

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 November 2012

Public Authority: NHS Bedfordshire
Address: Gilbert Hitchcock House
21 Kimbolton Road
Bedford
MK40 2AW

Decision (including any steps ordered)

1. The complainant has requested information relating to healthcare for patients who have or are thought to have ME/CFS.
2. The Commissioner's decision is that NHS Bedfordshire has not applied section 14 correctly. In addition, the Commissioner has found NHS Bedfordshire to be in breach of section 10(1) of the FOIA for failing to respond to the request within 20 working days.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
4. NHS Bedfordshire should provide the complainant with a response to his request which complies with the requirements of section 1(1) of FOIA or issue a valid refusal notice complying with section 17(1) of the FOIA.
5. 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

6. On 7 December 2011, the complainant wrote to NHS Bedfordshire and requested information as attached in Appendix 1.

7. After intervention by the Commissioner NHS Bedfordshire responded on 2 May 2012. It refused to provide the requested information citing section 14 of the FOIA as its basis for doing so.
8. NHS Bedfordshire declined to carry out an internal review.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant stated that he wanted the Commissioner to consider whether NHS Bedfordshire was correct in its application of section 14 of the FOIA in order to refuse to provide the information requested.
10. The Commissioner considers that the scope of this case is to determine if NHS Bedfordshire has correctly applied section 14 of the FOIA. In addition the Commissioner will also consider the time taken for NHS Bedfordshire to provide a refusal notice to the complainant.

Reasons for decision

11. Section 14 of FOIA states that:

(1) Section (1) does not oblige a public authority to comply with a request for information if the request is vexatious.

(2) Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

12. NHS Bedfordshire stated that it refused to progress the request on the grounds that it was vexatious as it has received 23 requests over a two year period asking for the same information (see Appendix 2 which provides a list of the requests & responses issued).
13. NHS Bedfordshire declined to carry out an internal review on the grounds that nothing new could be gained from another meeting with the complainant.
14. NHS Bedfordshire explained that in 2009 a conference call was held with the complainant and five members of NHS Bedfordshire to discuss his concerns about services unavailable to him in Bedfordshire between

November 2007 and May 2008. A further meeting was hosted by NHS Bedfordshire between the complainant and the Chief Executive in 2009 to try to and resolve the complainant's issues. In addition NHS Bedfordshire advised that four complaints were escalated to the Ombudsman and no adverse findings against it were made. The Commissioner understands from the complainant that as a result of these meetings an agreement was reached that NHS Bedfordshire would keep the complainant informed of when the situation changed and when he would be able to move back to NHS Bedfordshire to receive treatment. The complainant argues that this agreement was not met which left him no alternative but to make further FOI requests.

15. Between 31 May 2009 and 7 December 2011, NHS Bedfordshire received 23 FOI requests from the complainant, the majority of which related to National Institute for Clinical Excellence (NICE) Guideline 53 and the funding and implementation of CFS healthcare.
16. As an example NHS Bedfordshire stated that they received one request which comprised of 37 sections and it was estimated it would take one person at least three weeks to complete that particular request.
17. NHS Bedfordshire stated that this was typical of the requests received.
18. The Commissioner acknowledges the number of requests made but also notes that there was a gap of 18 months during this time period ie. a request was made on 19 August 2009 and the next request was not made until 28 March 2011.
19. The complainant telephoned the Commissioner's office and explained that as NHS Bedfordshire had not kept him updated as promised, he had no alternative but to continue making FOI requests to try and ascertain if specialist health care for ME/CFS patients in Bedfordshire had been implemented.
20. The Commissioner has issued guidance to assist in the consideration of what constitutes a vexatious request:
(http://www.ico.gov.uk/for_organisations/freedom_of_information/guide/refusing_a_request.aspx)
21. This guidance explains that for a request to be deemed vexatious the Commissioner will consider the context and the history of the request as well as the strengths and weaknesses of both parties arguments.
22. NHS Bedfordshire has stated several times in its correspondence that the request is a repeated request and that all the information it holds has been provided.

Section 14(2)

23. Section 14(2) states: *Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.*
24. The Commissioner has noted the complainant specifically states in his request that *"It only covers documentation created or modified on or after the last creation or modification date of information provided before in my FOI request of April 2011 and acknowledged in your email of 12 April 2011."*
25. The previous request for this list of documents was made on 28 March 2011 and the last request was made on 7 December 2011. Therefore there is a period of nine months between the requests.
26. It is the Commissioner's view that it is not unreasonable for there to have been meetings, negotiations, plans and correspondence in relation to this issue over a period of nine months.
27. It is also arguable that implementation plans may have changed along with operational plans etc. Additionally, budgetary information, funding and training of staff are likely to be reviewed on a regular basis.
28. It is the Commissioner's view that this request should not be seen as a repeated request due to the time elapsed, and the clear indication of the complainant that he was seeking information that had been created since his request in March 2011.

