

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 October 2019

Public Authority: NHS Nene Clinical Commissioning Group

Address: Francis Crick House
6 Summerhouse Road
Moulton Park Industrial Estate
Northampton NN3 6BF

Decision (including any steps ordered)

1. The complainant has requested communications between two specific individuals and other parties and bodies, about two nursing homes. NHS Nene Clinical Commissioning Group ('the CCG') released some information, having redacted the personal data from it under section 40(2) of the FOIA. The CCG withheld other information under section 21(1) of the FOIA as it considers this information is already accessible to the complainant by other means. The complainant is not satisfied with the CCG's reliance on section 21(1) with regard to some of the requested information.
2. The Commissioner's decision is as follows:
 - The CCG breached section 1(1), section 10(1) and section 17(1) as it did not comply with section 1(1) or provide a refusal notice within 20 working days.
 - The CCG can rely on section 21(1) to withhold some of the information the complainant has requested as it accessible to him by other means.
3. The Commissioner does not requires the CCG to take any remedial steps.

Request and response

4. On 20 October 2018 the complainant wrote to the CCG and requested information in the following terms:

"All correspondence including emails and telephone records, briefing notes, assessments, between Gabriella O'Keeffe (Quality Improvement Manager) and any other party employed by or outside of the CCG regarding [Redacted] Nursing Home. [Redacted] Nursing Home, [Redacted]"

All correspondence including emails and telephone records, briefing notes, assessments, between Gabriella O'Keeffe (Quality Improvement Manager) and any other party employed by or outside of the CCG regarding [Redacted] Nursing Home. [Redacted] Nursing Home, [Redacted].

All communication between Ms O' Keeffe and other NHS bodies (including NHS England) and Local Authority bodies and their employees relating to:

- a) *[Redacted] Nursing Home registering with a GP practice to secure generic GP cover for residents discharged to [Redacted] Nursing Home including (but not limited to) correspondence with Daniel Kane GPA.*
 - b) *Commissioning placements/blocking placements to [Redacted] Nursing Home and [Redacted] Nursing Home.*
 - c) *Details in particular we require to relate to [Redacted] of the quality monitoring department (now left) and emails etc that exist relating to our request between Gabriella O'Keeffe and Dan Kane. daniel.kane@nhs.net"*
5. As well as the name of an officer that is not already in the public domain, the Commissioner has redacted the names of two nursing homes from the request. She considers that by combining the names of the nursing homes, the geographic area covered by the CCG and other details given in this notice it would be possible to identify the complainant and others.
6. The CCG responded to the above request on 1 March 2019 – its reference FOI.18.NEN219. It released some relevant information, having redacted personal data under section 40(2) of the FOIA. The CCG said it was relying on section 21 to withhold other information.

7. The complainant requested an internal review on 3 March 2019. From this correspondence it appears he was dissatisfied with the CCG's reliance on section 21 to withhold particular information.
8. The CCG provided an internal review on 25 March 2019. It maintained its position with regard to its reliance on section 21.

Scope of the case

9. The complainant contacted the Commissioner on 26 April 2019 to complain about the way his request for information had been handled.
10. The Commissioner has noted that the complainant has wider concerns about the service provided by the CCG and has sent the Commissioner what he considers to be evidence supporting his complaint to her. The Commissioner has explained to the complainant that her role is to consider the CCG's compliance or otherwise with the FOIA legislation. She also explained that she would only take into account evidence that supports his position that the CCG has not complied with the FOIA in respect of his request.
11. In correspondence to her dated 19 August 2019 the complainant confirmed that he is dissatisfied with the CCG's reliance on section 21 to withhold information within the scope of his request.
12. The Commissioner's investigation has therefore focussed on the CCG's application of section 21(1) to the information it has withheld. She has also considered the timeliness of the CCG's response to the request.

Reasons for decision

Section 21 – information accessible to the applicant by other means

13. 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 not exempt information.
14. Section 21(1) of the FOIA says that information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
15. In its submission to the Commissioner, the CCG has confirmed that the information that it has withheld under section 21(1) comprises emails

that were either sent **by** the complainant, his wife or an employee [of the complainant and his wife], or sent **to** the complainant, his wife or an employee.

16. The CCG has provided the Commissioner with the information it is withholding and she has reviewed it. The Commissioner has also reviewed the complainant's request. She notes that it includes a request for correspondence between a specific individual and "*any other party employed by or outside of the CCG*". She accepts that the complainant, his wife and an employee could be categorised as parties "*outside of the CCG*".
17. The CCG has noted in its submission that in the spreadsheet on which it has recorded the withheld information there are gaps in some of the 'To', 'From' and 'CC-ed' boxes associated with particular emails. It says it does not have this particular information as it is an email within a longer chain and that information has been removed at some points. However, all the emails in the spreadsheet were sent to/from the complainant (this is clear from the content of these emails, which the CCG has reproduced in the spreadsheet) and it therefore believes it is reasonable to conclude that he also has those emails as part of the chain.
18. The CCG says in its submission that all the emails, but one, came from or were sent to a particular email address and that this is the email address the complainant used to submit his information request, and was using up to 2 May 2019. The CCG considers that it is reasonable to conclude that the complainant continues to have access to that email account and that the exempted emails would be accessible to him through that account.
19. The CCG has acknowledged that some emails were not written by the complainant, but they were still sent or received by this email address which would make them accessible to him, since the complainant has access to the account. The CCG says it provided the complainant with an Appendix that included the date, time and subject line of the exempt emails which would assist him with locating them.
20. The only email that was not sent to the above email address was, says the CCG, an email from the CCG to two other email addresses associated with one of the nursing homes referred to in the request.
21. The CCG says that whilst one of the addresses may potentially be an old email address for the nursing home, it still believes this email to be reasonably accessible to the complainant. As the owner of the organisation, the complainant would be responsible for this email address as the responsible data controller. Whilst the password may

have been forgotten or the account not used for a number of years, the CCG does not consider that this means that the information is no longer reasonably accessible. It believes that it would not be unreasonable or unfeasible for the applicant to contact the email provider to gain access to this account if needed.

22. The CCG has taken into account the fact that the request was made via email in the first instance, indicating that the complainant has access to the internet and has been responsible for two nursing homes. It considers that it is therefore reasonable to assume that it would not be difficult for him to liaise with the email providers to gain access to this email account. The CCG had put the above case to the complainant in its internal review response.
23. As mentioned, the Commissioner has reviewed the withheld information. She has noted that one type of email address (associated with the complainant) included in the withheld information is a 'name of nursing home@...' address. From the emails' content that the CCG has provided in the spreadsheet, these emails were written by the complainant's employee. A second email address used more than once is a 'carehome@' address alongside a named individual who the Commissioner understands to be the complainant's wife. There is one example of a third type, namely the employee's Outlook email address. The email sent to that Outlook account was also sent to the 'name of nursing home' account.
24. If the complainant's wife and/or employee wish to receive the above emails that they have either sent or received they have the option of requesting this information from the CCG under the data protection legislation. If these emails were not exempt information under section 21 of the FOIA the Commissioner considers that they would in any event be exempt under section 40(2) as this information is the personal data of third persons.
25. As it is, the Commissioner finds that this information is exempt under section 21(1) of the FOIA. The complainant has written to her using the 'carehome' email address. She therefore finds that the information associated with the 'carehome' address would already be accessible to him as he clearly has access to that email account. She finds that he would also be able to access the information associated with the 'name of nursing home' email account (which includes the one email also sent to the employee's Outlook account) as he is the owner of that nursing home. She finds this to be the case even were it to be necessary for the complainant to retrieve the account password from the email provider. While he is dissatisfied with the CCG's reliance on section 21, the Commissioner notes that the complainant has not indicated either to her or the CCG that he cannot access the emails in question.

26. The Commissioner has decided that the CCG can withhold the disputed information under section 21(1) of the FOIA as it is information that is reasonably accessible to the complainant. Section 21 is an absolute exemption which means it is not subject to the public interest test.

Section 10 – time for compliance / Section 17 – refusing a request

27. Under section 10(1) of the FOIA an authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.
28. Under section 17(1) of the FOIA an authority must issue a refusal notice within the time for complying with section 1(1).
29. In this case the complainant submitted his request on 20 October 2018 but the CCG did not provide a response to it until 1 March 2019 – almost five months later. Because the CCG did not communicate the non-exempt information to the complainant, or issue a refusal notice with regard to the information it withheld, within 20 working days the Commissioner finds that the CCG breached sections 1(1), 10(1) and 17(1) of the FOIA.

Right of appeal

30. 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

31. 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.
32. 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

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