

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 February 2024

Public Authority: Epsom and St Helier University Hospitals NHS Trust

Address: Wrythe Lane
Carshalton
Surrey
SM5 1AA

Decision (including any steps ordered)

1. The complainant has requested information from Epsom and St Helier University Hospitals NHS Trust (the Trust) about applicants for jobs. The Trust provided some information but cited section 12 (cost of compliance exceeds appropriate limit) of FOIA to part of the request. Much later the Trust questioned the accuracy of the information it had provided and concluded that section 12 applied to the whole request.
2. The Commissioner's decision is that the Trust has cited section 12(1) of FOIA appropriately. He has found a breach of section 16(1) of FOIA in the Trust's original response to the complainant. However, he accepts that the Trust is now unable to offer any meaningful advice and assistance, given the history and context of the request. The

Commissioner has also decided that the Trust breached sections 1(1), 10(1) and 17(5) of FOIA in terms of the timeliness of its response.

3. The Commissioner does not require further steps.

Request and response

4. The complainant requested information from the Trust under FOIA on 23 June 2022. The request is reproduced in an annex at the end of this decision notice due to its length.
5. The complainant chased a response on 23 July 2022.
6. The Trust responded on 27 July 2022 as follows: information was provided for what it describes as "part two" (regarding ethnicity, this was actually in part one of the request) and "part three" (actually part two of the request). Section 12 was cited regarding part one (numbers in roles, labelled 1-14).
7. The complainant asked for an internal review on 27 July 2022 arguing that they were familiar with the Trac system and that the data could be provided. Later, the Trust was not able to locate any evidence that it had received the review request.
8. The complainant chased an internal review on 20 November 2022.
9. On 12 September 2023 the complainant chased the review again. The Trust acknowledged the chaser on the same day and explained that it had not received the internal review request but that it would carry one out.
10. On 28 September 2023 the complainant sent a further chasing email.

Scope of the case

11. The complainant contacted the Commissioner on 12 October 2023 to complain about the way their request for information had been handled.
12. On 24 October 2023 the Commissioner wrote to the Trust to say that he was accepting the complaint without an internal review.
13. The Commissioner chased a response from the Trust several times subsequently but it was not until 25 January 2024 (dated 11 December 2023) that the Trust responded to the Commissioner. The Trust did not

send an internal review to the complainant but did provide the response to them that it had given to the Commissioner.

14. The Commissioner considers that the scope of his investigation is to decide whether the Trust has cited section 12 appropriately and to look at any procedural issues.

Reasons for decision

Section 12 – cost of compliance exceeds the appropriate limit

15. Section 12(1) of FOIA states that:

“(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

16. The appropriate limit is set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations'). The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour. This means that in practical terms there is a time limit of 18 hours in respect of the Trust. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) of the Fees Regulations states that an authority can only take into account the costs it reasonably expects to incur during the following processes:
 - determining whether it holds the information;
 - 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.
17. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the

Commissioner considers that any estimate must be “sensible, realistic and supported by cogent evidence”¹.

18. Please note that the Commissioner underpins the reasons for this decision with the analysis in his recent decision notices, [IC-261370-F4T1](#) and [IC-261362-W9S9](#) and [IC-261361-V6G6](#) as they are closely linked cases. Some of the argument reflects these three previous decisions. The Trust is part of The South West London Health and Care Partnership.

The Trust’s view

19. In its response to the Commissioner the Trust confirmed that it had been correct in citing section 12 to part one of the request in its original response. The Trust concluded that the the answer it had provided was “insufficient, failing to provide the appropriate justification for applying the section 12 exemption”. It explained that “the Trust should have set out how the cost of compliance with the request exceeded the appropriate limit...” It had “concerns over the robustness and accuracy” of the information it had provided.
20. “The SWL recruitment hub is hosted by Kingston Hospital NHS Foundation Trust and provides Trac recruitment for the SWL Trusts”. It is used to monitor recruitment. The concerns raised over Trac that are listed below are shared by the Trusts in SWL and the “expert users”:

“1. TRAC reporting will include all open campaigns during a requested period and will not differentiate between complete and incomplete campaigns. An incomplete campaign will not record data for each of the stages of a recruitment campaign.

2. TRAC reporting does not cover all recruitment activity. This includes all international recruitment campaigns; recruitment events; and agency managed recruitment. As a result, TRAC data does not include a significant volume of recruitment activity particularly for the recruitment of HCAs and nursing staff.

3. Reporting Equality data from TRAC is significantly different when

¹ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf>
(para 12)

compared to the new starter data on the NHS Electronic Staff Form (ESR). The SWL Recruitment Hub is currently undertaking work to understand the variance in reporting.”

21. The Trust explains that Trac can produce reports but it has “legitimate concerns over the accuracy and functionality of its reporting”. Producing “the rigorous interrogation of data and subsequent analysis” would require manual intervention.

