

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 October 2021

Public Authority: Homerton University Hospital NHS Foundation Trust

Address: St Leonard's Hospital
Nutall Street
London
N1 5LZ

Decision (including any steps ordered)

1. The complainant requested details of individuals who had been ejected for not wearing a facemask. Homerton University Hospital NHS Foundation Trust ("the Trust") denied holding any information in recorded form.
2. The Commissioner's decision is that, on the balance of probabilities, the Trust does not hold any information in recorded form that would fall within the scope of the request. The Trust has therefore complied with its duty under section 1(1) of the FOIA.
3. The Commissioner does not require any further steps.

Request and response

4. On 22 December 2020, the complainant wrote to the Trust and requested information in the following terms:

"Please provide me with information how many people your security guards removed from the Homerton Hospital for not wearing face covering though they stated they are exempt from wearing face covering since the new legislation had come into force on 24th July 2020? And how many of them were native/ not native English speaker?"

5. On 14 January 2021, the Trust responded and denied holding the requested information.
6. The complainant requested an internal review on the same day. The Trust sent the outcome of its internal review on 29 January 2021. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 27 January 2021 to complain about the way his request for information had been handled.
8. The Commissioner considers that the scope of her investigation is to determine whether the Trust held any recorded information within the scope of the request.

Reasons for decision

Section 1 (Held/Not Held)

9. 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.*
10. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, she will consider any reason why it is inherently likely or unlikely that information is not held.
11. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

The Trust's position

12. The Trust's initial response stated that there was no central record of such instances. Its internal review stated that it was not aware of any such incidents because all its patients had been compliant with the law.
13. In her initial letter to the Trust, the Commissioner noted that there may not be a central record of such instances, but that it was possible that local records might exist. For example, the security team would need to know if a particular individual had been ejected so that all team members could, if necessary, prevent that individual from returning. Keeping such records would also be important in the event of a complaint or litigation against the Trust.
14. The Trust responded to say that:

"The head of security has stated that security do not keep records of patient ejections or removal, either on trust network drives, local computer drives, or on any hardcopy written format in either a book or on a wall-list. If such information was recorded, it would only be kept on Datix, which is our electronic Incident Reporting Tool. We have performed electronic searches on this system, for the requested date range, as requested by [the complainant], using search terms: Removal / Ejection / Mask and Security / patient aggression etc., in combinations that would most likely produce the desired result. The latter revealed some two incident reports containing limited information concerning our security officers attending incidents where patients either protested or refused to wear a mask. Neither of these reports clearly identified that the patients were removed from the hospital; from the searches we performed, we concluded there was no routine recording of such activity or conclusive evidence of patient removal from our hospital."

15. The Trust accepted that it probably should keep formal records of incidents of this type and informed the Commissioner that it intended to make such a recommendation through the appropriate channels. Nevertheless, at the point the request was submitted it did not hold any information in recorded form – and that remained the situation.

The Commissioner's view

16. As noted above, the Commissioner can rarely say definitively that particular information does or does not exist. The established standard is that she need not do so and is only required to consider the public authority's efforts to locate relevant information in order to make a judgement based on the balance of probabilities.

17. For information to be caught by the FOIA it must be held in recorded form. That could be in electronic form such as an email, or it could be a paper document or even an audio recording. Even if something is written on a Post-It note and stuck to someone's computer, it will be recorded information. However, information that is only contained in someone's head will not be information that is held in recorded form.
18. The Commissioner considers that it was appropriate for the Trust to have started its search by consulting its Head of Security. That individual would have an overview of security-related matters and would be likely to know where any recorded information would be found.
19. The Trust has clearly searched its systems and holds no information that would fall within the scope of the request as the incident logs do not record whether the individual was or was not removed from the premises or whether they had claimed an exemption from the duty to wear a face covering – which was the premise on which the request was based.
20. It is possible that a security guard *did* eject an individual from the premises during the period covered by the request and either did not report it or only did so verbally, with no written record being created.
21. The Commissioner is not saying categorically that *no* individual was ejected during the relevant period – only that no written record exists to confirm or refute the statement. The Trust has recognised that it probably should hold such records and has made appropriate recommendations – however the fact that it has had to do so only underlines the fact that no current records exist.
22. In the absence of any evidence that would contradict the Trust's position, the Commissioner is satisfied, on the balance of probabilities, that no information is held in recorded form.

Right of appeal

23. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

24. 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.
25. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
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