

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 July 2023

Public Authority: NHS England
Address: PO Box 16738
Redditch
B97 9PT

Decision (including any steps ordered)

1. The complainant has requested information from NHS England in relation to correspondence in which Evusheld is mentioned. NHS England advised that it does not hold further requested information in addition to what it disclosed via its initial response.
2. The Commissioner's decision is that, on the balance of probabilities, NHS England does not hold any further information within the scope of the request. As NHS England failed to provide a substantial response within 20 working days, it has breached section 10 of FOIA.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 26 October 2022, the complainant wrote to NHS England, making three separate requests for information. NHS England has aggregated the three the requests, which are as follows:

"For the period 1 July 2022 to 6 September please provide:

All papers, emails (whether a primary preparer, recipient or cc'd) or other electronic communications between Professor James Palmer and the Chief Medical Officer in which Evusheld (i.e. the

combination of tixagevimab and cilgavimab, AZD7742 or any other name that is used by the DHSC for this) is mentioned.

All papers, emails (whether a primary preparer, recipient or cc'd) or other electronic communications between Professor James Palmer and the Charlotte Taylor in which Evusheld (i.e. the combination of tixagevimab and cilgavimab, AZD7742 or any other name that is used by the DHSC for this) is mentioned.

All papers, emails (whether a primary preparer, recipient or cc'd) or other electronic communications between Charlotte Taylor and the Chief Medical Officer in which Evusheld (i.e. the combination of tixagevimab and cilgavimab, AZD7742 or any other name that is used by the DHSC for this) is mentioned"

5. NHS England responded on 24 November 2022, advising that it was not in a position to respond to the requests, but it would do as soon as possible.
6. On 14 March 2023, NHS England provided the complainant with three emails in relation to the request and advised that personal information was redacted under section 40(2) of FOIA – personal information. It also advised that further information may be held by the Department of Health and Social Care (DHSC).
7. The complainant requested an internal review on 30 March 2023, advising that they considered further information would be help within the scope of their request. They did not dispute the redactions made on the emails they were provided with.
8. The Commissioner accepted the case without an internal review.
9. During the Commissioner's investigation, NHS England explained that it does not hold any further information in relation to the request.

Scope of the case

10. The complainant contacted the Commissioner on 29 May 2023 to complain about the way their request for information had been handled.
11. The Commissioner considers that the scope of the complaint is to determine whether NHS England is correct when it says it does not hold any further information in relation to the requests. He will also consider the time taken for NHS England to respond to the request.

Reasons for decision

Section 1 – general right of access

12. Section 1 of the FOIA states that any person making a request for information is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request and, if that is the case, to have that information communicated to him.
13. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.
14. In other words, in order to determine such complaints, the Commissioner must decide whether on the balance of probabilities a public authority holds any - or additional - information which falls within the scope of the request (or was held at the time of the request).
15. NHS England has explained that the named individual and the Chief Medical Officer are not staff members of NHS England and, therefore, they do not hold the requested information. They advised the complainant that they may wish to contact the DHSC, as it may hold further information.
16. NHS England explained that they did ask the Professor to search their mailbox for any emails held in scope of the request and can confirm that no further information is held. It explained that upon notification of the ICO's investigation, the Professor double checked their records and no further information was found.
17. NHS England advised that the Professor searched for all emails between the requested dates for emails relating to Evusheld or the combination of tixagevimab and cilgavimab, AZD7742, and then manually checked whether there are any communications between the named individual, the Chief Medical Officer and themselves.
18. NHS England also confirmed that the Professor has confirmed that they do not have a WhatsApp connection to the named individual and the Chief Medical Officer. The Professor also confirmed that text messages were also searched and there is no material within the scope of the request.

19. NHS England advised that it manages the records and information it produces in line with its statutory and legal obligations, which are outlined in its records retention policy¹.
20. NHS England has confirmed that it also searched for any deleted items and no further information was located within the scope of the request. It also explained that there is a hold on the destruction of records across NHS England due to the Covid Inquiry and, as such, it is highly unlikely that any emails/records within the scope of the request would have been deleted/destroyed.
21. The complainant has questioned email chains that have been part of the information provided to them, as they contained "Re:" in the title. The Commissioner asked NHS England if these original emails are held/have been searched for. NHS England advised that the email dated 2 August 2022, was not sent to or from James Palmer and was likely forwarded to James Palmer from another employee. They added that the original email is not within the scope of the complainant's request.
22. For the second email, dated 24 August 2022, NHS England has explained that this was in reply to an earlier email, as shown in the correspondence. The email prior to this was sent by another department outside of the organisation. It advised that as the email originated outside of the organisation, and is not correspondence between the named individuals, it does not fall within the scope of the request.
23. The Commissioner understands why the complainant considers further information would be held by NHS England. However, he is satisfied that NHS England does not hold any further information in relation to the request. As per NHS England's advice, the complainant may be best placed in contacting DHSC for further information within the scope of the request.
24. Based on the above, the Commissioner is satisfied that NHS England has carried out adequate searches and that if any further information were held, it would have been identified. As such, on the balance of probabilities, the Commissioner is satisfied that no further information is held within the scope of the request.

Procedural matters

25. Section 1(1) of FOIA states that:

"Any person making a request for information to a public authority is entitled –

¹ [NHS England » Corporate records retention and disposal schedule](#)

(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.”

26. Section 10(1) of FOIA states that a public authority must respond to a request promptly and “not later than the twentieth working day following the date of receipt”.
27. From the evidence provided to the Commissioner in this case, it is clear that NHS England did not deal with the request for information in accordance with FOIA. The Commissioner finds that NHS England has breached section 10(1) by failing to respond to the request within 20 working days.

Other matters

28. The Commissioner reminds NHS England that it is best practice to carry out an internal review and within 40 working days.
29. FOIA does not require an authority to have a review procedure in place. However both the Code of Practice made under Section 45 of FOIA (the “Code”) and the Commissioner recommend it is good practice to have one.
30. Paragraph 5.1 of the Code recommends that “It is best practice for each public authority to have a procedure in place for dealing with disputes about its handling of requests for information.”
31. Section 17(7) of FOIA requires public authorities to provide the details of the internal review process if they have one. They should also inform the applicant of their right to complain to the Commissioner under Section 50 if they are still dissatisfied following the outcome of the internal review.
32. Paragraphs 5.4 and 5.5 of the Code advise that, although there is no statutory time limit for carrying out a review, it is best practice to do so within twenty working days or, in exceptional circumstances, forty working days.

Right of appeal

33. 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

34. 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.
35. 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

Michael Lea
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