

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 6 July 2022

**Public Authority:** Birmingham Women's and Children's NHS Foundation Trust

**Address:** Mindelsohn Way  
Birmingham  
B15 2TG

### Decision (including any steps ordered)

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1. The complainant has requested information from Birmingham Women's and Children's NHS Foundation Trust (the Trust) concerning its policies, processes and complaints. The Trust did not provide a response to the complainant until the Commissioner intervened. When the Trust did respond, it disclosed most of the requested information but refused to provide the remainder under section 12 FOIA (cost of compliance exceeds appropriate limit).
2. The Commissioner's decision is that, on the balance of probability, the Trust has now provided all the information it holds (apart from what was withheld under section 12 FOIA) to the complainant and has complied with section 1 FOIA. However, it did so beyond the legislative timeframe and therefore breached section 10 FOIA. The Commissioner has also decided that the Trust breached section 17(1) FOIA by not issuing a valid refusal notice within the appropriate timescale. The Commissioner finds that the Trust has cited section 12 appropriately, though late in the day, but failed to provide advice and assistance to the complainant and therefore breached section 16(1).
3. Therefore the Commissioner does not require the public authority to take any further steps.

## Request and response

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4. On 28 June 2021 the complainant wrote to the Trust and requested information in the following terms<sup>1</sup>:

"...In addition, I would also like to make SAR/FOI requests for the following information. If some of the information I am requesting does not fall under this remit. I would appreciate if you would pass any of the requests or questions which are relevant to another department (specifically those involved in the review process) to them:

1) On what date did the policy come into existence which stated that anyone could instruct BCH that any child's parent's contact details be removed and replaced by any other person. In the absence of any checks as to the PR [parental responsibility]/LG [legal guardian] status of the person instructing/requesting, or without seeking permission or even informing the parent originally listed on the system that they had been removed?...

2) On what date was the policy referred to revised? What exactly does the policy now state relating to changes to patients' demographic details, who can instruct them, what checks are made and informing of person being removed from the system, and what the formal process is now?

3) **[redacted]**

- i) Was the policies review as promised by the Medical Records and Safeguarding Teams undertaken following the **[redacted]**? If so what was the process followed and on what date did this take place?
- ii) What was the outcome of this review?
- iii) How did the Complaints Team monitor this had been completed?
- iv) Explore the recent changes to the way complaint actions are monitored
- v) Was **[redacted]** aware that these policies had not been reviewed and revised...

5) When did the policy which stated that there is no specified time frame for the Trust to complete a Formal Complaint Investigation

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<sup>1</sup> The missing numbers in the request refer to data protection matters that cannot be addressed here.

come into existence? Is this policy still in place?

6) Does the Formal Complaints Policy contain any formal requirement to advise complainants at the outset upon raising concerns that there is a time limit from the date of the incident in which the complainant is able to escalate concerns resulting from an unsatisfactory response from the Trust, to the PHSO?

7) On what date did the 'Making Experiences Count' come into existence? Has it now been replaced? (I was advised it was being rewritten during the course of my Formal Complaint to the Trust). What Policy replaced it? On what date? I would like to request a copy of this Policy and any/all revised versions following the 'MEC' Policy.

8) **[redacted]**

i) How many times a patient's PR/NoK has been changed/removed/replaced on Lorenzo [patient record system] since my initial complaint **[redacted]**? Is the Trust able to access demographic details of contacts who have already been removed from Lorenzo? Is there any process in place or intention for the Trust to contact those who have been removed from the system without consent? Is there any policy/process to inform anyone who may have had their details removed from Lorenzo without their knowledge or consent to be notified, or to allow them to check whether this has affected them?

ii) What were the findings of: 'Complete a retrospective review over the 4 years identify other similar scenarios where demographics have been changed without the PR's/NoK consent'?

iii) Have there been any similar complaints or PALS concerns regarding contact/demographic details of patients being removed from the system? How many and over what time period? How many of these, if applicable, were upheld?...

11) I would like confirmation as to where details of Formal Complaints are held by the Trust **[redacted]**..."

5. This request was acknowledged by the Trust on 29 June 2021 and on 7 July 2021 the Trust said it would respond as soon as possible.
6. On 19 July 2021 the complainant chased a response to their 28 June 2021 request. However, the Trust would, at that point, have still been compliant regarding the statutory timeframe for their FOI request.

