

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 March 2019

Public Authority: NHS Enfield Clinical Commissioning Group
Address: 116 Cockfosters Road
Barnet
EN4 0DR

Decision (including any steps ordered)

1. In two requests the complainant has requested information from NHS Enfield Clinical Commissioning Group ('the CCG') about an 'Enfield Single Offer' contract. The CCG relied on section 21(1) of the FOIA with regards to some information (information accessible to the applicant by other means); it released some information and provided links to where other relevant information is published. The complainant considers that the CCG holds further relevant information.
2. The Commissioner's decision is as follows:
 - On the balance of probabilities, the CCG holds no further information falling within the scope of the requests and has now complied with section 1(1)(a) of the FOIA.
 - The CCG breached section 10(1) as it has not communicated to the complainant all the information it holds within 20 working days.
3. The Commissioner requires the CCG to take the following step to ensure it complies with the legislation:
 - If it has not already done so, in order to comply with section 1(1)(b) of the FOIA the CCG must communicate to the

- complainant the further information it has identified it holds, which it has referred to in its submission of 4 March 2019, having redacted personal data from it.
4. The CCG must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

Request 1 – FS50758483

5. On 28 February 2018 the complainant submitted a request to the CCG through the 'What Do They Know Website' in the following terms:

"I wish to make a request under the Freedom of Information Act (2000) regarding the Enfield Single Offer contract, as awarded to Enfield Healthcare Cooperative Ltd.

Please supply me with all information held relating to the decision making process to have one provider (rather than more than one) to deliver this contract. I would expect that the CCG would hold recorded information relating to their decision to proceed on the basis of having one provider, and that this may be located in emails, minutes"

Request 2 – FS50758484

6. On 28 February 2018 the complainant submitted a second request to the CCG through the 'What Do They Know Website' in the following terms:

"I wish to make a request under the Freedom of Information Act (2000) regarding the Enfield Single Offer – Locally Commissioned Services contract, as awarded to Enfield Healthcare Cooperative Ltd.

Please supply me with all information held relating to the decision making process to use a restricted procurement process with regard to this contract. I would expect that the CCG would hold recorded information relating to their decision to proceed on the basis of a restricted procurement process, and that this may be located in emails, minutes of meetings, memoranda, records of decision taken and other records."

7. The CCG responded to both requests on 29 March 2018 – its references FOI.17.ENF222 and FOI.17.ENF221. With regard to both requests the

CCG said the information the complainant has requested was already reasonably accessible to her and was therefore exempt information under section 21(1) of the FOIA. The CCG provided the complainant with a series of links to where it said relevant information is published.

8. The complainant requested reviews of both responses on 8 April 2018. She said her request concerned the decision-making process behind the use of a restricted procurement process and that she had not received information about this.
9. Following intervention by the Commissioner, the CCG provided a review of FS50758483 (FOI.17.ENF222) on 3 December 2018. The CCG maintained its reliance on section 21 with regard to some information falling within the scope of the request, but said it had identified it holds further information that it acknowledged it should have communicated to the complainant. This was a draft version of a procurement template for the Enfield Single Officer and the CCG provided a link to where this information is now published.
10. The CCG also provided the complainant with updated links to published information on the CCG's procurement decision to launch a restricted list-based procurement for care closer to home services (ie the Enfield Single Offer) and information on the contract award by the CCG to Enfield Healthcare Cooperative Limited.
11. In addition the CCG released an excerpt from the minutes of a meeting dated 7 June 2017 where the particular recruitment route was approved. Finally, the CCG said that it had searched its records and could confirm that it does not hold any email correspondence that falls within the scope of the request as the matter was discussed and approved through the procurement committee rather than in email exchanges.
12. Following intervention by the Commissioner, the CCG also provided a review of review of FS50758484 (FOI.17.ENF221) on 3 December 2018 which duplicates the review above.

Scope of the case

13. The complainant contacted the Commissioner on 21 June 2018 to complain about the way her requests for information had been handled. Following receipt of the internal reviews she remained dissatisfied.
14. The Commissioner's investigation has focussed whether the CCG has complied with section 1(1) of the FOIA with regard to both requests. She has also considered whether the CCG complied with its obligation under section 10(1).

