

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 December 2011

Public Authority: Department of Health
Address: Room 317
Richmond House
79 Whitehall
London
SW1A 2NS

Decision (including any steps ordered)

1. The complainant asked the Department of Health (DOH) to provide:
"electronic copies of the ranked hospital level data for Rounds 5, 6 and 7 of the National Sentinel Stroke Audit as published to date, both the organisational and clinical components...Note that these requests are not for the data in the published 'Public Reports' which place individual hospitals and hospital trusts into quartiles according to the scores attained in the assessment criteria."
2. The Information Commissioner's decision is that the DOH has failed to comply with its obligations under section 1(1)(a) of the FOIA as it informed the complainant that it does not hold the requested information. The Commissioner considers that the requested information is held by the Healthcare Quality Improvement Agency (HQIP) and/or the Royal College of Physicians (RCP) on behalf of the DOH under section 3(2)(b) of the FOIA.
3. The Information Commissioner (the Commissioner) requires the DOH to take the following steps to ensure compliance with the legislation:
 - Provide the complainant with the requested information or issue a valid refusal notice under section 17 of the FOIA.
4. The DOH must take these steps 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 (or the Court of

Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 27 February 2011, the complainant wrote to the DOH and made the request described in paragraph 1 above.
6. The DOH responded on 24 March 2011 stating that complying with the request would exceed the appropriate cost limit.
7. Following an internal review the DOH wrote to the complainant on 20 April 2011. The DOH overturned its original decision stating that it should have informed the complainant that it does not hold the requested information.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He considers that the DOH holds the information he has requested. In support of his view he directed the Commissioner to guidance issued by HQIP in August 2008, which was available on its website at the time of the request.
9. The Commissioner has considered whether the DOH holds the requested information including consideration of whether it is held by another organisation(s) on behalf of the DOH.
10. In the course of his investigation the Commissioner has considered all of the arguments made by the complainant and the DOH including those not specifically referenced within this decision notice.

Reasons for decision

11. Section 1(1)(a) of the FOIA states that a person making a request for information has a right to be informed whether a public authority holds information of the description specified in their request. Section 3(2)(b) of the FOIA states that information is held by a public authority if *"it is held by another person on behalf of the authority."*
12. The Commissioner considers that determining whether a public authority holds any requested information is a question of fact. The appropriate standard of proof to apply is the civil standard of the balance of

probabilities. The burden of proof is on the public authority to demonstrate to the appropriate standard that it does not hold the requested information.

13. The National Sentinel Stroke Audit is a centrally-funded national project delivered under the National Clinical Audit & Patient's Outcomes Programme (NCAPOP). The Healthcare Commission was contracted by the DOH to deliver the NCAPOP between 2003 and 2007. This included delivery of round 5 of the National Sentinel Stroke Audit. HQIP is currently contracted by the DOH to deliver the NCAPOP from 2008 to 2012. This has included delivery of rounds 6 and 7 of the National Sentinel Stroke Audit.
14. The organisation contracted to deliver the NCAPOP works in consultation with the DOH and the DOH's stakeholders to decide which audits it should support within the funding it has been allocated. The detailed scope of audits delivered under the NCAPOP is then agreed between the contractor and the body that is subcontracted to design and conduct the audit. The Royal College of Physicians (RCP) was subcontracted by the Healthcare Commission and HQIP respectively to design and conduct rounds 5, 6 and 7 of the National Sentinel Stroke Audit.
15. The DOH has explained that the RCP does not routinely provide National Sentinel Stroke Audit data to the DOH as the contract for conducting the audit is between the RCP and the NCAPOP contractor. The information provided to the DOH during rounds 5, 6 and 7 of the National Sentinel Stroke Audit would have related to the publication of the final audit reports and the published data. The DOH has stated that it would not have been provided with the hospital level data that the complainant has requested.
16. The Commissioner considers that the way in which the National Sentinel Stroke Audit has been conducted, being delivered under contract by the Healthcare Commission or HQIP and designed and conducted by the RCP, explains why the DOH does not have the requested information in its possession. It therefore remains for the Commissioner to consider whether the requested information is held by another organisation or organisations on behalf of the DOH.
17. The DOH has stated that the following in relation to the requested information:

The holder of the information for National Sentinel Stroke Audit rounds 5, 6 and 7 was either the Health Care Commission (round 5) or HQIP (rounds 6 and 7).

