

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 15 November 2021

Public Authority: NHS Commissioning Board (NHS England)
Address: Quarry House
Quarry Hill
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant has requested copies of two pandemic briefing papers and any correspondence between the Head of Emergency, Preparedness, Resilience and Response and the Department of Health and Social Care and the Chief Medical Officer in the three months following the submission of these papers to the Chief Medical Officer.
2. NHS England (NHSE) disclosed the papers to the complainant but stated that no correspondence in the scope of the request was held.
3. The Commissioner's decision is that NHSE has conducted appropriate searches to identify relevant information but that no information in scope of the request is held. She therefore finds, on balance, that NHS England has complied with its obligations under section 1(1) of the FOIA.

Request and response

4. On 21 December 2020 the complainant made a request to NHSE for information in the following terms:

"Please find attached an official document sent by a policy manager at the Department of Health and Social Care to NHS England on 19 May 2020. It was disclosed under the FOIA to a member of the public and

maps progress on implementing the Lessons Identified following Exercise Cygnus in 2016.

The comments in the document at sections LI5 and LI6 refer to two reports submitted by NHS England to the former Chief Medical Officer (CMO) [redacted] following Exercise Cygnus:

Pandemic Influenza Briefing paper – NHS Surge and Triage
(completed December 2017) – please provide me with a copy of this report, and date it was submitted to the CMO.

Pandemic Influenza Briefing paper – Adult social care and community healthcare – *please provide me with a copy of this report, and date it was submitted to the CMO.*

Please provide me with copies of correspondence related to the NHS Surge and Triage document, and which is dated within 3 months following submission to the CMO, between the head or deputy head of NHS England's EPRR group and the CMO.

Please provide me with copies of correspondence related to the NHS Surge and Triage document, and which is dated within 3 months following submission to the CMO, between the head or deputy head of NHS England's EPRR group and civil servants / special advisers at the Department of Health and Social Care."

5. On 21 January 2021, NHSE wrote to the complainant and apologised for not providing a response within the statutory timeframe. It said that this was because of the need to prioritise its resources in dealing with the COVID-19 pandemic, including the redeployment of staff across the organisation. It said that it would aim to provide a response as soon as possible.
6. The Commissioner issued a decision notice on 2 March 2021 requiring NHSE to issue a response in line with its obligations under the FOIA.
7. NHSE responded to the request on 6 April 2021. For the first two parts of the request NHSE confirmed it held the requested information but considered it exempt under section 38(1)(a) of the FOIA. For the third and fourth parts of the request NHSE stated the information was not held.
8. The complainant asked for an internal review on 12 April 2021. This was focused on the decision to refuse to provide the information that was held. The complainant provided some arguments in favour of the public interest in disclosure.

9. Despite the ICO intervening and writing to NHSE, no internal review was forthcoming and the Commissioner used her discretion to accept this matter for investigation.

Scope of the case

10. The Commissioner accepted the complaint for investigation on 11 June 2021.
11. During the course of the Commissioner's investigation NHSE disclosed the two reports to the complainant stating that with the passage of time it now considered these reports could be provided. For the remaining two parts of the request – the correspondence – NHSE continued to state relevant information was not held.
12. The Commissioner considers the scope of her investigation to be to determine if NHSE holds any information in scope of the remaining parts of the request.

Reasons for decision

Section 1 – is the information held?

13. Section 1(1) of the FOIA states that:

"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

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

14. In cases where a dispute arises over the extent of the recorded information held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by a public authority to check that the information is not held and any other explanations provided by the authority to explain why the information is not held.
15. The Commissioner is not required to prove beyond any doubt that the information is or is not held, she is only required to make a judgement on whether, on the balance of probabilities, the information is held.

16. In determining whether information was held in this case, the Commissioner asked NHSE questions to establish its relationships with the parties named in the request and to determine if NHSE had conducted appropriate and adequate searches to identify if any relevant information was held.
17. The complainant had provided documents to the Commissioner showing that NHSE's National Head of Emergency, Preparedness, Resilience and Response (EPRR) and the Department of Health and Social Care (DHSC) had corresponded about the planning stages of the NHS Surge and Triage document. He suggested that if the Head of EPRR and the DHSC had corresponded during the planning then it was reasonable to assume they would have corresponded in the months following the submission of the document to the Chief Medical Officer (CMO).
18. The disputed parts of the request asked for correspondence between the Head of EPRR and the CMO following submission of the NHS Surge and Triage document and correspondence between the Head of EPRR and civil servants/special advisers at the DHSC.
19. NHSE has explained that at the time of the request the CMO acted as the UK government's principal medical adviser. The Head of EPRR was a policy manager within NHSE and there was no Deputy Head of EPRR.
20. NHSE has therefore explained that its searches were focused on the Head of EPRR's communications in the three months following the submission of the document to the CMO. NHSE required the Head of EPRR to search his emails as well as searching the EPRR shared network drive.
21. NHSE considers that this was the appropriate way of searching for relevant information as any correspondence from the Head of EPRR would either be held by him directly or stored on the shared drive. NHSE advised that keyword searches were undertaken using the terms 'surge', 'triage' and 'Cygnus'. In addition to this the Head of EPRR stated he did not communicate directly with the CMO or civil servants/special advisers in relation to this topic.
22. In order to be absolutely certain NHSE also searched within the email account of the person who, at the time of the request, was serving as NHSE's Strategic Incident Director for COVID-19. NHSE used the same search terms: surge, triage and Cygnus, and found no correspondence between this person and the CMO or civil servants/special advisers at the DHSC.
23. The Commissioner notes that the purpose of the paper was to provide an update to the CMO on NHSE's pandemic planning. It is not therefore

unreasonable to assume that NHSE would have communicated with the CMO about this, both before and after the paper was submitted. Similarly, it is reasonable to assume that NHSE would have communicated with civil servants/special advisers at the DHSC given that the CMO provides public health and clinical advice to ministers in the DHSC.

24. The emails provided by the complainant which pre-date the paper being submitted do show that communications took place between NHSE and the DHSC and NHSE and the CMO's Private Secretary. There are also emails that show that the Head of EPRR did correspond to arrange a meeting between officials to discuss the plan. From this it seems clear the Head of EPRR was involved in post-Cygnus work to prepare the plan and did have discussions with the DHSC and the CMO (albeit through his Private Secretary). The Commissioner can therefore understand why the complainant would question whether similar communications occurred once the plan had been submitted to the CMO.
25. The Commissioner does accept that the searches conducted by NHSE would have been the most reasonable searches to identify relevant information. These searches used specific keywords and these are, in the Commissioner's view, appropriate keywords that would have returned relevant records. The emails that pre-dated the submission of the plan all used one of these keywords in either the body of the email or the subject line of the email so it seems appropriate these keywords were used in the search by NHSE.
26. The Commissioner has no reason to dispute NHSE's assertions that no results were returned from these searches. Whilst she considers it very likely that high level discussions did take place following the submission of the plan it is not a certainty that these would have involved or been initiated by the Head of EPRR. Given the search terms and direct questions asked to the Head of EPRR provided no information the Commissioner can only conclude that the Head of EPRR was not directly involved in follow-up discussions about the plan once it was submitted to the CMO based on the assertions given by NHSE.
27. The Commissioner is therefore satisfied that NHSE does not hold the information requested in the final two parts of the request and has complied with its duty under section 1(1) of the FOIA.

Right of appeal

28. 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

29. 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.
30. 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

Jill Hulley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF