

**Freedom of Information Act 2000 (FOIA)  
Environmental Information Regulations 2004 (EIR)  
Decision notice**

**Date:** 8 February 2023

**Public Authority:** Liverpool University Hospitals NHS Foundation Trust

**Address:** Prescot Street  
Liverpool  
Merseyside  
L7 8XP

**Decision (including any steps ordered)**

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1. The complainant has requested information relating to the construction of a new hospital and the collapse of Carillion.
2. The Trust refused to comply with the request, citing regulation 12(4)(b) (manifestly unreasonable) of the EIR.
3. The Commissioner's decision is that the Trust was entitled to refuse the request under regulation 12(4)(b).
4. The Commissioner does not require the public authority to take any steps.

**Background information**

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5. The complainant made the following four-part request to Liverpool University Hospitals NHS Foundation Trust ('the Trust') on 29 April 2022:

"1. I believe that the March and April minutes should have been included in the 8041 FOI response. I would also request that all previous and future minutes should be placed as accessible on the website.

2. Are the details of what has been undertaken since the collapse of Carillion going to be placed on the website as a matter of course - i.e., repairs, surveys, remedial actions etc?
3. If not can I request that they are - specifically was the roof replaced - if so, can all the reasons why be released?
4. Also following the beam strengthening was/is there going to be testing of the support structure going to be undertaken - bearing in mind that there were structural failures and that the structure wasn't designed for this increased weight."
6. The complainant subsequently brought a complaint to the Commissioner about the Trust's handling of this request. The Commissioner explained to the complainant that part 2 of the request was not a valid request for information. The Commissioner also explained that, since the Trust had informed the complainant that the roof for the hospital in question had not been replaced, it followed that the Trust wouldn't hold any information relevant to part 3 of the request. Therefore, the Commissioner dismissed this complaint, under section 50(2)(c) (Application for decision by Commissioner) of FOIA, under the reference IC-176664-L6K3.

## Request and response

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7. On 21 July 2022, the complainant wrote to the Trust again and made another request for information. This is the request that is the subject of this notice:

"Re. Your ref TB/FOI8205 Outcome of internal review dated 17/06/2022.

With regards to the strict literal technical interpretation as per below as per Elements 2 and 3 and the suggestion by the ICO I hereby request details of what works/actions have been undertaken since the collapse of Carillion by the Trust."
8. On 12 August 2022 the Trust responded and informed the complainant:

"Further to your request for information made under the terms of the Freedom of Information Act 2000, the Trust can confirm this request has been previously answered under FOI 8348. A copy of our response to FOI 8348 is attached for reference."
9. The complainant brought a complaint about this request to the Commissioner, who determined that an internal review hadn't been

conducted. He informed both the complainant and the Trust that an internal review would need to be conducted.

10. On 20 September 2022 the Trust provided the outcome to this internal review. Having done so, the Trust acknowledged that its response of 12 August 2022 was unsatisfactory and the complainant's request of 21 July 2022 was not a repeat of a previous request. However, it refused to comply with the request, citing regulation 12(4)(b).

## Reasons for decision

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11. The Commissioner has considered several cases<sup>1</sup> involving the complainant and requests they have submitted to the Trust. As with the previous cases, this request focuses on the construction of a new hospital and the collapse of Carillion. As this construction project represents a "measure" affecting or likely to affect the elements of the environment, it represents environmental information according to regulation 2(1)(c) of the EIR.
12. Regulation 12(4)(b) states that a public authority can refuse to disclose information in response to any request that is manifestly unreasonable.
13. The Commissioner considers that a request can be manifestly unreasonable for two reasons: firstly, if compliance with the request would incur an unreasonable burden on the public authority both in terms of costs and the diversion of resources and secondly where the request is vexatious.
14. In its internal review outcome, the Trust explained it was applying regulation 12(4)(b) on the grounds of burden. During this investigation, the Trust confirmed to the Commissioner that it's also applying regulation 12(4)(b) on the grounds of vexatiousness. The Commissioner has therefore considered both of the Trust's arguments accordingly.
15. Following the lead of the Upper Tribunal in *Craven v Information Commissioner & DECC* [2012] UKUT 442 (AAC), if a request is vexatious under section 14, then it will also be manifestly unreasonable and hence 12(4)(b) of the EIR will be engaged.

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<sup>1</sup> [IC-123838-W7L2 \(ico.org.uk\)](#); [ic-141289-v5n9.pdf \(ico.org.uk\)](#); [ic-179002-b0b0.pdf \(ico.org.uk\)](#)

16. The singular practicable difference is that a public authority must consider the balance of public interest when refusing a request under the EIR whereas it does not have to do so under FOIA.

