

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 November 2020

Public Authority: Devon Partnership NHS Trust
Address: Wonford House Hospital
Dryden Road
Exeter
EX2 5AF

Decision (including any steps ordered)

1. The complainant requested information about the use of the Hare PCL:SV test. Devon Partnership NHS Trust ("the Trust") initially refused to accept the request as being valid before later refusing the request as vexatious.
2. The Commissioner's decision is that the Trust has failed to demonstrate that the request was vexatious and is therefore not entitled to rely on section 14(1) of the FOIA to refuse it. She also finds that the Trust failed to respond to the request with 20 working days and thus also breached section 10 of the FOIA.
3. The Commissioner requires the Trust to take the following steps 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 these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 24 January 2020, the complainant wrote to the Trust and requested information in the following terms:

"As the Devon Partnership NHS Trust has previously allowed the use of the Hare PCL instrument within the Devon Partnership NHS Trust services, the following questions are made:

- 1. Can you please confirm that the Hare PCL:SV is a screening tool administered for identifying persons requiring further assessment in the assessment of Psychopathy?*
- 2. Can you please confirm whether the Hare PCL:SV was designed for diagnostic or predictive use to identify Psychopathy?*
- 3. Can you please confirm whether the Hare PCL:SV is intended to replace the PCL-R?*
- 4. Can you please confirm whether informed consent (voluntarily, knowingly, and intelligently agrees to partake in the assessment) is required before an assessment will take place in clinical NHS settings?*
- 5. Can you please confirm whether an assessee must be apprised with his legal rights with respect to the anticipated forensic service?*
- 6. Can you please confirm whether an assessee must be apprised with the purpose of the evaluation?*
- 7. Can you please confirm whether an assessee must be apprised with the nature of the proceedings to be employed?*
- 8. Can you please confirm whether an assessee must be apprised with how the assessment will be used?*
- 9. Can you please confirm whether an assessee must be apprised with the party retaining the services of the assessor?*

"Yours faithfully,

"Mr [initial]"

6. On 21 February 2020, the complainant chased the request, this time signing off his email with both his title and his full surname.

7. The Trust responded on 2 March 2020. It stated that:

“Devon Partnership Trust would like to remind you that under S.8(1)(b) of the Freedom of Information Act, to make a valid request under the Act, you’re obliged to provide your real name. Given the similarities in the request with previous requests associated with an individual deemed as vexatious by the Trust, we suspect you have provided alias details.”

8. The complainant responded on the same day. He pointed out that he had provided his real name and that other public authorities had processed his requests without questioning his identity. He sent a further follow up email the day after noting that, for FOIA purposes, only a request can be vexatious not the individual making it. A further brief exchange of correspondence followed.
9. Following the intervention of the Commissioner, the Trust carried out an internal review. It informed the complainant of the outcome of that review on 19 June 2020. It now refused the request as vexatious.

Scope of the case

10. The complainant first contacted the Commissioner on 18 March 2020 to complain about the Trust’s refusal to regard his request as being valid.
11. After a delay caused by the pandemic, the Commissioner wrote to the complainant noting that the most expedient way of dealing with the situation would be for him to provide proof of identity either directly to the Trust or to the Commissioner. The complainant did furnish the Commissioner with evidence to demonstrate that he had made the request using his real name.
12. Satisfied that the complainant had provided his real name, the Commissioner then wrote to the Trust on 26 May 2020, noting that she considered that the request met the requirements of section 8(1)(b) of the FOIA and that there appeared to be no other reason for not treating the request as valid. Rather than return to the beginning, she suggested that the most practical way forward would be for the Trust to carry out an internal review and to either provide the information or issue a refusal notice.
13. Following the outcome of that review, the complainant contacted the Commissioner again on 19 June 2020 and asked her to investigate the Trust’s use of section 14(1) to refuse his request.

14. Whilst the complainant did seek one, in the circumstances, the Commissioner does not consider that it would have served a useful purpose to have asked the Trust to carry out a further review of its position. She therefore exercised her discretion accepted the case for investigation.
15. Submissions were sought, from the Trust, as to why it considered that section 14(1) was appropriate. Those having been provided, the Commissioner sought further clarification, once that had been provided and the Trust confirmed that it had nothing further to add, the Commissioner considers it appropriate to reach a decision on the evidence that has been presented.
16. The scope of this decision is to determine whether or not the Trust is entitled to rely on section 14(1) of the FOIA to refuse the request.

Reasons for decision

Section 14 - Vexatious

17. 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.*

18. Section 14 of the FOIA states that:

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

19. The term “vexatious” is not defined within the FOIA. The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It commented that “vexatious” could be defined as the “manifestly unjustified, inappropriate or improper use of a formal procedure”. The Upper Tribunal’s approach in this case was subsequently upheld in the Court of Appeal.
20. The *Dransfield* definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.

21. *Dransfield* also considered 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. It explained that these considerations were not meant to be exhaustive and also explained 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).
22. The Commissioner has published guidance on dealing with vexatious requests¹, which includes a number of indicators that may apply in the case of a vexatious request. However, even if a request contains one or more of these indicators it will not necessarily mean that it must be vexatious.
23. When considering the application of section 14(1), a public authority can consider the context of the request and the history of its relationship with the requester, as the guidance explains: "*The context and history in which a request is made will often be a major factor in determining whether the request is vexatious, and the public authority will need to consider the wider circumstances surrounding the request before making a decision as to whether section 14(1) applies*".
24. However, the Commissioner is also keen to stress that in every case, it is the request itself that is vexatious and not the person making it.
25. In some cases it will be obvious when a request is vexatious but in others it may not. The Commissioner's guidance states: "In cases where the issue is not clear-cut, the key question to ask is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress."

