

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 January 2019

Public Authority: NHS England
Address: 4N22 Quarry House
Quarry Hill
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant has requested information relating to wide-scale health changes in North West London. He requested the supplementary assurances that were provided by North West London Collaboration of Clinical Commissioning Groups (NWL CCGs) in response to a letter 'Shaping a Healthier Future; Next Steps' that was sent to them by NHS England, dated 7 November 2017. NHS England refused to provide this information citing section 22 of the FOIA – information intended for future publication.
2. The Commissioner's decision is that NHS England has correctly applied section 22 of the FOIA and that, at the time of the request, the balance of the public interest favoured maintaining the exemption.
3. The Commissioner does not require any steps to be taken as a result of this decision notice.

Request and response

4. On 12 March 2018, the complainant wrote to NHS England and requested information in the following terms:

"I have told you that I have been trying since November, under the provisions of the Freedom of Information Act, to gain any reliable data from the MCAP experiment at Ealing Hospital, with no success. Currently I have no reason to think that any meaningful data came from the

scheme. Hence my two supplementary questions.

Under the terms of the Act, please:

1. Send me the supplementary assurances delivered to you by NHS NWL in response to the 7 November letter 'Shaping a Healthier Future: Next Steps' from Mr Slegg and Mr Buggle concerning the SOC1 [Strategic Outline Case Part One] for the NW London STP [Sustainability and Transformation Partnership];
2. Confirm whether or not these assurances rely in any way on data From Finnamore, GE Finnamore, Finnamore Oak or any Finnamore-related organisation;
3. Confirm whether Finnamore data have been demonstrated to be reliable."
5. NHS England responded on 11 April 2018 and denied holding the information requested at part two and three but confirmed that information relating to part one of the request was held. However, it withheld this information citing section 22 of the FOIA – future publication.
6. NHS England provided an internal review on 30 May 2018 in which it maintained its original position that section 22 applied to the requested information.

Scope of the case

7. The complainant contacted the Commissioner on 1 June 2018 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of this case to be whether NHS England has correctly applied section 22(1) to part one of the request -

"Send me the supplementary assurances delivered to you by NHS NWL in response to the 7 November letter 'Shaping a Healthier Future: Next Steps' from Mr Slegg and Mr Buggle concerning the SOC1 [Strategic Outline Case Part One] for the NW London STP [Sustainability and Transformation Partnership]."

Background

9. NHS England has provided some background to explain the Shaping a Healthier Future programme of work referred to in the request.
10. This programme was established in November 2011 by the eight former north-west London Primary Care Trusts (PCTs). It underwent full public consultation in 2012. A preferred option was published in February 2013 which was approved by a Joint Committee of PCTs and, subsequently, by the Secretary of State for Health in October 2013.
11. The proposals were to build 28 out of hospital hubs to divert activity away from acute trusts meaning a change of site function for Ealing Hospital to "local hospital" which would mean the loss of full A&E plus associated medical beds but with 24 hour emergency provision. In order to achieve this, additional capacity would be required at Hillingdon, Northwick Park, Central Middlesex and West Middlesex Hospitals. In order to change Charing Cross, additional capacity would be required at St Mary's, Chelsea and Westminster and a small increase at Hammersmith Hospitals.
12. At the time of the request this programme of work was set out in a letter which was sent to NWL CCGs from NHS England/NHS Improvement requiring further assurances on the Shaping a Healthier Future activity model. The requirement was that NWL CCGs should show how planned non-elective activity reductions would impact on the number of hospital beds required in North West London over the next 15 years taking account of population growth, length of stay and occupancy assumptions. The available evidence was required such as their achievements to date in controlling non-elective activity growth, the testing of models, and trend projection.
13. NWL CCGs were also required to look at the available evidence from identified areas and to demonstrate sufficient alternative provision; show that specific drug treatments would reduce categories of admissions; or provide credible plans to improve performance without compromising patient care if beds were being used less efficiently than the national average. NWL CCGs had to demonstrate that there was sufficient alternative provision put in place alongside or ahead of bed closures and that there was a new workforce to deliver it. NWL CCGs were expected to model the overall impact of Shaping a Healthier Future on what is termed Net Present Value which is a technical economic measure of value used in the Treasury financial evaluation model for business cases.