15. The Commissioner has discussed the CCG's interpretation of the requests under 'Other Matters'.

Reasons for decision

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

16. Under section 1(1)(a) of the FOIA anyone who requests information from a public authority is entitled to be told if the authority holds the information. Under section 1(1)(b) the authority has a duty to communicate the information to him or her if it is held and is not exempt information.
17. The complainant has confirmed to the Commissioner that she is seeking information on the decision-making process which resulted in the decision to award the Enfield Single Offer contract to one sole provider and the decision to award the contract on a restricted procurement process. She says the Enfield Single Offer Contract began on 1 October 2017 and is to run until 31 March 2019. One of the complainant's concerns is therefore that she has received no information dated prior to 1 October 2017.
18. The complainant also considers that some of the information she has received – a document called 'Annex G Procurement Checklist' – would indicate that other information – such as external guidance and advice – exists. She is sceptical that the CCG holds no emails, memoranda or notes of meetings. She has said that using a restricted procurement process is unusual. She says she would therefore expect such a matter to be fully discussed and that a record would be kept of the review and options appraisal that led to the decision to use a restricted procurement process being taken.
19. In its initial submission to the Commissioner the CCG first addressed the complainant's point about not having received information dated prior to 1 October 2017. The CCG noted that, although it considered some information to be exempt from release under section 21, it provided the complainant with links to two published documents; one which was dated pre-October 2016 and the other which was dated 7 June 2017. The CCG also noted that at internal review it provided the complainant with an extract from a CCG Committee meeting dated 7 June 2017.
20. The CCG next considered the complainant's point about information she has received - the 'Annex G Procurement Checklist' - that suggested to her that other information is held. The complainant had quoted the following points from that document:

"All individual specifications were clinically reviewed internally at Enfield Clinical Reference Working Group (CRWG), and externally via Enfield Local Medical Committee (LMC)."

"NHS Enfield CCG in collaboration with NCL CCGs, Local and Regional Medical Committees and NHS England have developed the proposals."

"NHS Enfield has sought and received legal external guidance and advice on its assurance processes."

"For 2017/2018 and 2018/19, the CCG is seeking to consolidate all Care Closer to Home services under one offer to patients: the Enfield Single Offer."

21. The CCG said it considered that this aspect of the complainant's complaints to the Commissioner focuses on information that was not part of her original requests and, as such, the CCG was not obliged to communicate this information to her (if held) in response to that request. It noted that the scope of the complainant's requests is determined by what it described as the "key phrase": 'decision-making process'. The CCG said this phrase substantially narrows the amount of information that would be captured. It said that whilst wider work may have been completed in relation to the Enfield Single Offer, including assessments or recommendations, this work could not be categorised as 'decision-making'. The CCG has confirmed that decisions were made by respective committees and any recorded information to do with this has been disclosed to the complainant, or exempted under section 21.
22. The CCG next addressed the complainant's point about emails, memoranda or notes of meetings not being held. The complainant has argued that she would have expected considerable discussion within the CCG and between the CCG and other bodies before the decision to proceed with the particular procurement process was made. She considers that such discussion would be held in the above emails etc. In its initial submission the CCG said that the complainant was expecting to receive information on 'discussions' prior to decisions and that this did not form part of her original requests. As such she was not entitled to this information under section 1 of the FOIA.
23. With regards to the complainant's view that using a restricted procurement process is unusual and would have been discussed, the CCG confirmed that a restricted process is a recognised procurement route and has historically been the route selected most commonly by commissioners. This is because it allows the number of bidders put through to the 'Invitation to Tender' stage to be reduced on the basis of the quality of their Pre-qualification Questionnaire submissions. The CCG directed the Commissioner to Appendix B of its published 'Clinical

Procurement Corporate Governance and Strategic Framework', where the process is detailed.

