Freedom of Information Act 2000 (FOIA)

Decision notice

Date:	**20 December 2024**
Public Authority:	**NHS North West London Integrated Care Board**
Address:	**15 Marylebone Road London NW1 5JD**

Decision (including any steps ordered)

1. The complainant has submitted a request to NHS North West London Integrated Care Board (the ICB) relating to a subcontractor's Medical Device Management Policy. The ICB stated that it does not hold the requested information.

2. The Commissioner's decision is that the ICB does not hold the requested information, nor is such information held on the ICB's behalf by the third-party contractor the purposes of section 3(2)(b) of FOIA.

3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. On 19 July 2023, the complainant submitted the following request for information to the ICB:

> "Re: Hammersmith & Fulham NHS Community Wheelchair Service subcontracted to AJM Healthcare Ltd.
>
> This is a FOI request related to Hammersmith & Fulham NHS Community Wheelchair Service, subcontracted to AJM Healthcare Ltd. AJM run several NHS Community Wheelchair Services in over a dozen geographic locations in England.

According to a recent email from the clinical director of the organisation, AJM Healthcare Ltd. follows MHRA guidance on Managing Medical Devices (see link below): https://assets.publishing.service.gov.uk...

For information, a large proportion of the NHS wheelchairs and associated equipment that AJM provides to the public are reusable and frequently reused medical devices, supplied to service users in their own homes, in nursing and residential homes and in hospitals.

I would be very grateful if the ICB would kindly release a copy of AJM Healthcare's medical device management policy and a copy of AJM Healthcare's medical device safety policy.

I would be very grateful if the ICB could please inform me if AJM Healthcare has a Medical Devices Safety Officer (MDSO) or equivalent, responsible for reporting adverse incidents involving NHS wheelchairs to MHRA.

Does the ICB covering Hammersmith & Fulham have a Medical Devices Safety Officer (MDSO) or equivalent?

Please release any documents that explain how AJM complies with the following part of the MHRA guidance on Managing Medical Devices, related to care homes: "The management structure for medical devices should have clear lines of accountability up to board level. These lines of accountability should be extended, where appropriate, to include general practitioners, residential and care homes, community-based services, independent hospitals providing services for NHS patients, managed care providers, Private Finance Initiative (PFI) organisations and other independent contractors. It is important to establish who is accountable, and where there is a need for joint accountability arrangements."

In January 2023, I filed a complaint to AJM about their therapists observing repeated improper and unsafe use of wheelchairs by dementia nursing home staff, but not properly recording in the care home system, nor escalating to the registered manager or otherwise adequately acting on the matter to prevent recurrence.

As a result, AJM informed me that they had changed their internal policy & guidance to AJM staff about how to act and make records when they observe improper & unsafe use of medical devices in nursing homes, including care home staff

failing to follow manufacturers guidance and instructions on how to use wheelchairs.

FYI, a vast number of NHS-funded patients suffer life changing "unwitnessed" falls from wheelchairs in care homes - frequently recorded with no relevant details about the medical device and simply recorded as: "resident and wheelchair found on the floor, nobody witnessed the accident/incident, the resident does not remember and can't explain what happened".

I would be grateful if the ICB would kindly release the information about the changes AJM made to their policy and guidance, related to how to record in the care home system and how to communicate with care home management when AJM staff observe improper and unsafe use of NHS medical devices in care homes.

Please release the AJM conditions of loan of wheelchairs to residents in care homes (many of whom are detained under DoLS), explaining AJM's and the care home's joint accountability about the use, management and maintenance (daily/weekly/monthly/annual) of NHS wheelchairs, on long-term loan and use in care homes."

5. The ICB responded on 15 August 2023, stating that

- it does not hold a copy of the Medical Device Management Policy or Medical Device Safety Policy but advised that it had been assured that AJM Healthcare had such policies.
- It had been assured that AJM Healthcare had a MDSO, responsible for reporting adverse incidents involving NHS wheelchairs to MHRA.
- The ICB covering Hammersmith & Fulham did not have a MDSO or equivalent as this role would sit with the provider.
- It had been assured that AJM Healthcare's management structure met the requirements of the MHRA guidance document.
- It had been assured that AJM Healthcare's policy relating to how to record in the care home system and how to communicate with care home management when AJM Healthcare staff observed improper and unsafe use of NHS medical devices in care homes were "revised to include a specific form which, when required, a clinician will complete within the appointment and provide

directly to the care provider in hard copy to assist them with use of the prescribed equipment."

- It provided the complainant with AJM Healthcare's Handover Form and Conditions of Loan Form.

6. On 28 March 2024, the complainant responded to the ICB with the following:

> "Re: Request for internal review - NHS North West London (Ref: [reference redacted) - 14.08.2023 - grounds for review wrong and misleading information, vague information, withholding information
>
> Just yesterday I received a public FOI response from MHRA, showing that the ICB provided wrong and misleading information in FOI case ref: [reference redacted] (ICB response attached and link below).
> [link redacted]
>
> On 14.08.23 wrongly and misleadingly stated:
> "NW London ICB is assured that AJM have a Medical Devices Safety Officer, responsible for reporting adverse incidents involving NHS wheelchairs to MHRA."
>
> This is untrue, as you can see in the attached MHRA list detailing the organisations having in place a MDSO.
>
> I am copying CQC, because NW London ICB should do some fact-checking, before publicly releasing information related to services they commission with NHS public funds (AJM Healthcare, the NHS Community Wheelchair Service). The ICB are obliged to provide accurate information about MDSOs and I have already informed the ICB that AJM Healthcare provides overused wheelchairs, resulting in bolts and parts falling off, and this exposes the care home residents at risk of avoidable harm. If AJM had in place an MDSO, duly notified to MHRA as the process requires, the management of the NHS community wheelchairs would be better and safer.
>
> Furthermore, the NW London ICB states that they have not appointed a MDSO for the ICB, because this is the duty of the provider. Unknown to the IBC [sic], the provider did not appoint a MDSO, leaving the public with no protection, as required by numerous relevant gov. guidances and alerts.

"Does the ICB covering Hammersmith & Fulham have a Medical Devices Safety Officer (MDSO) or equivalent? No, this role would sit with the provider.
NW London ICB is assured AJM's management structure meets the requirements of the MHRA guidance document."

The NW London ICB seems to have been given hollow assurances, without doing any fact checking.

Please, release full information and documents related to how NW London ICB was assured that AJM's management structure meets the requirements of the MHRA guidance document.

Please release the revised policies and documents referred to in the following vague and evasive response given by the ICB: "NW London ICB is assured that AJM's policy was revised to include a specific form which, when required, a clinician will complete within the appointment and provide directly to the care provider in hard copy to assist them with use of the prescribed equipment."

The response below is highly improbable: "NW London ICB does not hold a copy of the medical device management policy or medical device safety policy but is assured that AJM have such policies used by their staff to fulfil their duties in regard to use of medical devices."

If the ICB does not hold a copy of the abovementioned medical device management policy or medical device safety policy, how can the ICB rest assured that AJM has such policies in place and that the said policies are adequate for the purpose.

Please, release full copies of the NW London NHS Community Wheelchair Services medical device management policy and/or medical device safety policy."

7. As explained in the Commissioner's Freedom of Information guidance[1], the Commissioner would normally expect correspondence that is seeking to challenge the outcome of the initial response to a request under FOIA as a request for internal review.

[1] Request handling, Freedom of Information – Frequently Asked Questions | ICO

8. The ICB had not completed an internal review by the time the matter was referred to the Commissioner.

Scope of the case

9. The complainant contacted the Commissioner on 25 May 2024 to complain about the way their request for information had been handled.

10. The Commissioner noted that the internal review remained outstanding over 40 days after it was requested. However, to avoid further delay to the complainant, he used his discretion and accepted the complaint for full investigation without an internal review response from the ICB on 17 June 2024.

11. The ICB provided the complainant with the outcome of its internal review on 17 June 2024. It stated that:

    - In relation to the provision of information relating to how the ICB was assured that AJM Healthcare's management structure meets the requirements of the MHRA guidance document, it advised that the Quality and Compliance Manager is the person responsible and provided a copy of AJM Healthcare's MDA procedure flow chart for details of the process and explanation.

    - In relation to the release of the revised policies and documents referred to in the ICB's initial response, the ICB stated that the information is found on page 8 of AJM Healthcare's Clinical Record Keeping policy, which it had attached. The ICB stated that AJM Healthcare had provided this to the ICB. It also provided the complainant with a number of other AJM Healthcare policies that it stated reflected and were supported by the MHRA 2021 policy.

    - The ICB confirmed that it did not have a standalone Wheelchair Services Medical Device Management Policy and/or Medical Device Safety Policy.

12. The Commissioner wrote to the complainant on 28 August 2024 and asked whether they remained dissatisfied with the outcome of their request, following the ICB's internal review response.

13. The complainant responded to the Commissioner on 11 September 2024, stating that they remained dissatisfied with the ICB's response to their request for information.