Reasons for decision

Section 22 – intended for future publication

14. Section 22(1) of the FOIA states that:

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).

15. The Commissioner considered the following questions in order to determine whether section 22 is engaged –

- Is there an intention to publish the requested information at some future date?
- At the point the request was made, had the intention to publish been taken by the public authority?
- Was it 'reasonable' in all the circumstances of the case that NHS England should withhold the information until some future date (whether it had been determined or not)?

If the answer to the three questions above is affirmative, the exemption is engaged. However, there is then a fourth question that must be considered:

- Is it in the public interest to maintain the exemption or disclose the information?

Is there an intention to publish the requested information at some future date?

16. The Commissioner has published guidance on section 22 which includes the following:

"For the exemption in section 22 to apply, the public authority must, at the time of the request, hold the information and intend that it or 'any other person' will publish it in future. This means that it must have a settled expectation that the information will be published at some future date."¹

¹ <https://ico.org.uk/media/for-organisations/documents/1172/information-intended-for-future-publication-and-research-information-sections-22-and-22a-foi.pdf>

17. The complainant's view is that the information he requested would not be published in full. He told NHS England that the assurances would be background information and would not be published, either in whole or in part. He supported his argument by saying that SOC1 (the first report which had been published) had incorporated information in its report without publishing a separate consultancy report. He provided the Commissioner with a response to a separate information request from NWL CCGs to underpin his argument. He expressed his discontent with the "secrecy" which surrounded the planning of these changes leading to "uncertainty". The complainant is convinced that there is no planned publication date for the information he requested.

At the point the request was made, had the intention to publish been taken by the public authority?

18. NHS England has provided the Commissioner with evidence that at the time of the complainant's request the requested information was held by it and that it had been informed by the NWL CCGs that there was an intention to publish it. The evidence consists of an email from the NWL CCGs sent on 10 April 2018 confirming in relation to this request that there was an intention to publish the information around the assurance process on the "Healthier North West London" website (the CCGs' joint website) and a link² was provided.
19. NHS England also provided the withheld information to the Commissioner. The information that has been provided to the Commissioner and withheld under section 22 as intended for future publication consists of detailed drafts containing assurance information. As they are in draft form, the Commissioner is unable to establish what will be in the final published documents.
20. The Commissioner wrote again to NHS England on 12 November 2018, having in mind the complainant's doubt and the need to establish that all the requested information is indeed intended for future publication, to get confirmation that the information it had identified was the specific information in its entirety that was requested at part one of the complainant's request.
21. The ICO's guidance on section 22 includes the following comments:

² <https://www.healthiernorthwestlondon.nhs.uk/documents/implementation-business-case-imbc>

"A general intention to publish some information will not suffice. It is not enough for the public authority to note that it will identify some, but not all, of the information within the scope of the request for future publication.

The information that the public authority intends to be published must be the specific information the applicant has requested.

If, in the course of preparing information for publication, some information is discarded or rejected, the exemption under section 22 will not cover that rejected material. Clearly, at the time the decision is made to discard that material, the public authority no longer holds the information with a view to its publication."

22. On 3 December 2018 NHS England responded to the Commissioner stating that it was its expectation that the NWL CCGs would publish the information requested by the complainant:

"NHS England did not feel it necessary to question or interrogate the statement provided to us by the CCGs, as we had no reason to disbelieve the position."

23. Having given the matter further consideration, the Commissioner wrote to NHS England on 17 December 2018 emphasising that proper assurances were required from NWL CCGs of their intention to publish all the requested information from part one that was held at the time of the request. NHS England responded to the Commissioner on 8 January 2019 attaching an email from the Chief Officer of NWL CCGs confirming the intention to publish.
24. Looking at the scope of the request, NHS England has given the Commissioner sufficient assurances that the information, when it is published, will cover in its entirety the information requested at part one of the request.

Was it 'reasonable' in all the circumstances of the case that NHS England should withhold the information until some future date?

