

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 March 2012

Public Authority: East of England Strategic Health Authority
Now part of: NHS Midlands and East Strategic Health Authority

Address: Victoria House
Capital Park
Fulbourn
Cambridge
CB21 5XB

Decision (including any steps ordered)

1. The complainant has requested information about his complaints that focussed around the defects in the appointment process of appointing an individual as Chief Executive at a Hospital Trust and alleged defects in the investigation that was undertaken by the public authority about them.
2. The public authority did not answer the request in 20 working days and a complaint was referred to the Information Commissioner ('the Commissioner'). After the Commissioner's intervention, the public authority then provided a response and provided the complainant with some information that was relevant to the request.
3. The complainant contended that there was further relevant recorded information held and the investigation focussed on this. After conducting a detailed investigation, the Commissioner has decided that on the balance of probabilities there was no further relevant recorded information held by the public authority.
4. However, he has found procedural breaches of sections 1(1)(a), 1(1)(b) and 10(1). He considers that there are no remedial steps that can be taken to remedy these breaches and he has therefore not ordered any.

Request and response

5. The complainant's MP (after the complainant raised the issue with him) raised a number of concerns about the background, circumstances and conduct of the appointment process that led to an individual being employed as the Chief Executive of a Hospital Trust. The complaint led to the SHA to commission an independent report about the matter and this report explained what had gone wrong and what needed to be done.
6. The complainant complained about a number of things including the terms of reference of the report, the outcome of the report and the SHA's record keeping. The SHA had a meeting with the complainant subsequently and wrote a letter to outline its view of the situation. That letter stated '*what it did not do was identify a failure of governance at the Trust*'. The complainant wants to understand more about how the SHA came to this view. The letter also contained information about an agenda item for a meeting of the SHA's board dated 26 May 2011. This was referred to in the third part of the request.
7. On 1 July 2011 the complainant requested the following information:
 1. *Could you please explain exactly the SHA's criteria for what constitutes "a failure of governance" (page 2 of your letter). This issue was not part of the terms of reference of the inquiry so it can only be a judgement made by the SHA in this case. If appointing a trust's Chief Executive by a process that is in flagrant defiance of clear instructions issued by the most senior official of the NHS does not constitute a failure of governance, what does? I must stress in this connection that the appointment process certainly was illegitimate. The Concise Oxford Dictionary states that something is illegitimate when it is "not in accordance with a rule" and that clearly applies in this case. The term "very best practice", which you repeat in your letter and was central to my complaint about the inquiry's terms of reference, is meaningless except as a way of disguising the illegitimacy of the process;*
 2. *Please provide me with copies of all recorded communications between yourself and others relating to my complaints. I trust that this request will not on this occasion be met with the response that no such records exist; and*
 3. *Please provide me with the recorded outcomes of the escalation meeting that the SHA held with the [Hospital Trust redacted] on 13 June (see paragraph 3.8 of your attachment).'*

8. The SHA failed to issue a response within 20 working days and the complainant referred the case to the Information Commissioner ('the Commissioner').
9. After the Commissioner's intervention, the SHA tried to issue a response on 22 November 2011 to the complainant. It implied that there was no information held for request 1 and provided the information it considered relevant for requests 2 and 3. The response was not sent to the right address and with the SHA's consent the Commissioner forwarded it to the complainant on 7 December 2011.
10. Given the history of this request, the Commissioner decided to use his discretion to consider it substantively without an internal review.

Scope of the case

11. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He was originally concerned that he had not received a response.
12. On 7 December 2011 the complainant agreed that the scope of the Commissioner's investigation would be to determine:
 - *Whether there is any further relevant recorded information held for all three elements of the request dated 1 July 2011;*
 - *If so, whether you can have it; and*
 - *To consider the procedural issues about the handling of this request. In particular, the unacceptable delays.*
13. The Commissioner also notes that the original SHA became part of a SHA cluster between receiving the request and responding to it. The original SHA is a designated public authority under FOIA and the request was made to it. The Commissioner has considered the operation of the FOIA to the public authority as it was at the date of the request. For the avoidance of doubt, he can confirm that all records that were the responsibility of the original SHA were transferred to the SHA cluster.
14. Secondly, the Commissioner notes that some of the disputed information for request 2, if held, would be likely to amount to the complainant's own personal data. This would mean that the Commissioner may need to consider the information under his separate Data Protection Act 1998 responsibilities. However, information is only personal data where it is held, and thus the Commissioner has firstly

considered whether further relevant recorded information is held in this decision notice.