7. On 29 July 2021 the Trust wrote to the complainant listing the FOIA requests made in the complainant's 28 June 2021 email. This letter suggested that these items had been dealt with:

"...[we] understand that these questions, some of which we have tried to answer in previous correspondence with you. (sic) all relate broadly to your original complaint and the detailed subsequent correspondence that has been ongoing with the Trust ..."
8. On 5 August 2021 the complainant wrote to the Trust and asked that it provide a refusal to carry out an internal review in order that a complaint could be made to the Commissioner.
9. The complainant said that the Trust had not responded to their 28 June 2021 FOI requests, that the regulatory timeframe had been exceeded, and that they would not have requested information that they had already been provided with.
10. On 17 August 2021, the complainant again chased a response from the Trust.
11. The Trust responded to the complainant on 23 August 2021 indicating that the complaints process had been exhausted. Although this correspondence referred to information requests, it did not address the matter of FOI requests and did not meet the standard required for a section 17 FOIA refusal notice. This is addressed later in this decision notice. The Trust stated that it would no longer respond to information requests as part of a list of other items it did not intend to respond to.

### **Scope of the case**

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12. The complainant wrote to the Commissioner on 6 August 2021 and stated that the Trust would not conduct an internal review and that the Trust would not engage or respond, despite breaching the FOIA timeframe and failing to use any exemption regarding their 28 June 2021 request.
13. On 13 January 2022, the Commissioner wrote to the Trust and explained that he had reviewed the information. He considered that the Trust's response did not fulfil the requirements of section 17 FOIA. The response had not separated out data protection from FOI requests and directed the Trust to the Commissioner's guidance on his website. The Commissioner told the Trust to respond to the complainant as soon as possible and, at the very latest by 27 January 2022, copying in the Commissioner. The Commissioner further invited the Trust to send

evidence, if it felt it had adequately answered the complainant's request/s under FOIA.

14. On 8 March 2022, the Trust provided its response to the complainant's information requests. The Trust did not separate out freedom of information from data protection requests. The Trust stated that it was providing all the requested information, there was no other information remaining to be provided, except for one part that fell under data protection legislation. Any more time spent reconsidering the complainant's requests would be disproportionate. No exemptions were cited.
15. On 14 March 2022 the Commissioner spoke to the complainant to discuss their complaint.
16. On the same day the Trust called the Commissioner. The Trust stated that its response under data protection legislation and the FOIA were sent out together to the complainant. The Commissioner stressed that he needed a response to his letter, dated 13 January 2022.
17. The Trust confirmed that it had sent a secure large file transfer on 8 March 2022 to the complainant containing all the information that had been requested, dating back to 2017 with only one outstanding part that did not fall under the FOIA.
18. The complainant explained to the Commissioner that, as the numbering was not sequential, they had had difficulty locating the relevant information. They also said that the electronic files were not in logical order and did not correlate to the numbered requests in the table the Trust had provided.
19. The Commissioner wrote again to the Trust on 25 May 2022 as he needed to clarify what responses it had made to the complainant's FOI requests and whether it held any further information.
20. The Trust responded on 15 June 2022, citing the cost exemption to part of the request (section 12 FOIA) for the first time.
21. On 17 June 2022, the Commissioner wrote to the Trust asking it to respond to his questions regarding section 12.
22. The Trust responded to the Commissioner on 27 June 2022.
23. The Commissioner considers the scope of this case to be whether the Trust holds any further information within the scope of the request, whether it is entitled to rely on section 12 FOIA, and any procedural issues that may have arisen.

## Reasons for decision

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### **Section 1 - general right of access to information held by public authorities**

24. 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.”

25. In cases where there is a dispute over the amount of information held, the Commissioner applies the civil test of the balance of probabilities in making his determination. This test is in line with the approach taken by the Information Rights Tribunal when it has considered whether information is held (and, if so, whether all of the information held has been provided). The Commissioner is not expected to prove categorically whether the information is held.

26. On 25 May 2022 the Commissioner wrote to the Trust outlining his view that it had provided the complainant with the requested information in a series of electronic files without clearly differentiating between the different pieces of legislation. He listed the information requests as set out in paragraph 4 (28 June 2021 request) of this decision notice and asked the Trust to explain exactly what its response had been to the complainant and whether it had provided all the requested information.

27. The Trust responded to the Commissioner on 15 June 2022. In respect of parts one and two of the request, the Trust confirmed that there was no individual policy in which the information was contained. However, it had disclosed the relevant leaflets and flowcharts on 4 March 2022 (the disclosure appears to have been on 8 March 2022) which contained the updated processes, following changes that had been put in place, to confirm parental responsibility before updating contact details. The Trust also disclosed the Patient Administration Services Team (Outpatient Services Standard Operating Procedure). Page one of the policy states that the policy was approved on 11 January 2016 and subsequently issued again on 11 January 2020 with the amended process for confirming parental responsibility (page six of that document). The Trust considers that it has answered questions one and two of the request and

provided the complainant with the location of the information they sought.

