

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 October 2021

Public Authority: North East London Clinical Commissioning Group

Address: 4th Floor – Unex Tower
5 Station Street
London
E15 1DA

Decision (including any steps ordered)

1. The complainant requested information about Fit and Proper Person investigations. North East London Clinical Commissioning Group (“the CCG”) denied holding any information within the scope of the request.
2. The Commissioner’s decision is that, on the balance of probabilities, the CCG holds no information within the scope of the request.
3. The Commissioner does not require any further steps.

Request and response

4. On 11 April 2021, the complainant wrote to the CCG and requested information in the following terms:

*“I am writing to make a request for the following information.
Which I am entitled under the Freedom of Information Act 2000.
Please send me the following information:*

- *How many times did people ask your predecessors Newham and WELCCG to conduct a Fit and proper Person investigation into the CEO or member/s of the governing Board in 2018?*

- *How many times did people ask your predecessors Newham and WELCCG to conduct a Fit and proper Person investigation into the CEO or member/s of the governing Board in 2019?*
 - *How many times did people ask your predecessors Newham and WELCCG to conduct a Fit and proper Person investigation into the CEO or member/s of the governing Board in 2020?*
 - *If a Fit&Proper Person investigation/s took place, what was the outcome in 2018?*
 - *If a Fit&Proper Person investigation/s took place, what was the outcome in 2019?*
 - *If a Fit&Proper Person investigation/s took place, what was the outcome in 2020?*
5. The CCG responded on 4 May 2021. In respect of "WELCCG" it stated that it held no information and that no entity of that name had existed. In respect of Newham CCG, it denied holding any information as CCGs were not subject to Fit and Proper Person investigations.
6. The complainant was not happy with this response and sought an internal review. In particular, she disputed that "WELCCG" did not exist.
7. Following an internal review the CCG wrote to the complainant on 24 August 2021. It reaffirmed its stance that "WELCCG" had never existed as a distinct entity, but noted that it did not hold any information within the scope of that part of the request anyway. In respect of Newham CCG, it reiterated its stance that it held no information.

Scope of the case

8. The complainant contacted the Commissioner on 10 May 2021 to complain about the way her request for information had been handled. At that point, the CCG had yet to complete its internal review and the Commissioner's intervention was necessary to bring about a response.
9. Having reviewed a copy of the outcome of the CCG's internal review, the complainant asked the Commissioner to investigate the matter. She was adamant that "WELCCG" had existed and that the outcome of the internal review was:

"a totally unacceptable reply as it is unlawful, dishonest and an attempt to gaslight me."

10. The Commissioner considers that the scope of her investigation is to determine whether the CCG holds any recorded information within the scope of the request.

Background

11. Regulation 5(3) of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 ("the Regulations") states that, in order to act as a director (or exercise similar powers to those of a director) of a health service provider, a person must meet the following criteria:
 - (a) *the individual is of good character,*
 - (b) *the individual has the qualifications, competence, skills and experience which are necessary for the relevant office or position or the work for which they are employed,*
 - (c) *the individual is able by reason of their health, after reasonable adjustments are made, of properly performing tasks which are intrinsic to the office or position for which they are appointed or to the work for which they are employed,*
 - (d) *the individual has not been responsible for, been privy to, contributed to or facilitated any serious misconduct or mismanagement (whether unlawful or not) in the course of carrying on a regulated activity or providing a service elsewhere which, if provided in England, would be a regulated activity, and*
 - (e) *none of the grounds of unfitness specified in Part 1 of Schedule 4 apply to the individual.*
12. A service provider must inform the Care Quality Commission if it considers that any of its directors does not meet, or no longer meets, these criteria.
13. The CCG was created on 1 April 2021 following the merger of the CCGs previously covering Barking & Dagenham, City & Hackney, Havering, Newham, Redbridge, Tower Hamlets and Waltham Forest.
14. Prior to the merger, three of the predecessor bodies – Newham CCG, Tower Hamlets CCG and Waltham Forest CCG – worked closely together. The CCG states that this collaboration took the form of a loose association, using the umbrella name "WEL", but that each of the CCGs had retained its own legal status. The complainant disputes this and has

pointed to documents in the public domain which, she argues, suggests that not only did "WELCCG" exist, but that it had some form of legal status. The Commissioner notes that the documents she has seen refer to the "WELCCGs" rather than the "WELCCG", but, as she will go on to explain, she does not consider that this is relevant to the only issue she is required to determine: whether or not the CCG to which the request was made holds any recorded information.

