

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 1 September 2011

Public Authority: Camden and Islington NHS Foundation Trust
(the 'Trust')

Address: Chief Executive's Office
2nd Floor
St Pancras Hospital
4 St Pancras Way
London
NW1 OPE

Summary

The complainant requested under the Freedom of Information Act 2000 (the 'Act') copies of all papers (minutes, reports, agendas and all other documents) for the closed ('confidential') parts of all board of directors meetings held by the Trust since 1 July 2009. The Trust responded that the costs limit [section 12(1)] applied and provided no information. The complainant requested an internal review and the Trust upheld its decision.

The complainant referred this case to the Commissioner. The Commissioner has found that section 12(1) has not been applied appropriately. The Commissioner orders the Trust to reprocess the request within the next 35 days without relying on section 12.

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 17 March 2010 the complainant requested the following information under the Act:

'Please provide me with all papers (minutes, reports, agendas and all other documents) for the closed ("confidential") parts of all board of directors meetings held by the Trust since 1 July 2009 onwards.'

3. On 18 March 2010 the Trust confirmed that it had received the request and that it was under active consideration.
4. On 16 April 2010 the Trust issued its response. It confirmed that there were 5 board meetings for which there are 39 files related to the closed ('confidential') parts of the meeting. It explained that it believed that most of the information was likely to be exempt. However, it said that the retrieving of the files and their review would take in excess of thirty hours and it was relying on section 12 of the Act. It asked whether the complainant could refine his request.
5. On 16 April 2010 the complainant requested an internal review. He explained that the costs of redaction and approving the disclosure cannot be taken into account and thus section 12 was applied inappropriately. He did not wish to refine his request.
6. There followed a delay in providing an internal review. The Commissioner intervened on a number of occasions to ensure that one was provided. The Commissioner will make further comments about this matter in the Other Matters section of this Notice.
7. On 14 March 2011 the Trust communicated the results of its internal review. It confirmed that it felt it was appropriate to maintain its position. It said it needed to check the 39 files to see if it was appropriate to disclose any information within them.

Scope of the case

8. On 22 July 2010 and 7 January 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He expressly complained about the lack of an internal review.
9. On 15 March 2011 the complainant agreed that the Commissioner would be considering the Trust's substantive compliance with the request dated 17 March 2010 and any procedural defects – such as delays.
10. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

11. On 22 September 2010 the Commissioner wrote to the complainant and the Trust to explain that he had received this complaint. He explained to the Trust that his guidance was that a reasonable time for completing an internal review is 20 working days from the date of the request for review, and explained that in no case should the total time taken exceed 40 working days. He asked for it to now issue an internal review response in 20 working days.
12. On 7 January 2011 the complainant wrote to the Commissioner. He confirmed that he still had not received an internal review. On 10 January 2011 the Commissioner notified the Trust that he would consider this matter substantively.
13. On 10 February 2011 the Commissioner called the Trust. He explained how section 12 works and particularly that the Trust was not entitled to count the time spent redacting information. He told the Trust that it should conduct its internal review promptly and provide him with any information that is being withheld. He confirmed what he said in writing.
14. On 17 February 2011, 25 February 2011, 7 March 2011, 10 March 2011 and 14 March 2011 the Commissioner telephoned the Trust to chase progress and understand what its position was about its internal review. This led to the internal review being issued on 14 March 2011.
15. On 15 March 2011 the Commissioner spoke to the Trust to explain that its position did not accord with the Act and a Decision Notice will now be issued. On 6 April 2011 he made one further enquiry of the Trust by telephone and asked it to confirm its answer in writing on 4 May 2011. It did so on the next day.

Analysis

Substantive matters

16. The Trust's position is that it is relying on section 12(1) because the work required to process the request would exceed the appropriate limit.
17. It knows that there are 39 files that contain relevant recorded information and believes that a lot of the information may require redaction. It has confirmed to the Commissioner that there is no other information within those 39 files which is not relevant to the request dated 17 March 2010. It believes that it would not be appropriate to do the work redacting the information because it would take more work than the 18 hours specified by the *Freedom of Information and Data*

Protection (Appropriate Limit and Fees) Regulations 2004 (the "Regulations")¹.

18. The Commissioner has therefore considered whether section 12(1) has been applied appropriately in this case.

Section 12(1)

19. The reason the exclusion was included in the Act was to prevent a request from being too burdensome on a public authority. The Information Tribunal in *Quinn v Information Commissioner & Home Office* [EA/2006/0010] explained this point in this way (at paragraph 50):

'The fact that the rules drafted pursuant to s.12 have the effect of defining what is a reasonable search and the amount of time and money that a public authority are [sic] expected to expend in order to fulfil their obligations under the Act, serves as a guillotine which prevents the burden on the public authority from becoming too onerous under the Act.'

