

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 July 2015

Public Authority: Basildon and Thurrock University Hospitals
Address: Nethermayne
Basildon
Essex
SS16 5NL

Decision (including any steps ordered)

1. On 22 February 2014, the complainant requested information from Basildon and Thurrock University Hospitals NHS Foundation Trust ('the Trust') about how it manages and uses the drug, Mannitol. Correspondence with the complainant followed. This culminated in the Trust informing the complainant that it is not obliged to comply with the request he submitted on 2 October, as it considers this request to be vexatious under section 14 of the FOIA.
2. The Commissioner's decision is that the request is not vexatious, under section 14(1) or a repeat request under 14(2) and therefore the Trust is incorrect not to comply with it.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Comply with the request of 2 October 2014 or issue a valid refusal notice, having first confirmed whether or not the complainant is satisfied that the Trust's response of 11 April 2014 has already addressed the third element of the 2 October request.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 2 October 2014, the complainant wrote to the Trust and requested information in the following terms:

"I think there has been a misunderstanding regarding one of the questions as I have not asked this before to the best of my knowledge. I have asked for the quantities and dates of orders of mannitol since the date (Feb 2011) stated in my previous email. To date I have received no [1] dates of purchases or the names of the suppliers [2] where these purchases came from. Please provide this information and [3] where these were stored ie which departments they were sent to as your robust system within the pharmacy should collate this information."

6. The Trust responded on 27 October. It said that it is not obliged to comply with this request under section 14 of the FOIA as it considers the request to be vexatious. It subsequently confirmed its application of section 14 in later, undated, correspondence to the complainant.

Scope of the case

7. The complainant contacted the Commissioner on 3 February 2015 because he is not satisfied that the Trust has refused to comply with his request of 2 October. The Commissioner has focussed his investigation on the Trust's application of section 14(1) to this request but has also considered whether the request is a repeat request to which the Trust should have applied section 14(2).

Background

8. The complainant's mother died at Queen's Hospital, Romford in early 2013 having been transferred there from Basildon Hospital. He considers that aspects of the treatment she received at Basildon Hospital led to her death. The Trust has told the Commissioner that an inquest into the death of the complainant's mother concluded that she died of natural causes. An independent report was also commissioned into the circumstances of the case and this was shared with the complainant.
9. The Trust says it has had substantial correspondence with the complainant. This includes correspondence generated as a result of a service complaint the complainant raised with the Trust about the circumstances of his mother's death. This correspondence is concluded, with the Trust having advised the complainant that there are no further

avenues for local resolution and that he should pursue his complaint against the Trust with the Parliamentary and Health Service Ombudsman.

Reasons for decision

10. Section 14(1) of the FOIA says that a public authority is not obliged to comply with a request for information under the FOIA, if that request is vexatious.
11. The term "vexatious" is not defined in the FOIA. The Commissioner has identified a number of 'indicators' which may be useful in identifying vexatious requests. These are set out in his published guidance on vexatious requests. In short they include:
 - Abusive or aggressive language
 - Burden on the authority
 - Personal grudges
 - Unreasonable persistence
 - Unfounded accusations
 - Intransigence
 - Frequent or overlapping requests
 - Deliberate intention to cause annoyance
12. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is vexatious.
13. The Commissioner's guidance suggests that, if a request is not patently vexatious, the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. In doing this the Commissioner considers that a public authority should weigh the impact of the request upon it and balance this against the purpose and value of the request.
14. Where relevant, public authorities also need to take into account wider factors such as the background and history of the request.
15. The complainant had initially submitted a 13 part information request on 22 February 2014. The request was for information about aspects of the Trust's use of the drug Mannitol including policies followed, how many times it has been applied to a suspected or actual brain injury, who supplies it to the Trust and how it is stored.

16. The Trust responded on 13 March and told the complainant that it did not hold information related to nine parts of the request. It disclosed information related to four parts, namely the Trust's current policy on use of Mannitol in cases of suspected/actual brain injury; the manufacturer's recommendations for storing, preparing and using this drug; the date it changed supply of Mannitol and information Basildon Hospital received from external sources regarding the storage and use of Mannitol.
17. The Commissioner has seen the email correspondence between the Trust and the complainant that then followed, which is summarised below.
18. On 14 March, the complainant submitted a series of supplementary questions and additional information requests about the Trust's response. This included a request for confirmation from the Trust that its pharmacy did not circulate a particular 'memo' that outlines procedures for applying Mannitol. The Trust interpreted the correspondence of 14 March as a request for an internal review.
19. On 11 April, the Trust reviewed its response to the complainant's original request. As well as reconsidering its original response, in this review the Trust also addressed the complainant's supplementary questions and requests of 14 March and asked the complainant to clarify three of his queries.
20. On 14 April, the complainant again referred to the 'memo' and said that this 'memo' warns of problems with Mannitol. On 2 May, the Trust again requested clarification about the nature of the complainant's information request. (The Commissioner understands this request to comprise the complainant's query regarding the 'memo' and the remaining two queries, mentioned at §19, that the Trust considered were unclear.) Correspondence on this matter followed. The complainant submitted a clarified, three part request on 5 September, which included the following:

"Please provide me all information relating to orders of Mannitol since Feb 2011 including manufacturers details and quantities"
21. The Trust responded on 1 October. It explained that the 'memo' to which the complainant had previously referred is a bulletin that was created by the Trust's pharmacy and issued to the pharmacy department in 2009. It sent a copy of this bulletin to the complainant.
22. With regard to the part of the request provided at §20, the Trust told the complainant that it had already disclosed relevant information on 11 March in response to the complainant's correspondence of 14 March.

(The Trust made a mistake with the date it had referenced; it had in fact disclosed this information in its internal review of 11 April). The Trust re-sent this response, as follows:

"We do not centrally collate information regarding how many times Mannitol is applied to a suspected or actual brain injury. Information on the administering of Mannitol is held on a patient by patient basis.

The total number of Mannitol 500ml infusions issued from pharmacy to Trust departments from 18th February 2013 to present is 114. These were issued to a number of different locations across the Trust.

Please be advised that our issue data does not mean that the Mannitol was administered to patients in all instances. Apart from in the critical care unit, there is no system to centrally collect data on what drugs are administered to patients, this information is held on a patient by patient basis.

40 bags of Mannitol have been issued to the A&E department since 18th February 2013 to date.

Please be aware that Mannitol is used throughout the Trust and is not solely used for patients with suspected brain injury. As previously stated, we do not centrally collate information on the reason why Mannitol is administered, this information is held on a patient by patient basis."

23. In response to this, on 2 October the complainant submitted the further request that is the subject of this notice.
24. Given that the Trust suggested that an aspect of the complainant's request of 5 September is a repeat of a request he submitted on 14 March the Commissioner has first considered whether the provision under section 14(2) might be applicable. Section 14(2) says that a public authority is not obliged to comply with a request that is identical or substantially similar to a previous request from the same person.
25. The request that the complainant submitted on 14 March was as follows:

"You must keep a record of drugs [Mannitol] taken from a Pharmacy please provide this information. How often have A&E requested it?"
26. While the complainant's request of 2 October again concerns the Hospital's management of Mannitol, it is a request for information on the Trust's orders of Mannitol since February 2011, to include the manufacturer's details and quantities ordered and in what departments these orders were stored. The Commissioner does not consider this to be an identical request to the 14 March request and, while similar, he

does not consider it to be substantially similar. He is therefore not convinced that the request of 2 October is a repeat request and consequently, the provision under section 14(2) cannot be applied to it. He has gone on to consider the Trust's characterisation of the request as vexatious, under section 14(1).

27. In its submission to the Commissioner, the Trust has said that continuing to answer the complainant's repeated questions causes the Trust an unjustified level of disruption and is an inappropriate use of public resources. It considers that the complainant's intent is to cause disruption to the Trust and that he has abused his right to information under the FOIA by using the Act to continue contact with the Trust, thereby maintaining a route through which he can criticise the Trust's services.
28. The Trust says it has told the complainant a number of times that it does not hold some of the information he requested. It says that the complainant nonetheless frequently refers to information he says he has garnered - from the inquest, the independent report and his correspondence with the Trust regarding his wider service complaint - that suggests to him that the Trust holds more information than it has disclosed to him. He consequently disagrees with the Trust's position that it does not.
29. The Trust has referred to the fact that, during their correspondence, the complainant has also submitted new questions and also presented the same questions in new ways. The length of time Trust staff have spent clarifying, researching and replying to the complainant's requests and questions has had a detrimental impact on relevant staff and the wider department - it has distracted them from other work, and caused a degree of distress.
30. The Trust finally applied section 14 to the request of 2 October "as a last resort" because it had concluded that it had exhausted all available avenues in its attempt to provide a response that the complainant will find satisfactory. It considers this will not be possible because the complainant does not accept that the Trust does not hold some of the information he requested.
31. The Commissioner has reviewed all the correspondence between the Trust and the complainant between 22 February and 5 September 2014. He has identified 19 separate requests for information about the Trust's use and management of Mannitol, prior to the complainant's request of 2 October. In addition, the Commissioner notes that the complainant asked the Trust a number of questions about Mannitol that the Trust has replied to outside of the FOIA.

32. In his view, the Trust approached the complainant's multi-part and, at times, unclear requests (and questions) in accordance with the Act and has endeavoured to provide a satisfactory response to each request, and to answer each of the complainant's questions. It has remained polite and helpful in the face of, on occasion, some brusque correspondence from the complainant. Up until the 1 October, once a request had been clarified the Trust either provided the complainant with information within the scope of a particular request that it holds, or informed the complainant that it does not hold other information that the complainant has requested. In the Commissioner's view, the only request that the Trust has not dealt with, and the reason for his complaint to the Commissioner, is the complainant's request of 2 October.
33. In considering whether this request can be categorised as vexatious, the Commissioner has considered his criteria for vexatiousness, given at §11 to §14 and his wider [guidance on section 14\(1\)](#).
34. He considers that some of the criteria at §11 are met, but only up to a point. He accepts that the complainant has submitted a high number of requests over approximately six months and that responding to these has caused a degree of burden to the Trust. From the evidence of the correspondence provided to him however, the Commissioner is less easily convinced that the complainant is demonstrating a level of persistence that is unreasonable, or has a personal grudge against the Trust and so deliberately intends to cause it annoyance. The Commissioner's initial conclusion is therefore that the request of 2 October is not patently vexatious.
35. He notes in the guidance that in [Information Commissioner vs Devon County Council & Dransfield](#) [2012] UKUT 440 (AAC), (28 January 2013) the Upper Tribunal took the view that the ordinary dictionary definition of the word vexatious is only of limited use, because the question of whether a request is vexatious ultimately depends upon the circumstances surrounding that request.
36. In further exploring the role played by circumstances, the Tribunal placed particular emphasis on the issue of whether the request has adequate or proper justification.
37. After taking these factors into account, the Tribunal concluded that 'vexatious' could be defined as the "...manifestly unjustified, inappropriate or improper use of a formal procedure.'
38. The Tribunal's decision clearly establishes that the concepts of 'proportionality' and 'justification' are central to any consideration of whether a request is vexatious. This being the case, the Commissioner

has considered whether the complainant's request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.

39. This has meant weighing the evidence about the impact on the authority and balancing this against the purpose and value of the request. He has also taken into account wider factors such as the background and history of the request.
40. The background to the request is discussed at §8 - §9. The complainant has concerns about the treatment his mother received at Basildon Hospital. Although the inquest into his mother's death concluded that she died of natural causes, the complainant is seeking information about how the Trust uses and manages the drug Mannitol, which the Commissioner understands was administered to his mother.
41. The Commissioner notes that Basildon and Thurrock University Hospitals NHS Foundation Trust was put into special measures by Monitor in July 2013, and put into the highest risk category by the Care Quality Commission in October 2013. The Commissioner considers that it would be natural for these matters to have concerned the Trust's service users at that time, including the complainant. (The Trust came out of special measures in June 2014.)
42. It appears to the Commissioner that the complainant is seeking to better understand all the circumstances of his mother's death. Given the matters above, the Commissioner considers that the motive behind the complainant's requests and questions, prior to and including his request of 2 October, are justified.
43. The complainant's request of 5 September 2014 was for information about orders of Mannitol since February 2011, including manufacturers' details and quantities. The Trust said that this request was a repeat of his request of 14 March 2014, to which it had responded on 11 April 2014.
44. The Trust's response of 11 April – at §22 – does not in fact address who manufactured the supplies of Mannitol that it ordered, how much it ordered or when it ordered it (although in the Commissioner's view when the orders had been placed had not been clearly requested on 5 September). This therefore generated the complainant's request of 2 October in which he requests [1] the dates when the Trust purchased supplies of Mannitol, [2] the name(s) of its suppliers/manufacturers and [3] where (ie in what departments) its supplies of Mannitol were stored.
45. With regard to the third element of this request, the Commissioner notes that in its response of 11 April, the Trust does say that it issued 114 infusions of Mannitol from its pharmacy to a range of locations

around the Trust from 18 February 2013 to the present (ie April 14) with 40 infusions being sent to the A&E department.

46. It appears to the Commissioner that on 2 October the complainant broadly requested elements of information that he considers the Trust did not provide in April, in its response to his March request or his subsequent request in September.
47. Having thoroughly reviewed all the correspondence and taken account of the background and wider history of the request, the Commissioner considers that the complainant's request of 2 October is reasonable in the circumstances. The Commissioner recognises that the complainant's on going correspondence with the Trust does cause it a degree of disruption. However, since he considers the request in question to be justified, he does not consider that any further burden that responding to the request may cause the Trust would be disproportionate. Consequently, he has decided that, on this occasion, the Trust is not correct to categorise this particular request as vexatious under section 14(1). He notes the Trust's suggestion at paragraph 9 however, and considers that a complaint to the PHSO may now be an appropriate way for the complainant to progress his concerns about the Trust.

Right of appeal

48. 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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

49. 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.
50. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Pamela Clements
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