

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 01 October 2018

**Public Authority:** NHS Commissioning Board (NHS England)  
**Address:** 22 Quarry House  
Quarry Hill  
Leeds  
LS2 7UE

### Decision (including any steps ordered)

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1. The complainant requested information relating to a company analysis of responses to a consultation on the Gender Identity Services. NHS England (NHSE) cited section 22 (intended for future publication) of FOIA to refuse the request.
2. The Commissioner's decision is that NHSE correctly applied section 22(1) of the FOIA in its response to the request. The information has now been published.

### Request and response

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3. On 6 December 2017 the complainant requested the following information:

*'I wish to make a Freedom of Information, (FOI), request in regard to NHS England's interaction with a company trading as Rocket Science Lab - <http://rocketsciencelab.co.uk/>*

*This company has been commissioned by NHS England's Specialised Commissioning, via Fraser Woodward, to undertake work, including the analysis of 800 responses to a consultation on the Gender Identity Services for Adults Proposed Service Specifications which closed on the 17<sup>th</sup> October 2017.*

<https://www.engage.england.nhs.uk/survey/gender-identity-services-for-adults/>

*Apparently, the raw data has been returned as it was presented to the Gender Identity Service Clinical Reference Group on Friday 1<sup>st</sup> December 2017.*

*I, also, [A] request a copy of the raw data used to present to the CRG, [B] a copy of what will be given to the Clinical Reference Group at its next meeting, and [C] a copy of what will be made available to the public. (A, B C added by the Commissioner)*

*I, also, request the parameters/questions that were put to Rocket Science Lab to carry out the analysis in the first place, i.e. to generate the raw data obtained that was returned to Specialised Commissioning.*

*It is preferable that the data is available in an electronic format.'*

4. On 21 December 2017 NHSE confirmed that it held some information and cited section 22 - information that is intended for future publication:

*'We have interpreted your reference to "raw data" to mean the outcome of the quantitative and qualitative analysis of consultation responses by Rocket Science Lab. Please let us know if this is incorrect.*

*NHS England holds some recorded information in relation to your request.*

*[A] In regards to raw data presented to the Clinical Reference Group (CRG) NHS England does hold recorded information.*

*On 1 December 2017 the CRG for Gender Identity Service received a presentation on a high level summary of the quantitative responses that were received during consultation. The data used to develop the presentation was not generated by data received from Rocket Science Lab but from NHS England's own on-line survey function. It was explained to CRG members that the data presented was preliminary and subject to change as an outcome of the ongoing analysis of consultation responses by Rocket Science Lab.*

*The information that we hold is therefore draft and subject to change as an outcome of the independent analysis of the consultation response, which has not yet been received by NHS England.*

*As such, we are withholding this information under Section 22 of the FOI Act, which states that public bodies are not obliged to disclose information that is intended for future publication.'*

5. NHSE explained that it did not hold information for [B] and [C]:

*[B] 'In regards to what will be given to the Clinical Reference Group at its next meeting NHS England does not hold recorded information. The independent analysis of consultation responses has not yet been received by NHS England.'*

*[C] In regards to what will be made available to the public NHS England does not hold recorded information. The independent analysis of consultation responses has not yet been received by NHS England.'*

6. NHSE provided the invitation to tender in response to the parameters/questions that were put to Rocket Science Lab to carry out the analysis in the first place.
7. The complainant requested an internal review on 1 January 2018: *'I am disappointed... at NHSE's refusal to allow us to make proper checks for fairness and equity of NHSE's policies...Barely any feel they were heard – which is why the service specifications are of such poor quality and have attracted 800+ concerns, forcing NHSE to have them externally analysed. The results of which, NHSE are now attempting to suppress, and dumb down – why?'*
8. NHSE sent the outcome of its internal review on 3 January 2018. NHSE explained that the review could only consider the handling of the FOIA request and could not consider concerns on the wider subject matter. NHSE interpreted the internal review request as relating to the decision to withhold some of the requested information under the exemption at section 22. NHSE upheld the decision:

*'As this information is currently in draft form, and remains subject to change, we consider that the public interest was, and remains, in favour of maintaining the exemption.'*

## **Scope of the case**

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9. The complainant contacted the Commissioner on 5 January 2018 to complain about the way his request for information had been handled and after further documents were provided the case was accepted on 22 February 2018.
10. The Commissioner has focussed her investigation on determining if NHSE correctly applied section 22 of the FOIA in its response to the request for information.

## Reasons for decision

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### Section 22 Information intended for future publication

11. (1) *Information is exempt information if -*

*(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),*

*(b) the information was already held with a view to such publication at the time when the request for information was made, and*

*(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).*

12. In order to determine whether section 22 is engaged the Commissioner therefore considered the following questions:

- When the complainant submitted the request, did NHSE intend to publish the information at some date in the future?
- If so, had NHSE determined this date when the request was submitted?
- In all the circumstances of the case, was it 'reasonable' that NHSE should withhold the information from disclosure until some future date (whether determined or not)?

### **Was the information held with a view to its publication at a future date?**

13. Section 22 applies only when the requested information is held by a public authority with a view to publication, by that public authority or another body, at the time the request was received.

