

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 08 July 2009

Public Authority: Heart of England NHS Foundation Trust
Address: Birmingham Heartlands Hospital
Information Governance
Devon House
Bordesley Green East
Birmingham
B9 5SS

Summary

The complainant requested the mortality figures for a (named Doctor). The public authority refused to comply with the request by virtue of the provisions of section 12(1) of the Act. The Commissioner finds the public authority correctly relied on section 12(1). He however also finds that the public authority in breach of section 10(1) for failing to inform the complainant it held the information requested within 20 working days, and 17(5) for failing to specify within 20 working days that it was not complying with the request by virtue of the provision at section 12(1).

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 26 October 2007, the complainant requested the:

'Monthly mortality figures of (named Doctor) between January 2006 and January 2007.'

3. The public authority responded on 10 December 2007. It explained that to comply with the request would exceed the appropriate cost limit under the Act, and it was

therefore exempt from complying with the request by virtue of section 12 of the Act.

4. According to the public authority, whilst it did collect mortality data for the hospital, the only way to validate this on an individual consultant basis would be to manually examine the medical records of all the patients under the care of the individual consultant.
5. On 07 March 2008, the complainant wrote back to the public authority expressing her dissatisfaction with the decision not to comply with the request.
6. The public authority proceeded to conduct a review of its decision and wrote to the complainant on 18 September 2008 with the conclusions of the review. It upheld the original decision not to comply with the request by virtue of section 12 of the Act.

The Investigation

Scope of the case

7. The complainant had already contacted the Commissioner on 21 August 2008 to complain about the way her request for information had been handled prior to the internal review which was completed on 18 September 2008. The complainant specifically asked the Commissioner to review the public authority's refusal to comply with her request by virtue of the provisions of section 12 of the Act.

Chronology

8. On 05 January 2009, the Commissioner wrote to the complainant outlining the scope of the investigation and inviting her comments if any.
9. The scope of the investigation as noted above was confirmed in a letter from the Commissioner to the complainant dated 29 January 2009.
10. On 02 February 2009, the Commissioner wrote to the public authority requesting its submissions in relation to the complaint. The public authority responded in a letter dated 13 March 2009.
11. The Commissioner wrote back to the public authority on 01 April 2009, and the public authority responded on 14 April 2009.

Analysis

Procedural Matters

Sections 10 and 17

12. The Commissioner finds the public authority in breach of section 17(5) for failing to specify to the complainant within 20 working days that it was refusing to comply with the request by virtue of section 12(1) of the Act.
13. He additionally finds the public authority in breach of section 10(1) for not informing the complainant within 20 working days that it held the information requested.
14. A full text of sections 10 and 17 can be found in the Legal Annex to this Notice.
15. The Commissioner has also commented on the length of time it took the public authority to conduct its internal review in the 'Other Matters' section of this Notice.

Section 12

16. Under section 12(1) of the Act, a public authority is not obliged to comply with a request for information if to do so would exceed the appropriate cost limit set by the Act. The cost limit equates to 18 hours' work for a public authority at £25 per hour. A public authority may only take into account the cost of determining whether it holds the information requested, locating, retrieving and extracting the requested information in performing its calculation.
17. A full text of section 12 can be found in the Legal Annex to this Notice.
18. The named Doctor is an elderly care consultant. The public authority explained that elderly care consultants work as part of a team and patients did not always remain under the care of one consultant throughout their admission, and only a review of all deaths of patients under the care of the elderly care directorate in the period of the request would authoritatively determine the mortality figures for (named Doctor). This would be based on the (named Doctor's) level of involvement in the deceased patient's care.
19. According to the public authority, between 01 January 2006 and 31 December 2006, there were 272 recorded deaths in elderly care. It explained that to provide mortality figures for individual consultants up to January 2007 would require identifying, locating, retrieving, and reviewing the medical record of approximately 272 patients in order to determine which consultant was substantially involved in a patient's care. The Commissioner understands that these records are all held manually rather than electronically.
20. The public authority explained that it does hold some mortality figures broken down by consultants. These figures are however based on the consultant's name appearing on the admission and/or discharge form. According to the public

authority, the fact that a consultant's name appears on an admission or discharge form does not mean that they were actively involved in a patient's care at the time of death. As a result, it would need to make reference to the relevant patient records (i.e. approximately 272 in total) in order to verify the mortality figures for (named Doctor).