The Trust's position

26. The Trust provided the Commissioner with a short submission in which it noted that its dealings with the complainant went back as far as 2003. It provided meeting notes from 2008 where the complainant's interactions with the Trust were discussed. The Trust also provided the Commissioner with copies of letters it had sent to the complainant in 2009 and 2017 informing him that it was likely to treat further

¹ <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

correspondence in respect of the Hare PCL:SV process as vexatious. Finally, it provided a copy of an internal log of a phone call from the complainant in which he had been “verbally aggressive.”

27. Having considered these documents, the Commissioner contacted the Trust again in October 2020, noting the age of the documents provided and the lack of contemporaneous evidence.
28. In response, the Trust provided a copy of an email it had sent to the complainant in 2017, reminding him of its letters of 2017 and 2009. There was also a log of call it had taken from the complainant, in response to that email, which the call handler had been required to terminate. Finally, there was text from a lengthy email that the complainant had sent in 2018 to the Trust (and, apparently, to others) claiming that the Trust had failed him over a number of years.

The complainant's position

29. The complainant did not provide a formal submission as to why his requests were not vexatious – and the Commissioner notes that he was under no obligation to do so. However, he did inform the Commissioner in his correspondence that he considered that there was a public interest in the information he was trying to access.
30. Based on the documentary evidence provided it is evident that the complainant has a long-standing grievance with the Trust which stems from a particular interaction he had with the Trust which was not, he believes, handled correctly and which has subsequently impacted his life. Given the sensitive personal nature of the matters concerned and the relatively little weight she has attached to them in reaching her decision, the Commissioner does not consider it appropriate to record any further details in this notice about the complainant's original interactions with the Trust.

The Commissioner's view

31. Section 14(1) of the FOIA relieves a public authority of its responsibility to communicate information or even establish what information might be held. The Commissioner therefore consider that the bar for refusing a request in this way should be set high and it is the responsibility of the public authority to demonstrate that it has been met.
32. In this particular case, the Commissioner does not consider that the Trust has provided the quantity or the quality of evidence to support its position that the request was vexatious.
33. In particular, the Commissioner notes that, beyond mere assertion, the Trust was unable to offer single piece of evidence from the 12 months

prior to the request being made – the only piece of evidence submitted having been created a month after the request was refused as vexatious.

34. The Commissioner is especially disappointed that the Trust failed to provide such evidence despite being specifically asked and provided with a second opportunity in order to do so. The Commissioner is unsure of whether such evidence exists, but it has not been provided and it would be unfair to the complainant if she were to go back to the Trust a third time.
35. Whilst the evidence from the period 2007-9 demonstrated that the complainant was causing a nuisance to the broader work of the Trust, the Trust was unable to show the extent to which that behaviour had continued or developed in the intervening period. Having a request refused as vexatious does not amount to a lifetime ban from making requests on the same or any other topic. It was the responsibility of the Trust to demonstrate that the same factors identified in 2007-9 were also present in 2020 and it was unable to do so.
36. In the Commissioner's view, the Trust's position essentially amounts to saying that because the same individual made a similar request in 2007, when his behaviour was poor, the request of 2020 is vexatious and any further requests he might make will also be vexatious. Such a position fails to account for any changes which might have taken place in the past decade.
37. Whilst relying on section 14 to refuse a request provides a public authority with a certain level of protection from those who wish to abuse the FOIA process, it should also (although the Commissioner accepts this may not always be the case) act as warning to the requestor that their behaviour has become unacceptable. A section 14 refusal notice should cause a reasonable person to reflect on their behaviour, modify it and then, if necessary begin seeking information once again – but this time in an appropriate way. It would be unfair to such a person if they were to be deprived of their right of access to information permanently and the Trust has not demonstrated that the complainant is not such a person.
38. Given that the Trust has failed to demonstrate that the request was vexatious, the Commissioner does not need to make any assessment of the value of the request or of the public interest in the information.
39. The Commissioner therefore considers that the Trust has failed to demonstrate that the request was vexatious and therefore it was not entitled to rely on section 14(1).

Procedural matters

40. Section 8(1) of the FOIA states:

In this Act any reference to a "request for information" is a reference to such a request which –

- (a) is in writing,*
- (b) states the name of the applicant and an address for correspondence, and*
- (c) describes the information requested.*

41. The Commissioner considers that the complainant's original request (of 24 January 2020) was not valid as he did not include his real name. The Commissioner's guidance on this matter states that a title and initial will not satisfy the criteria at section 8(1)(b).² However, when the complainant chased the request on 21 February 2020, he included his full surname – meaning that his request became a valid one at that point.

42. Section 10 of the FOIA states that a public authority must comply with its duties under section 1(1) of the FOIA "*promptly and in any event not later than the twentieth working day following the date of receipt.*"

43. The Trust did not respond to the request or issue a refusal notice until 19 June 2020. It therefore breached section 10 of the FOIA.

Other matters

44. Notwithstanding her comments in paragraph 37 and the broader decision, the evidence provided to the Commissioner by the Trust indicated that some of the complainant's historic behaviour was unacceptable. Nothing in this decision notice should be taken as an endorsement of that behaviour.

45. If, in the future, the Commissioner were to be provided with evidence demonstrating that patterns described in 2007-9 had reappeared, it is likely that she would find that the Trust was entitled to rely on section 14 to refuse a future request.

² <https://ico.org.uk/media/for-organisations/documents/1164/recognising-a-request-made-under-the-foia.pdf>

Right of appeal

46. 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

47. 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.
48. 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

Phillip Angell
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF