

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 March 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 on 19 items that presented opportunities for learning, which had been referred to in a meeting. NHS England (NHSE) relied on section 21 of the FOIA to withhold the information as it said it was already accessible to the complainant in a report that it had provided to them previously. The complainant disputed NHSE's reliance on section 21 but considers that NHSE does hold the information they have requested elsewhere.
2. The Commissioner's decision is as follows:
 - NHSE incorrectly applied the exemption under section 21(1) of the FOIA to the requested information. This is because, on the balance of probabilities, NHSE does not hold the requested information – in the report or elsewhere.
 - NHSE breached section 1(1)(a) of the FOIA as it indicated it holds the requested information when, on the balance of probabilities, it does not.
3. The Commissioner does not require NHSE to take any remedial steps.

Background

4. In correspondence to the Commissioner the complainant has provided a background to their request. They say that the requested information relates to a complaint they made about how their Responsible Officer (RO) dealt with a revalidation process the complainant underwent. NHSE investigated this complaint under a framework for investigating ROs. The investigation was initiated by a doctor who is a Higher Level Responsible Officer (HLRO) and the RO's line manager.
5. The investigation reported in June 2018 and the complainant has a copy of that report.
6. The complainant says that the framework and the decision making group's terms of reference are clear that the outcome of their complaint is not the investigation's final report, but the recommendations the HLRO local decision making group made.
7. The local decision making group in this case met on 4 July 2018. NHSE has released to the complainant an extract of the minutes of this meeting. The minutes note as an Action: *"The local team to go through the 19 items where there were opportunities to learn and take action."*
8. The complainant also received a letter from the HLRO dated 13 July 2018 in which the HLRO notes the report and outcome of the investigation.

Request and response

9. On 19 July 2019 the complainant wrote to NHSE and requested information in the following terms:

"Would you please release to me under the Freedom of Information Act the 'nineteen opportunities for improvement to the local team's appraisal and revalidation system and its implementation' as identified. by the HLRO local decision making group of 4.7.2018 as stated in the attached minutes.

For clarification, the requested information is a list of the 19 items, where there were opportunities to learn and take action, the local team were asked to go through."

10. The request indicates that the complainant interpreted the 'list of 19 items' to be a list of learning opportunities for the local team that had

been identified as a result of the complainant's specific complaint about their RO, and the resulting investigation.

11. NHSE responded on 7 August 2019. It said the information that the complainant had requested was exempt from release under section 21 of the FOIA as they had access to the information in the report NHSE had previously released to them.
12. In correspondence dated 12 August 2019 the complainant advised NHSE that the information to which they had access – the report – did not include the information they had requested. They said that because, in their view, the recommendations had been generated by the local decision making group on 4 July 2018, the report, which was finalised in June 2018, could not contain those recommendations.
13. Following its internal review NHSE wrote to the complainant on 29 August 2019. It maintained its reliance on section 21 and said it would consider relying on section 14(1)(vexatious request) if it received the same or similar requests from the complainant.

Scope of the case

14. The complainant contacted the Commissioner on 5 September 2019 to complain about the way their request for information had been handled.
15. The Commissioner's investigation has considered whether NHSE holds the requested information and its reliance on section 21(1) to withhold that information.

Reasons for decision

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

Section 21 – information accessible to applicant by other means

16. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b) to have the information communicated to him or her if it is held and is not exempt information.
17. Section 21(1) of the FOIA says that information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

18. NHSE's position was that a report that it had previously provided to the complainant contained the information he has requested – the '19 items'. It considered that the requested information was therefore accessible to the complainant by other means and so exempt under section 21(1).
19. For a public authority to rely on section 21(1), or any of the exemptions in Part II of the FOIA, the authority must hold the information in question. The Commissioner first considered whether the requested information was held in the report.
20. Having reviewed the report, the Commissioner does not consider that it holds the requested information. This is because the 19 items which present opportunities for learning – as the complainant has interpreted those items from their reference in the meeting minutes - are not identified anywhere in the report. It is therefore open to judgement as to what those 19 items could be. In correspondence to the Commissioner the complainant identified what they consider the 19 opportunities might be; however, someone else might identify a different set of opportunities from the report.
21. Because a degree of assessment and judgement is needed to identify learning opportunities in the report – 19 definitive items are not identified through numbering or listing anywhere in the report – the 19 items the complainant has requested cannot be said to be held in the report. The requested information was therefore not accessible to the complainant in the report that had previously been provided to them. NHSE therefore wrongly applied section 21(1) of the FOIA to this information.
22. The Commissioner went on to consider whether NHSE holds the requested information anywhere else and she corresponded with NHSE about this.
23. The Commissioner referred NHSE to the Action: in the local decision making group's meeting minute: "*The local team to go through the 19 items where there were opportunities to learn and take action.*" She also referred it to the correspondence of 13 July 2018 that the complainant had received from the HLRO in which he or she notes that 19 opportunities had been identified and suggests these will be addressed "*going forward*".
24. The Commissioner asked NHSE to explain how the local team involved would address these learning opportunities if they are not specified/listed somewhere. As discussed, 19 specific opportunities that the complainant has requested are not held in the report, but the Commissioner asked NHSE whether it was certain that, as a result of the

report, 19 opportunities for future learning had not been listed, recorded or detailed elsewhere.

