

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 30 August 2022

**Public Authority:** Norfolk and Waveney Integrated Care Board  
**Address:** Lakeside 400  
Old Chapel Way  
Broadland Business Park  
Thorpe St Andrew  
Norwich  
NR7 0WG

#### **Decision (including any steps ordered)**

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1. The complainant requested information about action taken as a result of contempt proceedings. Norfolk and Waveney Integrated Care Board ("the Board") provided some information, but refused the remainder of the request as vexatious.
2. The Commissioner's decision is that the request was not vexatious and that the Board was not entitled to rely on section 14(1) of FOIA to refuse it. However, he only considers that elements 2, 3 and 4 of the requested constituted valid requests in accordance with section 8 of FOIA.
3. The Commissioner requires the Board to take the following steps to ensure compliance with the legislation.
  - Issue a fresh response to element 3 of the request that does not rely on section 14(1) of FOIA.
4. The Board 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.

## Nomenclature and Background

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5. The request under consideration here traces its roots back to enquiries the complainant made to the body that commissioned health services in her area. Whilst many of the people involved have remained the same throughout the process, the body responsible for commissioning is now on its third different name in the space of just over two years.
6. Originally the complainant made requests to NHS Norwich Clinical Commissioning Group (NCCG). However, that body merged with several other clinical commissioning groups in April 2020 to form Norfolk and Waveney Clinical Commissioning Group ("NWCCG"). NWCCG was the public authority to whom the request was made and which responded to the request.
7. Whilst the Commissioner commenced his investigation with a letter to NWCCG, during the course of the investigation, on 30 June 2022, that body ceased to exist, with its functions being transferred to the Board – which had been set up to meet the requirements of the Health and Care Act 2022. The Board has, in responding to the Commissioner, taken on responsibility for responding to the request that is the subject of this notice.
8. To make the decision easier to follow, the Commissioner has tried to refer to "the Board" as the public authority dealing with this particular request and "the Board and its predecessor bodies" to refer collectively to the Board, NCCG and NWCCG. However, he does recognise that the constantly-shifting nature of service commissioning (albeit that the most recent shift has been one mandated by law) may have contributed in part to the complainant's frustration. He has therefore referred to either NCCG or NWCCG where he considers it appropriate and relevant to do so.
9. By way of background, the Commissioner notes that the complainant originally made requests to NCCG in 2017 regarding the manner in which it calculated personal health budgets.<sup>1</sup> The complainant argued that there was a discrepancy between the funding allocated to NCCG to

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<sup>1</sup> Ordinarily, clinical commissioning groups are responsible for ensuring the health needs of the populations they serve are met. Each group receives a budget based on anticipated need and it must then use that budget to commission services to meet those needs. However, in some circumstances an individual can request to be allocated their own personal health budget – from which they can commission their own services in order to meet their particular needs.

provide her personal health budget and the amount of money she actually received. The requests were aimed at understanding the level of discrepancy and how and why it occurred.

10. NCCG refused to provide this information, which it considered commercially sensitive. The complainant brought a complaint to the Commissioner who upheld NCCG's decision to withhold the information. The complainant then appealed that decision to the First Tier Tribunal.
11. The First Tier Tribunal upheld the appeal in 2019 ("the 2019 Tribunal decision"). It ruled that NCCG held further information than it had previously identified and that the information it had identified as falling within the scope of the request did not engage section 43 of FOIA. Although some of the information had been disclosed to the complainant during the course of the appeal, the Tribunal ordered that the remaining information be disclosed to her.
12. NCCG contacted the complainant after the Tribunal judgement had been promulgated. It provided her with some further information, but the complainant was unhappy at the quality of information provided and argued that NCCG had failed to comply with the 2019 Tribunal decision.
13. The Board has informed the Commissioner that NCCG did meet with the complainant to attempt to conclude the matter informally, however this failed to resolve the matter completely and in late 2020, the complainant asked the First Tier Tribunal to certify, to the Upper Tribunal, that NCCG had failed to comply with the 2019 Tribunal decision and was thus in contempt of court ("the contempt certification proceedings"). By this point NCCG had ceased to exist and was the respondent to the proceedings in name only. NWCCG was joined to the contempt certification proceedings as an interested party.
14. Having considered the application for certification, the First Tier Tribunal concluded that NCCG had wilfully failed to comply with the previous judgement. However, as NCCG no longer existed, the judge declined to certify a contempt to the Upper Tribunal as it would involve a disproportionate use of resources. NWCCG could not be held in contempt as it had not been ordered to do anything.
15. During 2018, the complainant had a complaint ongoing with the Parliamentary Health and Social Care Ombudsman (PHSO). In March of that year, three staff members of NCCG received cards via the online retailer Moonpig. These cards contained quotations from various items of correspondence or judgements relating to the complainant. In some cases, they also contained images of the staff members involved that had been "scraped" from NCCG's website. Given the nature of the information the cards contained, NCCG concluded that they had been

