

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 January 2014

Public Authority: NHS Commissioning Board
Address: Southside
105 Victoria Street
London
SW1E 6QR

Decision (including any steps ordered)

1. The complainant has requested information on the NHS Commissioning Board's (referred to in this Notice as NHS England) powers and the sections of the legislation which set out these powers. NHS England explained the legislation which sets out its powers and provided links to the complainant.
2. The Commissioner's decision is that NHS England has complied with its obligations under section 1(1) of the FOIA. He also accepts that section 21 is engaged in relation to the information which NHS England provided links to. However, he does find that NHS England breached section 10(1) and 17(1) of the FOIA.

Request and response

3. On 1 July 2013, the complainant wrote to NHS England and requested information in the following terms:

"To assist my understanding of the remit of NHS England may I ask you for a copy of the Act or document which sets out your powers, with the identified specific sections of it which you rely on to make your decision that you are unable to assist me."

4. In this same correspondence the complainant also asked the following question which he intended to be part of his request for information:

"Given that NRES (NHS Research Ethics Service)/HRA (Health Research Authority) are a 'separate legal entity' I am puzzled that NHS England approached them. What was the purpose of that?"

5. NHS England responded on 8 July 2013 and explained it did not consider it was best placed to answer the questions asked by the complainant as it was NRES and the HRA who had been the subject of a complaint. It stated that in any event NHS England's functions were set out in the NHS Constitution and provided a copy of this.
6. Following further correspondence NHS England wrote to the complainant on 6 August 2013 (in a letter erroneously dated 8 July 2013). It stated that there were two pieces of legislation which set out the separation between different NHS bodies and the complaints procedures: the Local Authority Social Services and National Health Service Complaints (England) Regulations 2009 and the Health & Social Care Act 2012. NHS England did not provide copies of these documents due to their size but did provide links to websites where the legislation is publicly available.

Scope of the case

7. The complainant contacted the Commissioner on 9 August 2013 to complain about the way his request for information had been handled.
8. In correspondence with the Commissioner the complainant has clarified that the intention of his request was to seek information on the powers of NHS England. He does not consider this has been met by the provision of the NHS Constitution as he does not think that NHS England has adopted some of the practices set out in the Constitution.
9. The Commissioner considers the scope of his investigation to be to determine what information NHS England holds within the scope of the complainant's request and to ascertain whether this information has been provided to the complainant.

Reasons for decision

Section 1 and section 21

10. 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."

11. The requests for information contained in the correspondence of 1 July 2013 which form the scope of this investigation were for copies of Acts or documents setting out NHS England's powers (with specific sections marked) and for any recorded information held which might answer the question as to why NHS England approached NRES and the HRA about the complainant's complaint.
12. When considering if all relevant information setting out the powers of NHS England have been provided the Commissioner has asked NHS England to clarify all documents which contain references to NHS England's powers and functions and whether these have been explained to the complainant.
13. NHS England has clarified that the NHS Constitution¹ sets out the general responsibilities of all NHS bodies. A copy of this document was provided to the complainant in response to his request on 8 July 2013. The Commissioner has reviewed the NHS Consultation and accepts that it does contain a broad overview of the standards expected from NHS bodies but is not specific to NHS England and does not include any detail on the functions of NHS England.
14. NHS England also provided links to the Local Authority Social Services and National Health Service Complaints (England) Regulations 2009² and the Health & Social Care Act 2012³. The former of these sets out the NHS complaints procedure and the latter underpins the creation of NHS England and outlines its remits and responsibilities.
15. The Commissioner considers that these two pieces of legislation are also relevant to the complainant's information request, particularly the Health & Social Care Act 2012. NHS England provided the complainant with a means to access these publicly available documents and as such,

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<http://www.nhs.uk/choiceintheNHS/Rightsandpledges/NHSConstitution/Documents/2013/the-nhs-constitution-for-england-2013.pdf>

² <http://www.legislation.gov.uk/ukxi/2009/309/contents/made>

³ <http://www.legislation.gov.uk/ukpga/2012/7/section/9/enacted>

whilst it has not been directly quoted by NHS England, the Commissioner considers that section 21 of the FOIA is applicable.

16. Section 21 provides that information is exempt from disclosure if it is reasonably accessible to the applicant by other means. In order for section 21 to apply the information must be accessible to the particular applicant who requested the information.
17. The complainant has not indicated he has any issues with being able to reasonably access the information provided in the website links by NHS England but has indicated he does not consider this information provides him with the information he requested.
18. The Commissioner therefore has determined that the two pieces of legislation which NHS England provided web links to are reasonably accessible and the section 21 exemption is engaged.
19. The Commissioner has also considered whether these three documents are sufficient to outline the powers of NHS England. The complainant had specifically asked for the documents or Act which set out NHS England's powers and the Commissioner is of the view that the Health & Social Care Act specifically details the remit and responsibilities of NHS England. The other documents provided to the complainant provide additional detail on some of the obligations placed on NHS England. The Commissioner is therefore satisfied that NHS England has provided the complainant with, or provided the means for the complainant to access, any documents which refer to NHS England's responsibilities and remit.
20. For the second part of the complainant's request, the Commissioner wrote to NHS England to ask if any information was held which would answer the question raised by the complainant – the reason for NHS England contacting NRES/HRA.
21. NHS England has explained that it did communicate with NRES/HRA but as this communication was short and took place over the telephone no written record of this communication exists. As such there is no further information NHS England can provide.
22. For this reason the Commissioner accepts that NHS England has answered the complainant's requests and there is no further information it is required to provide.

Section 10 and section 17

23. Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

24. Section 17(1) states that –

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

25. In failing to provide a proper refusal notice under section 17(1) and by failing to explain to the complainant within 20 working days that legislation was accessible via the links it provided, and was therefore exempt under section 21, NHS England contravened its obligations under section 10(1) and 17(1) of the FOIA.

Right of appeal

26. 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: GRC@hmcts.gsi.gov.uk

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

27. 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.
28. 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
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF