

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 18 June 2020

**Public Authority:** Barts Health NHS Trust  
**Address:** 9 Prescott Street  
London  
E1 8PR

#### **Decision (including any steps ordered)**

---

1. The complainant requested information relating to a particular information governance breach. Barts Health NHS Trust (the Trust) refused to comply with the request and cited section 14(1) of the FOIA (vexatious requests) as its basis for doing so.
2. The Commissioner's decision is that the Trust was not entitled to rely on section 14(1) to refuse the request. She also finds that the Trust breached section 10(1) of the FOIA by failing to provide its substantive response to the request within the statutory timescale of 20 working days.
3. The Commissioner requires the Trust to take the following step to ensure compliance with the legislation:
  - Issue a fresh response to the request which does not rely on section 14(1) of the FOIA.
4. The Trust must take this step 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 contempt of court.

## Request and response

---

5. On 5 June 2019 the complainant wrote to the Trust and requested information in the following terms:

*"Would you please forward to me all documentation in the Trust's possession relating to the Information Governance Breach Dated ID 196001 - STEIS reference 2018/9504.*

*I am happy for you to email me this information and I look forward to receiving it within 20 working days after you receive this email."*

6. Before the Trust provided a substantive response, there was some intervening correspondence between the Trust and the complainant in which the Trust attempted to get the complainant to reduce the scope of the request.
7. On three occasions between 28 June and 3 July 2019 the Trust told the complainant that it was putting his request on hold while it awaited his "clarification". It stated that it could restart the 20 working days from the point at which a satisfactory reply constituting a valid request was received. However, rather than asking for clarification of the request the Trust was, in fact, asking the complainant to refine his request.
8. For example, on 2 July 2019 the Trust wrote to the complainant and stated that it did not have the resources to ask potentially every department in the organisation if they held relevant records. It asked the complainant if he was willing to "specify the scope as follows: Correspondence uploaded to Datix in relation to the incident". The Trust said that this was likely to be the most important information relating to the incident. It went on to say:

*"While we appreciate that you have a right to information about the Trust, we also need to ensure that we spend our resources well and therefore we ask you to be as specific as possible about what exactly you want (the ICO discourages requesters to 'fish' for information) so that we can provide information that is relevant to you (and the wider public) and make good use of our time. We therefore trust that you will agree with this approach and ask you to confirm the scope of the request*

*Please note that the Trust does not need to respond while we ask a requester for clarification and can restart the 20 working days from the point at which a 'satisfactory reply constituting a valid request is received'. Once we have received your clarification, we will send an acknowledgement of this.."*

9. Each time the Trust requested "*clarification*" the complainant replied and attempted to provide some assistance by confirming he already had copies of certain documents or listing the relevant staff or departments to contact in relation to the request. However, he maintained that he wanted all of the relevant records, as originally requested.
10. Then, on 25 July 2019 the Trust provided its substantive response to the request. It refused the request under section 14(1) of the FOIA, on the basis that it was vexatious.
11. The complainant requested an internal review on 26 July 2019.
12. On 28 August 2019 the Trust provided the outcome of its internal review. It maintained its original position that the request was vexatious under section 14(1) of the FOIA.

### **Scope of the case**

---

13. The complainant contacted the Commissioner on 6 September 2019 to complain about the way his request for information had been handled. Specifically, he disputed the Trust's decision to refuse his request on the basis that it was vexatious.
14. The scope of this case and the following analysis is to consider whether the Trust was correct to rely on section 14(1) of the FOIA as its grounds for refusing to comply with the request. The Commissioner will also consider whether the Trust responded to the request within the statutory time for compliance.

### **Reasons for decision**

---

#### **Section 14(1) – Vexatious requests**

15. Section 14(1) of the FOIA states that a public authority is not obliged to comply with a request for information if the request is vexatious.
16. The term vexatious is not defined in the FOIA. The Upper Tribunal (Information Rights) considered in some detail the issue of vexatious requests in the case of the Information Commissioner v Devon CC &

Dransfield (GIA/3037/2011)<sup>1</sup>. The Tribunal commented that vexatious could be defined as the “*manifestly unjustified, inappropriate or improper use of a formal procedure*”. The Tribunal’s definition clearly establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.

