

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 March 2024

Public Authority: NHS England
Address: Quarry House
Leeds LS2 7UE

Decision (including any steps ordered)

1. The complainant has requested information about complaints “for the last 5 years” from NHS England (NHSE). NHSE originally withheld the information under section 21 and 22 of FOIA. This is because some of the information was already accessible to the complainant and because, at the time of the request, the remainder was intended for future publication. NHSE subsequently disclosed information relevant to the request.
2. The complainant is dissatisfied because NHSE disclosed the information in financial years and the complainant considers it was clear that they wanted the information in calendar years.
3. The Commissioner’s decision is that, in the circumstances, NHSE’s interpretation of the request as being for information in financial years was reasonable and that it complied with section 1(1) of FOIA.
4. It’s not necessary for NHSE to take any corrective steps.

Request and response

5. The complainant made the following information request to NHSE on 18 September 2023:

"I would like to know how many complaints from individuals NHS has dealt with in each of the last 5 years?

Also how many of these, in each year, have ended up being investigated by the PHSO?

I would also like to know how many of these individual complaints to the PHSO were upheld against NHSE?"

6. NHSE responded on 5 October 2023. It relied on section 21 of FOIA to withhold the requested information which it said was already accessible to the complainant through its published annual reports. NHSE provided a link to those reports.
7. By return, the complainant wrote to NHSE and said, "I am unable to find the information that I have requested in NHSE Annual Report for 2023. Nor any of the previous years."
8. On 20 October 2023, NHSE wrote to the complainant. It said it had assessed their communication as being a request under FOIA which it would answer within 20 working days. The Commissioner understands that here NHSE was referring to correspondence it received from the complainant on 4 October 2023, in which they had re-stated their request of 18 September 2023, in very slightly different terms but still for "the last 5 years."
9. On 1 November 2023 NHSE advised the complainant that it considered section 22 of FOIA would apply, that it would need to conduct a public interest test and that this might delay its response.
10. On 2 November 2023 NHSE wrote to the complaint. It reproduced the complainant's request of 4 October 2023. NHSE said it had decided to release some of the information it holds but was relying on section 22 to withhold the remaining information. NHSE gave specific instructions on where information about complaints could be found in the annual reports for 2018/19, 2019/20, 2020/21 and 2021/22. NHSE relied on section 22 of FOIA to withhold the complaint information for the 2022/23 report as this report was due to published.
11. The complainant submitted a complaint to the Commissioner on 13 November 2023. The Commissioner began his investigation on 16 February 2024 which is well within his six-month service standard for progressing complaints submitted to him.
12. On 16 February 2024 the Commissioner contacted NHSE. This was because he'd noted that its 2022/23 annual report had subsequently been published but he hadn't been able to find any complaint information in it.

13. On 23 February 2023, NHSE provided the complainant with a fresh response. It provided links to the requested information for the four earlier years which is already published and provided the information for 2022/23.
14. In a submission to the Commissioner, NHSE advised that at the time of the request it had intended to publish the 2022/23 complaint information in its annual report as it had done in previous years. However, in the interim NHSE had decided to reduce the amount of information contained in the report and the complaint information wasn't included in the most recent report.
15. On 24 February 2024 the complainant wrote to NHSE to say that they remained dissatisfied as they had been provided with information in financial years and they had requested information in "individual years" and "from the 1st January to 31 December." They also said they hadn't requested information for the current year ie 2023.
16. NHSE and the Commissioner had a telephone conversation on 27 February 2024.
17. The Commissioner has a duty to protect his resources and to identify opportunities for resolving complaints informally where possible. He wrote to the complainant on 27 February 2024 following his call with NHSE that day. The Commissioner noted that the complainant had requested information for "the last 5 years". He acknowledged that with the benefit of hindsight NHSE might have clarified their request with the complainant but that it had provided the information in calendar years as that's how it published this information.
18. The Commissioner advised the complainant that NHSE had told him that it was treating the complainant's correspondence of 24 February 2024 as a new, clarified request – for the information in calendar years – and was processing that request accordingly. He invited the complainant to withdraw their complaint.
19. On 3 March 2024 the complainant wrote to the Commissioner. They re-stated that [in their request of 18 September/4 October 2023] they hadn't asked for the information in financial years and that there shouldn't have been anything for NHSE to need to clarify. The complainant said that their correspondence to NHSE of 24 February 2024 was a request for an internal review, not a new request and that they wanted to progress their complaint.

Reasons for decision

20. This reasoning covers the complainant's request of 18 September 2023, which they re-stated on 4 October 2023 in broadly the same terms. The focus of the complainant's complaint to the Commissioner isn't NHSE's initial application of section 21 and 22 but its interpretation of the request. The Commissioner will therefore consider whether NHSE's interpretation of the request was a reasonable and objective reading of the request, and whether it complied with its duty under section 1(1) of FOIA in respect of that request.
21. Under section 1(1) of FOIA a public authority must (a) confirm whether it holds information that's been requested and (b) communicate the information if it's held and isn't exempt information.
22. In this case, the complainant requested complaint information "for the last 5 years" and they consider that it's clear they meant the last five calendar years. NHSE provided information in financial years because that's how it's traditionally published this information.
23. The Commissioner considers that, given it has published information about complaints in financial years in the past, NHSE's interpretation of the request as being for information in financial years was a reasonable interpretation for it to make. If it was clear that by "last 5 years" the complainant meant calendar years, then NHSE would have provided the information in calendar years (if it wasn't exempt information).
24. Only an applicant knows what information it is that they're seeking when they submit a request. In the Commissioner's view, if it's important to an applicant to receive the information in a particular format they should specify that format when they submit their request. The Commissioner has published guidance for applicants on making a request to ensure they receive the specific information they're seeking¹. One of his tips is to "try to make it as easy as possible for the public authority to understand what you want to receive."
25. Being provided with the information in calendar years is important enough to the complainant for them to complain to the Commissioner about the information in financial years that NHSE provided. However, the complainant didn't ask for the information in calendar years in their original request. And in their request for an internal review the

¹ <https://ico.org.uk/for-the-public/official-information/>

complainant said they hadn't been able to find the information they'd requested but again, didn't specify they wanted the information in calendar years.

26. Having provided the complainant with a link to its annual reports in its response to the request, the review request simply led NHSE to provide the complainant with more detailed directions as to where they could find the published information that it considered they were seeking.
27. For the reasons explained – how the request and internal review request were worded and how NHSE has published the information in the past - the Commissioner finds that NHSE's interpretation of the request was reasonable and so it was reasonable for it to provide the information to the complainant in financial years. The Commissioner therefore finds that NHSE complied with section 1(1) of FOIA in respect of the request.
28. Moving forward, the Commissioner is satisfied that the complainant's correspondence to NHSE on 24 February 2024 can be categorised as a clarified request – they've now clarified that they're seeking the information in calendar years. NHSE is entitled to handle this as a new request, and it's confirmed to the Commissioner that it's now dealing with that request. NHSE should provide the complainant with a response to that request promptly and within FOIA's statutory time frame.

Right of appeal

29. 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

30. 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.
31. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Cressida Woodall
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF