

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 February 2016

Public Authority: NHS Commissioning Board (NHS England)

Address: 4N22 Quarry House
Quarry Hill
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant has requested information relating to a report into the health economy of Eastern Cheshire. The Commissioner's decision is that the NHS Commissioning Board (NHS England) has correctly applied section 22(1) of the FOIA in its response to the request. The Commissioner does not require NHS England to take any steps as a result of this decision notice.

Request and response

2. On 4 March 2015 the complainant wrote to NHS England and requested information in the following terms:

'I would like a copy of the report commissioned by NHS England into the distressed health economy of eastern Cheshire. More information is here: <http://m.bbc.co.uk/news/uk-england-stoke-staffordshire-31644850>'
3. NHS England responded on 16 April 2015. It refused to provide the requested information and cited section 43.
4. The complainant requested an internal review on 19 May 2015.
5. On 23 July 2015 NHS England sent the complainant the outcome of its internal review and cited section 22 (Information intended for future publication) for refusing to provide the requested information.

Scope of the case

6. The complainant contacted the Commissioner on 13 October 2015 to complain about the way the request for information had been handled, and after providing further documents, the case was accepted.
7. The Commissioner has focussed his investigation on determining if NHS England correctly applied section 22 of the FOIA in its response to the request for information.

Background

8. NHS England provided the following background.
9. To ensure efficient and effective planning of NHS services, NHS England, the NHS Trust Development Authority ("TDA") and Monitor published joint guidance in December 2013, requesting both commissioners and providers in designated areas (known as local health economies ("LHEs")) to develop five-year strategic plans.
10. In order to further this work, NHS England, the TDA and Monitor launched the Intensive Planning Support Programme in early 2014 in order to identify and provide support to a number of challenged LHEs. The purpose of the consultancy project was to support these LHEs in developing robust strategic five year plans that were both clinically and financially sustainable, in order to allow these LHEs to tackle any potential problems that were likely to occur in the coming years to avoid costly interventions.
11. Eleven LHEs were nominated to receive intensive planning support and four consultancy firms were commissioned to support these LHEs with the development and strengthening of their strategic plans. The consultants employed prepared a report for each LHE.
12. Eastern Cheshire is part of the Southern Sector LHE, which was one of the eleven LHEs nominated. It is this report that the complainant has requested. The report produced for them is split into the following four deliverables:

Deliverable 1: Diagnosis, supply and demand

Deliverable 2: Solutions development and options analysis

Deliverable 3: Final report

Deliverable 4: Transition report

13. The consultants were only offering advice so their reports could be accepted, accepted in part or rejected by the LHEs but the eleven LHEs were still required to produce robust five year strategic plans setting out their commissioning intentions. These plans will be available on the website of the local clinical commissioning group (CCG). The eastern Cheshire strategic plan (a part of the Southern Sector LHE) was published in July 2014 and can be found here: -

<https://www.easterncheshireccg.nhs.uk/Downloads/Publications/Strategies/NHSECCCG5YearStrategicPlan.pdf>

14. A summary report of the key findings of NHS England, Monitor and the TDA's joint project to support the 11 challenged LHEs was published in December 2014: -

<https://www.gov.uk/government/publications/making-local-health-economies-work-better-for-patients>

15. This report concludes that the work done has already helped the healthcare organisations in the eleven LHEs achieve a common case for change, improved working relationships and enabled progress towards more sustainable services. However, the majority of challenged LHEs still needed to put in place more robust arrangements to deliver the necessary changes. This work is still ongoing.

Reasons for decision

Section 22 Information intended for future publication

16. (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).

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

- When the complainant submitted the request, did NHS England intend to publish the information at some date in the future?

- If so, had NHS England determined this date when the request was submitted?
- In all the circumstances of the case, was it 'reasonable' that NHS England 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?

18. NHS England informed the complainant and the Commissioner that the intention to publish the report was contained in the response to a parliamentary written question:

- On 11 February 2015, the following written question was asked in Parliament: -

"To ask the Secretary of State for Health, if he will place in the Library copies of the full reports by KPMG he has commissioned into the health economies of (a) Staffordshire, (b) Eastern Cheshire, (c) South West London, (d) North East London, (e) Cumbria, (f) Mid-Essex, (g) Cambridge and Peterborough, (h) Leicestershire, (i) Northamptonshire, (j) East Sussex and (k) Devon."

- On 23 February 2015, Jane Ellison MP answered the question with the following response: -

"As part of NHS England, NHS Trust Development Authority (TDA) and Monitor's joint project to support 11 challenged local health economies develop clinically and financially sustainable five-year strategic plans, four consultancy firms (including KPMG) were commissioned to support the local areas with the development and strengthening of their plans.

Reports were provided by the consultants to support the project's Programme Board, consisting of NHS England, TDA and Monitor, to manage the contracts and ensure that the service specification was being met.

Work is ongoing based on the contents of these reports and there are a number of steps that have to be undertaken in each of the local health economies before these reports can be released: the production of the five-year strategic plan, consideration of the plan, consultation on possible reforms to the health economy, recommendations for possible reforms following consultation, and implementation of recommendations.

To release the reports ahead of the steps identified above being completed would be likely to prejudice their outcome. The timescales for

the above processes will be different in each of the 11 areas and, as the strategic plans are produced, they are made available from the relevant clinical commissioning group websites through their board papers."

[\(http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-02-11/224177/\)](http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-02-11/224177/)

19. The date of publication does not need to be definite for the exemption to apply. There will be some information that is compiled as part of a scheduled procedure which includes a planned publication date. The date of publication of other material may be less certain, for example:
 - a deadline may be provided, but publication could be at any time before then;
 - publication will take place once an information gathering exercise has been completed; or
 - by reference to other related events.
20. NHS England explained that publication will take place by reference to other related events. 'Following the preparation of these reports, LHEs have been working on implementing the recommendations made by the consultants.' It is anticipated that the four steps outlined in the parliamentary response will take place, prior to publication:
 - (i) The LHE will prepare a strategic plan, which will be considered locally;
 - (ii) there will be consultation on possible reforms to the LHE;
 - (iii) there will be recommendations for possible reforms following consultation; and
 - (iv) there will be an implementation process by which these recommendations are put into practice.
21. NHS England explained that the purpose of the reports was to inform LHEs how best they can plan for improving the health system. The intention is that, as the plans mature and LHEs have clarity about their response, the reports are published as part of the explanation as to how these plans came about.
22. Whilst some plans (including Eastern Cheshire) have been published, the implementation process is still ongoing (i.e. that LHEs are still carrying out work in order to fully address the recommendations in the reports).
23. NHS England also explained that it considered it appropriate that there will be some local discretion in setting the dates for publication as the

steps above are likely to be completed by the LHEs at different paces. It is anticipated that the information will be published by summer 2016.

24. Therefore the Commissioner has considered the above and accepts that at the time of the request (4 March 2015), there was a settled intention to publish the report, even though that date was not specified and would take place after a number of steps.

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 stated that

'The notice does not, however, explain how the release of these reports would prejudice the outcome of the work described, and so I can see no objective assessment of whether the balance of public interest favours disclosing or withholding the information. It is my view that the release of these reports would not prejudice the work being referred to. These reports have been released on a limited basis to the people completing the work referred to in the notice. They have also been seen by government officials and by key local stakeholders including CCGs, councils and MPs. The only people who have not seen these reports is the general public.

Furthermore, I would suggest it is in the public interest for the public to be able to see these reports before they are consulted on recommendations based or partially based on them.'

