

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 November 2013

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

Decision (including any steps ordered)

1. The complainant requested the NHS Commissioning Board (referred to as 'the public authority' throughout this notice) to disclose the papers presented to the board meeting of 14 December 2012 and the minutes recorded. The public authority refused to disclose this information, citing section 36(2)(b) of the FOIA.
2. The Commissioner has reviewed the withheld information and considered the public authority's application of section 36(2)(b) of the FOIA. He has concluded that section 36(2)(b) of the FOIA is engaged in this case. However, he is of the view that the public interest in maintaining this exemption is outweighed by the public interest in disclosure. He therefore requires the public authority to take further action as follows:
 - The public authority should disclose the papers submitted to the board meeting of 14 December 2012 and the minutes recorded of that meeting (labelled Appendix F and G in its response to the Commissioner dated 29 August 2013).
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 20 December 2012, the complainant wrote to the public authority and requested information in the following terms:

"In guidance issued to CCGs [Clinical Commissioning Groups] this week, the Commissioning Board says that "the formula proposed by the Advisory Committee on Resource Allocation (ACRA) accurately predicts the future spending requirements of CCGs". I wish to see:

1. the full report prepared by ACRA, including proposals for a new formula
 2. a copy of the paper presented to members of the Commissioning Board setting out the implications of the new formula and reasons for rejecting it
 3. minutes of the meeting at which the Commissioning Board decided to reject the formula proposed by ACRA."
5. The public authority responded on 25 January 2013. In respect of element 1 of the request, it refused to disclose the requested information under section 22 of the FOIA, as it intended to publish it shortly. Concerning elements 2 and 3, the public authority confirmed that it wished to rely on section 36 of the FOIA but required more time to consider the public interest test.
6. The public authority responded further on 5 February 2013. It disclosed the recorded information it held relating to point 1 of the request. In relation to elements 2 and 3, it stated that it considered section 36 of the FOIA applied and that it had reached the view that the public interest in disclosure was outweighed by the public interest in maintaining this exemption.
7. The complainant requested an internal review on 5 February 2013.
8. Following an internal review the public authority wrote to the complainant on 2 April 2013. It stated that it remained of the opinion that elements 2 and 3 of the complainant's request were exempt from disclosure under section 36 of the FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 2 April 2013 to complain about the way his request for information had been handled.

Specifically, the complainant does not agree that section 36 of the FOIA applies to his request and he considers there are strong public interests for the disclosure of this information.

10. As the complainant confirmed that he received sufficient information from the public authority to answer element 1 of his request, this notice will focus on elements 2 and 3 of the request only and the public authority's application of section 36 of the FOIA.
11. The public authority confirmed that it held recorded information addressing elements 2 and 3 of this request and wished to rely specifically on section 36(2)(b)(i) and 36(2)(c) of the FOIA.

Background

12. The Commissioner understands that a board meeting was held on 14 December 2012. During this meeting the allocation of resources to CCGs was discussed, a decision was reached at the meeting and according to the public authority this decision was final.
13. The actual allocation of resources to CCGs was published on line shortly afterwards on 17 December 2012 and were therefore publicly available via the following link at the time the complainant's request was made:
<http://www.england.nhs.uk/everyonecounts/>
14. The requested information is the papers submitted to that board meeting and the minutes recorded which discussed the allocation of resources to CCG's for 2013 -2014.

Reasons for decision

15. Section 36(2) of FOIA states that information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under the FOIA-
 - (b) would, or would be likely to, inhibit –
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

16. Section 36 is also a qualified exemption and is therefore subject to the public interest test.
17. For a public authority to cite section 36 of the FOIA the qualified person must give their reasonable opinion that the exemption is engaged. For the Commissioner to determine that the exemption is engaged it must be demonstrated that the designated qualified person has given their opinion, and that the opinion is reasonable.
18. The qualified person for the public authority is the Chief Executive Sir David Nicholson and the public authority has confirmed that Sir David Nicholson gave his reasonable opinion in his capacity as the qualified person that sections 36(2)(b)(i) and 36(2)(c) apply in this case.
19. As the Commissioner is satisfied that the opinion is the opinion of the qualified person for the public authority concerned, he now needs to consider whether that opinion is reasonable. It is important to highlight at this point that this is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold.
20. The Commissioner has reviewed the withheld information, the submissions he received from the public authority and the information that was given to the qualified person in order for him to reach his opinion.
21. The public authority confirmed that releasing the papers and minute extracts regarding the CCG allocations would be likely to significantly prejudice the ability for internal deliberation. This includes the importance of the public authority being able to make sensitive and complex decisions, such as those regarding allocations, in a 'safe space'. It argued that the knowledge that such information may not be protected in the foreseeable future could affect the robustness and directness of advice on complex issues and that this would be likely to prejudice the free and frank exchange of views and provision of advice. In addition, the public authority stated that disclosure would be likely to hinder the ability of the authority to receive and consider appropriate advice over the distribution of authority's resources and, in particular, CCG allocations.
22. The Commissioner accepts that the allocation of NHS resources is a complex area, which will require extensive debate and deliberation by those authorities governed with the task of deciding how to allocate spending. The requested information here is the papers submitted to the board meeting and the minutes produced, which detail the public authority's frank deliberations on how best to allocate resources to CCGs

