

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 24 August 2009

Public Authority: Mid Essex Hospitals NHS Trust
Address: Bloomfield Court
 Pudding Wood Lane
 Chelmsford
 Essex
 CM1 7ET

Summary

The complainant submitted a request to Mid-Essex Hospitals NHS Trust (the 'Trust') for various information about policies and statistics relating to its services. A substantive response to the request was not provided. The Commissioner's decision is that the Trust failed to comply with section 1(1)(a) and (b) of the Act and must now do so within 35 calendar days of the date of this notice. The Commissioner found that the Trust breached section 10(1) of the Act.

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 13 November 2008 the complainant requested various information about policies and statistics relating to the Trust's services. The full request is listed in Annex A of this Decision Notice.
3. The Trust acknowledged the request on 17 November 2008 and stated that some of the information would not be disclosed under the Act because it was the complainant's personal data. The Trust sought some clarification about certain elements of the request, and the complainant responded with clarification later

the same day by email. In that email, the complainant also added an additional point to his information request:

“I would like copies of all procedures and codes of practice concerning the offering of patients a choice after a breach of the “cancelled operations guarantee”, the recording of this data and any follow up procedures you may have in place prior to July 2008.”

4. The Trust acknowledged the complainant's email by return. However, it did not provide a full response within twenty working days of receipt of the request.
5. The complainant emailed the Trust on 5 January 2009 because he had not received a response to his requests. On 9 January 2009 the Trust emailed the complainant and apologised for the delay in responding, adding that it hoped to respond in the near future.

The Investigation

Scope of the case

6. On 19 January 2009 the complainant contacted the Commissioner to complain about the Trust's failure to respond to his request. The Commissioner notes some of the information requested would, if held, constitute the personal data of the applicant. He considers that the appropriate access regime under which to respond to requests for an applicant's own personal data is the Data Protection Act 1998. This decision therefore relates only to those aspects of the request which would not constitute the applicant's own personal data and which therefore fall to be considered under the FOI Act. These are elements A-H, K, L, and the additional request of 17 November 2008 labelled O, as detailed in Annex A to this Notice.

Chronology

7. On 3 February 2009 the Commissioner wrote to the Trust and asked it to respond to the complainant's request within a further ten working days.
8. The Commissioner contacted the Trust by telephone on 1 June 2009 and was informed that the Trust was in the process of collating a response to the request. The Trust agreed that it would seek to respond to the request within a further fifteen working days, providing a copy to the Commissioner.
9. Having received no notification of a response to the request being provided to the complainant, the Commissioner telephoned the Trust on 5 August 2009 to establish whether a response had been sent. The Trust explained that it was still in the process of compiling a response and apologised for the ongoing delay.

Analysis

Procedural Requirements

Section 1

10. Section 1(1) of the Act 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. The Commissioner considers that the Trust has failed to comply with section 1(1)(a) and (b) of the Act to date, as it has not provided a response to the complainant.

Section 10

12. Section 10(1) of the Act states 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.”

13. The Commissioner considers that the Trust has breached section 10(1) of the Act as it failed to respond to the request within twenty working days following the date of receipt.

The Decision

14. The Trust has breached section 10(1) of the Act in failing to comply with section 1(1) within twenty working days following receipt of the request.

Steps Required

15. The Commissioner requires the Trust to respond to the complainant's request in accordance with section 1(1)(a) of the Act by informing the complainant whether it holds the information, or issuing a refusal notice explaining why it is excluded from the section 1(1)(a) duty to confirm or deny if information is held. If the exclusion from the duty to confirm or deny does not apply, and the information is held, then the Trust should respond to the complainant's request in accordance with section 1(1)(b) by either communicating the information to him or issuing a

valid refusal notice. Any refusal notice issued should comply with the requirements of section 17.

16. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

17. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

18. The Commissioner will also consider the public authority's compliance with the provisions of the DPA in relation to the complainant's request for his own personal data. However this consideration will be dealt with separately and will not form part of this Decision Notice, because any assessment under section 42 of the DPA would be a separate legal process from the consideration of a complaint under section 50 of the FOI Act.

Right of Appeal

19. 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 24th day of August 2009

Signed

**Lisa Adshead
Senior FOI Policy Manager**

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

Annex A

On 13 November 2008 the complainant requested the following information from the Trust:

A/ I would like to know the Trust's policy concerning the rights of patients, in particular the right of choice.

B/ I would like to know the Trust's code of practice for informing patients of their rights, in particular breaches of the cancelled operations guarantee.

C/ I would like to know who is responsible for ensuring this code of practice is carried out.

D/ I would like to request the following information.

1/ The number of last minute cancellations for non clinical reasons during Q2 2008 - 09

2/ The number of patients not treated within 28 days of last minute cancellations during Q2 2008 -09.

3/ The choices made by these patients after this breach i.e.

- * to remain on list at existing NHS Trust
- * to be treated at another NHS Trust
- * to be treated at a private hospital
- * to be treated abroad
- * other alternatives for treatment

4/ As D3 above but for

- Q1 2007 -08 20 patients
- Q2 2007 -08 22 patients
- Q3 2007 -08 7 patients
- Q4 2007 -08 9 patients
- Q1 2008 -09 3 patients

E/ I would like to know how many times between Q1 2007-08 and Q2 2008-09 has the Trust failed to meet the Dept. of Health's code of practice regarding patients choice after a breach of the cancelled operations guarantee.

F/ I would like confirmation of who audit's the figures supplied to the Dept. of Health regarding the Trust's performance, the frequency of such an audit and when was this last done.

G/ I would like to know who has the authority within the administration of waiting lists to overrule the recommendations of your clinical staff. [date redacted] urgent appointment requested by [name redacted] appointment given for 9 weeks later (subsequently cancelled). Next appointment given 12 weeks from [date redacted] (your stated standard waiting time). From cancelled appointment on the [date redacted] next appointment

given for 13 weeks later (your stated standard waiting time). (If spending 2 days sitting on one of your wards is standard treatment for ureteric stones *[detail redacted]*, please advise). *[date redacted]* urgent TCI requested by *[name redacted]* appointment given for 9 weeks later (subsequently cancelled). Next appointment given 12 weeks from *[date redacted]* (your stated standard waiting time). *[date redacted]* appointment requested in 2 weeks by *[name redacted]* appointment given for 14 weeks later (below the level of service deemed satisfactory by the health care commission).

H/ I would like to know the Trust's policy and code of practice on prioritising the admission of elective day patients.

I/ I would like an explanation on how an urgent operation being requested on the *[date redacted]* resulted in treatment not being given till the *[date redacted]*

J/ I would like to know why only a primary attempt was made on the *[date redacted]* to *[details redacted]*.

K/ I would like to know the average waiting time, for a private patient under going laser fragmentation of multiple ureteric stones and insertion of a JJ stent.

L/ I would like an estimated cost for the successful completion of the above procedure if conducted privately by *[name redacted]*.

M/ I would like confirmation that all the cancellations and the breaches of standards detailed in my complaint have been recorded correctly.

N/ I would like a copy of my Medical Records from the *[date redacted]* (out patient appointment with *[name redacted]*) to the present day."

On 17 November 2008 the complainant added a further point to the request:

O/ "I would like copies of all procedures and codes of practice concerning the offering of patients a choice after a breach of the "cancelled operations guarantee", the recording of this data and any follow up procedures you may have in place prior to July 2008."

Legal Annex

General Right of Access

Section 1(1) provides 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.”

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(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.”

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.”