Reasons for decision

15. The dispute in this case is whether the public authority holds further relevant recorded information that was not provided to the Commissioner on 22 November 2011 and the complainant by the Commissioner on 7 December 2011.

16. Section 1(1)(a) 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,

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

17. It should be noted at this stage that the FOIA only offers the complainant the right to relevant recorded information that is held by the public authority. There is no right for new information to be generated when the building blocks are not held in recorded form.

18. In determining whether the public authority does hold the requested information, the Commissioner considers the standard of proof to apply is the civil standard of the balance of probabilities.

19. In deciding where the balance lies in cases such as this one, where the complainant has asked him to consider the public authority's response with regard to whether or not the requested information is held, the Commissioner may look at:

- explanations offered as to why the information is not held; and
- the scope, quality, thoroughness and results of any searches undertaken by the public authority.

Request one

20. Request one can be divided into two parts:

- A request for the public authority's criteria for a failure of governance; and

- Rhetoric about why the complainant disagrees with its view about whether there was such a thing in the context of the subject of his complaints.
21. Only the first part of the request constitutes a request for information under FOIA. This is because section 8(1) of FOIA requires a request to contain a description of the information requested and the rhetoric about its consideration of the complainant's complaint does not constitute a description of recorded information.
 22. The public authority didn't address this part of the request in its refusal notice. This was not the right approach. The Commissioner asked it to issue a new refusal notice for this part of the request and it issued that refusal notice in March 2012. This will be considered further in the procedural matters section of this notice.
 23. When conducting his investigation, the Commissioner asked the public authority to reconsider its position and to consider whether it held criteria that explained what it considered as a failure of governance in any context. The SHA explained that it did not hold relevant recorded information of this description.
 24. It explained that its standing orders and financial instructions form the bedrock about how it governs itself, but they do not provide criteria about what constitutes a failure of governance. The Commissioner considers that the most obvious place for such criteria to be held would be within those official documents and accepts that they do not contain any information that is relevant to the request.
 25. The Commissioner drew the SHA's attention to the relevant parts of the letter that it sent to the complainant (noted in paragraph 6 of this notice) above. As stated, it appeared to explain that there were circumstances where the SHA would deem it appropriate for the Chair of a Hospital Trust to leave and thus it would offer support that the public authority may have relevant recorded information about when it would consider this was so (even if that information was not called 'failure of governance criteria' it would still be relevant to the request).
 26. The SHA explained that the letter did not offer a complete picture of the situation. It clarified that it did not have any formal power to make the Chair of a Hospital Trust leave their post. Instead the only authority that had national responsibility for appointing and firing these individuals was the Appointments Commission. The Appointments Commission publishes

external guidance about when it exercises its powers that explain what criteria it uses and how it goes about removing these individuals¹.

27. The Commissioner has carefully considered this policy and notes that:

- 'A failure of governance' is not a specific point that would lead to the Chair being removed (see paragraphs 5 and 6);
- To start the process, the SHA Chair must make a decision whether to refer the Hospital Trust Chair to the relevant Appointments Commissioner. It is their decision to make in full appreciation of the facts;
- Should a case be referred to the Appointments Commissioner then it will be for that individual to ask the referrer to obtain necessary evidence to establish what happened. The Appointments Commissioner will ensure that the referrer is clear on the process, timings, roles and how matters are to be communicated;
- The policy explains that the preferred way forward when an individual is to be removed is for them to resign and/or for their resignation to be sought by the referrer, unless it would not be in the public interest for the individual to be employed in a different role in the NHS in the future; and
- If the option to resign is not taken, then the Appointments Commissioner would take on the case with a view to suspending them and if there is adequate evidence, then terminating their employment.

28. The SHA explained that its independent investigation had the dual purpose to (1) assess the matters raised by the complainant's MP; and (2) consider whether there was adequate evidence to refer this case to the Appointments Commissioner. It did not need to have criteria that indicated what a 'failure of governance' was to undertake these purposes and does not hold information that addresses this request.

¹<http://www.google.co.uk/url?q=https://www.appointments.org.uk/resources/res.aspx%3Fp%3D/Policy/fileFilename/18/Policy%2520paper%252018%2520-%2520Removing%2520or%2520suspending%2520chairs%2520and%2520NEDs.pdf&sa=U&ei=7vNVT92aMYbO8QP-p-3DCA&ved=0CBQQFjAA&usg=AFQjCNF0taUpsoHNFzD4YW89k743p8OiwA>

29. It explained that its role was not to make judgments about governance. Instead its functions and roles are summarised at the following link:

http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4134778.pdf

30. The Commissioner noted from this presentation that it indicated that the SHA had the following responsibilities to:

- *'manage corporate affairs'*;
- *'manage PCTs to ensure they deliver their functions effectively'*;
and
- *'have a direct role in ensuring NHS Trust performance'*.