28. The Trust confirmed to the Commissioner that parts 3(i)-(v) of the request were addressed on pages 76-79 of the document called 'Review of **[redacted]** complaint' which had been disclosed in a redacted form to the complainant, also in March 2022. The Trust considers that it has provided the complainant with the information that had been requested.
29. Parts 5-7 of the request: in March 2022 the Trust released to the complainant both the 'Making Experiences Count Policy' and the 'Complaints Policy'. The current version of the complaints policy was issued in July 2020 and superseded the 'Making Experiences Count' policy. This last version of the 'Making Experiences Count' policy was issued in June 2013. A review was due in June 2016 but was extended to June 2019. Then a further extension was put in place, pending the publication of the 'Complaints Policy' in 2020. The Trust contended that it had complied with this request.
30. Part 8 of the request - the Trust explained that the information that falls within the scope of parts (ii) and (iii) is provided within the discussion on page 80 of the document entitled 'Review of **[redacted]** Complaint'. The Trust stated that in addition to this information, the Trust undertook an audit which is set out in Appendix 8: Snapshot audit in relation to the changing of demographic information at BCH of the document 'Review of **[redacted]** complaint' which was disclosed in redacted form to the complainant in March 2022. In respect of part (i) the Trust is unable to centrally collate and analyse data within compliance costs (section 12 FOIA), regarding how many times a patient's parental responsibility/next of kin has been changed or removed. The Trust stated to the Commissioner that it is therefore unable to confirm how many times these have been changed, removed or replaced on the system since the complainant had made their initial complaint. The Trust believes it has justified why this information cannot be provided and that the remainder is complete.
31. The information regarding request 11 was provided as part of a letter and information disclosure to the complainant in March 2022. The Trust refers to the document it sent '**[redacted]** Information Requests', contained in row 23. The Trust states that it has now complied with the information request of 28 June 2021 and that it does not consider there to be any outstanding information remaining, apart from the exempt information where it had cited section 12.
32. The Commissioner had also asked more generic questions about how the Trust had searched for the information, whether the information was

held electronically, manually or both, what search terms it had used, whether the Trust has a business need or statutory requirement to hold the information.

33. The Trust states that it used search terms that would have located the relevant information but that it cannot be "completely sure that there are not small pieces of missing information".
34. The Trust undertook a thorough search of Patient Advice and Liaison Services (PALS) and the electronic complaint files as well as a thorough complaint analysis. Conversations were held with key staff who were able to identify relevant information or search files and folders.
35. The Trust confirmed that the PALS and complaint files are electronic and the "vast majority of information held by the Trust is electronic". In respect of policies, search terms used were key words from the requested policies on a networked computer, using the Trust intranet.
36. The Trust does not believe that any of the information falling within scope has been destroyed

"but is unable to categorically confirm this to be the case...The Trust is able to search for deleted items however, there may be occasions where the Trust is unaware that information has been deleted from individual devices which is not caught by any deletion."

### **The Commissioner's view**

37. The Commissioner makes his decision based on the balance of probability and a civil standard of proof. On the balance of probability, the Commissioner accepts that the Trust has now carried out adequate searches and that there is unlikely to be any further information held that has not already been provided to the complainant.

### **Section 12 – cost of compliance exceeds the appropriate limit**

38. Section 12(1) of the FOIA states that:

"(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."

39. The Trust cited section 12 for the information the complainant had requested at 8(i) of their request as set out in paragraph 4 of this decision notice.



40. The appropriate limit is set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations'). The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour. This means that in practical terms there is a time limit of 18 hours in respect of the Trust. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) of the Fees Regulations states that an authority can only take into account the costs it reasonably expects to incur during the following processes:
- determining whether it holds the information;
  - locating the information, or a document containing it;
  - retrieving the information, or a document containing it; and
  - extracting the information from a document containing it.
41. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the Commissioner considers that any estimate must be 'sensible, realistic and supported by cogent evidence'.<sup>2</sup>
42. The Trust explained that it had seen many thousands of patients since 2016. By way of illustration it had seen 100,000 patients in the previous 12 months. Any one of these appointments might see a change of demographic details of contact for various reasons. Although the Trust holds the requested information, it is held within each patient record but cannot be extracted in any meaningful way for analysis. This means that a member of staff would have to access the electronic record system

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<sup>2</sup> <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf>  
(paragraph 12)

and the audit trail for each of the many thousands of attendances to see if any changes had been made. The Trust has estimated that this would take in excess of 15-30 minutes per record.