sent either by, or at the direction of, the complainant – a claim she denies – and wrote to her warning that it would not tolerate such behaviour.

## **Request and response**

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16. On 15 September 2021, the complainant wrote to the Board and, referring to the contempt certification proceedings, requested information in the following terms:
- 1) "Please can you explain why no individuals were required to leave the organisation as soon as the CCG became aware, in 2019, of the criminal offence of contempt of court, as outlined by the First-tier Tribunal.
  - 2) NWCCG's Complaints Handling Policy and Procedure states that: 'Whether disciplinary action is warranted is a separate matter for management outside of the Complaints Procedure and there must be a separate process of investigation.' Please provide a copy of the CCG's investigation and disciplinary policy and procedure.
  - 3) Please confirm whether any disciplinary investigations have been carried out for any CCG employees following the FtT's judgement, and/or following any complaints that have been received by the CCG with regards its criminal offences in respect of [the 2019 Tribunal decision].
  - 4) Please can you confirm whether NCCG informed NHSE of the contempt prior to Melanie Craig's appointment as CO of NWCCG.
  - 5) There are NHS processes which ensure that its Officers are fit and proper people who have not been responsible for, privy to, contributed to or facilitated any serious misconduct or mismanagement. Please can you explain why NWCCG appointed John Ingham as CFO in April 2020, when it was already aware that he was the member of the senior management team directly responsible for the offending CCG employee.
  - 6) Please can you explain why NWCCG appointed Melanie Craig as CO in April 2020, when it was already aware that she was the AO for decisions made in respect to a deliberate contempt of court.
  - 7) Please can you explain why the Accountable Officer has not since been held accountable for a criminal offence for which she was responsible."

17. The Board responded on 12 October 2021. It provided the information that it held in respect of element 2 and refused the remainder of the request as vexatious.
18. Following an internal review the Board wrote to the complainant on 1 November 2021. It upheld its original position.

### **Scope of the case**

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19. The complainant contacted the Commissioner on 2 November 2021 to complain about the way her request for information had been handled.
20. The complainant had also made two further requests for information, around the same time, which the Board also refused, either in full or in part, as vexatious. All three requests were referred to the Commissioner. At the outset of the investigation (and at the suggestion of the Board), the Commissioner proposed to deal with all three complaints concurrently – seeking only a single submission from the Board and the complainant. Both parties agreed to this approach, although the Commissioner has issued separate decision notices in respect of each request.
21. In this particular case, the Board also queried whether the entirety of the request was valid.
22. The Commissioner considers that the scope of this investigation is to determine whether any parts the request were valid and, if they were whether they were also vexatious.

### **Reasons for decision**

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#### **Which parts of the request were valid?**

23. 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.

24. Section 8(1) of the FOIA states:

In this Act any reference to a "request for information" is a reference to such a request which –

- (a) is in writing,
- (b) states the name of the applicant and an address for correspondence, and
- (c) describes the information requested.