22. The Trust goes on to point out that

“...it also takes part in wider SWL recruitment campaigns as well other campaigns managed outside of Trac which would require the disaggregation of Trust activity from that of the other Trusts supported by the SWL Recruitment Hub”.

Trac does not allow the Trust to scrutinise this data. Producing the “requested data for all completed campaign activity would require extraction of data from Trac and other sources” before undertaking manual analysis.

23. It explains that the Trust has “approximately 700 recruitment campaigns occurring annually”. It is no longer possible to report on the timeframe specified by the request because data is only retained for 400 days. The Trust estimates that it would take between 15 minutes and 2 hours to review each campaign. Based on the estimate, it would take between 175 hours and 1,400 hours to review the 700 campaigns, therefore vastly exceeding the fees limit.

24. The Trust also concludes that section 12 should have been applied to the whole request in line with [IC-261370-F4T1](#). It acknowledges that it provided a late response to the complainant and did not respond to the review request and has not been able to conclude “whether it was missed altogether” or “not received”. The Trust has taken remedial actions to address any recurrence.

25. Overall the Trust withdrew its original response as “the validity of the information” it did provide “must be questioned” and “the data cannot be confirmed as robust”.

The complainant’s view

26. The complainant believes that the Trust’s response to the Commissioner was “factually incorrect” and that they wished to consult with Trac. However, the complainant was unable to obtain “independent verification” within the time available.

27. The complainant provided some information from the equality data step by step guide reporting from Trac that they themselves had provided to a different Trust to demonstrate that what they had requested could be reported on by the Trust in a much shorter timeframe. An individual familiar with Trac could run a report in 20 minutes. Even allowing extra time – the whole request would not take more than 10 hours in total.
28. The complainant provided a number of arguments to support why they did not accept that section 12 applied to the request:
- The request was not for the number of completed campaigns, it was for the number of applicants, shortlisted and offered in a 12 month period. Additionally, “the trust has given no explanation as to why there should be a difference in likelihood of outcome by ethnicity between these two data sets”.
 - The complainant did not require every single campaign, just requiring a “substantial sample” and does not accept that the amount of manual analysis is necessary. They argue that there is an argument to exclude overseas recruitment campaigns run by an agency in a particular geographical area because they are likely to be disproportionately of one ethnicity.
 - “Even where a trust adds successful candidates from the campaigns to Trac at the offer stage and onboards them the total number is often able to be identified via the NHS ESR (HR) system where (eg) fully qualified nurses will initially be employed at Band 4 pending registration with the NMC and a move to Band 5, only overseas starters are onboarded in this way. In addition, this would only prevent the trust from providing data for one professional group at one band and not for the whole data request.”
 - The complainant needed information about the ethnicity of applicants and the likelihood of an offer according to ethnicity, not information about the ethnicity of staff.
 - The complainant questions the Trust’s argument that the recruitment data is incorrect and that “it is not possible to draw this conclusion from a simple comment” that the two systems are different.
 - The complainant has “great difficulty in accepting” the Trust’s view on accuracy as it has “used the Trac system to undertake the required reporting and active planning for the year in question” and this is in the public domain. The complainant attached Workforce Race Equality Standard data (WRES), WRES dashboard

analysis and the Trust's Workforce Race Equality Standard plan to underpin their argument that the Trust could not have reached conclusions from the same system if the data is unreliable. The complainant queries how the Trust can be in compliance with its Public Sector Equality Duty².

- The complainant considers that the second part of the request has nothing to do with the Trac system and would "normally be held under a specific corporate or departmental budget heading".

The Commissioner's view

29. Regarding this last bullet point, information relating to part two of the request was provided in the initial response from the Trust. However, the Trust withdrew that response 18 months later. The Commissioner notes that a public authority is not obliged to provide any information if it has calculated that the overall cost of providing the requested information would exceed the fees limit.
30. The Commissioner understands the frustration the complainant feels at the delays regarding this request. The inability to provide the requested information clearly has implications for any future research the complainant might wish to do.
31. At the time the request was made the data was held, even if the Trust's calculation is that it was beyond the fees limit to provide it, and any decision has to be based on the situation at the time. The fact that the data is no longer held for the April 2021-March 2022 period makes any analysis of whether it was subject to section 12 somewhat academic. It cannot now be provided, whatever the Commissioner's decision.
32. There have been many delays and failures in communication in the Trust's responses. The complainant has argued that the Trust has made certain suppositions about what data was required rather than what had actually been requested.
33. Better engagement with the complainant might have meant that the issues pointed out regarding the scope of the request could have led to a clearer understanding of what was being requested and potentially less manual intervention. There seems to have been a reluctance on both sides to accommodate the other's position. Ultimately, the arguments of the Trust and those of the complainant regarding what

² [The Public Sector Equality Duty \(PSED\) | EHRC \(equalityhumanrights.com\)](https://www.equalityhumanrights.com/en/public-sector-equality-duty)

data can be provided from Trac are disputable. However, the Commissioner has accepted that the technical limitations of the Trac system mean that providing the requested information (if that was still possible) would exceed the fees limit of 18 hours, even if the actual figure cannot be accurately calculated due to the various permutations.