31. He considered that this may have meant that the SHA would have required criteria for a failure of governance in order to undertake these responsibilities. However, after further explanation from the SHA, he acknowledges that this is not so. The evidence clearly indicates that the Appointments Commission has primary responsibility for dealing with matters of this nature. It shows that the SHA are focussed on acting as a guardian for the NHS and ensuring that local commissioners are held to account. Its main functions require it to relay and explain national policy, set direction and support the development of services. Its focus is on ensuring that clinical and health objectives are met.

32. The Commissioner considers that the SHA's focus is not on corporate governance and it is reasonable for it to say that it does not hold relevant recorded information of the nature described in the request. The situation that the request was about was sufficiently bespoke for there not to be a policy or a set of criteria about what to assess when considering what happened.

33. The SHA also indicated that they had checked their physical and electronic records for such information on at least two independent occasions (using different officers). The Commissioner considers that the nature of what was requested would, if held, be easy to locate. He considers that the relevant members of staff would know that they held such information and finds that the SHA's rationale for not having the information is convincing.

34. He therefore considers for all the reasons above that on the balance of probabilities the SHA does not have any relevant recorded information that would address this request.

35. He must reiterate, for the avoidance of doubt, that the FOIA imposes no obligation to generate information in response to a request when it is not held.

Request two

36. Request two is fairly clear in its wording: *'Please provide me with copies of all recorded communications between yourself and others relating to my complaints'*. However, it should be noted that the Commissioner clarified with the complainant that his reference to *'yourself'* related to the named individual to which he had addressed the request and not the public authority as a whole.
37. The SHA provided a number of communications at the time of its response. However, the complainant claims that there ought to be more communications. He said in particular that the *'and others'* part of the request appeared to be ignored. The Commissioner has therefore considered whether there is further relevant recorded information of the description noted in request two.
38. As a preliminary issue, the Commissioner asked the SHA about the letter dated 30 June 2011 which was referred to in the request. He explained that he had received this letter from the complainant and that he considered it fell within the scope of the request. He asked why the SHA did not provide that letter. The SHA confirmed that because the letter was referenced in the request, it knew that the complainant already had it. It decided that there was no need to provide the complainant with the same letter again and did not do so. This issue will need further consideration in the procedural matters of this notice. However, the Commissioner will discount this letter at this stage and the remainder of his analysis will focus on whether further relevant recorded information is held beyond the letter dated 30 June 2011 and its attachments.
39. The Commissioner has noted that any communication that falls in the scope of this request must have the following qualities to be caught by the request:
- It must relate to his complaints; and
 - **One** of the parties in the communication must be the individual to who the request was made.
40. For the first point, the SHA explained the nature of each of the complaints that the complainant had made and confirmed that when processing this request it had considered every complaint that it had identified.

41. For the second point, the SHA explained in two different communications to the Commissioner that it fully understood that his investigation concerned all communications including those not made with the complainant. It also confirmed that its search covered the activities that led to the commissioning of the report into the conduct about which the SHA was concerned.
42. From the submissions outlined above, the Commissioner was satisfied that the SHA had interpreted his request correctly and had conducted searches based on the correct objective reading of the request.
43. The Commissioner also asked the SHA to confirm the searches it had undertaken to be sure that it had found all the relevant recorded information it held for this request. The SHA confirmed that:
 - The SHA checked the electronic and paper records of all individuals that were in any way involved with the preparation of the report and/or what actions were taken afterwards. It explained that this included those referenced in the report and other individuals who the relevant individual remembered consulting. It also independently reviewed the email account of the specified individual;
 - The SHA knew that these searches were done on every relevant file, email account and computer because it had an documentary audit trail;
 - The SHA explained the search terms used when conducting its electronic checks – the name of the complainant, the hospital, the name of the complained about, the chief executives' names and the relevant dates – and no further recorded information was recovered that was not provided;
 - The SHA also checked its paper record that was generated after the complainant made a complaint. This paper record was clearly labelled and it would be obvious that relevant information about the complaint should be placed in it;
 - The SHA also discussed the request with its technical IM&T provider and checked its backup files to ensure that nothing relevant was deleted between the request being received and it being answered; and
 - The SHA also explained that as far as it was aware that no information had been deleted between the time of the complaint and the answering of the request.
44. The Commissioner also made further enquiries in order to ensure the SHA had conducted thorough searches for the requested information.

45. Firstly, the Commissioner drew the SHA's attention to the contents of the same letter that explained that the individual the request was about 'needed to speak to some of those involved at the time'. He explained that this appeared to indicate that there were communications missing that had not been provided to the complainant. The SHA said that the relevant individual had confirmed that she made no notes or written communications when making these enquiries.
46. Secondly, the Commissioner has carefully considered the SHA's records management policy. It explained that it had adopted the DoH's Code of Practice which can be found at the following link:

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4131747
47. The Commissioner has considered this Code of Practice and does not consider that it indicates that further relevant recorded information must be held in relation to this request.
48. Overall, the Commissioner is satisfied that on the balance of probabilities the SHA has provided all the relevant information that it holds for request two (except the letter dated 30 June 2011 and its attachments). He is satisfied that it has conducted the right searches based on the right understanding of the request and that its submissions about why there is no further relevant recorded information is reasonable in this case.
49. However, he considers it should have provided the letter dated 30 June 2011 and its attachments, even though it was referred to in the request and he will explain why in the procedural breaches part of this notice below.

Request three

50. The complainant explained that his understanding of the correspondence indicated that the concerns that has arisen when considering his complaints meant that the SHA had a formal escalation meeting which was distinct from the 'Annual Plan meeting' referred to in the correspondence.
51. He referred the Commissioner to paragraph 3.8 of the attachment to the letter dated 30 June 2011 that stated:

"3.8 The Trust governance risk rating has been red or amber-red for five consecutive months. The SHA Medical and Nurse Directors met with their counter-parts at the Trust in March to discuss quality issues including Serious Incidents, Never Events and

HSMR. The PDB agreed to write to [Hospital redacted] to arrange a formal escalation meeting. This will take place on 13 June 2011".

52. The SHA provided a number of communications at the time of its response. However, the complainant explained that it wasn't clear to him that the meeting it identified was the one he requested.
53. The SHA confirmed that there was only one meeting with the relevant Trust on the given day and that it had checked its key staff calendars to ensure there were no further meetings.
54. It explained that it had double checked its electronic and paper records for all records of 'escalation meetings' in the relevant calendar year.
55. It also explained that nature of the searches that it had done and the organisational procedures and protocols that have been arranged to ensure compliance with FOIA.
56. The Commissioner considers that on the balance of probabilities that there is no further relevant recorded information held for request three.

Procedural breaches

57. The SHA did not handle the requests in a timely nor comprehensive manner before the Commissioner considered this case. It committed a number of procedural breaches of FOIA and the purpose of this final section of this decision notice is to note them.

Section 1(1)(a)

58. The SHA failed to formally deny that it held relevant recorded information for request one and this was an ongoing breach of section 1(1)(a). This requires no remedial steps because the SHA issued an appropriate notice during the course of his investigation.

Section 1(1)(b)

59. The SHA failed to provide the letter dated 30 June 2011 because of its understanding that the complainant had it. The Commissioner considers that this constituted a breach of section 1(1)(b).
60. The Commissioner considers that FOIA operates as a public disclosure regime and the complainant can use information acquired under it with no restrictions. He therefore considers that the SHA should have considered this information for disclosure under FOIA, despite knowing that the complainant had it. This will enable the complainant to use the information without restrictions and be confident that the searches were complete. In this situation, the SHA would be able to say that they hold

this information, yet consider it is reasonably accessible to the complainant and apply the exemption found in section 21(1). However, what it cannot do is not mention the information at all as in this case. This is the reason why the SHA breached section 1(1)(b).

61. The Commissioner does not require any remedial steps to be taken because he knows that the complainant is in possession of the letter dated 30 June 2011 (and its attachments) and notes that there are no restrictions on the complainant about how that information can be used.

Section 10(1)

62. Section 10(1) of FOIA requires that a public authority complies with section 1(1) promptly and in 20 working days at the latest. Section 1(1) requires the public authority to confirm or deny whether it has relevant recorded information and either provide it or rely on an appropriate exemption.
63. The SHA failed to issue any response within 20 working days and therefore breached section 10(1).
64. It also failed to comply with 1(1)(a) or 1(1)(b) when it issued its response and therefore continues to be in breach of section 10(1). However, this decision notice now explains and remedies those breaches and there are no further remedial steps that can be taken to put them right.

Right of appeal

65. 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

66. 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.
67. 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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