25. Section 84 of FOIA defines "information" as:

"Information recorded in any form"

26. A public authority is only obliged by FOIA to consider disclosing information that it already holds in recorded form at the time it receives a request. It is not required to create or acquire information that it does not already hold in order to satisfy a request.
27. The Commissioner does not consider that elements 1, 5, 6 or 7 constitute valid requests for information as they do not seek information that the Board holds (or is likely to hold) in recorded form. Rather, each of these elements invite the Board to provide bespoke justifications for decisions it has taken. That amounts to the creation of new information that the Board does not already possess.
28. Elements 2, 3 and 4 of the request are all valid because either seek a specific document (element 2) or seek to establish whether the Board carried out certain actions (elements 3 and 4). These would all be matters that the Board would be likely to hold recorded information about.

### **Were the valid elements of the request vexatious?**

29. Section 14 of the FOIA states that:

Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

30. The term "vexatious" is not defined within the FOIA. The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It commented that "vexatious" could be defined as the "manifestly unjustified, inappropriate or improper use of a formal procedure". The Upper Tribunal's approach in this case was subsequently upheld in the Court of Appeal.
31. The Dransfield definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.

32. Dransfield also considered four broad issues: (1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the requester, (3) the value or serious purpose of the request and (4) harassment or distress of and to staff. It explained that these considerations were not meant to be exhaustive and also explained the importance of: "...adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests." (paragraph 45).
33. The Commissioner has published guidance on dealing with vexatious requests<sup>2</sup>, which includes a number of indicators that may apply in the case of a vexatious request. However, even if a request contains one or more of these indicators it will not necessarily mean that it must be vexatious.
34. When considering the application of section 14(1), a public authority can consider the context of the request and the history of its relationship with the requester, as the guidance explains:

"The context and history in which a request is made will often be a major factor in determining whether the request is vexatious, and the public authority will need to consider the wider circumstances surrounding the request before making a decision as to whether section 14(1) applies".
35. However, the Commissioner is also keen to stress that in every case, it is the request itself that is vexatious and not the person making it.
36. In some cases it will be obvious when a request is vexatious but in others it may not. The Commissioner's guidance states: "In cases where the issue is not clear-cut, the key question to ask is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress."

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<sup>2</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/dealing-with-vexatious-requests-section-14/>

## **The complainant's position**

37. In her submissions to the Commissioner, the complainant explained that:

"Despite my best and ongoing efforts to ensure that the CCG is held to account for its unlawful actions throughout the FTT proceedings, it remains unclear as to whether any wrongdoing was even acknowledged internally, whether anyone was held accountable, or whether any lessons have been learnt.

"It is also unclear how the CCG can uphold a Section 14 exemption for a request for clarity about accountability within senior management following a verdict of contempt of court. This is clearly and strongly in the public interest, the resources required to meet the request are minimal, and none of my requests or complaints to date have elicited a satisfactory response about the matter."

38. Her motivation for seeking the information in all three requests, the complainant noted, was:

"an attempt to obtain information about the CCG's systemic mistreatment of complainants and furthermore, how it has seen fit to use an unquantified and allegedly unquantifiable amount of public money to harass and malign the character of a vulnerable member of its registered community. In the wider public interest, I also seek to establish how many more victims of its maladministered PHB service it sent unsolicited, accusatory letters to. These patients all have complex healthcare needs, like myself, and are among the most vulnerable members of our community."

39. She also added that:

"Such mistreatment of complainants rarely happens in isolation. In the wider public interest, it is my intention to expose the internal machinations of an NHS organisation that uses public money to act on the erroneous suspicions and personal grudges of individual employees from a defunct organisation that was evidently providing maladministered and unlawful services. The requested information seeks to identify these failings, thwart the evident victim-blaming culture, and improve complaints processes."

## **The Board's position**

40. In its submission, the Board put forward its own version of the events that had preceded the complainant's request. In its view the complainant was simply using her request as



"nothing more than an attempt to continue to argue matters and further litigate."

