

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 November 2023

Public Authority: Kingston Hospital NHS Foundation Trust

Address: Galsworthy Road
Kingston upon Thames
Surrey
KT2 7QB

Decision (including any steps ordered)

1. The complainant has requested information from Kingston Hospital NHS Foundation Trust (the Trust) about applicants for jobs. The Trust refused to provide some of the information, citing sections 12 (cost of compliance) and section 22 (future publication) of FOIA.
2. The Commissioner's decision is that the Trust has cited section 12(1) of FOIA appropriately. He also accepts that the Trust could not offer any meaningful advice and assistance within the context of the request. However, the Trust breached sections 1(1)(b), 10(1) and 17(1) of FOIA.
3. The Commissioner does not require further steps.

Request and response

4. On 23 June 2022 the complainant wrote to the Trust and requested information about job applicants. The request is too lengthy to include here but appears in an annex at the end of this decision notice.

5. The Trust responded on 9 September 2022 after the complainant had chased a response. It refused the requested information at Part One under sections 12 and 22 of FOIA. The Trust provided information under Part Two. It stated that the system could only produce 256 days of data.
6. On 20 November 2022 the complainant asked for an internal review querying the application of sections 12 and 22.
7. On 12 September 2023 the complainant chased the lack of an internal review and asked for a link to the data that the Trust had said would be published or that the information be provided to them.
8. The Trust provided an internal review on 22 September 2023. In the review it revised its position regarding its reason for citing section 12 of FOIA because the system was, in fact, able to produce 400 days of data, as opposed to the previously stated 256 rendering it unnecessary to "interrogate paper and information from other sources". However, it still argued that section 12 applied for the following reason -

"To produce the requested data for all completed campaign activity would require us to extract the data from TRAC and other sources and undertake a manual analysis to produce the report. This would take over 18 hours and therefore Section 12 is engaged."
9. The Trust maintained that section 22 of FOIA had been appropriately cited and that the "related information" had now been published and could be accessed via the following link:

<https://kingstonhospital.nhs.uk/work-for-us/equality-and-diversity-atkingston-hospital/>

Scope of the case

10. The complainant contacted the Commissioner on 28 September 2023 to complain about the way their request for information had been handled.
11. After the Commissioner began his investigation, the Trust responded to him on 2 November 2023 and continued to maintain its citing of section 12(1) of FOIA. However, the Trust withdrew its citing of section 22 of FOIA.
12. The Commissioner considers that the scope of his investigation is to decide whether the Trust has cited section 12 appropriately.

Reasons for decision

Section 12 – cost of compliance exceeds the appropriate limit

13. Section 12(1) of FOIA states that:

“(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.”

14. The appropriate limit is set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations'). The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour. This means that in practical terms there is a time limit of 18 hours in respect of the Trust. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) of the Fees Regulations states that an authority can only take into account the costs it reasonably expects to incur during the following processes:

- determining whether it holds the information;
- 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.

15. 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 IC & Medicines and Healthcare Products Regulatory Agency EA/2007/0004*, the

Commissioner considers that any estimate must be "sensible, realistic and supported by cogent evidence".¹

16. The Trust stresses that the complainant "has repeatedly insisted that the data can be pulled from the Trust's TRAC [applicant tracking system]". However, "senior members of staff at the Trust and expert users of the Trust's system" dispute the accuracy of running reports from this system and consequently being able to provide the requested information.
17. The Trust acknowledges that it had previously provided figures in response to an earlier request "based on simple running of reports that, on further examination, proved to be inaccurate". The Trust found issues with the TRAC system when checking it against the ESR [electronic staff record] system. To accurately generate this data "would be an extensively manual process and take considerably longer than eighteen hours". The report wouldn't answer the questions asked in the request and can't provide the breakdown requested without the manual process.
18. The Trust provided the Commissioner with the views of the Trust's experts on the system and the recruitment process that were provided just after the request and more recently. The standard reporting tool is very rigid and, the Trust contends that it would be necessary to download a separate report for Band 2, Band 3 etc and then add them together for quarter one and two. It explains that for quarter three onwards a report would need to be run per question. Additionally, nurses and midwives cannot be reported on separately as they are in the same staff group in TRAC.
19. To provide the requested information involves a great deal of manual work and because of flaws in TRAC it will not report on "complete Campaigns". The Trust gives the example of a report being run April to September where a job is advertised on 29 September. The job would be included in the 'number of applicants' but the outcome would not be included in the 'shortlisted or 'offered' columns. The Trust says that this would look as if it did not employ as many BAME staff because it cannot run reports on completed campaigns. An incomplete campaign means that there isn't the data for each stage of recruitment. It states that it would take three days to download and manipulate into what would be an incomplete view. The Trust argues that running a report is one thing but that the reporting is not accurate for the reasons given. Additionally,