14. The complainant is concerned that the ICB has not provided them with a copy of AJM Healthcare's Medical Device Management Policy. The

complainant also advised that in the ICB's internal review response, it had provided a copy of the MHRA's Managing Medical Devices policy.

15. However, the complainant has clarified that they did not request the MHRA policy; their request is for the AJM Healthcare Medical Device Management Policy. It is the Commissioner's understanding, from the ICB's initial response and its internal review request, that its position is that it does not hold a copy of this policy.

16. The complainant is also concerned that the ICB has disclosed five attachments, but it has not properly referenced them in its response or linked the attachments to the relevant items in their request for information.

17. Having reviewed the initial response and internal review, it appears to the Commissioner that the ICB has written out each part of the complainant's request/concern and under each part has referenced the relevant attachment by its document name. In any event, the Commissioner has advised the complainant that FOIA does not require public authorities to label or reference information in any particular way, so this is not an issue that the Commissioner would be able to investigate.

18. The complainant is also concerned that the ICB has not commented in its internal review response on the following statement it made in its initial response to the request:

> "NW London ICB is assured that AJM have a Medical Devices Safety Officer, responsible for reporting adverse incidents involving NHS wheelchairs to MHRA."

19. The complainant has stated that that the above response "was, at that time, inaccurate because even if AJM had very recently put into place a Medical Devices Safety Officer (MDSO), this person had not been duly notified to MHRA as required."

20. The Commissioner has advised the complainant that this is also not an issue that he is able to consider. This is because FOIA does not require public authorities to generate information or to answer questions, provide explanations or give opinions or comments, unless this is recorded information that they already hold. Instead, FOIA is solely concerned with access to recorded information. Whether the quoted statement by the ICB is or is not accurate is therefore not an issue that would fall within the Commissioner's remit to investigate in this instance.

21. The Commissioner considers that the scope of his investigation is therefore to consider whether the ICB holds further information within the scope of the request for the purposes of FOIA (section 3(2) of FOIA) and, if so, whether that information should be disclosed in response to the request. The particular information in question is AJM Healthcare's "Medical Device Management Policy" (MDMP).

Reasons for decision

Section 1 general right of access to information held by public authorities

22. Section 1 of FOIA states:

> "(1) 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
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> (b) if that is the case, to have that information communicated to him."

Section 3(2) – information held by a public authority

23. Section 3(2) sets out the two legal principles that establish whether information is held for the purposes of FOIA:

> "For the purposes of this Act, information is held by a public authority if—
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> (a) it is held by the authority, otherwise than on behalf of another person, or
>
> (b) it is held by another person on behalf of the authority."

24. The Commissioner must therefore consider the following two questions when determining whether the MDMP is held by the ICB for the purpose of FOIA:

- Does the ICB itself hold a copy of the AJM Healthcare MDMP?
- If not, does AJM Healthcare hold the MDMP on behalf of the ICB?

25. The Commissioner's guidance[2] explains the circumstances in which information is considered to be held by a public authority for the purposes of FOIA.

26. The Commissioner's guidance also makes it clear that, whether information is held by a public authority, or is held on behalf of a public authority, depends on the facts of the case.

Does the ICB itself hold a copy of the AJM Healthcare MDMP?

The complainant's position

27. The complainant has stated that they understand from MHRA guidance that healthcare organisations and NHS Community services should have in place a MDMP. The purpose of the MDMP is to help ensure that risks associated with the use of medical devices are minimised or eliminated and should in this case include an inventory of the NHS wheelchairs that AJM Healthcare manages and deploys on behalf of the NHS, under the NHS contract.

28. The complainant has provided the Commissioner with documents to show that the wheelchairs provided by AJM Healthcare remain the property of the NHS, and that AJM Healthcare is providing services on behalf of the NHS.

29. The complainant believes that under the Health and Care Act 2022, the ICB is under several duties, and therefore the MDMP related to the wheelchairs that AJM Healthcare manages and deploys must be agreed by both the ICB and AJM Healthcare. The complainant therefore considers the ICB to be the co-owner and co-author of the MDMP.

30. The complainant has also stated that because they believe that the requested MDMP to have been proofread, validated, and signed off by the ICB, it therefore must hold a copy.

31. In view of these factors, the complainant believes that the ICB does hold a copy of the AJM Healthcare MDMP.

The ICB's position

32. The ICB has stated that it does not hold a copy of the MDMP in question but that it is instead held by AJM Healthcare.