Reasons for decision

Section 1 (Held/Not Held)

15. 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.*

16. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, she will consider any reason why it is inherently likely or unlikely that information is not held.

17. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

The complainant's position

18. At the outset of the investigation, the Commissioner wrote to the complainant. She drew attention to the CCG's responses and noted that the regulations to which the request referred did not apply to CCGs. Given that the legislation did not require the CCG to carry out investigations of this particular type, it seemed unlikely that it would hold any requested information – regardless of the nature of WEL.

19. The complainant did not accept the Commissioner's initial view. Once again, she raised the status of "WELCCG" and argued that the ICO had made an error in interpreting "the law" (it was unclear which law she was referring to). She also accused the Commissioner of giving "greater weight" to the arguments of the CCG and of failing to take account of all the evidence she had submitted. Finally, the complainant also pointed towards a Government-commissioned report which had called for the Regulations to be extended to other organisations – such as CCGs.¹

The CCG's position

20. The CCG provided a short submission. It confirmed that it was not covered by the Regulations because it was not a provider of services. It therefore was not required to carry out such investigations and did not do so.

The Commissioner's view

21. As noted above, the Commissioner is only required to make a decision based on the balance of probabilities. However, the facts of this case come as close as possible to being definitive.
22. The complainant's request seeks information about complaints arising under a specific piece of legislation (the Regulations) and the CCG was correct to interpret it in this way. Having done so, it stands to reason that the CCG would only be likely to hold any information within the scope of the request if it was covered by the Regulations.
23. Regulation 5 of the Regulations is quite clear that it only applies to *providers* of services. CCGs do not provide services – rather, each CCG commissions other organisations to provide services on behalf of the populations it serves.
24. The complainant has pointed towards the Kark Review (published in November 2018) which does indeed recommend that Regulation 5 of the Regulations be extended to numerous other health bodies – including CCGs. However, the very fact that this report calls for the Regulations to be extended to CCGs, underlines the fact that, in 2018 at least, such bodies were not covered – and no change to the legislation has occurred since.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/787955/kark-review-on-the-fit-and-proper-persons-test.pdf

25. To that extent, the Commissioner has indeed given greater weight to the arguments made by the CCG – because those arguments are clearly reinforced by the relevant statutory provisions. Much of the evidence that the complainant provided had little relevance, because it did not address the issue of whether the CCG held any recorded information.
26. As the CCG is not a provider of services it is not covered by Regulation 5 of the Regulations and is not required to carry out investigations such as the type specified in the request – nor does it do so. As it does not need to carry out such investigations, it follows that the CCG will hold no relevant information.
27. It is unfortunate that such a disproportionate amount of time has been spent disputing the nature of “WELCCG”. Whether WELCCG existed and in what form is irrelevant as, even if it had existed exactly as the complainant believed, it would also not have held any information that it could have bequeathed to its successor – as it would not have been a provider of services.
28. In fairness to the complainant, the CCG’s initial response could have been considerably clearer in explaining that this was the reason why it held no information. By providing separate and different responses in respect of “WELCCG” and Newham CCG, the CCG gave the impression that different reasons applied to each organisation – when in fact the primary reason was the same. To some extent, this was corrected in the internal review, but the review also got bogged down in addressing the legal status of “WELCCG” rather than focusing on the fact that the Regulations could not have applied anyway
29. The Commissioner is therefore as confident as she can be that the CCG holds no recorded information within the scope of the request.

Other matters

30. The Section 45 FOIA Code of Practice states that internal reviews should be completed within 40 working days. The Commissioner notes that the CCG’s internal review in this case took three and a half months. Whilst mindful of the pressures being face by all health bodies at the present time, the Commissioner still considers this to be poor practice.

Right of appeal

31. 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

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

32. 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.
33. 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
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