18. It has also stated:

The raw data collected in the round 5 audit is in retention at the Royal College of Physicians (the suppliers of the audit).

19. The Commissioner asked the DOH to provide copies of the relevant agreements between the DOH and the organisations responsible for delivering the NCAPOP. The DOH has provided copies of the documents which form the contract between the DOH and HQIP. The DOH has been unable to locate the agreement between the DOH and the Healthcare Commission although it has stated that a memorandum of understanding was in place.

Round 6 and 7 of the National Sentinel Stroke Audit

20. The agreement for the delivery of the NCAPOP between 2008 and 2012 was made between the Secretary of State for Health and a consortium comprising of The Academy of Medical Royal Colleges, The Royal College of Nursing and The Long-Term Conditions Alliance (now National Voices). The agreement included provisions to establish a company limited by guarantee that would be responsible for the delivery of the NCAPOP. The agreement stated that when the company was established the consortium members and the DOH would sign novation over to it. Thereafter, all obligations and liabilities under the contract would only be enforceable against that company. HQIP was established as a company limited by guarantee under this agreement in April 2008.
21. The Commissioner has reviewed the documents that comprise the contract between the DOH and HQIP for the management of the NCAPOP. Section 2 of the contract is entitled 'Terms and Conditions of Contract'. It includes the following provisions relating to Freedom of Information under section 38:

38. FREEDOM OF INFORMATION

38.1 The Contractor acknowledges that the Authority is subject to the requirements of the FOIA and the Environmental Information Regulations and shall assist and cooperate with the Authority (at the Contractor's expense) to enable the Authority to comply with these Information disclosure requirements.

38.2 The Contractor shall and shall procure that its sub-contractors shall:

(a) transfer the Request for Information to the Authority as soon as practicable after receipt and in any event within five working days of receiving a Request for Information; and

(b) provide all necessary assistance as reasonably requested by the Authority to enable the Authority to respond to a Request for Information within the time for compliance set out in section 10 of the FOIA or regulation 5 of the Environmental Information Regulations.

38.3 The Authority shall be responsible for determining at its absolute discretion whether the Commercially Sensitive Information and/or any other Information:

a) is exempt from disclosure in accordance with the provisions of the FOIA or the Environmental Information Regulations; or

(b) is to be disclosed in response to a Request for Information, and in no event shall the Contractor respond directly to a Request for Information unless expressly authorised to do so by the Authority.

[...]

38.5 The Contractor shall ensure that all information produced in the course of the Contract or relating to the Contract is retained for disclosure and shall permit the Authority to inspect such records as requested from time to time.

22. The Commissioner considers that the 'Terms and Conditions of Contract', and in particular section 38.5, makes clear that the information produced in the course of the contract would be retained for disclosure by the 'Authority' under the FOIA. The 'Authority' is defined in section 1.1 of the 'Terms and Conditions of Contract' as any designated person who is authorised to act on behalf of the Secretary of State for Health in matters pertaining to the contract.
23. The Commissioner also notes that section 38.2 states that the Contractor (the HQIP) is obliged to ensure that its subcontractors (such as the RCP) provide all necessary assistance to enable the 'Authority' (the DOH) to comply with a request for information within the applicable timeframe. Under this provision HQIP is obliged to ensure that its contract with the RCP to design and conduct the National Sentinel Stroke Audit reflected this obligation. Therefore, if the RCP holds the requested information, it would be obliged by contract to either assist the DOH directly to enable it to fulfil its FOIA obligations or to do so through the HQIP.
24. The guidance published by HQIP and referred to by the complainant entitled 'Freedom of Information – Clinical audit guidance – August

2008', also supports the notion that HQIP hold the audit data on behalf of the DOH. It refers to section 3 of the FOIA and goes on to state:

"The Department of Health has been advised that it is responsible for the data from its clinical audits on the basis that it pays for the data collection and is taking on a greater role in commissioning audits. Therefore, requests for audit data that fall under the requirements of the Act are to be handled by the Department of Health."

The Commissioner notes that the HQIP guidance document has now been withdrawn as the DOH does not consider that it is accurate.

25. The Commissioner's view is that HQIP holds the requested information in relation to round 6 and 7 of the National Sentinel Stroke Audit on behalf of the DOH. He considers that this is the case regardless of whether the data is in the possession of HQIP or the RCP. This is because if the RCP held the information it would be obliged by contract to assist HQIP, or the DOH directly, for the purposes of the DOH fulfilling its FOIA obligations.