17. In the Dransfield case, the Upper Tribunal also found it instructive to assess the question of whether a request is truly vexatious by considering four broad issues: (1) the burden imposed by the request (on the public authority and its staff); (2) the motive of the requester; (3) the value or serious purpose of the request and (4) harassment or distress of and to staff.
18. The Upper Tribunal did however also caution that these considerations were not meant to be exhaustive. Rather, it stressed the: “*importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests*” (paragraph 45).
19. The Commissioner has identified a number of indicators which may be useful in identifying vexatious requests. These are set out in her published guidance on vexatious requests<sup>2</sup>.
20. Where relevant, public authorities may take into account wider factors such as the background and history of the request and its relationship with the requester. However, the Commissioner is keen to stress that in every case the question is whether the request itself is vexatious and not the person making it.
21. In some cases it will be obvious when a request is vexatious. In cases where the issue is less clear-cut the Commissioner considers the key question to ask is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. This will usually mean weighing the evidence about the impact on the authority and balancing this against the purpose and value of the request.

---

<sup>1</sup> <https://www.judiciary.uk/judgments/info-commissioner-devon-county-council-tribunal-decision-07022013/>

<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1198/dealingwith-vexatious-requests.pdf>

## The Trust's position

22. The Trust argued that, when placed in the context of its wider dealings with the complainant, the request was vexatious.
23. By way of background, the Trust explained that the complainant was involved in an information governance breach (the breach) which was discovered in spring 2018. The Trust categorised the breach as a "serious incident". It told the Commissioner that the complainant disputed the seriousness of the breach and did not agree that it should have been treated as a serious incident. The breach was investigated independently by the London Audit Consortium (LAC). The investigation was concluded in May 2018 and a serious incident report was produced and provided to the complainant.
24. The Trust considered the following indicators from the Commissioner's guidance applied in this case:
  - personal grudges;
  - unreasonable persistence;
  - unfounded accusations;
  - intransigence;
  - frequent or overlapping requests;
  - disproportionate effort;
  - no obvious intent to obtain information; and
  - futile requests.
25. The Trust stated that some were stronger than others, although it did not confirm which of the indicators it thought were more compelling. It believed that together they formed an overall picture and pattern.
26. The Trust argued that by submitting this request the complainant was attempting to reopen an issue which had already been comprehensively addressed, specifically through the investigation conducted by the LAC. The Trust noted that the complainant did not accept the outcome of the investigation. It provided an extract of a letter the complainant sent to the Chief Executive Officer (CEO) on 6 June 2019, the day after he submitted his request and over a year after the investigation was completed, in which he disputed the outcome of the report and stated that the investigation should "*clearly be reopened*".

27. It further argued that the request was futile because the issue at hand individually affected the complainant and had already been conclusively resolved by the LAC's investigation.
28. The Trust did not seek to demonstrate that the request itself contained unfounded accusations, instead it asserted that he made these accusations in his wider correspondence on the matter. It provided quotes from letters the complainant sent to the CEO on 10 February and 6 June 2019, including the following:

*"It has come to my knowledge that personnel in the EFM department have embarked on a course of manipulating the Trust's obligations to the regulatory authorities for their own purposes. Essentially to pursue their campaign of bullying against me"*

*"It also provides a motive for your misleading statutory authorities. In order to accommodate [name redacted] wish that I do not return to the EFM department, you have endeavoured to 'beef up' the Trust's case by ensuring that at the time of the Disciplinary Hearing this incident remains categorised as a serious incidence even though it is nothing of the sort."*

29. Additionally, it stated that he did not consider the Lead Investigator of the LAC's investigation was sufficiently qualified. It highlighted a comment from the complainant's letter to the CEO in which he stated that based on her report of May 2018 it was clear that the Lead Investigator knew nothing about how information governance data breaches were assessed.
30. The Trust argued that the complainant had a personal grudge against a particular manager at the Trust, who he claimed he was bullied by. It said this was investigated by the LAC in June 2018 but the complaint was not upheld. Despite this outcome, the Trust stated that the complainant continued to make accusations about the manager. He claimed that they prepared the LAC's serious incident report regarding the breach and that they had done so for reasons of malice, even though the author was listed as another person.
31. Since spring 2018 the complainant submitted five requests under the FOIA, including the request being considered in this notice. He also submitted two subject access requests under data protection legislation. The Trust asserted that these were all related to the breach and the complainant's associated claim of bullying. It stated that, within the same time frame, the complainant had also been corresponding with various members of staff regarding these matters.