21. According to the public authority, the process would involve identifying the patient identification number of each of the deceased patients and where their records are located (i.e. Heartlands or Solihull hospital or offsite). The public authority estimated it would take approximately 1 hour in total to carry out this task.
22. This is then sent to the respective medical records managers who would request onsite records (if held onsite) from the public authority's case note tracking system and if available from the medical records library or from the relevant staff if the record(s) are in use at the time.
23. The public authority explained that for offsite records (which is generally how deceased medical records are stored), it would ask for the records to be retrieved by the company which manages its offsite storage. This is done via a web based system. According to the public authority, it estimates the process of administering requests for retrieval would take approximately 4 hours, that is, around 50 seconds per record.
24. The public authority further explained that when medical records are moved, they would have to be checked and then booked into the case note tracking system to confirm their new location. It estimated this task would take approximately 8 hours to carry out this task for approximately 272 records, or just under 2 minutes each.
25. In terms of reviewing the medical records, the public authority explained that the volume of each patient's medical records varied depending upon their condition and treatment but it estimated it would take approximately 30 minutes to examine each record. This would therefore equate to approximately 136 hours to examine approximately 272 patient records.
26. In total, the estimated time it would take the public authority to comply with this request is 149 hours. As noted above, the appropriate limit for the public authority is set at £450, estimated at £25 per person per hour, which equates to 18 hours' work.¹ The Commissioner considers that some elements of the public authority's time estimates may be over-generous, however even if this were the case, it is clear that the estimated cost of complying with the request would far exceed the limit.
27. Whilst the Commissioner did question why mortality figures were not validated immediately after death, his decision (in accordance with his remit under section 50 of the Act) is based solely on whether the public authority was correct to conclude that it could not comply with the complainant's request by virtue of the application of the cost limit. The public authority however pointed out that

¹ Freedom of Information & Data Protection (Appropriate Limit and Fees) Regulations 2004

in February 2008 it implemented a new process to ensure that clinicians validated mortality figures for consultants within days of a patient's death.

28. Based on the explanation provided above, the Commissioner is persuaded that complying with the request would have exceeded the appropriate cost limit, and he therefore finds that the public authority correctly relied on the provisions of section 12(1) of the Act.

The Decision

29. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The public authority correctly relied on section 12(1) in refusing to comply with the complainant's request.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The public authority breached section 10(1) for failing to inform the complainant within 20 working days that it held the information requested.
- It also breached section 17(5) for failing to specify to the complainant within 20 working days that it was refusing to comply with the request by virtue of section 12(1).

Steps Required

30. The Commissioner requires no steps to be taken.

Other matters

31. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
32. The Commissioner's position as explained in the 'Freedom of Information Good Practice Guidance No. 5' is that internal reviews should take no longer than 20 working days, and in exceptional circumstances which have been clearly explained to the complainant, the total time taken should not exceed 40 working days. This guidance was published in February 2007 well before the complainant's request. The Commissioner acknowledges that the length and complexity of the ongoing complaint regarding the complainant's late mother's care could have affected the public authority's handling of her information request

but does not consider there would be any justification for a public authority to take 6 months to conduct an internal review.

33. Although the delay does not constitute a breach of the Act, the Commissioner would like to record his concern and also make it clear that this does not accord with good practice. He therefore expects the public authority to be aware of his position as provided in the published guidance as his office will monitor the public authority's compliance or otherwise via future complaints made against it.

Right of Appeal

34. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 8th day of July 2009

Signed

**Anne Jones
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

LEGAL ANNEX

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(2) states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 17(4) provides that -

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

Section 17(6) provides that –

“Subsection (5) does not apply where –

- (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.”

Section 17(7) provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

Exemption where cost of compliance exceeds appropriate limit

Section 12(1) provides that –

“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.”

Section 12(2) provides that –

“Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.”

Section 12(3) provides that –

“In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.”

Section 12(4) provides that –

“The secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority –

- (a) by one person, or
- (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.”

Section 12(5) – provides that

“The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are estimated.

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 10(2) provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

Section 10(3) provides that –

“If, and to the extent that –

- (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
- (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

Section 10(4) provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

Section 10(5) provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

Section 10(6) provides that –

“In this section –

“the date of receipt” means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”