25. The next point to be considered is whether it was reasonable for NHS England to withhold the information until some future date of publication.
26. NHS England considers that applying section 22 was reasonable at the time of the request and reasonable at the time it responded to the Commissioner. It does not accept that it is reasonable to override the publication plans of the NWL CCGs. NHS England believes that to do so would mean that the NWL CCGs would face increased public

attention such as media enquiries and FOI requests leading from disclosure. The NWL CCGs would then have to devote extra resources to dealing with these at a time when resources have been allocated for a managed publication date. Disclosure by NHS England would not be reasonable because it would directly impact on another public authority.

27. Further arguments were presented concerning the unreasonableness of NWL CCGs being faced with an uncontrolled release of information, rather than a planned and logical release. NHS England argue that piecemeal release would be confusing both to the applicant and the public. Generating more correspondence for the NWL CCGs to deal with was likely to have an undesirable impact and cause confusion.
28. NHS England contends that the information needs to be released to the public at the same time which it does not consider would be served by release under freedom of information. Disclosure to the complainant and any interested parties is likely to lead to 'batches' of enquiries and further 'batches', once the information is published. Again, this would create a resource issue.
29. As the holder of this information but not the author, NHS England is convinced that it would be unreasonable to put information into the public domain which could be misinterpreted and for which it could not provide technical analyses.
30. The Commissioner accepts NHS England's view that adhering to the planned publication date is reasonable and therefore the exemption is engaged. Consequently, the Commissioner has gone on to consider the public interest arguments.

Public interest arguments in favour of disclosing this information

The complainant's view

31. The complainant provided the Commissioner with detailed reasons as to why this information should be released. He argued that plans for a 'transformation' of health services in North West London from acute care to care in the community is unachievable.
32. He explained that the Board of NHS Improvement had rejected the Strategic Outline Case Part One (known as SOC1) on the basis that the figures were 'counterfactual' and that further work was required. The complainant argued that it would be in the public interest to see the new data because he claimed that over £70 million had been spent so far to try and prove the business case for Shaping a Healthier Future. His view is that the public should be allowed to see what value had been derived from this expenditure by being able to examine the data that would justify the business case.

33. He believes that the information is being withheld because there has been no progress and no announcement of a revised Business Case or Strategic Outline Case. The suggested publication date of late summer has not materialised and the website's latest news on this matter is now two years old.
34. NHS England provided few arguments in favour of disclosing the requested information. It recognised the public interest in being accessible, open and transparent, though this is a generic point. However, in this specific case it recognised the genuine public interest in the Shaping a Healthier Future project and any potential changes to NHS Services and how they are planned and delivered.

Public interest arguments in favour of maintaining the exemption

35. Some of the same arguments presented in support of how reasonable or otherwise it would be to disclose this information were also presented as public interest arguments. NHS England stated that the unfair diversion of public resources from 'business as usual' would not be in the public interest. Releasing information before it can be done so in a planned and logical way would not be likely to facilitate public understanding.
36. Further argument was provided around the 'safe space' that is needed to consider the assurances and that an earlier than planned release would have a negative impact on these considerations.
37. Finally, NHS England is clear that any such release would also negatively impact on its working relationship with the NWL CCGs. It could lead to a decline in trust as it would be likely to impact on the Shaping a Healthier Future project and any future collaboration which was against the public interest.

The balance of the public interest arguments

38. The Commissioner has considered the arguments provided by the complainant and the public authority. The strong public interest arguments for the release of this information are not in doubt and it is clear that there is the settled intention to publish. This is underpinned by the fact that SOC1 was published. Once the Commissioner has established that there is an intention to publish, it is not part of her role to consider when that date might be.
39. The Commissioner has therefore focused on the arguments as to whether it should be released prior to the planned publication. There is an additional complication in this case due to the fact that NHS England is not the publisher of this information but nonetheless holds it. The argument it has put forward regarding the potential mistrust that would occur in the future relationship between NHS England and the NWL CCGs should the former publish information already intended for

publication by the latter, is persuasive. Similarly, the ability of the NWL CCGs to release information in a planned, coherent and logical manner is likely to be compromised which is not in the public interest.

40. The Commissioner has therefore decided that NHS England was correct to withhold the information under section 22 at the time of the request.

Right of appeal

41. 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

42. 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.
43. 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