43. In order to understand why any such changes have been made and the complainant's implied/anticipated question about how many of these changes happened without consent, the member of staff would have to request and then examine the patient's physical healthcare records to understand the context of any such changes, if they are documented in the healthcare record. The Trust estimates that this would take between 15 minutes and an hour, depending on the location and volume of the patient record. Given the volume of appointments, the Trust considers that this would be a disproportionate task.
44. The Trust states that it has reiterated to the complainant that, to the best of its knowledge, there has only been one instance of this particular complaint. It therefore does not have or intend to have any process or policy in place for those who have been removed from the system without consent. Should a similar incident be drawn to its attention via the complaint or PALS system, it would be managed on a case-by-case basis.
45. Although the Trust could not answer the complainant's question, it has provided them with 'A snapshot audit relating to the changing of demographic information at BCH'. This audit was undertaken by the Trust to understand the extent of risk associated with its practice and was a prospective audit looking at practice over six days in July 2020 across all Trust settings. The audit demonstrated that there was over 1041 attendance across that six days, approximately 5 per cent of children or young people attended with a carer/accompanying adult who was not a parent. Where changes in demographic were requested, parental responsibility was confirmed in all but 12 of the cases (approximately 1 per cent). The audit also detailed some of the scenarios behind these 12 cases as well as a number of recommendations for improved practice. The Trust stated that it disclosed this audit in order to be transparent with the complainant and to help them understand that it believes that there will have been very few cases where demographic details were changed inappropriately, without the consent of those with parental responsibility.

### **The Commissioner's view**

46. It is beyond the Commissioner's remit to consider the manner in which the Trust holds this information or the fact that it does not have the ability to extract it electronically. He accepts that this process has to be done manually and the Trust's explanation of how this would be done.

The Trust did not carry out a sampling exercise but had, prior to the request, conducted an audit that provided a snapshot of six days in the life of the Trust in relation to changes in demographic details.

47. The Commissioner accepts that with regard to request 8(i) just determining how many potential cases there would be, would exceed the fees limit. Even if it took just one minute per file it would significantly exceed the cost limit, as set out in paragraph 40, many times over. In order to fulfil the request it would also have been necessary to carry out further searches in order to understand why any such changes had been made.

### **Section 16 – duty to provide advice and assistance**

48. Section 16 of the FOIA states:

“(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.”

49. The Trust has found its communications with the complainant to be “challenging” due to “repetitive and overlapping” requests. It believes that it has provided a proportionate level of support, advice and assistance to aid the complainant to access the information and explanations that they required.
50. As far as the Commissioner is able to ascertain, the Trust only cited section 12 to part 8(i) of the request on 15 June 2022 in its response to the Commissioner. The complainant therefore had no opportunity to refine or resubmit their request as they were unaware that it had been cited. The Commissioner therefore considers that no advice and assistance was offered. The Trust did provide an audit that analysed a snapshot connected to the issues in the request but this was an indirect way of responding to the request. His view is that there needed to be a more specific response that cited section 12 and provided advice and assistance as to how the request could be refined.

### **Sections 10 and 17 – time for compliance and refusal notice**

51. Section 10(1) FOIA states that responses to requests made under the Act must be provided, "promptly and in any event not later than the twentieth working day following the date of receipt".
52. The complainant requested information from the Trust on 28 June 2021. The Trust did not provide the information until 8 March 2022 in a large file transfer. This was over seven months beyond the time for compliance. Therefore, the Trust breached section 10(1) FOIA.
53. Section 17(1) FOIA states that where a public authority refuses a request for information, it must provide the applicant with a refusal notice explaining the exemptions relied upon and why they apply (if not apparent), no later than 20 working days after the date on which the request was received.
54. The Commissioner cannot find where the Trust applied any exemptions in line with the legislation. It mentions the fact that it could not respond to part 8(i) of the request because it would be unable to do so within "compliance costs" (presumably section 12) but does not appear to have explained this to the complainant in its March 2022 response.
55. The Commissioner therefore finds that the Trust breached section 17(1) in its handling of the request.

### **Other matters**

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56. Firstly, the Commissioner considers that the complainant has been repeatedly required to chase a response from the Trust due to the blurring of the parameters between the Trust's complaints process and their rights under FOI legislation. This has resulted in a frustrating and time-consuming experience for the complainant. The Commissioner's view is that the Trust initially provided a poor response both to the complainant and the Commissioner. However, the Trust subsequently improved its engagement with the Commissioner.
57. The Trust did not make a clear enough distinction between data protection and freedom of information legislation. Although requests involving both can be challenging, because the requested information was provided without the distinction being made, this resulted in confusion for the complainant in locating the relevant information. The Trust has apologised to the Commissioner for this. It explained that its reason for doing so was to provide a large amount of information to which the complainant was entitled rather than confirming which legislation it was being disclosed under. The Trust has assured the Commissioner that it has learnt from this error and will ensure that it

makes clear which legislation the information has been disclosed under in the future. The Commissioner draws the Trust's attention to his [Guide to freedom of information | ICO](#) and expects that the Trust will improve its practices in line with this.

## Right of appeal

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58. 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)

59. 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.
60. 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** .....

**Janine Gregory**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**