Section 14(1)

29. The Commissioner will consider arguments put forward in relation to some or all of the following five factors to reach a reasoned conclusion as to whether a reasonable public authority could refuse to comply with the requests on the grounds that they are vexatious:
 - whether compliance would create a significant burden in terms of expense and distraction;
 - whether the request is designed to cause disruption or annoyance;
 - whether the request has the effect of harassing the public authority or its staff;
 - whether the request has any serious purpose or value;

- whether the request can otherwise fairly be characterised as obsessive or manifestly unreasonable;
30. The Commissioner agrees with the Tribunal that the bar need not be set too high in determining whether to deem a request vexatious. He also agrees with the Tribunal that the term 'vexatious' should be given its ordinary meaning, which is that it 'vexes' (causes irritation or annoyance; in relation to section 14(1), the annoyance must be caused by the process of comply with the request).
 31. The Commissioner wrote to NHS Bedfordshire on 27 September 2012 asking it to provide its arguments as to why it felt the request met all or any of the criteria listed above.
 32. It is not necessary for all five factors to be engaged, however these are elements which are commonly encountered and the balance of these factors can be helpful in illustrating the reasons for any decision. Where the request falls under only one or two categories or where the arguments sit within a number of categories but are relatively weak, this will affect the weight to be given to the public authority's claim that section 14 is engaged.
 33. NHS Bedfordshire provided the following arguments.

Would compliance create a significant burden in terms of expense *and* distraction?

34. NHS Bedfordshire has not provided any information as to why responding to this request would create a significant burden in terms of expense *and* distraction. However, it has indicated that it had estimated it would take one person 3 weeks to complete a previous request by the complainant, and this was typical of the requests received from him.
35. Where a public authority's only concerns relate to the costs of complying with the request then it should consider citing section 12; to engage section 14, the Commissioner expects the public authority to show that complying with the request would cause a significant burden both in terms of costs **and** also diverting staff away from their core functions.
36. NHS Bedfordshire has not provided any evidence that this is the case to the Commissioner.

Is the request is designed to cause disruption or annoyance?

37. NHS Bedfordshire considered that the complainant's request is vexatious and repeated, likely to cause unjustified distress, disruption and irritation.

38. This factor relates to the requestor's intention. Having considered the history and context of the request it cannot be established that the requestor has the intention to cause disruption or annoyance, to NHS Bedfordshire.
39. The Commissioner considers that while NHS Bedfordshire may be annoyed or irritated by the complainant's requests, this is a normal part of the role of a public authority dealing with requests. This is not the same as harassment and the Commissioner does not consider that NHS Bedfordshire has provided sufficient arguments to establish an intention to cause disruption or annoyance from the complainant's requests, Similarly a degree of annoyance or irritation is something which public servants will experience from time to time and can be expected to rise above, unless it approaches levels which will indeed constitute harassment. The Commissioner does not consider this is such a case.

Does the request have the effect of harassing the public authority or its staff?

40. NHS Bedfordshire stated that in October 2010 it had to restrict the complainant from harassing staff members and instruct him to have contact with one member of staff. However, it did not provide any further information or evidence in support of this argument e.g. there have been no personal attacks aimed at individuals or correspondence that could be perceived as hostile.
41. The likely effect of the request should be considered here, not the intention of the complainant. It is an objective test – a reasonable person must be likely to regard the request as harassing or distressing.
42. Having considered the context of the request and the evidence provided by NHS Bedfordshire, it is the Commissioner's view that the request is unlikely to cause distress or harassment to NHS Bedfordshire.

Does the request have any serious purpose or value?

43. NHS Bedfordshire has not considered this argument at all. It is the Commissioner's view that the requests do have a serious purpose and value in trying to establish what services are available in Bedfordshire, along with any implementation plans for new services for ME/CFS patients. This goes beyond the individual's personal interests and this alone could potentially be reason enough to prevent the request being deemed vexatious.

Can the request otherwise fairly be characterised as obsessive or manifestly unreasonable?

44. NHS Bedfordshire felt that the request was a continuation of a pattern of behaviour and part of an on-going campaign to pressure NHS Bedfordshire.
45. The Commissioner accepts that at times there is fine line between obsession and persistence and although each case is determined on its own facts, the Commissioner considers that an obsessive request can be most easily identified where a complainant continues with the request(s) despite being in possession of other independent evidence on the same issue.
46. It is the Commissioner's view that although there have been a large number of requests in relation to this issue, and in isolation could be seen as obsessive, having considered the context of the requests they are not manifestly unreasonable.

The Commissioner's conclusion

47. Having considered the arguments presented by NHS Bedfordshire the Commissioner has concluded that it has not demonstrated sufficient reasons to deem the request to be vexatious.
48. NHS Bedfordshire's claim that the complainant's requests are harassing is weak and carries no real weight. Furthermore, it has not considered whether the request has a serious purpose or value. Therefore the Commissioner is not satisfied that NHS Bedfordshire has considered all the appropriate criteria in assessing whether the request was vexatious.
49. Additionally, the Commissioner is not satisfied that this request is designed to cause disruption or annoyance.
50. The question of when a request should be refused as vexatious is a question of balance. It is clear that the threshold for refusal should not be set too high, so that a public authority would need to go to extraordinary lengths in dealing with a difficult applicant. By the same token, the bar should not be set too low, so that legitimate enquiries might be unfairly refused.
51. The Commissioner therefore finds that on balance, the present request was incorrectly refused as vexatious.

