

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 November 2010

Public Authority: Blackpool, Fylde and Wyre Hospitals NHS Trust
Address: Blackpool Victoria Hospital
Whinney Heys Road
Blackpool
Lancashire
FY3 8NR

Summary

The complainant made a request on 1 November 2009 to Blackpool, Fylde and Wyre Trust for the protocol for the management of upper GI laparoscopic procedures which was implemented as a result of an investigation by the Healthcare Commission into the death of his mother. The Trust had previously applied section 14(1) to a similar request from the complainant and therefore did not issue a refusal notice in relation to this request. The Trust informed the complainant that it would not enter into any further correspondence with him in relation to his complaint due to the Vexatious Complaint Status communicated to him in October 2008.

The complainant had previously submitted the same request to the Trust in August and September of 2008, to which the Trust had responded. The complainant complained to the Commissioner about his 1 November request in December 2009.

In reaching a decision in respect of this complaint, the Commissioner has also taken account of the reasoning and analysis of the same history and context he considered in a previous similar complaint from the complainant (reference FS50234985) in which he upheld the Trust's decision to apply section 14(1) to that request.

The Commissioner has found that section 14(1) does also apply in this case and has therefore not upheld the complaint.

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.

Background

2. In 2005 the complainant's mother had an operation at a hospital which comprises part of the Trust. Unfortunately, a few days after the surgery, she passed away. In reaching a decision in respect of this complaint, the Commissioner has also taken account of the reasoning and analysis of the same history and context in a previous similar complaint from the complainant in case FS50234985. The Decision Notice in case FS50234985 is available online at the following link:

http://www.ico.gov.uk/upload/documents/decisionnotices/2009/fs_50234985.pdf

This complaint recently went to appeal (Reference EA/2009/0103) and the Tribunal upheld the Commissioner's decision finding the complainant's request of 1 December 2008 to be vexatious.

3. Having complained to the Healthcare Commission in early 2006 about the death of his mother, the complainant has subsequently alleged that the Trust had failed to meet the requirements set out in the Healthcare Commission's findings and has been critical of the Trust's alleged reluctance to apologise for its role in his mother's death. Consequently, the complainant has continued to ask the Trust to respond to information requests or general comments about this matter.
4. In October 2008, the Trust informed the complainant that it considered him vexatious for the purposes of its own 'Vexatious Complaints Policy' and informed him that it would no longer respond to correspondence associated with the death of his mother and his subsequent complaint to the Healthcare Commission. It is important to note that the Trust's own vexatious policy has no connection to the issue of vexatiousness contained in section 14(1) of the Freedom of Information Act 2000. On 1 December 2008 the complainant requested information about the implementation of the Trust's own vexatious complaints policy. The Trust applied section 14(1) of the Act to this request. The Trust's

decision was upheld by the Commissioner in his Decision Notice reference FS50234985 and subsequently by the Tribunal.

5. Prior to the Trust's application of section 14(1) to the aforementioned request made on 1 December 2008, the complainant wrote to the Trust in August and September 2008 to request a copy of the protocol for the management of upper GI laparoscopic procedures which the Trust had implemented in September 2007, to which the Trust responded.
6. Following the Trust's application of section 14(1) in respect of the 1 December 2008 request, the complainant submitted another request to the Trust on 1 November 2009 for the same information previously requested in August and September 2008 about the protocol for the management of upper GI laparoscopic procedures.

The Request

7. The request that serves as the basis of this notice was submitted to the Trust on 1 November 2009:

"On 28 February 2008 [name redacted] wrote to the Healthcare Commission and stated that [name redacted] had implemented a new pathway in September 2007 for management of upper GI laparoscopic procedures that was attached at Appendix 5 of that letter.

Please provide the document that was issued in September 2007 implementing the new pathway as stated by [name redacted] and provide any subsequent updated issues of that document."

8. On 3 November 2009 the Trust wrote to the complainant, it did not issue a further refusal notice, however it stated:

"Due to the Vexatious Complaint Status communicated to you on 8 October 2008, we will not be responding to your letter dated 1 November 2009 nor will the Trust enter into any further correspondence with you in regard to your complaint."

Please refer to the explanation provided under Procedural Requirements at paragraph 61.

9. With its response, the Trust enclosed a copy of a completed 'Action Plan' of its actions against the recommendations from the Healthcare Commission following the death of the complainant's mother post-surgery.

