

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 November 2022

Public Authority: Chelsea and Westminster Hospital NHS Foundation Trust

Address: Chelsea and Westminster Hospital
Unit 111
Harbour Yard
Chelsea Harbour
London
SW10 0XD

Decision (including any steps ordered)

1. The complainant requested information from Chelsea and Westminster Hospital NHS Foundation Trust (the Trust) relating to the number of patients that have died, having tested positive for Covid-19, with a Do Not Resuscitate (DNR)/Do Not Attempt CPR (DNACPR) order on their record. The Trust refused to comply with some of the request, citing section 12 (cost limit) of FOIA.
2. The Commissioner's decision is that the Trust is entitled to rely on section 12(1) of FOIA to refuse some of the complainant's request. The Commissioner does not consider that it would be possible to refine the request meaningfully in order to bring the cost of compliance within the cost limit and is therefore satisfied that the Trust has not breached section 16(1) (duty to provide advice and assistance). However, he has recorded procedural breaches of section 1(1) (general right of access), section 10(1) (time for compliance), and section 17(1) (provision of a valid refusal notice) of FOIA.
3. The Commissioner does not require the Trust to take any steps as a result of this decision notice.

Request and response

4. On 29 October 2021, the complainant made the following request for information to the Trust:

"As of 4pm on 30th April 2020, NHS England reports that 278 patients have sadly died in your hospitals; - Chelsea and Westminster Hospital and - West Middlesex University Hospital, having tested positive for Covid-19.

- 1) How many of these 278 patients had a DNR / DNACPR order (or similar decision) on their records?
 - 2) How many of the above patients with DNR / DNACPR order (or similar decision) on their records, were at Chelsea and Westminster Hospital?"
5. The Trust responded on 26 November 2022 with the following:
- "This information is not recorded centrally and would require a check for a DNACPR form for each patient. All the information the Trust is required to record has been passed to NHSE."
6. The complainant wrote to the Trust on 1 December 2021 with the following:
- "Appreciate that the "information is not recorded centrally and would require a check for a DNACPR form for each patient". However, depending on how patient records are held in the Chelsea and Westminster Hospital NHS Foundation Trust i.e. electronically or hard copy following are ways that the DNACPR information can be filtered within the FOI Act expected timelines;
- 1) if patients records are held electronically and/or scanned then using "find/search" for the word "DNR/DNACPR" would easily and quickly highlight this for each patient. This will show how many of the 278 patients (as of 4pm on 30th April 2020, NHS England reports having sadly passed away in your hospitals having tested positive for Covid-19) had a DNR/DNACPR order (or similar decision) on their records?
 - 2) if patients records and/or DNACPR forms are held in hard copy format then perhaps you can check a reduced sample i.e.
 - How many patients passed away from 23 March 2020 till 10 April 2020 in your hospitals having tested positive for Covid-19 ?
 - Of the above patients how many had a DNR/DNACPR form (or similar decision) on their records? In light of the above,

sending this email to request for the information to be provided, under the Freedom Of Information.”

7. The Trust provided the outcome of its internal review on 22 August 2022 refusing to comply with the request under section 12 of FOIA on the basis that the cost of complying with the request would exceed the cost threshold of £450.

Scope of the case

8. The complainant initially contacted the Commissioner on 17 June 2022 to complain about the Trust's failure to respond to their request.
9. On 22 June 2022, the Commissioner wrote to the Trust about its failure to issue a refusal notice in accordance with FOIA. The Commissioner advised the Trust to treat the complainant's correspondence of 1 December 2021 as a request for an internal review and to respond to the complainant within 20 working days.
10. Despite this intervention, the Trust failed to respond to the internal review request within 20 working days. Given the delay in this case the Commissioner used his discretion to accept the case for investigation without an internal review on 27 July 2022.
11. The Commissioner followed up the internal review request with the Trust on 3 and 15 August 2022, with the Trust issuing the outcome of its internal review on 22 August 2022.
12. The complainant contacted the Commissioner on 25 August 2022 stating that they disagreed with Trust's application of section 12 of FOIA.
13. During the Commissioner's investigation, the Trust revised its position. It provided the complainant with the number of patients that have died, having tested positive for Covid-19, with a DNR/DNACPR order on their record at Chelsea and Westminster Hospital (i.e. part 2 of the original request).
14. However, the Trust maintained its reliance on section 12 of FOIA in relation to the number of patients that have died, having tested positive for Covid-19, with a DNR/DNACPR order on their record at West Middlesex Hospital.
15. The Commissioner therefore considers that the scope of this case is to determine if the Trust has correctly relied on section 12(1) of FOIA to withhold the information relating to West Middlesex Hospital. The

Commissioner has also considered whether the Trust met its obligation to offer advice and assistance under section 16 of FOIA.

Reasons for decision

Section 12 – cost of compliance

16. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the “appropriate limit” set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Fees Regulations”).
17. Section 12(2) of FOIA states that subsection (1) does not exempt the public authority from the obligation to comply with paragraph (a) of section 1(1) (the duty to inform an applicant whether it holds information of the description specified in the request) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit. The Trust relied on section 12(1) in this case.
18. The Fees Regulations set the appropriate limit at £600 for central government, legislative bodies and the armed forces and £450 for all other public authorities. The appropriate limit for the Trust is therefore £450.
19. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively sets a limit of 18 hours’ work for the Trust.
20. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;
 - 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.
21. 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 Information Commissioner & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*,

the Commissioner considers that any estimate must be “sensible, realistic and supported by cogent evidence”. The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.

