

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 January 2020

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

Decision (including any steps ordered)

1. The complainant has requested information from NHS England in the form of slide packs relating to a speech given in 2015 by Jeremy Hunt about proposals for an NHS seven day service. NHS England refused to provide the information explaining that it would be withheld under section 36 in line with extant Appeals concerning the slide packs, later stating that it did not hold the information.
2. The Commissioner's decision is that NHS England has failed to demonstrate that it does not hold the requested information and has therefore failed to comply with section 1 of the FOIA. Additionally, NHS England did not engage sufficiently with the complainant to establish what he was requesting before it stated that the information was not held. Therefore the Commissioner finds that NHS England breached its section 16 duty to provide advice and assistance.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the complainant, which does not rely on the information not being held.

4. The public authority 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. This decision notice concerns a request that had previously been refused under section 14(1) of the FOIA by NHS England as it had concluded that the request was vexatious. The Commissioner agreed with the public authority and the complainant appealed to the Information Rights Tribunal. The Tribunal decision (EA/2018/0154) did not agree that the request was vexatious and ordered NHS England to comply with the request, unless one of the other exemptions in FOIA was made out.
6. The request (originally made on 12 October 2017) related to a speech that had been made in 2015 by the then Secretary of State for Health, Jeremy Hunt, about the government's interest in a seven day NHS within the context of proposed new contracts for consultants and junior doctors for NHS work. The Tribunal in EA/2018/0154 outlined briefly what had been said in the speech and the fact that a claim had been made that around 6,000 people lost their lives every year because of the lack of "*a proper 7-day service in hospitals*" and that this meant that a patient admitted on a Sunday would have a greater percentage likelihood of dying than one admitted to hospital on a Wednesday. The proposals caused a degree of controversy and a study published six weeks later (Freemantle 2015) concluded that there may be many reasons why mortality rates are higher at weekends. There were concerns expressed in certain quarters about the source of Mr Hunt's comments because this study had not been peer-reviewed or published at the time of the Secretary of State's speech and did not support the link he made between weekend mortality rates and the need for a seven day service.

Request and response

7. As a consequence of the Tribunal decision outlined in paragraph five above, the complainant made the following request for information under the FOIA on 13 April 2019 for information he had previously requested on 12 October 2017:

"As regards Tribunal case EA/2018/0154 – [name provided] vs Information Commissioner and NHS England - the time period for an appeal has now lapsed and as per the Tribunal's judgement you must now comply with the request for information.

I would be grateful if you could urgently comply with this request for information, or further steps will be taken. Given the time period has lapsed, it would be appreciated if this could be done urgently"

8. The complainant's 12 October 2017 request for information had been for the following:
 1. *Email correspondence relating to the 7DS briefing for the Secretary of State.*
 2. *Any slide packs created for this briefing in full.*
 3. *Meeting minutes relating to preparing for this briefing or the meeting minutes of the 7DS briefing of the Secretary of State.*
9. NHS England responded on 18 April 2019 and stated that it did not hold some of the requested information (part three) but confirmed that the remainder was held. Some redacted emails were disclosed. However, NHS England refused to provide the remainder of the information stating that section 36 would apply to part two of the request:

"...any slide packs created for this briefing in full"
10. NHS England explained that it was waiting for the result of Appeals to the First Tier and Upper Tribunal. The complainant was asked if he would defer consideration until the extant appeals had been heard.
11. As the complainant did not wish to await the outcome of those Appeals, NHS England then provided a final response (rather than an internal review) on 16 May 2019 in which it revised its position, stating that the information within the scope of part two of the request was not held. The complainant's query had drawn NHS England's attention to the specific wording of his original request. The public authority concluded that the complainant had requested slide packs "*created*" for the briefing by the Secretary of State. NHS England's view was that the complainant was aware that the Deloitte slidepacks are held by NHS England and that, nonetheless, he did not specifically request these. It concluded that the complainant was seeking "*any slide packs*" that had been "*created*" for the briefing which, it stated, do not exist.
12. After the Commissioner had written to NHS England the public authority responded on 9 October 2019. The Commissioner asked NHS England why it had originally cited section 36 to the request and later stated that the information was not held. NHS England explained that it had not issued a formal response to part two of the complainant's request but had simply reminded the complainant that the Deloitte slidepacks remained under consideration in two separate Tribunal cases (EA/2017/0111 and EA/2017/0113).

13. NHS England went on to suggest that the complainant could make another request for the Deloitte slides but that it would be likely to apply section 14(2) to such a request as it would be a repeat of the requests currently under consideration at the Appeals mentioned in paragraph 12 above and that a reasonable period had not elapsed.

Scope of the case

14. The complainant contacted the Commissioner on 16 May 2019 to complain about the way his request for information had been handled. He copied the Commissioner into an email he had written to NHS England where he questioned NHS England's focus on the use of the word "created" and clarified his meaning – *"by this I mean in context NHS England 'created' these slide pack attachments and used them as part of the briefing"*.
15. The Commissioner considers therefore that the scope of this complaint concerns whether NHS England holds the requested information or not and whether the complainant was given advice and assistance, in the light of NHS England's interpretation.

Reasons for decision

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

16. 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."

17. In cases where there is a dispute over the amount of information held, the Commissioner applies the civil test of the balance of probabilities in making her determination. This test is in line with the approach taken by the Information Rights Tribunal when it has considered whether

information is held (and, if so, whether all of the information held has been provided). She determines this by asking a series of questions concerning what searches have been made and the business needs and/or statutory requirements to hold such information.

18. NHS England stated that there is no discussion of any slides being "created" in the emails released to the complainant. Colleagues had no recollection of any slides being created for the briefing. NHS England had previously conducted other extensive email and electronic record searches in response to multiple requests from the complainant in relation to the seven day services and had not located any slide packs, other than those created by Deloitte. Therefore it had not conducted any further searches.
19. NHS England concluded that no recorded information had even been held in relation to this and had consequently not been destroyed. It confirmed that there was no business or statutory requirement for NHS England to have produced or retained any slides for this briefing.
20. On 5 November 2019 the Commissioner wrote to NHS England and asked it to explain further how it had arrived at the conclusion that the information sought was 'not held'. She pointed out that paragraph 9 of the Appeal (EA/2018/0154) states -

"As can be seen, the request refers to slide packs which the Appellant clearly thinks are produced by Deloitte. As such, this request appears to be the request for information (this time to NHSE) that the Tribunal had said in the previous judgment was 'a matter for another FOIA request'."

Paragraph 18 of the Appeal also states the following -

"NHSE accept that 'Deloitte did, however, produce...a number of iterations of a 'slide pack' in order to facilitate internal discussions of issues relating to the proposed '7-day NHS' '. NHSE also confirmed in the hearing that the information sought by the Appellant is held by them"

The complainant responded to NHS England and the ICO on the same day as he complained about NHS England, 16 May 2019 -

"I note your highlighting "created for this briefing". Clearly the original request was requesting the slide packs that were used in this briefing of the SoS, the word 'creation' is not be taken literally out of context as you are quite clearly attempting to do. By this I mean in context NHS England 'created' these slide pack attachments and used them as part of the briefing, and you quite clearly hold the slide packs. So please stop this painful obfuscation,"

The Commissioner asked NHS England why it had confirmed at Appeal that the information was held.

21. NHS England responded on 11 November 2019 by stating that it does hold various iterations of a slide pack that was created by Deloitte LLP. Deloitte had been commissioned to advise on the proposed implementation of a seven day NHS for NHS England. The public authority pointed out that the complainant had made several requests for the slide packs and that the Commissioner had agreed that it had been right to withhold them. NHS England stated that the complainant is clearly aware that these slide packs are held and drew the Commissioner's attention to another part of his request which directly refers to the Deloitte slide pack (this part was not considered by the Tribunal in EA/2018/0154) and that it had concluded that he was therefore seeking something other than the Deloitte slide pack and its iterations.
22. NHS England repeated again that an experienced requester knew how to make their requests clear and that he had chosen to request "*any slide packs created for this briefing*" but that the slide pack/s held were not "*created for this briefing*". It concluded by suggesting that if NHS England is wrong and the complainant is requesting the Deloitte slide pack/s then its view is that the request is either repetitious or redundant and that the dispute will be determined by the Tribunal.
23. On 15 November 2019 the Commissioner wrote to the complainant setting out NHS England's view as outlined above and asked him to confirm whether his request had been for the Deloitte slide packs.
24. The complainant confirmed that he was seeking the slide packs that were the subject of the Appeal. As his response acknowledged the confusing series of events, the Commissioner rang the complainant on 22 November 2019 in order to firmly establish that it was indeed the Deloitte slide packs that he sought. This was confirmed by the complainant. In the light of this confirmation, on 25 November 2019 the Commissioner asked NHS England to confirm its final position.
25. On 27 November 2019 NHS England reiterated its view that the information was not held. To the extent that the Commissioner disagreed, it added that it had already applied section 36 to previous requests for this information, that the Commissioner had agreed that the information should not be disclosed and that these had gone to Appeal.
26. Although the Commissioner understands NHS England's arguments, she has concluded nevertheless that the request is for the Deloitte slide

packs and that, had there been any doubt about the use of the word "*created*" or whether slide packs other than the Deloitte slide packs were being requested, this could have been addressed by NHS England at a much earlier date and appropriate advice and assistance given.

Section 16 – advice and assistance

27. Section 16 of the FOIA requires a public authority to provide "*reasonable advice and assistance*" to those making or wishing to make a request.
28. If a request is unclear or potentially has more than one objective reading, the Commissioner considers that this duty extends to making reasonable attempts to seek clarification of the request. In this case, NHS England seems to have made various assumptions which could have been validated or invalidated by seeking further clarification, bearing in mind the previous history of the request.
29. The Commissioner considers that NHS England did not provide reasonable advice and assistance to the complainant once it had decided that the interpretation it had been placing on the request for a considerable period of time was incorrect. Therefore she considers that NHS England did not discharge its duties under section 16 of the FOIA regarding this request.
30. The Commissioner does not, however, require the public authority to provide advice and assistance at this late stage, as it has now been confirmed what information the complainant is seeking.

Right of appeal

31. 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@justice.gov.uk

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

32. 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.
33. 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
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