Round 5 of the National Sentinel Stroke Audit

26. As outlined above, the DOH can not locate the agreement it had with the Healthcare Commission for delivery of the NCAPOP. This is compounded by the fact that the Healthcare Commission is no longer in existence. Therefore, it is not possible for the Commissioner to determine what provisions were included in the agreement concerning the DOH's obligations under the FOIA. Nor is it possible to establish whether there were any terms concerning the retention of audit data or the DOH's rights to it in the event that the Healthcare Commission was abolished.
27. The Commissioner considers that in these circumstances he must determine the case on a balance of probabilities. The agreement between the DOH and the Healthcare Commission was in place between 2003 and 2007. At the time of entering the agreement the DOH would have been aware of the obligations it would be subject to when the FOIA came into force.
28. The Commissioner considers that any reasonable public authority would have foreseen and made provisions to meet its obligations under the FOIA in any agreements it entered into at that time. It would have been prudent for the DOH to ensure that publically-funded national projects were conducted in an open and transparent manner. The Commissioner has no reason to doubt that the DOH would have considered this at the time of entering into the agreement for the delivery of the NCAPOP and would have ensured that the information collected in the course of the

contract would be subject to disclosure under the FOIA, notwithstanding any exemptions that applied.

29. In the Commissioner's view, on a balance of probabilities, the DOH's agreement with the Healthcare Commission would have included similar terms to the DOH's subsequent contract with the HQIP. On this basis he considers that until it was abolished the Healthcare Commission would have held the information in relation to round 5 of the National Sentinel Stroke Audit on behalf of the DOH. The Commissioner must therefore go on to consider the effect of the Healthcare Commission being abolished.
30. The Healthcare Commission subcontracted the RCP to design and deliver round 5 of the National Sentinel Stroke Audit under the NCAPOP. As the agreement between the DOH and the Healthcare Commission is unavailable, assuming that the provisions were similar, the Commissioner has considered what the position would be under the current contract if HQIP were to be abolished. The contract between the DOH and HQIP contains the following term within the document entitled 'Clinical Audit Supplementary Terms and Conditions - 29 October 2007':

2. Conclusion or Termination of Contract

2.1. On termination of the contract, all contracts relating to the core delivery of the National Clinical Audit Outcomes Programme are to be novated to the Authority or to an organisation the Authority chooses.

The Commissioner considers that on this basis, if HQIP were to be abolished, the RCP's contractual obligations to HQIP in relation to the NCAPOP would be novated to the DOH or another organisation designated by the DOH. This would include the provisions in the contract between HQIP and the RCP which concern its obligations to "*provide all necessary assistance as reasonably requested by the Authority to enable the Authority to respond to a Request for Information...*"

31. The Commissioner considers that on a balance of probabilities the contract between the DOH and the Healthcare Commission would have contained similar provisions to ensure that, in the event of the Healthcare Commission being abolished, the subcontractor's obligations were novated to the DOH. A reasonable public authority on entering such an agreement would have ensured that there were sufficient contractual provisions to protect its interests in the event of the main contractor being abolished. The Commissioner considers that the agreement between the RCP and the Healthcare Commission would have included an obligation on the RCP to assist the DOH in FOIA matters either directly or through the Healthcare Commission. Therefore, he considers it likely that on the abolition of the Healthcare Commission those obligations would have been novated to the DOH.

32. The DOH has stated that the RCP holds the raw data in relation to round 5 of the National Sentinel Stroke Audit. Based on his findings above the Commissioner's view is that on a balance of probabilities the RCP holds the audit data on behalf of the DOH.

Other matters

33. In the course of his investigation the Commissioner asked the DOH to provide details of its agreement with HQIP which covered the delivery of the National Sentinel Stroke Audit. He specifically asked the DOH whether the agreement contained any relevant terms concerning the DOH's rights to audit data, and which organisation would retain the data once an audit has been completed and/or once audit reports have been published. The DOH did not provide or refer to the Freedom of Information section of the contract in response to the Commissioner's questions.
34. The Commissioner is concerned that the relevant provisions in the contract between the DOH and HQIP were not brought to his attention until a late stage in his investigation. This has caused unnecessary delays in this case with which the complainant is understandably aggrieved.

Right of appeal

35. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

36. 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.
37. 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

Lisa Adshead
Group Manager

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