27. NHS England considers that the application of section 22 is sensible, in line with accepted practices and fair to all concerned. It is common for NHS organisations to employ consultancy firms to provide analysis at the high level planning stage and it would not usually be expected that this analysis would be published until the plans have matured, in order to allow space for the planning process.
28. A later publication date allows the LHEs the opportunity to use the reports to inform their local commissioning plans, and carry out this high level thinking in a safe space, free from public scrutiny, including further meetings between commissioners to discuss the future of the programme and reaching an agreement, without this being adversely impacted by premature publication of the Report.
29. In response to the complainant's concern that the public are not informed of the Report, NHS England stated that to release the reports ahead of this time could lead to undue concern about discrete issues at

an early stage in the process, which could overshadow and prejudice the planning and consultation process. If any risks are identified, it will not be helpful for any one risk to be debated in public in any depth at this stage, before there is a clear plan.

30. In addition, NHS England stated that they have made every effort to keep the public informed of the process. (see the summary report published in December 2014 – paragraph 14) Information is provided through a process which ensures that the public have all the relevant context and can understand the impact of the issues raised. NHS England does not consider that disclosure of the detail in the reports would, at this stage, be helpful in allowing the public to come to an informed opinion.
31. NHS England considers that disclosure of the Report would prejudice the ongoing work at this stage, by negatively impacting on the implementation and consultation process. It made the distinction between the limited disclosure that has taken place to those involved in the process, and a wider disclosure to the public.
32. Having considered the representations provided by the complainant and NHS England the Commissioner considers that it was correct to apply section 22 as at the time of the request there was a settled intention to publish and that it was reasonable to withhold the information from the consultancy report for each LHE so that discrete issues did not overshadow the overall planning process for the whole LHE.

The public interest test

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

33. 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.
34. NHS England also considered the fact that some information has been leaked. It appreciates that there is an argument that this diminishes the public interest in withholding the report as it weakens the argument that NHS England needs to ensure that information provided to the public is accurate and provided in line with the communications plan.
35. The complainant advised that the disclosure of the information is necessary in order for the public to be able to see these reports before they are consulted on recommendations based on them or partially based on them.

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

36. NHS England considers that there is a strong public interest that the disclosure of the Report into the public domain is properly managed, in line with a robust communications plan. This will allow NHS England to make available all the necessary information to
- understand the conclusions of the Report
 - understand what is being done to address the recommendations
 - allow all the NHS bodies involved to deal with queries in a full and consistent manner
 - will ensure a clear channel for queries, which will allow the queries to be directed to the correct body, in order to ensure a full and helpful answer
 - allow the Reports to be seen in the context of the plans to which they relate
 - early publication could cause undue concern on discrete issues in the Reports, and excessive public scrutiny and focus on these issues would interrupt the high level planning process currently ongoing
 - public focus on discrete issues could also negatively impact the consultation process, by diverting focus from the recommendations proposed
 - the LHEs are still at liberty to accept, accept in part or reject the Reports. As a result, there is scope for the information in these Reports to be misinterpreted and therefore for the public to take a view of the situation based on rejected recommendations.

The balance of the public interest arguments

37. The Commissioner has considered the detailed context to the request provided by the complainant and the arguments provided by NHS England in order to assess whether the public interest is weighed more heavily for or against disclosure.
38. The Commissioner gives considerable weight to the arguments that public authorities should operate in an open and transparent manner, that in this case, some information has been leaked and that the public should be able to see these reports before they are consulted on recommendations based on them or partially based on them.

39. However, the Commissioner has considered that more weight should be attached to the arguments to withhold the information from the consultancy reports to each LHE so that the ongoing planning discussions can continue to completion, so that any discrete issues or risks do not overshadow the overall planning process and so that the consultancy reports are published alongside and in the context of the five-year strategic plans for each LHE.
40. Therefore, the Commissioner considers that, on balance, it remains reasonable to withhold the information from the consultancy reports so that they are published in the context of the LHE plans to which they relate.
41. 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

42. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

43. 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.
44. 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

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