

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 January 2024

Public Authority Address: **NHS Sussex Integrated Care Board
Wicker House
High Street
Worthing
BN11 1DJ**

Decision (including any steps ordered)

1. The complainant has requested information about documents and services relating to a TiAA (NHS Sussex's internal audit provider) report. NHS Sussex Integrated Care Board ('the public authority') disclosed some information in response to the request, applied section 21 (information reasonably accessible to the applicant via other means) to some information and denied holding other information.
2. The Commissioner's decision is that:
 - The public authority has fully complied with its obligations under section 1 (general right of access to information) of FOIA.
 - The public authority was correct to apply section 21 to the information it did.
3. The Commissioner does not require further steps.

Request and response

4. On 25 July 2023, the complainant wrote to TiAA and requested information. Due to the length of this request, it's outlined in an annex to this notice. At the time of making their request, the complainant directed TiAA to the ICO's guidance¹ 'Information you hold for the purposes of FOIA', specifically, the section titled 'Information held on your behalf by another person.'
5. The Commissioner understands that TiAA was commissioned to undertake an independent review of the effectiveness of the NHS Sussex corporate governance framework at the end of 2022/23. More details can be found within the request itself.
6. On 25 July 2023 TiAA responded and confirmed it had passed the request to the public authority. It confirmed 'Where it is applicable and appropriate under FOIA, we would work with the ICB to progress your request.'
7. On 16 August 2023, the public authority provided a response. It disclosed some information, confirmed that section 21 (information reasonably accessible to applicant via other means) applied to other information and denied holding other information.
8. On 12 September 2023 an internal review outcome was provided. The internal review was partially upheld, acknowledging that the refusal notice failed to specify that either information was not held, or section 21 applied, where appropriate.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way their request for information had been handled.
10. Specifically, the complainant has two concerns:
 - The application of section 21.
 - The public authority's position that all relevant information has been identified.

¹ [Information you hold for the purposes of FOIA | ICO](#)

Reasons for decision

Section 1 – general right of access to information

Section 8 – request for information

11. In cases where a dispute arises over the recorded information held by a public authority (or held on the public authority's behalf by another person) the Commissioner, following the outcome of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities. This means that the Commissioner will determine whether it's likely, or unlikely, that the public authority has provided all information it holds in response to the request.
12. In its refusal notice and internal review response, the public authority clarified to the complainant that "a public authority is not obliged to create new information in response to a Freedom of Information Act request".
13. At the time of raising their complaint, the complainant explained "I am not asking NHS Sussex to 'create new information'...NHS Sussex may not hold the information TiAA will, so it is the responsibility of NHS Sussex to ask for the information."
14. The Commissioner has looked at the information the public authority says that it doesn't hold or more specifically, what the complainant is concerned NHS Sussex should ask TiAA for:
 - a. The complainant's questions regarding TiAA obtaining the public authority's consent to conduct such an audit;
 - b. Does the TiAA agree with the statements made by the public authority in line with the TiAA disclaimer;
 - c. Can TiAA provide any further information to backup or refute the statements made by NHS Sussex.
15. The public authority has explained to the complainant that "the NHS Sussex internal audit provider (TiAA) was commissioned to undertake this work with the explicit intention that the findings would be presented to the Board, in public, as part of the wider NHS Sussex annual governance review...consent was obtained by the nature in which the work was commissioned."
16. This explanation is, to the Commissioner, entirely reasonable. If an audit is commissioned under these circumstances consent is implicit. The Commissioner considers it unlikely that a record of consent would be held, by either the public authority or TiAA.

17. Turning to the complainant's concerns at 14b and 14c, in order for a request to be valid under section 8, it must clearly describe the information being requested. FOIA is a means by which to request recorded information held by public authorities – it's not a means by which individuals can ask questions in order to express their dissatisfaction. The Commissioner is satisfied that these aren't valid requests for information, though he accepts the public authority felt the need to confirm no information was held in response.
18. The complainant has received information in response to a subject access request ('SAR') that they made to TiAA. This information included an email that evidenced a voicemail between the public authority and the TiAA. Specifically, the voicemail indicates that one person has left another a voicemail with the "aim to catch up this afternoon."
19. At the time of raising their complaint with the Commissioner, the complainant wrote:

"Were the voicemails checked as part of the FOI request as they may hold information?"
20. The Commissioner has studied the request and he's satisfied that the complainant doesn't request transcripts of voicemails or explicitly ask for copies of correspondence between TiAA and the public authority.
21. Looking at the information that's been requested and the context of the voicemail (which appears purely administrative) the Commissioner doesn't consider it likely that any information that would fall within the scope of the request would be contained within the voicemail in question.
22. At the time of raising their complaint with the Commissioner, the complainant also stated:

"NHS Sussex Board held in public was further articulated within a paper shared at the Audit and Risk Management Committee on 14 December 2022 where the Director of Audit from TiAA was present. As a precursor to this being presented publicly, the Director of Audit from TiAA also attended the Board Seminar on 7 June 2023 to present the initial findings of the review."
23. The complainant flagged that these meeting minutes aren't available on the public authority's website and therefore section 21 can't apply. However, the Commissioner can't see anywhere in the request where the complainant requests minutes of these meetings. Therefore, they would fall outside of the scope of the request.

Section 21 – information reasonably accessible to the applicant via other means

Section 8 – request for information

24. Information is exempt from disclosure under FOIA if it's accessible to the requester by other means.
25. Section 21 is an absolute exemption. This means if section 21 applies there is no requirement to carry out a public interest test.
26. Unlike most exemptions, the circumstances of the requestor can be considered, as the information must be reasonably accessible to the particular requestor.
27. The Commissioner considers that its reasonable for a public authority to assume that information is reasonably accessible to the requestor until it becomes aware of any evidence to the contrary.
28. The public authority has pointed the complainant to several pieces of information in the public domain, including the TiAA audit report² itself. The Commissioner is satisfied that the report answers the complainant's questions: what documents were checked by TiAA and what issues were found? The report itself details the findings and includes an index of material that was referenced during the audit.
29. The complainant notes that, in their internal review request, they asked follow up questions and made follow up remarks:
 - 'there is no reference in the report to the failing of the following documents...;
 - 'request the information from TiAA on what they found and ask TiAA why complaints policy and complaints not checked, if checked asked for information.'
30. The scope of a request can't be added to, or altered, at internal review. However, the Commissioner again doesn't believe these additional questions or comments are valid requests for information under FOIA. The complainant appears to be questioning the validity and scope of the audit review, rather than requesting recorded information.

² [NHS Sussex Annual Report and Accounts \(ics.nhs.uk\)](https://www.ics.nhs.uk)

The Commissioner's decision

31. Some of the complainant's comments or questions don't represent valid requests for information and, on the balance of probabilities, the Commissioner is satisfied that the public authority has fully complied with its obligations under section 1 (general right of access to information) of FOIA.
32. The Commissioner is also satisfied that the public authority was correct to apply section 21 to the information it did.

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

Alice Gradwell
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex

"TiAA was commissioned to undertake an independent review of the effectiveness of the NHS Sussex corporate governance framework at the end of 2022/23, which included:

- Desktop review of relevant corporate governance documents
- Interview of Non-Executive and Partner Members of the NHS Sussex Board
- Review of completed self-assessments of the Corporate Governance Framework using the CQC Well-Led Framework Key Lines of Enquiry (KLOEs) and relevant NHS Oversight Framework KLOEs
- Review of completed Committee Effectiveness Self-Assessment Checklists

A copy of your report was attached to the NHS Sussex Governance Review dated 05 July 2023 (Governance Review 5.3-i-Governance-Review.pdf) copy attached. As NHS Sussex has put your report into the public domain, the issue of confidentiality does not apply.

So, in line with the ICO web site could you provide the following information (pass this to NHS Sussex) who will then process this as a Freedom of Information request.

1. Desktop review of relevant corporate governance documents

Questions

What documents were checked by TiAA?

What issues were found?

2. In line with your Disclaimer.

"This report has been prepared solely for management's use and must not be recited or referred to in whole or in part to third parties without our prior written consent.

No responsibility to any third party is accepted as the report has not been prepared, and is not intended, for any other purpose."

Questions

Was written consent requested by NHS Sussex?

Did TiAA give consent to this, date consent given and provide a copy of the letter/email?

3. Does TiAA agree with the statements made by NHS Sussex in line with TiAA disclaimer,

"The matters raised in this report are only those that came to the attention of the auditor during the course of the review, and are not necessarily a comprehensive statement of all the weaknesses that exist or all the improvements that might be made.

No responsibility to any third party is accepted as the report has not been prepared, and is not intended, for any other purpose.

TiAA neither owes nor accepts any duty of care to any other party who may receive this report and specifically disclaims any liability for loss, damage or expense of whatever nature, which is caused by their reliance on our report."

Statements by NHS Sussex (5.3-i-Governance-Review.pdf)

Corporate Governance Framework Dated 5 July 2023

"The NHS Sussex internal audit provider (TiAA) was commissioned to undertake an independent review of the effectiveness of the NHS Sussex corporate governance framework at the end of 2022/23, which included

- Desktop review of relevant corporate governance documents
- Interview of Non-Executive and Partner Members of the NHS Sussex Board
- Review of completed self-assessments of the Corporate Governance Framework using the CQC Well-Led Framework Key Lines of Enquiry (KLOEs) and relevant NHS Oversight Framework KLOEs
- Review of completed Committee Effectiveness Self-Assessment Checklists"

4. "The work undertaken by TiAA provides assurance that the systems and processes established by NHS Sussex are generally good, with robust decision-making and clearly established assurance flows. Areas for further focus identified following this review relate to ways of working and improving Board members' understanding of the appropriate levels of assurance."
5. "The work undertaken by TiAA provides assurance that the systems and processes established by NHS Sussex are generally good, with robust decision-making and clearly established assurance flows. Areas for further focus identified following this review relate to

development activities and ways of working and are set out below. These areas of further focus have informed the detailed response to the recommendations made by TiAA, as set out in the attached report.”

TiAA report comments

“series of interviews with Non-Executive Directors (NEDs), the ICB Chair and Partner Members (details in Appendix A) were conducted via MS Teams, complemented by effectiveness surveys for the main committees and compliance checks on work carried out so far.

TiAA was commissioned to undertake an independent review of the effectiveness of the NHS Sussex corporate governance framework at the end of 2022/23.”

The implication from this statement that you looked at all of the NHS Sussex corporate governance framework not just carry out MS Teams interviews?”

Questions

Can TiAA provide any further information to backup or refute the statements made by NHS Sussex?