

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 May 2025

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

Decision (including any steps ordered)

1. The Commissioner's decision is that NHS England (NHSE) is entitled to withhold information about enforcement undertakings in relation to the Countess of Chester NHS Foundation Trust under section 31(1)(g) of FOIA. This exemption concerns law enforcement. NHSE's handling of the request didn't comply with sections 1(1), 10(1) and 17(1) of FOIA.
2. The Commissioner does not require further steps.

Request and response

3. The complainant made the following information request to NHSE on 31 January 2024:

"Under the Freedom of Information Act 2000, I am writing to request information regarding the Countess of Chester NHS Foundation Trust, specifically concerning the enforcement undertakings referred to in the document titled "Enforcement Undertakings - Countess of Chester NHS Foundation Trust - July 2022."

1. Detailed Reasons for Enforcement Undertakings: I request a comprehensive explanation of the reasons leading to the enforcement undertakings, particularly focusing on the issues related to quality of care, performance, and governance.

2. Documentation and Evidence: Please provide all relevant documents, reports, and evidence that were considered in the process of deciding upon these enforcement undertakings.
 3. Compliance and Review: I am particularly interested in understanding whether NHS England has conducted a review of the Trust to assess its compliance with the enforcement undertakings. If such a review has been conducted, kindly provide the findings, reports, or any relevant documentation related to this review.
 4. Future Monitoring and Assessment Plans: Information about any future plans or strategies NHS England has in place to monitor the Trust's compliance with the enforcement undertakings and to assess its ongoing performance.
 5. Communication Between NHS England and Countess of Chester NHS Foundation Trust: Copies of any correspondence, including emails and letters, between NHS England and the Countess of Chester NHS Foundation Trust regarding the enforcement undertakings between the dates 1st August 2023 and 1st January 2024.
 6. Impact Assessment: Any impact assessments or evaluations conducted regarding the potential effects of these enforcement undertakings on patient care and Trust operations..."
4. On 29 February 2024, NHSE asked the complainant to clarify what they meant by "Impact Assessment," which the complainant did on 17 March 2024.
 5. NHSE responded to the request on 1 July 2024. It directed the complainant to published information relevant to part 1 of the request and applied section 21 of FOIA to some of this information. Section 21 concerns information that's accessible to the applicant by other means. NHSE advised it didn't hold the information requested in parts 5 and 6. It withheld the information requested in parts 2, 3 and 4 under section 31(1)(g) of FOIA, by way of section 31(2)(c). NHSE said that section 31 was also engaged, "...in light of the statutory public inquiry that is currently underway into the events involving Lucy Letby, the Thirlwall Inquiry."
 6. The complainant requested an internal review on 5 July 2024 in respect of NHSE's reliance on section 31 and the timeliness of its response.
 7. NHSE provided a review on 8 November 2024; it acknowledged the delay in its response and upheld its application of section 31.

Reasons for decision

8. This reasoning covers NHSE's application of section 31(1)(g) of FOIA to the complainant's request and the timeliness of its response. NHSE's internal review will be considered under 'Other matters.'
9. Under section 31(1)(g) of FOIA, information is exempt information if its disclosure would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection (2).
10. The purpose set out under section 31(2)(c), which NHSE has cited, is the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.
11. In its submission to the Commissioner NHSE has said that disclosing the withheld information would be likely to prejudice its ability to receive information freely from public bodies. This would inhibit its ability to undertake its statutory function relating to overseeing and regulating NHS Trusts and other NHS bodies. The withheld information enables NHSE to make fully informed decisions about the appropriateness of any enforcement action that may be relevant. Disclosing this information, NHSE says, would deter NHS bodies from engaging. It would make them reluctant to provide NHSE with information freely and frankly because of the risk of such information being put in the public domain.
12. According to NHSE, the requested information is vital to its statutory functions and its ability to deploy the powers that it has.
13. NHSE considers that releasing the information would be likely to cause prejudice to its decision-making processes by impacting its ability to make decisions on enforcement action. In turn, this would be likely to undermine its ability to undertake its statutory functions; that is, ascertaining whether circumstances that would justify regulatory action exist (section 31(2)(c)).
14. In its response to the request, NHSE advised that its core regulatory functions are described in section 13SB(2) and (3) of the National Health Service Act 2006 as amended by the Health and Care Act 2022 ('the 2006 Act'). In particular, NHSE has functions under Part 3 of the Health and Social Care Act 2012 in relation to NHS Trusts and Foundation Trusts. Under Chapter 3, NHSE determines and publishes the conditions which NHS Trusts and Foundation Trusts must comply with, known as the NHS Provider Licence. Where NHSE is satisfied that the licence holder has failed to comply with a condition of the Provider Licence, it may take enforcement action (including to accept undertakings from the licensee).