### **Unreasonable burden**

17. When refusing a request in this way, the Commissioner expects a public authority to provide a reasonable estimate as to how long compliance with the request would take. This estimate should be based on the quickest method of retrieving any relevant information. In most cases, this estimate requires the public authority to conduct a sampling exercise.
18. The Trust has explained 'Following discussions with the Assistant Director of New Hospital Construction and the Director of Finance – Capital and Commercial it was confirmed we do not have a document / report in recorded format that covers the scope of the request. Records relating to works carried out since the collapse of Carillion (timescale 2018 - 2022) including operational and maintenance issues, are stored within 3 separate electronic databases that amount to in excess of 100,000 files.'
19. The Trust has gone on to explain that just one of these databases holds two folders named 'Completion works' and 'z-Carillion'. The two of these folders combined contain 295,005 files which would need to be reviewed as part of the request. The Commissioner is satisfied that the Trust would need to review the files in question, in order to redact any personal data or commercially sensitive information.
20. The Trust has also explained that 'It would be necessary for the files to be downloaded prior to review. This would take a considerable amount of time and unfortunately, without carrying out this task, it was not possible to specifically calculate the time this would take. Using a broad estimation (for the documents contained within viewpoint) of 5 minutes per file to download / retrieve / review, it would take 24,583 hours i.e., 295,005 x 5 minutes = 24,583 hours. Following the sampling exercise, we established that due to the magnitude of the task to retrieve the data we were unable to narrow the scope.'
21. Even though they relate to FOIA, and not the EIR, the Commissioner is guided by the limits defined by the 'Appropriate Limits and Fees Regulations.'<sup>2</sup> The regulations state that a public authority such as the

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<sup>2</sup> [The Freedom of Information and Data Protection \(Appropriate Limit and Fees\) Regulations 2004 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

Trust does not have to comply with a request if to do so would exceed 18 hours.

22. In order to engage regulation 12(4)(b) in this way compliance with the request must be manifestly unreasonable which means that it must grossly exceed the 18 hour limit. Even if the Trust's method of downloading, retrieving and reviewing each file became doubly efficient, it would still take 12000 hours to review just one of the three databases relevant to the request. The Commissioner is satisfied this represents a manifestly unreasonable burden on the Trust and therefore regulation 12(4)(b) is engaged.

## **Vexatious**

23. The Commissioner's guidance<sup>3</sup> on vexatiousness discusses what might typify a vexatious request. This includes frequent/overlapping requests, unreasonable persistence, intransigence and unfounded allegations. It's important to remember that it is the request that is vexatious, not the requestor and the presence of the aforementioned factors, whilst indicators that the request might be vexatious, are not a guarantee that the request is vexatious.
24. The Trust has explained that 'In less than 12 months, the applicant has submitted 28 EIR/FOI requests; 9 of which have been in the last 60 days.' The Commissioner accepts this is a large number of requests but doesn't believe, on its own, that it indicates a vexatious request.
25. The Trust has gone onto explain that 'The applicant has submitted a total of 11 requests relating to this topic. In addition, the Trust has been subject to frequent correspondence and new requests before the Trust has had an opportunity to address earlier enquiries in terms of; open requests, open internal reviews and open ICO investigations.'
26. The Trust believes that 'The applicant's correspondence is quite often hard to follow and on many occasions the Trust has been unsure what (if any) information has been requested. Despite trying to ascertain clarity on the requests we find ourselves in a situation where lengthy correspondence contains a confusing mixture of questions, complaints, and other allegations.'
27. The Trust has also explained that it considers the request outlined in paragraph 5 (and by extension, the request that is the subject of this

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<sup>3</sup> [Dealing with vexatious requests \(section 14\) | ICO](#)

notice) is an example of vexatiousness by drift, whereby any serious purpose or value that the requests originally represented has been lost over time. The Trust has explained this is evident by the fact that the latest requests are not for recorded information, rather requests for explanations or opinions.

28. When considering whether a request is vexatious, it is often necessary to look at the context and history of the complainant's relationship with the public authority. The Trust believes that the complainant uses requests for information as an attempt to reopen an issue that has been extensively addressed by the Trust, both through FOIA and the EIR and other corporate governance routes.
29. The Trust believes that the pattern and duration of these requests indicate they are likely to continue in the future. The Trust also notes that the applicant has rejected the Trust's previous attempts to provide advice and assistance. Furthermore, the Trust has explained that it held 'a meeting with the applicant in September 2022 in an effort to gain clarity to assist with understanding regarding the content of these frequent requests. During the meeting the applicant advised he wished to know everything about the Trust meaning, unfortunately, at that time, I was unable to establish a way to assist both parties with a solution to reduce the frequency of the requests.'
30. With the above analysis in mind, the Commissioner concurs with the Trust that this request represents vexatiousness by drift.

### **The public interest test**

31. The Commissioner has determined that the request engages regulation 12(4)(b) because compliance would impose an unreasonable burden on the Trust and because the request is vexatious. He must now consider where the balance of the public interest lies.
32. The Trust has acknowledged that there is a public interest in transparency, accountability, and openness regarding the spending of public money.
33. There is also a public interest in understanding the fallout from the collapse of Carillion.
34. However, the Trust has also explained that 'The amount of time required to comply with the request would place a significant strain on the Trusts resources and require us to divert staff away from delivering our mainstream, core functions in provision of NHS care, placing a disproportionate and grossly oppressive burden on the Trust.'

35. Whilst the Commissioner acknowledges the serious purpose and value that the applicant's requests originally represented, he agrees with the Trust that this has waned considerably over time. The public interest in the construction project has been met through the previous disclosure in response to the complainant's requests and in relevant information it proactively publishes on its website. However, it is not proportionate for the Trust to incur such an unreasonable burden in order to fulfil what now largely represents a private interest.

## **Right of appeal**

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36. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

37. 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.
38. 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**

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