

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 April 2024

Public Authority: Newcastle upon Tyne Hospitals
NHS Foundation Trust

Address: Freeman Hospital
Freeman Road
High Heaton
Newcastle upon Tyne
NE7 7DN

Decision (including any steps ordered)

1. The complainant has requested information in relation to a public statement made by Newcastle upon Tyne Hospitals NHS Foundation Trust (the Trust) on 26 September 2023. The Trust initially identified and disclosed some information within the scope of the request, and then during a review, it disclosed further information.
2. The Commissioner's decision is that, on the balance of probabilities, the Trust has identified and disclosed all information held within the scope of the request. However, in failing to identify and disclose all the information in its initial response, the Trust has breached section 1(1) and 10(1) of FOIA.
3. The Commissioner does not require any further steps to be taken.

Request and response

4. On 26 September 2023, the complainant wrote to the Trust and requested information in the following terms:

"I would like to request sight of any recorded information held in relation to your public statement of the 26 September.

Specifically any communications between your Communications colleagues and the relevant responsible individuals at the Trust that led to the issued public statement.

I am not interested in having sight of individual names of Trust staff but it would be useful to understand which team/directorate that a communication has been sent from.”

5. On 29 September 2023, the Trust responded to the request. It provided the complainant with two documents related to the public statement that were sent to all members of staff: ‘Operational Update’ and ‘Message from the Chief Executive’.
6. On 2 October 2023, the complainant wrote to the Trust and asked it to carry out a review of its handling of the request. They said that the scope of the request included any information held in emails and WhatsApp messages between staff relating to the public statement being issued.
7. On 25 October 2023, the Trust wrote to the complainant with its review decision (dated 24 October 2023). It provided a copy of an email between its Communications Director and ‘Trust Senior Leads’ relating to the public statement. It also said that WhatsApp is not a Trust supported communication tool.

Scope of the case

8. The complainant contacted the Commissioner on 30 October 2023 to complain about the way their request for information had been handled.
9. The Commissioner has considered whether the Trust has identified and communicated to the complainant all the information it holds within the scope of the request.

Reasons for decision

10. Section 1(1) of FOIA states that:

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

11. When a public authority receives a request for information it has two obligations under section 1(1) of FOIA. Firstly it must explicitly confirm or deny whether it holds the information in question. Secondly, if it does hold that information, it must either provide a copy to the requester or issue a refusal notice.
12. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's arguments. He will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, he will consider any reason why it is inherently likely or unlikely that information is not held.
13. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
14. Section 10(1) obliges a public authority to comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.

The complainant's position

15. The complainant said that they are not convinced that the Trust had carried out adequate and proportionate searches to identify all relevant information held within the scope of the request. They also asked the Commissioner to consider whether there had been a breach of section 1(1) of FOIA.

The Trust's position

16. As part of his investigation, the Commissioner asked the Trust to satisfy itself that it had carried out appropriate searches (including carrying out additional searches) and to set out what these searches were. The Trust completed additional searches and confirmed that no further information within the scope of the request is held.
17. The Trust explained that at approximately 7.00pm on Monday 25 September 2023 it received a communication from BBC Look North. Its Communications Director, Chief Operating Officer (COO) and Chief Executive Officer (CEO) then met via MS Teams and discussed the Trust's response to the BBC. By 7:59pm the Communications Director shared the Trust's statement with the COO and the CEO. On Tuesday 26 September 2023, the statement was published within the BBC News Report.

18. The Trust confirmed that it has disclosed to the complainant the one email from the Communications Director to the COO and CEO on 25 September at 7:59pm relating to the statement. It also disclosed two internal communications ('Operational Update' and 'Message from the Chief Executive') that were sent to all members of staff on 25 and 26 September 2023 relating to the statement.
19. The Trust said that all communication involving its response occurred face to face (over MS Teams) with only the statement created and published electronically.
20. The Trust said that the contents of the statement were agreed during the meeting held over MS Teams and the email sharing the statement with the COO and CEO was for reference as opposed to approval purposes, which, is why searches (detailed below) did not identify any information showing their response to the statement.
21. The Trust also confirmed that the meeting was arranged by telephone due to the hour it received the communication from BBC Look North and the importance of the matter.
22. The Trust said that any information within the scope of the request would be held electronically. It confirmed that it asked members of staff in the communications department; including the Communications Director as well as the COO and CEO to carry out electronic searches for information within the scope of the request.
23. The Trust confirmed that all resources including email systems / mailboxes and MS Teams (including its chat function) were searched using the keywords 'letters', 'public statement', 'public', 'statement', '26 September', 'September' and 'press', however, no further information was identified relating to the statement.
24. In relation to the retention period of information within scope of the request, the Trust said that the NHS Records Management Code of Practice requires that press releases and important internal communications should be retained for six years.
25. The Trust confirmed that no information within the scope of the request had been deleted or destroyed.

The Commissioners view

26. The Commissioner notes the complainant's view. He also notes that the request specifically seeks information between communications colleagues and the relevant individuals at the Trust that led to the issued public statement.

27. The Commissioner also notes the short notice given of media reporting, that the meeting was arranged by telephone and involved three individuals, that the meeting was held on MS Teams, the meeting and creation of the statement took place within less than an hour, the email relating to the public statement was sent for reference and not approval purposes, and that the statement was issued the next day.
28. The Commissioner also notes that the Trust initially and subsequently identified and disclosed information within the scope of the request and did not apply any exemptions in an attempt to withhold it.
29. The Commissioner also notes the initial and additional searches carried out by the Trust and the relevant staff members; including of email systems and MS Teams, the keywords used and the likelihood that these searches would identify any further information held.
30. The Commissioner also notes that the NHS Code of Practice requires that press releases and 'important internal communications' be retained for six years, and that the Trust has confirmed that no information within scope of the request had been deleted or destroyed.
31. The Commissioner is therefore satisfied that, the Trust has identified and disclosed all the information it holds, and that on the balance of probabilities, it does not hold any further information within the scope of the request.
32. It is the Commissioner's decision that although the Trust has now identified and disclosed all the information it holds, in failing to do this in its initial response and disclosing further information during the review, the Trust has breached section 1(1) and 10(1) of FOIA.

Right of appeal

33. 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

34. 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.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Pamela Clements
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