15. NHSE's role in the oversight of NHS bodies is described further in the NHS Oversight Framework and in the NHS Enforcement Guidance.
16. First, the Commissioner is satisfied that NHSE has regulatory functions – as explained in paragraph 14 - and that the harm that NHSE envisions relates to the applicable interest within section 31(2)(c) ie the ability of NHSE to carry out those functions.
17. Second, the Commissioner accepts that disclosing the withheld information would or would be likely to have a detrimental impact on NHSE's ability to carry out its regulatory functions. This is because it could deter NHS bodies from voluntarily providing NHSE with information it needs to carry out its functions – in respect of matters associated with the Countess of Chester NHS Foundation Trust, which are still live, or in respect of other NHS bodies in the future. NHSE as a regulator may have powers to compel bodies to supply it with information but its investigations are likely to be more efficient if bodies are prepared to cooperate and fully engage with such investigations voluntarily.
18. Finally, from its submission it appears that NHSE considers that the prejudice it envisions from disclosing the information would be likely to happen, rather than would happen. The Commissioner considers that's a credible level of likelihood and that there's a real and significant risk of the prejudice occurring.
19. The Commissioner is satisfied the withheld information engages the section 31(1)(g) exemption, by way of section 31(2)(c), and he has gone on to consider the associated public interest arguments.

Public interest test

20. There's a very strong public interest in protecting the ability of public authorities to enforce the law and, in the case of NHSE, to be an effective regulator. The more serious the harm that could result from disclosure and the more likely it is that the harm will happen, the stronger the public interest will be in preventing that from happening.
21. In its submission, NHSE has acknowledged the public interest in promoting accountability and transparency; allowing individuals and organisations to understand and challenge decisions affecting their lives; and understanding and promoting transparency about how NHSE carries out its functions and the functions of the NHS bodies which NHSE oversees.
22. Against disclosure, NHSE has noted the following arguments:

"Maintaining and protecting the flow of relevant information from NHS bodies to NHS England, that comes from a space for free, open and proactive dialogue.

The ability for NHS England to undertake its regulatory functions by ensuring that NHS bodies are conforming to relevant standards.

The ability for NHS England to inhibit free and open dialogue between NHS bodies and itself to make fully informed decisions about any improvement recommendations or enforcement action."

23. In their complaint to the Commissioner, the complainant has said that there's a strong public interest in understanding the enforcement undertakings placed on the Countess of Chester NHS Foundation Trust. This includes its "rationale and impact on patient care and trust operations." The complainant considers that NHSE's withholding of information diminishes transparency and public accountability, which is crucial in healthcare oversight matters.

24. The complainant has also said,

"Contravention of Subject-Blindness:

The reference to the Lucy Letby case and the Thirlwall Inquiry introduces extraneous considerations and subjectivity into the decision-making process. The FOI Act and ICO guidance are clear that requests must be handled impartially, without regard to context unrelated to the requested information's content and scope."

25. The Lucy Letby case and Thirlwall Inquiry are valid considerations here. Both were live matters at the time of the request and currently. While the withheld information, which the Commissioner has reviewed, doesn't directly concern either the Lucy Letby Case or the Thirlwall Inquiry, it's of some relevance to both.

26. The public interest in protecting the integrity of an investigation or inquiry is likely to be strongest whilst it's ongoing. This is because that's when disclosure is likely to have the most harmful effects.

27. There will also be a strong public interest in maintaining the exemption if disclosure would make it harder for NHSE to acquire the information it needs and so hamper its ability to discharge its functions.

28. The Commissioner agrees that, given events there, there's a public interest in how the Countess of Chester NHS Foundation Trust was performing and being monitored in January and March 2024. But he's noted that some information about that matter is already in the public

domain and that NHSE directed the complainant to it. He considers that addresses the public interest to a satisfactory degree.

29. On balance, the Commissioner is satisfied that the combined weight of the interest in NHSE being able to maintain robust and efficient inquiries that are still live, and in being able to discharge its regulatory functions effectively in the future outweighs the public interest in disclosure in this case. The harm that's likely to be caused from disclosing the information is greater than the public interest in full transparency in this case.
30. To summarise, the Commissioner finds that NHSE correctly applied section 31(1)(g) to some of the information the complainant has requested and that the public interest favours maintain that exemption.

Procedural matters

31. Section 1(1) of FOIA requires a public authority (a) to confirm whether it holds information that has been requested and (b) to communicate the information if it's held and isn't exempt from disclosure.
32. Section 10(1) obliges the authority to comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.
33. If a public authority is relying on an exemption to withhold information, under section 17(1) of FOIA, it should issue the applicant with a refusal notice within the same timescale.
34. In this case, NHSE sought clarification within 20 working days of the request. The complainant clarified their request on 17 March 2024 but NHSE didn't comply with section 1(1) or issue a refusal notice in respect of the clarified request until 1 July 2024. NHSE therefore didn't comply with sections 1(1), 10(1) or 17(1) of FOIA.

Other matters

35. Provision of an internal review isn't a legal requirement under FOIA but is a matter of good practice. The FOIA Code of Practice advises that internal reviews should be provided in most cases within 20 working days of the request for one. In complex cases only, the Commissioner considers a review should be provided in a maximum of 40 working days.

36. In this case the complainant requested an internal review on 5 July 2024 and NHSE didn't provide one until 8 November 2024. The Commissioner has recorded this delay for monitoring purposes, although he's aware that it has been announced that NHSE will be abolished.

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.

Cressida Woodall
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