14. NHSE explained to the Commissioner that at the time of responding to the FOI request in December 2017 it had not agreed a publication date. However, there were various documents and communiques that established that there was a clear intention to publish the report.

15. NHSE referred to the invitation to tender document (dated 4 August 2017 and provided to the complainant, see paragraph 6 above) that informed bidders: *'the outcome of the consultation process will be a single report analysing the key themes and which will be subsequently published, that provides an independent analysis of the responses received and a supporting commentary'*.

16. NHSE provided the slide pack that had been prepared for presentation at various public events which explained to attendees that after the consultation, *'the responses will be analysed by an independent third party and a summary report will be shared by NHS England'*.
17. NHSE also referred to a blog from the Medical Director for Specialised Services on 27 November 2017 which described the process for securing an independent analysis of consultation responses and stated that *'the final report will be available in the New Year'*. (see <https://www.england.nhs.uk/author/james-palmer/>)
18. Both the complainant and NHSE informed the Commissioner that the report had been published on 11 May 2018.
19. The Commissioner sought clarification from NHSE that the requested information for 'raw data' had been published.
20. NHSE referred to the original request for *'the analysis of 800 responses to a consultation'* and were satisfied that it was appropriate to interpret the request as being for the final analysis/report, which was intended for publication.
21. NHSE had informed the complainant that it had interpreted the request for the 'raw data' as the *'outcome of the quantitative and qualitative analysis of consultation responses by Rocket Science Lab'*. (see paragraph 4 above) There is only one set of raw data which comprised of the 800 responses made by the respondents to the consultation. This is held within the on-line depository owned by NHSE.
22. This raw data was presented to the CRG in December 2017 with a summary (*'rather than analysis'*) of responses to the quantitative questions. The presentation was prepared before Rocket Science Lab delivered any analysis to NHSE.
23. The same raw data was passed to Rocket Science Lab by NHSE for analysis of the responses in full. The analysis conducted by Rocket Science Lab was then published as the report in May 2018. *'The published report is therefore the same raw data as was presented to the CRG in December 2017, but contains more information and analysis.'*
24. The Commissioner has considered the above and accepts that NHSE was correct to apply section 22 as, at the time of the request, there was a settled intention to publish and has now been published.

### **Was it 'reasonable' to withhold the information?**

25. However, for this exemption to be relied on section 22(1)(c) requires that the application is 'reasonable in all the circumstances' of the request.
26. The complainant argued that *'as it appears NHSE are attempting to force through service specifications that are likely to be unfit for purpose and discriminative. Neither have they properly consulted these documents so their refusing to release the data requested is impeding checks we need to make to ensure fairness and equity of the documents, consultation and procedures'*.
27. NHSE stated that at the time of the FOIA request it was not in possession of a final version of the report:
- 'We held a draft version that was subject to (although not specifically intended to) change. It was not in the public interest to put a draft version in the public domain as stakeholders may have become confused if changes were required, and therefore different versions entered circulation. It therefore follows that it was reasonable that publication was deferred until NHS England's relevant clinical advisory group and Programme Board members had considered the final version of the report for accuracy (in how it used nomenclature; clinical definitions; pathway descriptions etc.) and general sense checking (this happened in January and February 2018). If a draft report, which may have contained errors, had been put into the public domain, there was a risk that respondents to consultation would have lost faith in the integrity of the process of consultation generally.'*
28. The Commissioner accepts that at the time of the request NHSE did not hold a final version of the report but had a planned programme to publish the report. Therefore, the Commissioner considers that it was reasonable in all the circumstances to withhold the information as requested.

### **The public interest test**

#### **What public interest arguments in favour of disclosing the information were taken into account?**

29. The Commissioner is aware from the authority's submissions that it acknowledges the importance of public authorities operating in an open and transparent manner, and that this is a factor that has been considered as part of its public interest reasoning. The complainant has also advised that the disclosure of the information is necessary to *'ensure fairness of process'*.

### **What public interest arguments in favour of maintaining the exemption were taken into account?**

30. NHSE considered that there is a strong public interest that the disclosure of the report into the public domain is properly managed. There had been significant interest in the proposals and that consultation respondents held opposing viewpoints on the proposals. *'This is a contentious and emotive arena. In these circumstances, it is reasonable that neither the "raw data" nor the report were put in to the public domain via an unknown individual, and that publication was deferred so that all respondents to consultation, members of the public and media had equal and open access to the report content. We do not consider that the public interest would have been served by releasing the report to a single individual.'*
31. In particular, NHSE considered that it would have been *'inappropriate to share the "raw data" (i.e. draft quantitative analysis) without the eventual supporting narrative for the purpose of providing background and context.'*

### **The balance of the public interest arguments**

32. The Commissioner has considered the detailed context to the request provided by the complainant and the arguments provided by NHSE in order to assess whether the public interest is weighed more heavily for or against disclosure. The Commissioner considers that, on balance, it remained reasonable at the time of the request, to withhold the information in the circumstances so that the raw data and the report is provided with its full analysis.

### **Conclusion**

33. On the basis of the above factors, the Commissioner has concluded that at the time of the request the authority was correct to withhold the information under the exemption provided by section 22.

## Right of appeal

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34. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

35. 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.
36. 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**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**