41. The Board felt that it had made reasonable efforts to try to resolve the underlying grievance, but that these had been unsuccessful and therefore it could no longer justify continuing to devote resources to the matter.
42. In addition, the Board noted that the complainant had submitted 20 information requests since 2017, that she "routinely" challenged these requests (eleven requests for internal reviews, ten complaints to the Commissioner and two appeals to the First Tier Tribunal) and that it considered that, based on previous experience, responding to the request would likely spawn future requests.
43. Finally, the Board considered that the tone the complainant had used in her three requests (in particular her allegations of maladministration and criminal behaviour) was "unreasonable", "without foundation" and "targeted to cause upset or distress."
44. In summary the Board's position was that:

"It cannot...be disputed that the request only serves the private interests of the complainant. The questions are based on their interactions with the former NCCG and handling of [the 2019 Tribunal decision]. This serves no wider public interest.

"There is little, if any, public interest in disclosing this information to the complainant. [The Board] is concerned that disclosure would only serve to set a precedent that the FOIA can be misused."

### **The Commissioner's view**

45. The Commissioner considers that a public authority must meet a high bar to demonstrate that section 14 of is engaged. In the circumstances of this case, the Commissioner is not persuaded that that bar is met in respect of this particular request.
46. Whilst the Commissioner only appears to have been provided with a flavour of the correspondence exchanged between the various parties, it would appear that NCCG and NWCCG did not deal with the complainant's initial concerns as well as they might have done. That – and the process of being passed around a number of NHS bodies – has understandably caused the complainant to be frustrated and has caused her to mistrust the responses she has been given.
47. The Board has drawn attention to the volume of the complainant's requests. The Commissioner notes that, prior to this request being

responded to, only 19 requests had been received (one request post-dates the Board's refusal notice) including the three requests under consideration. Whilst the Commissioner does not consider that 19 requests (even 19 multi-faceted requests) over the course of four years represents an excessive amount, he does recognise that the complainant is likely to submit further requests in future which may or may not be relevant to the original underlying issue.

48. However, the Commissioner is not persuaded that the evidence the Board has supplied demonstrates that the complainant "routinely" refuses to accept the Board's initial response.
49. Prior to the three requests the Trust has refused as vexatious (which, understandably, the complainant wished to have reviewed both internally and by the Commissioner), the complainant had only sought internal reviews of eight (out of 16) requests – usually where the Trust had withheld information. Of those eight internal reviews, seven were referred to the Commissioner, with one complaint being upheld, two resolved informally (after further disclosures or explanations by the Board's predecessor organisations) and the remainder dismissed.
50. Of the four complaints that were dismissed by the Commissioner, one was successfully appealed to the Tribunal (the Commissioner assumes the Board's reference to a second Tribunal appeal to relate to the contempt proceedings – which were only dismissed on a technicality). That would suggest that the complainant only seeks to argue around half of the responses she has been provided with and that, of the requests that she does pursue, around half of those ultimately result in her being provided with additional information beyond what was originally provided. That is not indicative of a person pursuing information requests unreasonably or making futile complaints.
51. The Commissioner also notes that he is not satisfied the complainant's language is such that it would render the requests vexatious. The references to "maladministration" in other requests appear to refer to a previous complaint to the PHSO, on a similar subject, but made by another individual, in which the PHSO concluded that NCCG **was** guilty of maladministration.
52. Equally, the references to "criminal behaviour" appear to relate to the contempt certification proceedings. Contrary to what the Board claimed in its submission, the First Tier Tribunal judge found that NCCGs actions (or, more accurately, its inactions) did amount to a wilful defiance of the Tribunal's decision. In his decision, Judge O'Connor said that:

**"In my view the failure to comply with the terms of the Tribunal's Substituted Decision Notice was deliberate, and**

based in resource and cost considerations. This, and the prolonged nature of the failure by Norwich CCG to comply with the terms of the Substituted Decision Notice, clearly weighs heavily in support of exercising discretion to certify the offence to the Upper Tribunal. The fact that the applicant, albeit belatedly and at the hands of NWCCG not Norwich CCG, has been provided with the information that the Substituted Decision Notice directed is also relevant, but only to a limited extent given the important public interest in protecting the administration of justice, which includes the need for compliance with the orders of the Tribunal. **Absent the unusual feature of this case identified in the following paragraph, I would have exercised my discretion to certify an offence of contempt to the Upper Tribunal.** [emphasis added]