Procedural matters

34. Section 16 of FOIA requires a public authority to provide advice and assistance where it is reasonable to do so. The section 45 FOIA Code of Practice states that a public authority's advice and assistance obligation will be triggered when it relies on section 12 to refuse a request. If there is no reasonable way in which the request could be refined, the public authority should inform the requester that the request cannot be meaningfully refined.
35. In its original response, the Trust had provided some information. It cited section 12(1) to the first request in part one but had not offered advice and assistance as to how that part might be refined or confirmed that there was no such advice and assistance it could offer. Therefore it breached section 16 at that time. It did not cite section 12 of FOIA to the whole request until January 2024, 19 months after the request was received. The Trust did not offer advice or assistance but did set out the reasons why it was not able to provide the requested information.
36. Although the Trust had clearly breached FOIA in the length of time it took to cite section 12 to the whole request, the Commissioner accepts that, as a result, the Trust was not able to provide meaningful advice and assistance to the complainant, not least because the information is now not held. Additionally, though indicating a willingness to clarify, the complainant does not agree that the information cannot be provided from the Trac system for the reasons cited in paragraphs 26 to 28.
37. Section 1(1) of FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them. The Trust failed to confirm whether the information was held by the time for statutory compliance.
38. Under section 17(5) a public authority that's relying on section 12 of FOIA should give the applicant a refusal notice stating that fact within the same timescale.
39. Section 10(1) of FOIA requires these actions to be taken and compliance with section 1(1) within 20 working days of receipt of the request.

40. The Trust issued a refusal notice, indicating it held the requested information outside the 20 working day requirement and so breached sections 1(1), 17(5) and 10(1) of FOIA.

Other matters

41. The Commissioner is also concerned that the Trust no longer holds the requested information. It is unclear when the Trust first realised that it could not rely on the information from Trac. The length of time taken to establish this and the lack of communication with the complainant meant that the data was deleted in line with the Trust's retention period and cannot now be provided. This should not have happened, though the Commissioner considers that it was due to the overly slow recognition by the public authority that Trac data could not be interrogated without error in the way it had previously thought.
42. The section 45 code of practice³ recommends that a public authority complete the internal review process and notify the complainant of its findings within 20 working days, and certainly no later than 40 working days from receipt.
43. In this case, the complainant asked for a review in July 2022. The Trust did not formally provide a review to the complainant though it did provide a 'review' to the Commissioner which it then sent to the complainant. For a public authority that offers an internal review, this is unacceptable and has been recorded for monitoring purposes.

³ [CoP FOI Code of Practice - Minor Amendments 20180926 .pdf \(publishing.service.gov.uk\)](#)

Right of appeal

44. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

45. 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.
46. 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

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

Annex

47. Under the Freedom of Information Act, please provide me with the following:

Part One

Numbers of Job Applicants, Applicants Shortlisted for Interview, and Applicants Offered a position after interview, by ethnicity and for the following groups of staff, for the period 1 April 2021 to 31 March 2022 (2021-or, if not available, the most recent 12-month period – in which case please state which period the data is for):

1. All AfC Roles at bands 1 – 8b
2. All AfC Roles at 8c and above

3. All Registered Nursing Roles at Band 5
4. All Registered Nursing Roles at Band 8c and above

5. All Registered Midwives at Band 5
6. All Registered Midwives at Band 6

7. All Allied Health Professionals
8. All Occupational Therapists
9. All Physiotherapists
10. All Dieticians
11. All Radiographers

12. All SAS Roles
13. All Medical Consultant Roles

14. All Band 5 Bank Registered Nurse recruitment

Please supply the numbers of candidates (not the %) for the following Ethnicity Descriptors:

- Asian (including Chinese)
- Black
- Mixed (including Arab)
- Other
- White
- Unknown (including do not wish to say)

The above categories mirror the 2021 Census categories, please refer to the attached document setting out these category descriptors if further guidance is needed. If you use Trac please ensure that the Vietnamese, Japanese, Filipino, and Malaysian descriptors are included in the Asian category. Please note in particular that Chinese is listed as Other on Trac & should be re-classified as Asian in line with the 2021 census categories. This request is part of a larger research project. In order to avoid transcription errors please send the data as an Excel file in the following format:

Ethnicity	Number of Applicants	Number Shortlisted for Interview	Number Offered the Position
Asian			
Black			
Mixed			
Other			
White			
Unknown			

Part 2

Please provide the level of expenditure in the 2021-22 financial year on the recruitment of overseas nurses.

This request is part of a larger research project. In order to avoid transcription errors, please use the following format and send as an Excel file:

Number of Nurses Recruited in 21-22	Funding allocated to the trust for this purpose by NHSEI	Total cost to the trust (excluding NHSEI funding) of overseas nurse recruitment. This should include all associated expenses such as trust staff costs, Agency costs, flights, accommodation, etc. "	Total