The Investigation

Scope of the case

10. On 14 December 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
11. The complainant specifically asked the Commissioner to consider his view that the Trust was issuing “blanket refusals” to his information requests about issues relating to the death of his mother.
12. The Commissioner considered the Trust’s continued application of section 14(1) in relation to this particular information request.
13. The Commissioner also considered whether the Trust had issued a refusal notice in accordance with section 17 of the Act.

Chronology

14. On 12 January 2010 the Commissioner wrote to the complainant to advise that, having conducted an initial review of the complaint, he had formed a preliminary view that the outcome of his investigation would be likely to result in the complainant’s request being deemed vexatious in accordance with section 14(1) of the Act. The Commissioner explained that his initial observation was made with reference to this specific complaint and to the recently issued Decision Notice (reference FS50234985) which upheld the Trust’s decision to engage section 14(1) of the Act following the complainant’s request for the reasons the Trust implemented its own vexatious policy. The Commissioner noted that the complainant has submitted an appeal against the decision in FS50234985 and outlined that the appeal process could result in a different decision, for example, it could be found that the Trust had engaged section 14(1) incorrectly. In the light of the pending appeal the Commissioner asked the complainant whether he would be willing to withdraw his complaint pending the outcome of his appeal.
15. The complainant wrote to the Commissioner on 31 January 2010 to confirm he did not wish to withdraw his complaint pending the outcome of his appeal about his earlier complaint.
16. On 8 February 2010 the Commissioner both telephoned and wrote to the Trust advising of the Commissioner’s preliminary view, and asked the Trust whether it wished to provide any additional arguments supporting its application of section 14(1) beyond those cited in the Decision Notice referenced above.

17. On 10 February 2010 the Trust wrote to the Commissioner confirming it did not wish to add any further arguments in support of its application of section 14(1) in relation to this complaint, however that it considered the arguments it had put forward previously in respect of the investigation relating to FS502985 to be relevant to this case.
18. On 11 February 2010 the complainant wrote to the Commissioner stating that he felt it only fair that he should have an opportunity to respond to the Commissioner's intention to uphold the vexatious finding in his Decision Notice.
19. The Commissioner wrote to the complainant on 17 February 2010 asking him to forward his response and referred the complainant to section 17 of the Act regarding refusal notices. The Commissioner explained that the Trust had written to the complainant on 3 November 2009 refusing to enter into further correspondence about his complaint. The Commissioner also explained the Trust had applied section 14(1) of the Act to the complainant's previous, related, request.
20. On 21 February 2010 the complainant wrote to the Commissioner and reiterated his view that the Trust had not properly dealt with his current request which he stated pre-dated the request to which the vexatious complaint status had been applied.
21. On 22 February 2010 the Commissioner wrote to the complainant to advise that his understanding was that the Trust responded to the complaint of 10 August 2008 at the time, and that the current complaint was a repeat request for the previously requested information. The Commissioner explained the Trust responded to this complaint at the time and that the complainant submitted his complaint to the Commissioner after an undue delay. As such, the Commissioner had informed the complainant that he would not consider his complaint. The complainant then submitted a request for the same information to the Trust after it had applied section 14(1), to which the Trust responded on 3 November 2009. The Commissioner clarified that the request of 1 November 2009 and the response of 3 November 2009 would be the subject of the Decision Notice in this case and referred the complainant to the guidance on vexatious complaints available on his website.
22. The complainant wrote to the Commissioner on 23 February 2010 stating "On the basis that the Trust's vexatious complaints policy is the only grounds that I have been told for refusing this request I am objecting on the basis that I have been given no proper notification

and that the vexatious complaints policy is not a valid reason for blanket refusals." The complainant requested that the Commissioner proceed to Decision Notice.

23. The Commissioner wrote to the Trust on 13 April 2010 to clarify specifically what it had provided to the complainant in response to his request for a copy of the protocol, and whether the Trust had provided everything it held in respect of this request.
24. On 23 April 2010 the Trust wrote to the Commissioner to confirm what it had provided to the complainant, clarifying that a copy of its protocol for the management of upper GI laparoscopic procedures was provided on 1 September 2008 as a result of the Healthcare Commission's investigation, as opposed to the Freedom of Information regime.
25. The Commissioner contacted the Trust on 28 April 2010 to ascertain whether the Trust's protocol had been changed at all or updated since September 2008.
26. On 30 April 2010 the Trust wrote to confirm that the protocol has not changed or been updated. On 15 June 2010 the Trust also confirmed that it had not issued a refusal notice in relation to the 1 November request but rather it relied on the refusal notice previously issued in relation to a related request.