20. Section 12 of the Act does not oblige a public authority to comply with a request if the authority estimates the cost of complying with the request would exceed the appropriate limit.
21. The Trust has stated that it is likely to take more than 18 hours to read the 39 files, and redact the exempt information and therefore complying with the request would exceed the appropriate limit as set out in the Regulations. The Regulations set a limit of £450 to the cost of complying with a request for all public authorities subject to the Act not listed Schedule 1 part I. In estimating the cost of complying a public authority can take only the following into account:
- determining whether it holds the information requested,
 - locating the information or documents containing the information,
 - retrieving such information or documents, and
 - extracting the information from the document containing it.
22. The Regulations also state: 'any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf

¹ The Regulations can be located at the following link:
<http://www.legislation.gov.uk/uksi/2004/3244/contents/made>

of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour'.

23. The Trust has argued it will take 30 minutes to check each of the 39 files and whether the information could be released and therefore its estimate was that the request would take over 19.5 hours to answer. It then explained more time would be needed to undertake a proper review of whether the information should be disclosed and therefore the appropriate limit was exceeded.
24. In the Commissioner's view the key issue in this case is whether the words "extracting the information from a document containing it" can be said to include the redaction of exempt information. His view is that it does not. This is because in this context, the term "information" relates to the information **requested**, not the information to be disclosed. Therefore the time taken to redact a document (leaving only the information which is to be disclosed) cannot be taken into account because it is not an activity which is required to extract the requested information from information that was not requested. The Commissioner is supported by the recent decision of the High Court in *The Chief Constable of South Yorkshire Police v The Information Commissioner* [2011] EWHC 44 (Admin) a decision that can be found at the following link:
<http://www.bailii.org/ew/cases/EWHC/Admin/2011/44.html>
25. In this case the request is clearly asking for all the papers that were considered in five meetings. The Trust is aware that those papers are contained in 39 files and is able to identify them easily. It is only this identification process that can be charged for. It appears to wish to charge for the process of considering exemptions and it is not entitled to do so under the Regulations because this is not one of the exhaustive specified activities that allowed under Regulation 4(3). The Commissioner has explained this matter to the Trust and it will not vary its position.
26. The Commissioner finds that the Trust has incorrectly interpreted and misapplied the Regulations. It follows that it has applied section 12(1) inappropriately and cannot rely on this exclusion. This is because it cannot convince the Commissioner that a reasonable estimate for the work required to identify and obtain the files would take more than 18 hours.

The Decision

27. The Commissioner's decision is that the Trust failed to deal with the request in accordance with the requirements of the Act. It applied section 12(1) inappropriately.

Steps Required

28. The Commissioner requires the Trust to take the following steps to ensure compliance with the Act:

- Disclose all of the information contained in the 39 files or provide the complainant with a refusal notice in accordance with the requirements of section 17 of the Act setting out which exemption(s) apply to the information. The new refusal notice cannot rely on sections 12.
- The Trust must when considering its position look at each piece of withheld information and should either disclose it or come to a view about what exemption specifically applies to it.

Other matters

29. Although the following aspects do not form part of this Decision Notice the Commissioner wishes to highlight the following matter of concern.

Internal review response time

30. The Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days.
31. In this case the Trust took over ten months to issue an internal review.
32. The Commissioner wishes to place on record that the Trust should ensure that internal reviews are carried out promptly in future.

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

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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.

Dated the 1st day of September 2011

Signed

**Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Freedom of Information Act 2000

Section 1 General Right of Access

(1) 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.”

(2) Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 10 Time for compliance with request

(1) 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.”

(2) 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.”

(3) 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.”

(4) 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."

- (5) Regulations under subsection (4) may –
- (a) prescribe different days in relation to different cases, and
 - (b) confer a discretion on the Commissioner."

- (6) 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."

Section 12 Exemption where cost of compliance exceeds appropriate limit

(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."

(2) 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."

(3) 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."

(4) 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."

(5) 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.

Section 16 Duty to provide advice and assistance

(1) "It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case."

Section 17 Refusal of request

(1) 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.

(2) 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.

(3) 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.

(4) 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.

(5) 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.

(6) 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.

(7) A notice under subsection (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.'

Statutory Instrument 2004 No. 3244

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

...

The appropriate limit

3. (1) This regulation has effect to prescribe the appropriate limit referred to in section 9A(3) and (4) of the 1998 Act and the appropriate limit referred to in section 12(1) and (2) of the 2000 Act.

(2) In the case of a public authority which is listed in Part I of Schedule 1 to the 2000 Act, the appropriate limit is £600.

(3) In the case of any other public authority, the appropriate limit is £450.

Estimating the cost of complying with a request - general

4. - (1) This regulation has effect in any case in which a public authority proposes to estimate whether the cost of complying with a relevant request would exceed the appropriate limit.

(2) A relevant request is any request to the extent that it is a request-

(a) for unstructured personal data within the meaning of section 9A(1) of the 1998 Act^[3], and to which section 7(1) of that Act would, apart from the appropriate limit, to any extent apply, or

(b) information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply.

(3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in-

(a) determining whether it holds the information,

(b) locating the information, or a document which may contain the information,

(c) retrieving the information, or a document which may contain the information, and

(d) extracting the information from a document containing it.

(4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour.'