust has never answered any of the drug related questions.
26. The complainant stated that her request is not vexatious. The complainant explained that she had been forced to request similar information via an FOIA request as the answers to her questions regarding the medication Midazolam were not forthcoming.
27. The complainant explained that her close relative was recorded as being allergic to this medication and stated that her close relative was forced to have it whilst unconscious. The complainant believes her close relative died because of being given an overdose of this medication, linking her close relative's death to the 400 Gosport overdose deaths which she says are still unresolved for the relatives 20 years on.
28. The complainant has stated that this medication had several warnings from patient safety in 2008 and was used by a male nurse to murder and rape victims in 2000.
29. The complainant has referred to NHS legislation which states how this medication must be prescribed. She has stated that the medication was not given to her close relative as it is supposed to be prescribed.
30. The complainant has also referred the Commissioner to the "prescription order" tab of her close relative's medical records which states this medication was not off licence. The complainant stated that when all sub cut use of this medication is off licence, as advised by five UK manufacturers, the wider public safety issue regarding this medication and those who lack capacity is extreme.
31. The complainant stated that the fact the Trust fails to answer such questions is a reflection of the fact it does not raise serious incident reports regarding such adverse drug events or reactions when she believes it should, and seeks to hide such drug related facts.

The Commissioner's view

32. 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.

33. 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.
34. 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.
35. The Commissioner would like to highlight that there are many different reasons why a request may be vexatious, as reflected in the Commissioner's guidance and referred to in paragraphs 17-19 of this decision notice. There are no prescriptive "rules", although there are generally typical characteristics and circumstances that assist in making a judgement about whether a request is vexatious. A request does not necessarily have to be about the same issue as previous correspondence to be classed as vexatious, but equally, the request may be connected to others by a broad or narrow theme that relates them. A commonly identified feature of vexatious requests is that they can emanate from some sense of grievance or alleged wrongdoing on the part of the authority.
36. The Commissioner's guidance has emphasised that proportionality is the key consideration for a public authority when deciding whether to refuse a request as vexatious. The public authority must essentially consider whether the value of a request outweighs the impact that the request would have on the public authority's resources in responding to it. Aspects that can be considered in relation to this include the purpose and value of the information requested, and the burden upon the public authority's resources.
37. The fact that a request has one or more of the characteristics listed above does not necessarily mean that it is vexatious. For example, an individual who submits frequent requests may only be doing this in order to obtain further clarification because the public authority's previous responses have been unclear or ambiguous.
38. The Commissioner considers that, viewed in isolation, the request in this case may not seem to impose an unreasonable burden.
39. The Commissioner accepts that the request has purpose and value to the complainant, as she has strong feelings that her close relative died as a result of the medical care provided by the Trust. The Commissioner recognises that these issues have had a direct impact on the complainant. However, these are very personal issues and the

Commissioner considers that there are appropriate complaints or appeals processes available for the complainant, such as from the relevant public body or court. In situations where an individual disputes the actions of a public authority's medical care, the Commissioner recognises that the appropriate complaint or appeal process should be followed, and that the purpose of the rights provided by the FOIA is not to replace such processes, or else be used to express dissatisfaction with the outcome of them.

40. The Commissioner recognises that the issue of over prescribing drugs and medical negligence is likely to be a matter of wider public interest.
41. Having considered the timeline and supporting evidence provided by the Trust, the Commissioner understands that the complainant has made two FOIA requests prior to this one. The first FOIA request was submitted on 8 September 2015 for the Trust's policies on pressure ulcers, and the second was submitted on 26 March 2018 for information about the patient safety officer and MCA lead.
42. The Commissioner understands from the timeline provided by the Trust that the complainant has also made four requests for copies of her own personal data and for her close relative's personal data. The Commissioner understands that the fourth request was refused on the basis that it was repetitive and manifestly unfounded.
43. The Commissioner notes that the Trust provided the complainant with the routine concentration of Midazolam available on the wards at the Trust is 10mg in 2ml during a telephone conversation on 19 February 2018 in relation to a PALS complaint about her close relative's care. The Trust also confirmed this information in its letter to the complainant dated 28 February 2018.
44. The Commissioner also notes from the Trust's letter to the complainant dated 28 February 2018 that the complainant has requested from the Trust the evidence that the whole of the supposed 10mg or perhaps 5mg ampoule was not injected into her close relative. She therefore asked to see the discard records of the remainder of the Midazolam given to her close relative. She has explained to the Trust that she believes her close relative was prescribed 2.5mg of the Midazolam and therefore understands 7.5mg of the Midazolam should have been recorded as discarded. She therefore asked for a copy of any such discard record or notes confirming 7.5mg of the Midazolam was discarded. This suggests to the Commissioner that the complainant has received details of the size and dilution/strength of Midazolam used on the wards at the Trust.

45. Since complaining to the Commissioner about the handling of this request, the Commissioner understands from the Trust that the complainant has submitted a further request for information on 28 May 2019 for information which includes, amongst other things, the details about Midazolam as requested in the request being considered in this decision notice.
46. Having considered the context and history in which the request was made, the Commissioner recognises that even when the Trust has seemingly attempted to address or resolve some of the issues relating to the request, and provide some of the information sought by the complainant from her requests, the complainant has continued to correspond about the same issue.
47. The Commissioner's role in considering the application of section 14 of the FOIA to this request does not require her to carry out a public interest test as such, but rather to weigh the purpose and value of the request against the burden on the authority in complying with it.
48. The Commissioner's view is that this request, given the context of the wider dealings between the Trust and the complainant, would cause a disproportionate level of disruption on the Trust. In particular, the evidence of the complainant's previous dealings with the Trust suggests that, far from resolving the complainant's concerns, disclosure would be likely to result in the complainant sending further communications, including more information requests.
49. The Commissioner recognises that the complainant has her reasons for requesting the information. She is clearly not satisfied with how her close relative was treated by the Trust in relation to the medical care her close relative received. However, disclosure of the requested information would likely do nothing to resolve that dispute. In view of this, the Commissioner considers that the request for information has no wider value or purpose beyond the complainant's pursuit of her personal grievance against the Trust.
50. All of this leads the Commissioner to conclude that the impact of the request on the Trust is disproportionate and unjustified by any serious purpose or value. The Commissioner is satisfied that the request is vexatious and section 14(1) has been correctly applied.

Right of appeal

51. 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

52. 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.
53. 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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