[2] https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/information-you-hold-for-the-purposes-of-foia/

33. The ICB explained that the requested MDMP relates to a specific commissioned service, and that it is an external organisation's own policy. The ICB indicated that it did not therefore necessarily hold copies of it. However, the ICB stated that it had carried out searches on its local network.

34. The ICB explained that, if held, the MDMP would be with the commissioner of the service and kept electronically within a network folder (i.e. a case folder). The ICB explained that the case folder would be where the details of contract and service provision would be held.

35. The ICB confirmed that it contacted individuals involved with the service in question and that these folders were checked. As a result of these checks, the ICB determined that the MDMP was not held. It also stated that staff involved with managing the contract (including senior managers) were contacted and asked to carry out checks to determine what was held in relation to what had been requested. Again, the ICB determined that the information was not held.

36. The ICB has stated that the requested MDMP would be created, authored, and owned by the external organisation (AJM Healthcare) as a corporate policy document. The ICB explained that there may have been a need to see the document but, in this case, following searches and checking with colleagues managing the contract, the ICB did not identify any copy of the document held.

The Commissioner's view

37. Based on the ICB's submissions to him, the Commissioner is satisfied that it does not itself hold the requested MDMP. The Commissioner accepts the logic that were the ICB to hold this information, it would be held by staff involved in the relevant service area, as well as staff involved with managing the contract. He is therefore satisfied that the searches conducted by the ICB were sufficient, and that those searches found no further relevant information.

38. As the Commissioner is satisfied that the ICB does not itself hold a copy of the AJM Healthcare MDMP, he has gone on to consider whether the MDMP is held by AJM Healthcare on behalf of the ICB.

Does AJM Healthcare hold the MDMP on behalf of the ICB?

The complainant's position

39. During the Commissioner's investigation, the complainant advised the Commissioner of their belief that even if the ICB did not hold a copy of AJM Healthcare's MDMP itself, it was held by AJM Healthcare on the ICB's behalf. The complainant explained that this was because the ICB is

the commissioner of the outsourced NHS Community Wheelchair Service, and because AJM Healthcare is delivering the outsourced NHS service.

40. The complainant has referred the Commissioner to paragraph 21.18.1 of the NHS Standard Contract for 2024/2025 - General Conditions (Shorter Form)[3], which states:

> "…that this Contract and any other recorded information held by the Provider on a Commissioner's behalf for the purposes of this Contract are subject to the obligations and commitments of the Commissioner under FOIA and EIR".

41. The complainant has also referred the Commissioner to paragraph 28.2 of the NHS Standard Contract for 2024/2025 - Service Conditions (Shorter Form)[4], which states:

> "The Co-ordinating Commissioner may request from the Provider any information in addition to that to be provided under SC28.1 which any Commissioner reasonably and lawfully requires in relation to this Contract. The Provider must supply that information in a timely manner."

42. The Commissioner notes that the above requirement would only apply to contracts created between 1 April 2024 and 31 March 2025, which would not have been applicable at the time of the complainant's request for information as it was submitted to the ICB on the 19 July 2023. However, the Commissioner understands that the NHS Standard Contract for 2021/2022, when the service was subcontracted and the contract for every year since, contain the same requirements.

43. The complainant has also referred the Commissioner to a previous decision notice he has issued (FS50800160[5]), which the complainant believes to be the exact same situation as their own case. Specifically, the complainant referred to a section of the decision notice that states:

> "…through a close reading of the contract's terms, the Commissioner reached the conclusion that the contractor, Capita Business Services Ltd, held the requested information on behalf of the authority by virtue of section 3(2)(b) of FOIA. In reaching

[3] https://www.england.nhs.uk/nhs-standard-contract/
[4] 06-NHS-Standard-Contract-2024-to-2025-Service-Conditions-shorter-form-version-2-March-2024.pdf
[5] https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2616081/fs50800160.pdf

this decision, the Commissioner gave weight to a clause in the appendix of the contract which gave the authority access to certain information which related to one of its core functions.

Consequently, the Commissioner decided that "section 3(2) operates so that the requested information is held by Capita on behalf of the public authority" [para. 33]."

44. The complainant understands that the ICB is under a duty to compare the Device Management Policies of different NHS wheelchair service providers in their area, in order to ensure equal standards and improvement of the safety of the NHS wheelchair services commissioned by the ICB.

45. The complainant has also referred to NHS England's guide entitled "The insightful ICB board" which defines the core functions, key statutory duties, and responsibilities of ICBs. The Commissioner notes that the guide was only published on 28 November 2024, so again would not have been applicable at the time of the complainant's request for information.