Section 10(1)

52. The complainant has also raised concerns regarding the timeliness of the refusal provided by NHS Bedfordshire.

53. Section 10(1) of the FOIA states:
“..a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”
54. The complainant made his request on 7 December 2011. This was acknowledged on 8 December 2011, with a further email being sent on 12 January 2012 advising that the response would be delayed.
55. The complainant contacted the Commissioner on 13 February 2012 as he had not received a response to his request.
56. The Commissioner wrote to NHS Bedfordshire on 14 March 2012 advising we had received a complaint and asking NHS Bedfordshire to respond within 10 working days.
57. NHS Bedfordshire subsequently provided a response to the request on 16 May 2012. This was 112 working days after receipt of the request, 92 days outside the time allowed.
58. The Commissioner has therefore recorded a breach of section 10(1) of the FOIA.

Right of appeal

59. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

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

60. 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.
61. 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
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Appendix 1

This request covers information held by NHS Bedfordshire that relates directly or indirectly to health care for patients in Bedfordshire who have or are thought to have ME/CFS.

It only covers documentation created or modified on or after the last creation or modification date of information provided before in my FOI request of April 2011 and acknowledged in your email of 12th April 2011.

The response is to include:

1. Documentation authored by NHS Bedfordshire, past or present
2. Documentation received by NHS Bedfordshire from external individual or organisations
3. Any communications between NHS Bedfordshire and individual GPs or GPs.
4. Any communications between NHS Bedfordshire and The East of England Strategic Health Authority.
5. Any communications between NHS Bedfordshire and The Department of Health.
6. Any communications between NHS Bedfordshire and The Parliamentary and Health Service Ombudsman.
7. Any communications between NHS Bedfordshire and NICE and notes memos and emails related to any such communications
8. Any notes taken and held by NHS Bedfordshire not covered above
9. Any meeting agendas and or meeting minutes
10. Incoming and outgoing emails and memos not covered above
11. Any reports or guideline documents
12. Any decisions that have been discussed made or reversed
13. Negotiations between health service providers
14. Contracts for the provision of health care services
15. Strategic plans

Appendix 1 cont'd

16. Business cases
17. Operational plans
18. Functional plans
19. Service reviews
20. Risk assessments
21. Project plans
22. Healthy Needs Assessments
23. NICE Guidance Implementation Plans
24. GP Training
25. GP Validation

Any other documents that make reference to ME and or CFS it is taken to relate to it without specifically referencing it.

I request that the source, compilation date and publication date to be provided for each document where appropriate.

I request that the information be provided in electronic format

I request that the preparation and or compilation commenced date and the commissioned date be provided for any document where this is appropriate.

Information provided is expected to include the budgets, funding NICE guideline implementation, NICE guidance implementation effectiveness, training of staff, training of GPs, monitoring of GPs, implementation project management, patient statistic (expected and actual for all time periods), local and national clinic details (if appropriate), outcome statistics and feedback from clinicians, GPs and patients

Appendix 2

FOI requests 31.15.09 – 07.12.11

Date received	Reference	Response
11.02.2009	Conference call with complainant	See attached report
19.05.2009	Park Plaza Hotel	Mtg between complainant and [name redacted]?
26.05.2009	Actions from NHSB Meeting 19.05.2009	Pathway for suspected CFS patients
31.05.2009	FOI/2009/213 (2)	Electronic
04.08.2009	FOI/2009/216	Electronic
17.08.2009	FOI/2009/222	Electronic
17.08.2009	FOI/2009/223	Electronic
17.08.2009	FOI/2009/224	Electronic
18.08.2009	FOI/2009/225	?
18.08.2009	FOI/2009/226	Electronic
18.08.2009	FOI/2009/227	Electronic
19.08.2009	FOI/2009/231	Electronic
28.03.2011	FOI/2011/243	Electronic
12.04.2011	FOI/2011/-12 – 12/012	Electronic (inc attachment)
10.05.2011	FOI/2011-12/027	Responses sent 7 & 21 June 11 1 zip file with 55 documents

Appendix 2 cont'd		
	FOI/2011-12/027 Previous FOI request relating to CDS/ME	11 documents
	FOI/2011-12/027 Files relating to Bedfordshire & Hertfordshire Priorities Forum	5 documents
	FOI/2011-12/027 Files held by [name redacted] & Horizon Health	1 document
	FOI/2011-12/027 Files relating to London providers	1 zip file containing 15 documents
	FOI/2011-12/027 Files relating to Individual Funding Panel	1 zip file containing 10 documents
	FOI/2011-12/027 Files relating to NHS Beds commissioning of Hertfordshire's service	1 zip file containing 19 documents
	FOI/2011-12/027 Miscellaneous files	6 documents
	FOI/2011-12/027 Miscellaneous files	1 zip file containing 10 documents
11.07.2011	FOI/2011-12 088	Response sent 9.8.11
23.11.2011	FOI/2011-12 209	Response sent 20.11.12
07.12.2011	FOI 2011-12 219	To respond