25. NHSE has told the Commissioner that the words recorded in the 4 July 2018 minutes "*may not entirely match the information which is actually held.*" It acknowledged that the wording appears to imply that a specific list exists but confirmed that such a list does not exist. It says the report was a complex piece of work with recommendations throughout and "*some confusion may have arisen*".
26. NHSE confirmed to the Commissioner that the information it has provided to the complainant previously is all that it holds. It says it may have tried to be overly helpful in this case and, on reflection, it should have advised the complainant in the first instance that it does not hold the information they have requested. NHSE says that it cannot supply the requested information in this case as no such information exists; the complainant has had all the relevant information it holds.
27. In the Commissioner's view, if the 19 learning opportunities had been identified and were held, the most obvious place where they would have been recorded would have been in the report, but they are not recorded there. The Commissioner also considers that '19' is an unusually high number of potential points from which learning could be taken in the future.
28. The Commissioner put NHSE's position to the complainant and explained that her assessment was that the 19 learning opportunities were not held, in the report or elsewhere. In her correspondence to the complainant, the Commissioner noted that there had, however, been clear shortcomings in NHSE's handling of their request.
29. In correspondence to the Commissioner of 27 February 2020 the complainant disputed that the information is not held. They consider that the Commissioner should consider what the decision making group decided, not what is or is not held in the report. They said the group considered the report but also the complainant's comments and other information the group had.
30. The complainant considered that the fact that a specific number of opportunities for improvement were identified, and that the local team was advised to reflect on those learning opportunities, confirms that these opportunities were listed somewhere.
31. The complainant went on to make a number of observations and allegations about NHSE's handling of their request. These allegations will be considered separately, if appropriate. The focus of this decision

is whether or not NHSE's handling of the complainant's request complied with the FOIA.

32. What may have been a casual remark made in a meeting by a member of the decision making group about '19 items' in the report where there were opportunities to learn was recorded in the meeting's minutes. The Commissioner does not consider it unreasonable for the complainant to conclude from the minute that such information as he went on to request was therefore held, particularly as these opportunities are referenced in other correspondence.
33. The Commissioner reviewed the report again. She noted that under paragraph 3.5.3 of the report, there is a table containing a list of "core guidance and policies" to which the investigation referred. There are 19 items in that list. It would therefore not be unreasonable to assume that the individual in the meeting was referring to that list of guidance and policies. That would align with the minuted Action for the local team "*...to go through the 19 items where there were opportunities to learn and take action.*" It seems likely to the Commissioner that the local team was being advised to review the relevant guidance and polices and learn from these as appropriate.
34. The Commissioner put this conjecture to the complainant but they do not accept it and still remain of the view that NHSE holds information on 19 specific improvement opportunities that were identified as a result of their complaint and the resulting investigation. The complainant considers that the Commissioner should investigate the matter further.
35. NHSE has insisted to the Commissioner that it has released to the complainant all the information it holds that is relevant to their request, and that it does not hold the specific information requested – 19 opportunities from which the local team could learn in the future. NHSE has acknowledged that its handling of the request was clumsy, and that confusion may have arisen as to whether specific learning opportunities – which it advised that the local team would review and act on - had actually been individually identified from the report or elsewhere. It has confirmed that a record of 19 learning opportunities does not exist and acknowledged that it should have confirmed to the complainant that it does not hold this information when it first received their request.
36. Having considered all the circumstances of this case, at this point the Commissioner is satisfied on the balance of probabilities that NHSE does not hold the requested information. The report contains a list of 19 relevant policies and guidance; it does not contain a list of 19 specific opportunities that were identified as a result of the investigation, and from which the local team might learn in the future. The Commissioner does not consider such a list is held elsewhere either and does not

consider there is anything to be gained from considering this matter further.

37. The Commissioner finds that NHSE breached section 1(1)(a) of the FOIA as it indicated that it holds the information when on the balance of probabilities, it does not. NHSE therefore incorrectly relied on section 21(1) as it is not possible to exempt from release information that is not held.
38. If it is the case that the table of 19 items at paragraph 3.5.3 of the report are indeed those items referred to in the meeting minute – it is not definite but seems likely - the Commissioner makes the point that it took her a matter of a minute or two to identify that table and make the connection. Had NHSE taken a little more time to consider the complainant's request, the information in the report, and all the circumstances of the request it might have been able to clarify and resolve the situation with the complainant at an early stage. That would have made their complaint to the Commissioner unnecessary.

Right of appeal

39. 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

40. 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.
41. 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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