The ICB's position

46. In view of the complainant's belief that the MDMP was held by AJM Healthcare on behalf of the ICB, the Commissioner asked the ICB to explain the nature its relationship with AJM Healthcare, including with respect to the requested information itself. He also asked the ICB to provide a copy of the contract between the ICB and AJM Healthcare which it provided.

47. The ICB explained that AJM Healthcare is a private organisation contracted by it to provide a wheelchair service to the residents of north west London. The ICB confirmed that, at the time of the information request, this was to cover its London Boroughs (geographical areas) of Westminster, Hammersmith & Fulham, Kensington & Chelsea, Brent, and Ealing.

48. The ICB stated that the requested MDMP would not be information held by AJM Healthcare on its behalf. It clarified that the MDMP is an internal policy document of AJM Healthcare, created and owned by AJM Healthcare. It explained that AJM Healthcare has contracts with numerous other organisations and will have a suite of internal policy, procedures, forms, and template documents. The ICB also stated that the MDMP had not been created as a sole requirement of the ICB's contract with AJM Healthcare.

49. The ICB confirmed that the requested MDMP would not be information passed to it on termination or end of contract, unlike information regarding patient details and services provided.

The Commissioner's view

50. The Commissioner recognises that the effect of section 3(2) and the meaning of 'held' in the context of FOIA have been clarified by case law in the landmark decision of University of Newcastle upon Tyne v Information Commissioner and BUAV[6], a decision that was upheld by the Upper Tribunal on appeal.

51. His guidance states:

> "The BUAV case means that – to decide if you 'hold' the information for the purposes of FOIA – you need to establish if there is an 'appropriate connection' between the requested information and **your role and functions as a public authority** [emphasis added]".

52. In that respect, his guidance states:

> "Several factors can help you decide the extent to which you hold information for your purposes as a public authority. These factors include:
>
> - the extent to which you have access to the information,
> - the degree of control you have over the information, including controlling who has access to it and how it is used,
> - the extent to which you use it for your own purposes, regardless of whether it was created by a third party,
> - the extent to which you had an input in its creation or alteration,
> - the extent to which you retain ultimate responsibility over the management of the information, including its retention and deletion, and

6 https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i459/BUAV_v_IC_&_Newcastle_University_(0064)_PI_Decision_10-11-10_(w).pdf

- whether you are merely providing storage, either on your physical premises or on your electronic and cloud systems.

This is not an exhaustive list and the weight attached to each factor varies depending on the circumstances of each case".

53. Whilst this guidance is written to assist public authorities determine whether information they hold themselves if held by them for the purposes of FOIA or on behalf of another organisation, these factors also apply to the question of whether another organisation holds information on behalf of the public authority (in this case, whether AJM Healthcare holds the MDMP on behalf of the ICB).

54. Given the nature of the contractual arrangements between the ICB and AJM Healthcare, the Commissioner is satisfied that AJM Healthcare does not hold the MDMP on behalf of the ICB. The information is therefore not held by the ICB under section 3(2)(b) and is therefore not held by the ICB for the purposes of FOIA.

55. In reaching this conclusion the Commissioner has noted that;

- it is not normal for the ICB to require access to such information;
- the ICB does not need access to such information;
- there is no requirement for the monitoring and provision of such a policy to the ICB in the contract;
- there is no requirement in the contract management, reporting and information requirement section of the contact for AJM Healthcare to provide the policy to the ICB; and
- there is no requirement for the policy to be passed to the ICB on the termination or end of the contract.

The Commissioner's decision

56. In view of the above, the Commissioner if satisfied that the AJM Healthcare MDMP is not held by the ICB for the purposes of FOIA.

57. The Commissioner, having considered all the information the complainant has provided, can understand why the complainant would have expected a copy of the MDMP to be held by the ICB. However, for the reasons set out above, he is satisfied that the requested information is neither held by the ICB itself nor held by AJM Healthcare on behalf of the ICB.

Other matters

Internal review request

58. The Commissioner notes that the time taken for the ICB to respond to the internal review request exceeded 40 working days.

59. As explained in the ICO's guidance[7], internal reviews should usually be completed within 20 working days. However, there may be circumstances where public authorities require more time to complete an internal review, for example to address complex issues, consult with third parties or consider substantial amounts of information.

60. In these circumstances, this should be no more than an additional 20 working days, unless there are legitimate reasons why a longer extension is necessary.

[7] https://ico.org.uk/for-organisations/foi/guide-to-managing-an-foi-request/complaints-internal-reviews/

Right of appeal

61. 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

62. 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.

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

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