32. The Trust told the Commissioner that the complainant had been provided with extensive information about the serious incident throughout the course of the investigation. It argued that as he had not been specific about what he wanted, or what he believed had not already been provided, he was fishing for information.
33. In relation to the intransigence and disproportionate effort indicators, the Trust argued that the complainant was insistent on receiving all documentation relating to the breach and stated that he had not been willing to reduce the scope of his request.
34. With regard to the detrimental impact of the request, the Trust stated that while it did not seek to engage section 12(1) of the FOIA (costs of compliance) to the request, it considered the burden of time and costs was significant. In particular it highlighted the number of other requests the complainant submitted and the fact that information would require redaction. It believed that the following exemptions would apply to the information:
- section 40 (personal data) - information that would allow the requester and other individuals to be identified;
  - section 21 (information accessible to the applicant by other means) - information that was already accessible to the requester from his other requests and communication with the Trust;
  - section 41 (information provided in confidence) – information such as witness statements; and
  - section 31(1)(a) (law enforcement – the prevention and detection of crime) - information that could potentially provide an individual with information regarding the defence of Trust data and systems.
35. When explaining why this impact would be unjustified or disproportionate in relation to the request itself and its inherent purpose or value, the Trust stated:
- "The issue (IG breach) has already been resolved by an independent investigation and action taken which more recently has been upheld through an appeal process. The requester continues to challenge this in his correspondence with the CEO. The requester is pursuing a highly personalised matter. Most of the information caught under the request would be of little public interest value."*
36. The Trust confirmed that the appeals process it mentioned related to the complainant's dismissal from the Trust, which took place after the request was submitted.



## The Commissioner's decision

37. There are many different reasons why a request may be vexatious. There are no prescriptive "rules", although there are generally typical characteristics and circumstances that assist in making a judgement about whether a request is vexatious. A request does not necessarily have to be about the same issue as previous correspondence to be classed as vexatious, but equally, the request may be connected to others by a broad or narrow theme that relates them. A commonly identified feature of vexatious requests is that they can emanate from some sense of grievance or alleged wrong-doing on the part of the authority.
38. As the Upper Tribunal in Dransfield observed, there is:

*"no magic formula – all the circumstances need to be considered in reaching what is ultimately a value judgement as to whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of the FOIA."*
39. The context and history in which a request is made will often be a major factor in determining whether a request is vexatious, and the public authority may need to consider the wider circumstances surrounding the request before making a decision as to whether section 14(1) applies. In this case, the Trust considered that the particular context and history strengthened its argument that the request was vexatious.
40. In support of its position, the Trust argued that a number of the indicators of vexatiousness set out in the Commissioner's guidance applied in this case. While these indicators may be useful in identifying vexatious requests, the guidance also emphasises that the indicators are not a list of qualifying criteria. The fact that a request engages one or more of them will not necessarily mean that it must be vexatious. All the circumstances of the case will need to be considered in reaching a judgement as to whether a request is vexatious.
41. In reaching a decision in this case, the Commissioner considered the issues observed in the Dransfield judgement, as set out above at paragraph 17. Firstly, the Commissioner considered the extent to which the request imposed a burden on the Trust.
42. The Trust argued that the burden on time and finance was significant, particularly in the context of the number of other requests the complainant submitted. Within a time period of approximately one year the complainant made five requests under the FOIA and two subject access requests under the Data Protection Act 2018, which the Trust



stated were all related. Additionally, the Trust asserted that during this period the complainant also sent correspondence regarding the breach to various staff and departments within the Trust, including Human Resources, the department he worked in and the CEO.

43. The Commissioner does not consider the complainant submitted a particularly high number of requests and there was no evidence that they overlapped. With regard to the wider correspondence on the matter, given the background in this case, the Commissioner does not consider it was unusual or unreasonable for the complainant to have contacted departments such as Human Resources or his own department. The Trust did not provide a figure for the amount of correspondence the complainant sent, or examples that demonstrated any of the correspondence was of a particular length that might require extensive resources to respond to. The Commissioner's view is that the complainant's requests and wider correspondence do not appear to have reached a level that she deems unreasonable.
44. The Commissioner does not agree with the Trust's argument that the complainant was intransigent as he was unwilling to reduce the scope of his request. It is the Commissioner's view that, as the Trust refused the request on the grounds that it was vexatious, it was not necessary for the Trust to ask the complainant to narrow the scope of his request on multiple occasions prior to providing its initial response. The complainant was entitled to ask the Trust to deal with his request as it was originally worded. In doing so, the Commissioner does not consider that he was taking an unreasonably entrenched position.
45. Given the type of information that was requested, the Commissioner accepts that some of it was likely to be exempt. However, it is difficult for the Commissioner to place much weight on the argument that this would be particularly burdensome as the Trust did not provide an estimate of how long it would take to redact information or an example of the impact this would have on its resources.
46. While section 14 is designed to protect a public authority's resources from burdensome or vexatious requests, it is important to keep in mind that all information requests will impose some burden. Public authorities must accept this in order to meet their underlying commitment to openness and transparency.
47. Having considered the Trust's arguments regarding the burden imposed by the request, the Commissioner does not believe that the request would place a disproportionate burden on the Trust.
48. Next, the Commissioner considered the complainant's motive, as well as the purpose and value of the request.

49. The Commissioner considers that most requesters will have some serious purpose behind their request and it will be rare that a public authority will be able to produce evidence that the only motivation for submitting a request is to cause disruption and annoyance. However, if the information requested will be of little benefit to the general public this will restrict its value, even where there is clearly a serious purpose behind the request.
50. The Trust argued that in making the request the complainant sought to reopen a matter that had already been resolved by an independent investigation.
51. The fact that an investigation has been completed should not act as an automatic restriction on requesting information relating to it. However, an individual may be abusing their rights of access under the FOIA where they submit a request as a means to reopen matters which have already been comprehensively addressed by a public authority.
52. In this case, the request is undoubtedly linked to the LAC's investigation of the breach, which concluded just over a year before the complainant submitted the request. It is evident to the Commissioner, from the complainant's wider correspondence with the Trust, that he did not accept the outcome of that investigation. However, the Commissioner also understands that whilst the investigation had concluded there were other ongoing disciplinary matters that were connected to the breach.
53. The Trust also argued that the issue at hand individually affected the complainant. It believed that most of the information within the scope of the request was of little wider benefit to the public.
54. As the complainant was directly involved in the breach which was the subject of his request, the Commissioner acknowledges that he was pursuing a highly personalised matter. Nevertheless, this does not mean that the information is of no wider benefit to the public. It is the Commissioner's view that the requested information could potentially shed light on the Trust's processes for reviewing and investigating information governance breaches. The Commissioner recognises this could be of some benefit to the public, including those who use the Trust's services and other members of staff.
55. Finally, the Commissioner considered whether the request was designed to harass or cause distress to the Trust or its staff.
56. The Trust believed the complainant had a personal grudge against a particular manager. It also asserted that he made unfounded allegations within his wider correspondence regarding the breach. The Trust provided evidence from two letters the complainant sent to the CEO in

which he alleged that staff in his department were pursuing a campaign of bullying against him. He also stated the following regarding the LAC's report on the breach:

*"The report in itself if an abuse of the reporting system. To be 'Trumpish' about the matter this is a fake SI which fact has caused the author – obviously [name redacted] some considerable 'difficulty' when completing the form. She has now prepared a professional report that is accurate, objective and appropriate."*

57. The Commissioner recognises that the complainant is obviously dissatisfied with the handling of the investigation into the breach. His correspondence demonstrated a level of frustration with, and hostility towards, the Trust. However, the Commissioner does not consider that the complainant's request was designed to harass or cause distress.
58. In reaching a decision in this case, the Commissioner has taken all of the circumstances into account. She does not consider that the burden imposed on the Trust in complying with the request would be disproportionate.
59. The Commissioner is not persuaded that the current request can be categorised as vexatious and her conclusion is that the Trust was not entitled to rely on section 14(1) to refuse the request. At paragraph three above the Trust is now required to issue a fresh response to the request that does not rely on section 14(1).

### **Procedural matters – time for compliance**

60. Section 1(1) of the FOIA 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."*

61. Under section 1(3) where a public authority reasonably requires further information to identify or locate the requested information and has contacted the requester for further clarification, the 20 working day clock will commence the day after the public authority receives the necessary clarification.

62. Section 10(1) of the FOIA states that a public authority must respond to a request promptly and *"not later than the twentieth working day following the date of receipt."*
63. Section 10(6) provides that the date of receipt will be the day on which the authority receives the request or *"if later, the day on which it receives the information referred to in section 1(3)"*.
64. It is important to note that sections 1(3) and 10(6) are only applicable in cases where the authority cannot process the request without further information.
65. In this case, the Trust wrote to the complainant on several occasions before it provided its substantive response to tell him that it was putting his request on hold. It claimed that it required clarification of the request and that once this was received the clock would restart. However, the Trust was in fact asking the complainant to refine his request as it was concerned about the amount of resources required to respond to it. This does not constitute a valid reason to request clarification under the FOIA.
66. The Commissioner considers that there was only one objective reading of the request and the Trust did not require further information to identify or locate the requested information. Accordingly the time for compliance in this case is calculated from the original date of receipt, 5 June 2019.
67. As it took the Trust 57 working days to provide its response it is clear that the Trust did not deal with the request within the statutory time for compliance. The Commissioner therefore finds that the Trust breached section 10(1) by failing to respond to the request within 20 working days.

## Right of appeal

---

68. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

69. 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.
70. 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 .....**

**Ben Tomes  
Team Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**