¹ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf>
(para 12)

TRAC only processes standard campaigns and does not cover all recruitment activity such as recruitment managed separately - international recruitment, recruitment events (appointments made on the same day), and agency managed campaigns. This means that the TRAC data misses a lot of volume recruitment and it gives the example of HCAs and nursing. Any campaign managed outside of TRAC would need Kingston to be disaggregated from the other Trusts it supports.

20. The Trust stated again that the retention period is 400 days and that the original requested period is now outside that retention period. The Trust argues that "TRAC reporting functionality is very poor" and the data cannot be scrutinised. To complete what it has detailed would take more than 18 hours. The Trust runs around 500 campaigns a year with 12,500 applications and it estimates that it would take between 15 minutes and two hours for each campaign, depending on the volume of candidates and the data source. This could mean anything from 125 hours to 1000 hours and it contends that it would be nearer to the higher figure. To produce accurate data would require the Trust to do the following:
 - Extract the data from TRAC and other sources, undertake a manual review and analysis and produce the requested data set.
 - There is no single report available; multiple reports would have to be utilised and then the data manually 'stitched' together.
 - The data would have to be scrutinised for each individual applicant at each of the six recruitment stages that constitute the life cycle of applicants.

21. The Trust explained that it is able to "provide an ethnicity profile of our workforce and the ethnicity profile of new starters over a defined period from ESR, which is accurate". However, it is unable to provide the requested information in its entirety without it exceeding the appropriate limit. It does not accept that the previous information it provided to the complainant was accurate. Versions of TRAC vary from Trust to Trust as does the information entered into it and "the local system is operated by a specialist team".

22. As explained earlier, the complainant supported their position by referring to a previous request that had been made that was similar but there were fewer profession/grade categories "to which the trust had responded in full". The complainant pointed out that the data was produced from the same system. They also told the Commissioner that the Trust could not provide "recruitment data for some categories [as it] was not held for a full year", despite having done so previously. Additionally the complainant said that they had not asked for 'completed' campaigns and that it was their view (from familiarity with

the system) that "each report should take 10-20 minutes to produce from start to finish".

23. The parameters the Trust has provided, anything from 125 hours to 1000 hours with the suggestion that it would be likely to approach the higher figure, means that if the Commissioner accepts this assessment, even the lower figure is more than 100 hours beyond the statutory limit.
24. The complainant has always disputed that the system cannot provide the requested information well within the appropriate limit. This is based on personal knowledge of the TRAC system. However, the Commissioner is also aware that systems such as this are often not identical and may differ from public authority to public authority. Any system is also dependent on how a public authority has decided to utilise it. Additionally, the Trust has realised that it cannot provide the requested information by simply running a number of reports. Despite some of the flaws in the Trust's responses to the complainant, the Commissioner accepts that responding to the request would exceed the fees limitation.

Procedural matters

25. Section 16 of FOIA requires a public authority to provide advice and assistance where it is reasonable to do so. The section 45 FOIA Code of Practice states that a public authority's advice and assistance obligation will be triggered when it relies on section 12 to refuse a request. If there is no reasonable way in which the request could be refined, the public authority should inform the requester that the request cannot be meaningfully refined.
26. The Trust explained that the complainant had "discussed their requests on several occasions with the Information Governance team and the Trust Workforce department". It maintains that the refusal by the complainant to accept the Trust's opinion, as outlined, meant that it did not consider that further advice or discussion would be helpful.
27. The Commissioner accepts the Trust's position as the complainant required all the requested information and did not apparently accept that the request could be refined.
28. Section 1(1) of FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them. Where a public authority considers the information/some of the information is exempt from disclosure, section 17 of FOIA requires it to issue a refusal notice, explaining why.

29. Section 10(1) of FOIA requires these actions to be taken within 20 working days of receipt of the request.
30. The Trust issued a refusal notice and communicated some of the requested information outside the 20-working day requirement and so breached sections 1(1)(b), 17(1) and 10(1) of FOIA.

Other matters

31. Despite the fact that the Trust withdrew its application of section 22 of FOIA, the Commissioner is concerned that it continued to cite the exemption until it was finally withdrawn in November 2023. This was just over a month after the internal review when there had been the opportunity to reconsider after a long passage of time.
32. Understandably the complainant had suggested to the Commissioner that the Trust must hold the requested information in order to be able to publish it. They also pointed out that the links provided by the Trust did not provide them with the data they had requested. Additionally, the complainant stated that they were aware of another requester having asked for data where the Trust had cited section 22 but that the data still had not been published two years later.
33. The Commissioner would like to remind the Trust of his guidance:

“A general intention to publish some information will not suffice. It is not enough for the public authority to note that it will identify some, but not all, of the information within the scope of the request for future publication.

The information that the public authority intends to be published must be the specific information the applicant has requested.”²
34. The Commissioner is also concerned that the Trust, although it cited section 22, has not published the requested information and has said that it is now outside the retention period of 400 days. His guidance³ states that, if a public authority is due to delete information, it should be cautious about

² [information-intended-for-future-publication-and-research-information-sections-22-and-22a-foi.pdf \(ico.org.uk\)](#)

³ [Retention and destruction of information | ICO](#)

deleting any information that is subject to an information request as it may be legally obliged to communicate that information to the requester.

35. The section 45 code of practice⁴ recommends that public authorities complete the internal review process and notify the complainant of its findings within 20 working days, and certainly no later than 40 working days from receipt.
36. In this case the complainant requested an internal review in November 2022. The Trust did not provide the review until September 2023. This is some 8 months beyond the maximum recommended timeframe of 40 working days and the Commissioner considers it to be unacceptable.

⁴ [CoP FOI Code of Practice - Minor Amendments 20180926 .pdf \(publishing.service.gov.uk\)](#)

Right of appeal

37. 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

38. 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.
39. 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

Janine Gregory
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex

40. Under the Freedom of Information Act, please provide me with the following:

Part One

Numbers of Job Applicants, Applicants Shortlisted for Interview, and Applicants Offered a position after interview, by ethnicity and for the following groups of staff, for the period 1 April 2021 to 31 March 2022 (2021-or, if not available, the most recent 12-month period – in which case please state which period the data is for):

1. All AfC Roles at bands 1 – 8b
2. All AfC Roles at 8c and above

3. All Registered Nursing Roles at Band 5
4. All Registered Nursing Roles at Band 8c and above

5. All Registered Midwives at Band 5
6. All Registered Midwives at Band 6

7. All Allied Health Professionals
8. All Occupational Therapists
9. All Physiotherapists
10. All Dieticians
11. All Radiographers

12. All SAS Roles
13. All Medical Consultant Roles

14. All Band 5 Bank Registered Nurse recruitment

Please supply the numbers of candidates (not the %) for the following Ethnicity Descriptors:

- Asian (including Chinese)
- Black
- Mixed (including Arab)
- Other
- White
- Unknown (including do not wish to say)

The above categories mirror the 2021 Census categories, please refer to the attached document setting out these category descriptors if further guidance is needed. If you use Trac please ensure that the Vietnamese, Japanese, Filipino, and Malaysian descriptors are included in the Asian category. Please note in particular that Chinese is listed as Other on Trac & should be re-classified as Asian in line with the 2021 census categories. This request is part of a larger research project. In order to avoid transcription errors please send the data as an Excel file in the following format:

Ethnicity	Number of Applicants	Number Shortlisted for Interview	Number Offered the Position
Asian			
Black			
Mixed			
Other			
White			
Unknown			

Part 2

Please provide the level of expenditure in the 2021-22 financial year on the recruitment of overseas nurses.

This request is part of a larger research project. In order to avoid transcription errors, please use the following format and send as an Excel file:

Number of Nurses Recruited in 21-22	Funding allocated to the trust for this purpose by NHSEI	Total cost to the trust (excluding NHSEI funding) of overseas nurse recruitment. This should include all associated expenses such as trust staff costs, Agency costs, flights, accommodation, etc. "	Total