Analysis

Substantive Procedural Matters

27. In determining this case, the Commissioner has taken into account the submissions of both the public authority and the complainant. In addition, the Commissioner has taken account of the decision reached in FS50234985 detailed above. Full extracts of the relevant legislation considered in the case can also be found in the Legal Annex to this notice.

Section 14(1) - vexatious request

28. Section 14(1) provides that a public authority does not have a duty to comply with a request where it may be considered vexatious. As a general principle, the Commissioner considers that this section of the Act is meant to serve as protection to public authorities against those who may abuse the right to seek information.

29. Deciding whether a request is vexatious is essentially a balancing exercise and, in weighing up this issue, the Commissioner has considered the following factors:
- Could the request fairly be seen as obsessive or manifestly unreasonable?
 - Is the request harassing the authority or distressing to staff?
 - Would complying with the request impose a significant burden in terms of expense and distraction?
 - Is the request designed to cause disruption or annoyance?
 - Does the request lack any serious purpose or value?
30. In establishing which, if any, of these factors apply, the Commissioner will consider the history and context of the request. In certain cases, a request may not be vexatious in isolation but when considered in context it may form a wider pattern of behaviour that makes it vexatious. The Commissioner recognises, however, that it is the request and not the requester that must be vexatious for the exclusion to be engaged.
31. A significant feature of the Trust's submissions concern the complainant's attempts to reopen issues, namely the circumstances around his mother's death and the Trust's subsequent handling of his complaint, which the Trust deems have already been considered.
32. The Commissioner has also viewed the request for the document implementing a new pathway for management of upper GI laparoscopic procedures as forming part of the complainant's general grievance against the Trust.
33. The complainant requested the Commissioner to include in his Decision Notice some background in support of his view that his request of 1 November 2009 is not vexatious and should be treated differently to the others submitted to the Trust which can be summarised as follows:
- The complainant advised that, following the investigation into his mother's death, the Healthcare Commission's clinical adviser reported it was standard practice to routinely perform either a CT scan or gastrograffin swallow at 24 hours following complex hiatal surgery which was reflected in the Healthcare Commission recommendations to the Trust.
 - The complainant explained that the Trust accepted the clinical adviser's opinion and subsequently began to develop a new protocol for the management of post-operative hiatus hernia repairs, whereby the whole surgical directorate would introduce a practice of

performing a gastrograffin swallow 24 hours after complex hiatal surgery.

- The complainant explained that the Trust did not provide the revised processes it had implemented as had been requested by the Healthcare Commission, it had instead described them. He stated that the Trust's description contained no reference to the 24 hour timescale. He explained the Trust had informed the Healthcare Commission that the protocol requested by the complainant on 1 November 2009 was implemented by the Trust in September 2007.
 - The complainant clarified that on 10 August 2008 he requested copies of the Trust's authorised protocols/processes which it had told the Healthcare Commission had been or would be implemented by March 2008.
 - The complainant's view is that his request of 10 August 2008 was not objected to by the Trust on the grounds that it was vexatious, rather the Trust simply refused to provide him with the information requested. The complainant confirmed the Trust wrote to him on 1 September 2008 and provided him with the description it had given the Healthcare Commission but advised the Trust had not provided him with the issued processes he had requested.
 - The complainant then wrote to the Trust on 15 September 2008, again requesting it to provide the protocols it told the Healthcare Commission it had implemented. The complainant states that the Trust ignored the request.
34. In reaching his decision on this case, the Commissioner has considered the complainant's submissions detailed above as to why he resubmitted his request for the protocol for the management of upper GI laparoscopic procedures.
35. During the course of the investigation, the Commissioner has established that the Trust provided the complainant with a copy of the Trust's protocol for the management of upper GI laparoscopic procedures. Whilst the Trust has confirmed the copy of the protocol itself was provided on 1 September 2008 as a result of the Healthcare Commission's investigation, as opposed to it being provided as a result of a Freedom of Information request, the Commissioner has taken note of the significance of the date in reaching his decision in this case. Further, the Trust has affirmed that the protocol has not changed or been updated since it provided the complainant with a copy in September 2008.

Could the request fairly be seen as obsessive or manifestly unreasonable?

36. An obsessive request or a request that is manifestly unreasonable is often a strong indication of vexatiousness. Contributory factors can include the volume and frequency of correspondence and whether there is a clear intention to use the request to reopen issues that have already been debated.
37. The Commissioner understands that the death of a close family member will always be traumatic and will often lead to questions about the quality of healthcare offered to that individual.
38. The Commissioner has considered that the Healthcare Commission identified shortcomings in both the patient's treatment and the Trust's handling of the complainant's subsequent concerns. Coupled with this, the complainant is of the view that the Trust has failed to carry out the Healthcare Commission's recommendations or taken sufficient responsibility for its involvement in his mother's death. The Commissioner would therefore not find it unreasonable that a member of the family would want to know more about the surrounding circumstances of the case and, where applicable, to hold an authority to account.
39. However, the Commissioner is mindful that there must be a limit to such enquiries. The complainant was originally provided with a copy of his mother's health records case note folder in October 2005. Since July 2006, the Trust has fielded a significant number of separate requests, spread out over different dates. Many of these requests asked for comparative data on the type of procedure performed on the complainant's mother, and the ensuing complications.
40. In addition to the channel of communication afforded by the Act, the Trust has separately responded to the complainant's general correspondence about his complaint, as well as co-operating with the Healthcare Commission to further its own investigation.
41. Despite the vexatious complainant status communicated to the complainant by the Trust in October 2008 and following his request of 1 December 2008, the Trust's application of section 14(1) in its refusal notice of 23 December 2008, the complainant has persisted in requesting information about the protocol for the management of upper GI laparoscopic procedures, a matter which the Trust had already dealt with. The Commissioner is of the view that pursuing the request for the protocol for the management of upper GI laparoscopic procedures is indicative of obsessive behaviour.

42. In coming to this judgement, the Commissioner has borne in mind the fact that the Trust informed the complainant, in an email dated 11 November 2008, that he should contact the Parliamentary Health Service Ombudsman ('PHSO') if he wished to continue to pursue any part of his complaint, including the decision to class him as vexatious. Despite being offered the opportunity for recourse through the PHSO, the complainant has continued to contact the Trust in order to advance his own investigation.
43. The Commissioner accepts that there is a fine line between persistence and a request being obsessive or manifestly unreasonable. In this instance, the Commissioner believes that the complainant has stepped over this line by using the Act in an attempt to re-visit an issue that the Trust has already considered.
44. Furthermore, the Commissioner considers that the pattern of the complainant's requests instil little confidence that compliance would not simply have triggered further correspondence and requests.
45. Ultimately, the complainant will always remain dissatisfied with his mother's treatment and will therefore continue to contact the Trust in an effort to hold someone accountable for her death. Whilst noting the complainant's submissions as to why he resubmitted this request (outlined in the Analysis section of this Notice), nevertheless this has resulted in a repeat request for information on the protocol for the management of upper GI laparoscopic procedures. The Commissioner finds that this demonstrates the complainant's intentions to perpetuate a complaint against the Trust.
46. Against this background, the Commissioner has deemed the request as obsessive.

Does the request have the effect of harassing the public authority or causing distress to staff?

47. The Commissioner acknowledges that there will often be an element of overlap between the various vexatious criteria. For instance, where a request is considered obsessive, it may be the case that it will have the effect of harassing a public authority. Whilst the complainant may not intend to harass or cause distress, the Commissioner must consider whether this was the effect. This is an objective test, based on whether a reasonable person would be likely to regard the request as harassing or distressing.

48. The Commissioner has taken into account the likelihood that a response ending the ongoing exchange of correspondence could ever realistically be provided. However, given the length of time that the Trust has been dealing with this issue and the nature of the enquiries, the Commissioner believes it is reasonable to conclude that the effect of the request would be to harass the public authority or its staff.

Would complying with the request impose a significant burden in terms of expense and distraction?

49. When considering whether this factor applies, the Commissioner would expect a public authority to be able to show that complying with the request would cause a significant burden in terms of both costs and diverting staff away from their core functions.
50. In the Information Tribunal case of *Coggins v the Information Commissioner* (EA/2007/0130), the Tribunal found that a "significant administrative burden" was caused by the complainant's correspondence with the public authority that started in March 2005 and continued until the authority's application of section 14(1) in May 2007. Similarly, in this case, the Trust has had to deal with the complainant's correspondence and requests over a sustained period.
51. As is the case here, it is common for the complainant's correspondence to return to earlier matters, particularly where the complainant remains dissatisfied with the response. Whilst the Trust has conceded that complying with the request in question would not prove to be resource-intensive, it would seem reasonable for the Trust to consider that compliance would likely lead to further correspondence, thereby imposing a significant burden.

Was the request designed to cause disruption or annoyance?

52. The Commissioner observes that the actual effect of much of the complainant's contact with the Trust, particularly the revisiting of issues examined by the Commission, is to cause disruption and annoyance, although he considers that this would not to be the likely intention for much of the complainant's correspondence.
53. As referred to previously, the Commissioner is aware that the Trust has advised the complainant of his entitlement to contact the PHSO should he be unhappy with his being classified as vexatious or any other part of the Trust's management of his complaint. In the light of this, the Commissioner considers that the reason for requesting the protocol for the management of upper GI laparoscopic procedures is, at least in part, to continue his campaign against the Trust and, in so doing this

has caused disruption to the authority. That said however, the Commissioner considers there is insufficient evidence to conclude that any disruption or annoyance caused by the request was done so with deliberate intent.

Does the request lack any serious purpose or value?

54. By itself, whether a request does or does not have value is not of significance given that the freedom of information legislation is not concerned with the motives of an applicant, but in promoting transparency for its own sake. However, the Commissioner acknowledges that should a public authority be able to show that a request has no value or purpose, this may help bolster the application of section 14(1) when taken together with other supporting factors.
55. The Commissioner considers that, to an extent, the serious purpose or value the complainant originally had has been undermined by the long periods of time over which the correspondence was undertaken and his determination to reopen matters that have been deliberated on by the Trust. The Commissioner also finds it significant that the complainant had been provided with a copy of the requested protocol for the management of upper GI laparoscopic procedures on 1 September 2008. During the investigation the Commissioner sought clarification as to whether these procedures had changed between 1 September 2008 and 1 November 2009, and was advised by the Trust that they had not changed.
56. The Commissioner is acutely aware of the sensitivity of the subject of the complainant's requests. In decision reference FS50234985 he decided there was insufficient evidence to suggest this request lacked serious purpose or value. He has real concern that the Trust's application of section 14(1) to the request for its own 'Vexatious Complaints Policy' and to requests associated with the complainant's complaint about the Trust may prove obstructive to his efforts to hold the Trust to account. However, in this case the Commissioner is satisfied that the request had been made previously and had been addressed by the Trust and has decided that this request lacks serious purpose or value.

Conclusion

57. The Commissioner recognises that there is a fine balancing act between protecting a public authority from vexatious applications and the promotion of transparency in the workings of an authority.

58. Taking all the relevant matters into account, including the history and context of the request, together with the complainant's explanation as to why he feels this request should not be deemed vexatious, the Commissioner has found that the number and strength of the factors in favour of applying section 14(1) are of sufficient weight to deem this request as vexatious.

Procedural Requirements

Section 17(1), 17(5) and 17(6)

59. Full extracts of section 17(1), 17(5) and 17(6) can also be found in the Legal Annex to this notice. Having reviewed the procedural elements pertaining to refusal notices, the Commissioner has concluded that section 17(5) and 17(6) are applicable to this case.
60. The complainant complained that, in his view, the only grounds he has been given for refusing this request are on the basis of the Trust's own vexatious complaints policy. He considers that he has been given no proper notification and that the Trust's own vexatious complaints policy is not a valid reason for blanket refusals.
61. The Commissioner has investigated this matter and is satisfied that the Trust was relying on the refusal notice it issued on 23 December 2008 in relation to the previous, related complaint which applied section 14(1). The Trust's letter of 3 November 2009 referred to at paragraph 8 of this Notice relates to the complainant's complaint lodged with the Healthcare Commission. The Trust has confirmed that, in accordance with section 17(5) and 17(6) of the Act, it has not provided any response to this request. The Commissioner has concluded that the Trust was entitled to rely on the decision and the circumstances in the present case to deem this request as vexatious for the reasons detailed in its refusal notice of 23 December 2008 and is satisfied that the request was similar to the previous request. As such, the Commissioner is satisfied that the Trust has considered this request on its merits and has not simply applied a "blanket refusal". He has concluded that the Trust acted in accordance with the requirements of section 17(5) and 17(6) in refusing to deal with this request.

The Decision

62. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

63. The Commissioner requires no steps to be taken.

Right of Appeal

64. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 30th day of November 2010

Signed

**Gerrard Tracey
Principal Policy Adviser**

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

Legal Annex

S.1 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."

S.14 Vexatious or Repeated Requests

Section 14(1) provides that –

"Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious"

Section 14(2) provides that –

"Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with a previous request and the making of the current request."

s.17 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(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."