24. Finally, the CCG said it had it has not conducted any searches outside of formal committees and meetings as they are the only bodies authorised to make decisions of the type the complainant has referred to; decisions would not be made in email correspondence. The Commissioner has noted the extract from the Procurement Committee meeting minutes that the CCG provided to the complainant at internal review. In the extract the Committee confirmed that it supports the proposed approach to commission Care Closer to Home services and confirmed that it approved the proposal to launch a restricted list-based procurement for delivery of the Enfield single Locally Commissioned Service.
25. The Commissioner disagreed with the CCG's interpretation outlined in paragraphs 21 and 22. The Commissioner considered that any recorded discussions the CCG may have had internally and/or with other organisations about the option of proceeding with one provider (request 1) and the option of using a restricted procurement process (request 2) would form part of the decision making processes that the complainant has referred to in her requests. Although she has noted the CCG's confirmation at paragraph 23, the Commissioner asked the CCG to confirm that it holds no information in recorded form – such as email, telephone notes, (further) meeting minutes, memoranda – in which the matter of possibly proceeding with one provider and the matter of possibly using a restricted contract procurement process were discussed.
26. The CCG initially resisted a wider interpretation of 'decision-making process'. As it has stated at paragraph 21, its view was that 'decision-making process' narrows down the request to only the end point of the process; the point at which the final decisions were made. This differed from the Commissioner's interpretation. She considered that a reasonable interpretation of 'decision making process' encompasses any and all those interventions – meetings, emails, telephone conversations, discussions, briefings – that happened along the way and that finally led to the decision to go with one provider and the decision to use a restricted contract procurement process were taken. Not the final decision to choose whatever provider was chosen, and not the final decision to use a restricted contract, but the thoughts, options, ideas, reasoning, advice etc that may have influenced the decision-making process associated with possible providers and possible procurement routes, right from the beginning of that process.
27. The Commissioner was satisfied that hers was a reasonable interpretation of the requests and the complainant subsequently confirmed to her that it was any recorded information that the CCG may

hold within the scope of this interpretation that she was expecting to receive when she submitted the requests.

28. The Commissioner noted the confirmation that the CCG gave to the complainant at paragraph 11 but, given its narrow interpretation of the requests, she was not satisfied that the CCG had carried out adequate searches to identify any further relevant information it may hold.
29. The CCG then agreed to reconsider the two requests and approach them with this wider interpretation. It provided a further submission on 4 March 2019.
30. The CCG confirmed it had carried out electronic searches for information falling within the scope of a wider interpretation of the requests. It searched the accounts of members of staff who were involved in the procurement process, using the search terms 'Enfield Single Offer' and 'Single Offer'. The CCG says this retrieved no results within either the original scope of the request or the expanded interpretation.
31. The CCG says it is not a large organisation and is structured by commissioning managers ie for Urgent Care, Acute Commissioning, Mental Health Commissioning etc. Each manager is responsible for procurement within their individual remit and therefore does not undertake lengthy or informal conversations with other commissioning managers regarding procurement. Therefore, procurement normally rests with only one or two individuals who would be located in the same office and who would have verbal conversations where necessary. Any specialist advice sought would also be via telephone to the contracting team. It would be process-based and involve direction to relevant sections of the procurement policy. The Director of Commissioning has overarching responsibility for the commissioners under them. The CCG says that both the Commissioning Manager and the Director of Commissioning undertook the search above.
32. Using the above search terms, the CCG says it also undertook electronic searches of its shared drive. This search identified particular documents which it says fall within scope of the re-interpreted requests. No further information was identified regarding its original interpretation of the requests. The CCG has confirmed that it is content for this information to be released to the complainant, with personal data redacted under section 40(2) of the FOIA.

Section 10 – time for compliance

33. Under section 10(1) a public authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.

34. The Commissioner notes that the CCG did initially respond within the 20 working day deadline. At internal review however, the CCG identified it holds further information which it communicated to the complainant outside of the deadline. Moreover, in the course of the Commissioner's investigation the CCG has identified it holds additional relevant information. It follows that the CCG has breached section 10(1) on this occasion.

Other Matters

35. The CCG concluded its further submission to the Commissioner by maintaining that at the time it originally responded to the request it had provided the information it originally considered was in scope (as it had referenced in its internal review response). It was only by addressing a re-interpretation of the requests that further information has been identified.
36. The CCG asked the Commissioner to note the effect "*clarification*" has had on the prescribed time limits for responding to a request. It says it did not seek clarification originally as it was not aware at the time that there was another way to interpret the requests. It therefore considered that it did not breach section 10. The CCG considers that this has been an unusual request in that "*clarification has been volunteered after the final response has been received*". It considers it should not be penalised for this.
37. The Commissioner appreciates that on occasion it is possible to interpret a request in a particular way, and to respond to it accordingly, without it occurring that there might be another way to interpret the request. The internal review process is useful in that regard. In this case, having received web links to particular information, in her request for internal review the complainant quite clearly told the CCG that her request concerned the decision-making process behind the use of a restricted procurement process and that she had not received information about this. The Commissioner's own view on first reading the request was that it was a request for information about the decision making processes from their initiation, not at the final point that the actual decisions were made. With hindsight, and given the background to the requests, the CCG might therefore have considered whether its interpretation of the requests was, in fact, correct and clarified with the complainant what information she was expecting to receive, at the point of the internal review.

Right of appeal

38. 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

39. 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.
40. 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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