22. Section 12 is not subject to a public interest test. If complying with the request would exceed the cost limit then there is no requirement under FOIA to consider whether there is a public interest in the disclosure of the information.
23. Where a public authority claims that section 12 of FOIA is engaged, it should (where reasonable) provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit, in line with section 16 of FOIA.

Would the cost of compliance exceed the appropriate limit?

24. In its submission to the Commissioner, the Trust stated that it had already spent in excess of six hours trying to track down how the DNRs are recorded, where and when. It also stated that the Medical Examiner had estimated that around five hours had also been spent locating the information. The Trust had therefore estimated that 11 hours (i.e. £275) has already been spent trying to locate the information.
25. The Trust has estimated that the cost of retrieving the paper files from its offsite storage would be £974.58. The Trust provided the Commissioner with the following breakdown for this estimate:
 - Standard delivery cost (per mile) - $£0.65 \times 101 \text{ miles} = £65.65$
 - Admin Costs for Refile per box - $£0.65 \times 42 \text{ boxes} = £27.30$
 - Refile per file - $£0.29 \times 505 \text{ files} = £146.45$
 - File Retrieval - $£1.43 \times 505 \text{ files} = £722.15$
 - Collection - $£13.03 \times 1 = £13.03$
26. The Commissioner asked the Trust to explain why it would need to retrieve 505 files from its offsite storage when he understands that the number of patients that died at West Middlesex Hospital was 183, and of those 183, a proportion of those patients’ records have already been scanned to Evolve (the Trust’s electronic management system).
27. The Trust clarified that the paper notes are split into volumes and as the patients are generally quite old there is the likelihood that there could

be 5, 6 or 7 volumes per patient. These volumes could be stored in different locations.

28. The Trust has stated that the time taken to investigate and create the query to retrieve the electronic data for DNRs and notification of deaths linked to covid for both sites is 8 hours (i.e. £200)
29. The Trust has estimated the time it would take to retrieve the data by searching individual records on its document management system (Evolve) is 5 minutes per record (although a record may have several volumes to collate).
30. The Trust has estimated that the time it would take to assess the retrieved paper notes is 5 minutes per record (although a record may have several volumes to collate).
31. The Trust has therefore estimated that the time taken to retrieve the information from its document management system and the paper notes would be 15 hour (i.e. £375).
32. The Trust has stated that the cost to date of this FOI is approximately £475, without taking into account the time spent by other members of staff such as the health records team and operational staff.
33. It stated that to carry out the investigation on the West Middlesex Hospital's patient notes would cost a further £1350 (£975 + £375). This would bring the total to £1825 (£1350 + £475).
34. The Commissioner considers that the Trust's estimate that it would take more than the 18 hours (i.e. £450) limit to respond to the request relating to West Middlesex Hospital is reasonable. The Trust was therefore correct to apply section 12(1) of FOIA to part 2 of complainant's request.

Section 16(1) – The duty to provide advice and assistance

35. Section 16(1) of FOIA provides that a public authority should give advice and assistance to any person making an information request. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45

code of practice¹ in providing advice and assistance, it will have complied with section 16(1).

36. In its internal review response to the complainant, the Trust made no reference to the duty under section 16(1) – even to say that there was no advice and assistance on refining their request that it could offer the complainant on this occasion.
37. The Trust has explained that there was genuine confusion within the Trust about the various processes in different departments or systems and understanding the limitations of those. It stated that most of the correspondence with the complainant was about explaining its evolving understanding of the processes and what it was and was not capable of providing. The Trust explained that despite the complainant suggesting a smaller dataset, it considered that the Trust had already spent the maximum time on this request and the hospital was still very busy with Covid and post Covid catch-up.
38. The Commissioner notes that given the way the Trust holds its patient records at West Middlesex Hospital in both paper and electronic form, the fact that the relevant information would only be held in these records, and the length of time it would take to review each file, the Commissioner does not consider the complainant's request could be meaningfully refined to allow the information to be provided within the cost limit. As such, he is satisfied that there was no breach of section 16(1) of FOIA.

Procedural matters

Sections 1, 10 and 17 – time for compliance

39. Section 1(1) of FOIA says that an individual who asks for information from a public authority is entitled to (a) be informed whether the authority holds the information and (b) if the information is held, to have that information communicated to them.

¹ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

40. Section 10(1) of FOIA says that a public authority should comply with section 1(1) promptly and no later than the twentieth working day following the date of receipt.
41. Section 17(1) of 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 explain why they apply (if not apparent), no later than 20 working days after the date on which the request was received.
42. In this case, the total time taken by the Trust to confirm that it held information falling within the scope of the request and provide the complainant with a refusal notice exceeded 20 working days. The Commissioner therefore considers the Trust to have breached section 1(1), section 10(1) and section 17(1) of FOIA in this case.

Other matters

Internal review request

43. The Commissioner notes that the time taken for the Trust to respond to the internal review request exceeded 40 working days. Although there is no statutory time set out in FOIA within which public authorities must complete a review, the Commissioner takes the view that a reasonable time for completing an internal review is 20 working days from the date of the request for review, and in no case should the total time taken exceed 40 working days. The Commissioner therefore recommends that the Trust review the Section 45 code of practice².

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Right of appeal

44. 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

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

45. 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.
46. 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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