“The unusual feature of this case, referred to above, is that Norwich CCG no longer exist as a legal entity. This I find to be of significance and a factor which very weighs heavily in my consideration of whether to exercise my discretion to certify an offence by Norwich CCG to the Upper Tribunal. Although there is a strong public interest in the Tribunal ensuring that its orders are complied with, there is also a public interest in ensuring that the Tribunal’s resources are used appropriately. The resources that would be expended by the Upper Tribunal should it be required to consider this matter will be considerable and, in my view, the benefit to the public interest even if Norwich CCG are ultimately found to be in contempt, including deterring others from breaching the Tribunal’s orders, would be limited given that Norwich CCG is no longer in existence as a legal entity. I have also taken account of the fact that this is not a case in which Norwich CCG have deliberately ceased being a legal entity in order to avoid complying with the Tribunal’s order or to avoid punishment, it was as a consequence of matters wholly unrelated to litigation in the Tribunal.

“Looking at all the circumstances of the case, with particular weight being given to those features I have identified above, I have decided not to exercise my discretion to certify an offence by Norwich CCG to the Upper Tribunal despite my earlier conclusion that the requirements of section 61(3) have been met.”

53. The CPS guidance on contempt of court states that contempt can be either a civil or a criminal offence.<sup>3</sup> As the First Tier Tribunal ultimately

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<sup>3</sup> <https://www.cps.gov.uk/legal-guidance/contempt-court-reporting-restrictions-and-restrictions-public-access-hearings>

declined to certify a contempt, the issue of whether it should be a criminal or civil contempt was not formally decided upon. In the circumstances, the Commissioner has given the complainant the benefit of the doubt in that she may be unaware of the nuances of the law of contempt.

54. Given that context, whilst the Board (and, in particular the named individuals) may not appreciate its actions being referred to as criminal, in this case it is not an accusation entirely without merit if it is taken to mean "defied the 2019 Tribunal decision" – although the complainant should take great care when referring to particular individuals, as the judge made no finding in respect of any person, only NCCG as a corporate body.
55. In the Commissioner's view, this request seeks information about steps that the Board and its predecessor bodies took to respond to two Tribunal decisions – in particular a case in which censure for contempt was only avoided on a technicality. Given the criticism directed, by the judge, at NCCG, there is a public value in information that would show what steps the Board and its predecessor bodies had taken to prevent future occurrences or to hold its staff to account for a failure to comply with the 2019 Tribunal decision. That does not amount to re-litigating the contempt certification proceedings.
56. Having viewed all the circumstances of the case holistically, the Commissioner is not satisfied that the request is vexatious and the Board was therefore not entitled to rely on section 14(1) of FOIA in order to refuse it.
57. That does not mean that future requests that the complainant may make on this or related matters cannot be vexatious. As the complainant will be aware from the other decisions issued today, she is treading a fine line between requests that are vexatious and those which are not. It is important that she does not lose sight of those matters which carry a genuine wider public interest and those that are only of interest to her.

### **Remedial steps**

58. Where the Commissioner has found a breach of FOIA obligations he will normally order the public authority to take remedial steps to bring it back into compliance.
59. Where a public authority has incorrectly relied on either section 14 or section 12 of FOIA, the Commissioner will normally require it to issue a fresh response to the request that does not rely on that exemption.

60. In this case, the Board has already provided the information it holds in respect of element 2. It has also informed the complainant that the individual named in element 4 was appointed before the contempt certification proceedings had concluded. The Commissioner infers from this that the Board is saying that it does not hold the information as it could not possibly have informed NHS England about a decision that had yet to be made. In the circumstances, the Commissioner does not consider that it would serve a useful purpose to require the Board to respond to these elements as it has effectively already complied with its duty under section 1(1) of FOIA.
61. However, the Board has not indicated whether it carried out any investigations or took disciplinary action as a result of the contempt certification proceedings. The Commissioner is therefore requiring the Board to issue a fresh response to this element only.

## Right of appeal

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62. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

63. 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.
64. 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 .....**

**Roger Cawthorne**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**