for this current tax year. The Commissioner accepts that the public authority should be allowed the time and space to deliberate and discuss options without the threat of public scrutiny and possibly media coverage at the time those deliberations are taking place. He agrees public authorities should be given safe space to formulate their views and decisions.

23. The Commissioner is therefore satisfied that the qualified person's opinion in this case is in accordance with reason i.e. it is an opinion that a reasonable person could hold. As a result, the Commissioner has concluded that section 36(2)(b) of the FOIA is engaged in this case.
24. As section 36 of the FOIA is a qualified exemption, it is now necessary to consider the public interest test.
25. The public authority stated that it understands there is a public interest in transparency and in members of the public having information which enables them to understand more fully how decisions are reached and to see what information was taken into account in order to reach a decision. It stated that it also accepts that there is a public interest in financial information relating to public sector bodies. However, the public authority considered any public interest in favour of disclosure is outweighed by the strong public interest in maintaining the exemption in this particular case.
26. It confirmed that it considered there was a public interest in the public authority being able to make decisions in a robust and considered manner and in it being able to consider freely and appropriately frank advice it has received. The public authority stated that the meeting was a private discussion and it is of the view that the disclosure of the papers submitted to the board and minutes recorded would be likely to prejudice its ability to consider advice freely and frankly and hinder its ability to deliberate on such matters, which would in turn impact upon the robustness of decisions made.
27. The Commissioner has considered the arguments for and against disclosure.
28. It is the Commissioner's view that there is a considerable public interest in public resources and how these are to be allocated, particularly in the current climate of public spending cuts which are affecting all areas of the public sector, including the NHS. The Commissioner is also aware that there has been significant changes in the NHS recently – one of which is the replacement of Primary Care Trusts with the new CCGs. The CCGs are GP led – giving GP's the power to decide how to allocate funding according to needs in their local area. The Commissioner accepts there is considerable public interest in the changes that have

been made to the NHS recently and particularly how the new CCGs are to be funded and managed.

29. The Commissioner is also of the opinion that there is a public interest in overall transparency and providing information to the public to help them better understand why particular decisions have been made, particularly when those decisions affect how taxpayer's money is to be spent. Providing access to information which helps the public to understand more clearly how decisions are reached aids public debate and can also lead to better decision making in the future.
30. On the other hand, the Commissioner accepts that the public authority is set the task of deciding how to allocate public resources – this is an extremely complex area and there is a considerable public interest in allowing it the safe space to deliberate and consider options without the fear of public scrutiny and media coverage at this stage in the process. He agrees that the public authority's ability to consider advice or papers it may have received relating to the allocation of funding would be likely to be hindered if disclosure was ordered at the deliberating stage. It would not be able to concentrate on making any robust decisions as it would be likely that it would be routed away from doing this by having to deal with enquiries or possibly concerned parties about issues which have not been decided on or may not in actual fact materialise.
31. The Commissioner accepts that for robust and appropriate decisions to be made there has to be a safe space for frank and free deliberations on the various options available. If this was not protected, the quality of decision making would be likely to be affected.
32. However, he notes in this case that the public authority's decision on the allocation of resources to CCGs had already been made by the time of the complainant's request and the public authority confirmed that this decision was final and not subject to change. Therefore, in this case, it is evident that the public authority was not deliberating or formulating its view or decision at the time of the request, as this had already taken place and ended. There was therefore no obvious and overwhelming need for safe space to deliberate and reach a decision at the time the request was made.
33. The Commissioner appreciates that the request was only made within days of the public authority's final decision and therefore it can be argued that the matter was still live. However, again it is noted that the decision on resource allocation to CCGs was final and was not subject to further deliberation or possible change. The public interest arguments submitted by the public authority for the need for safe space are therefore not as prevalent as they may be, for example, if the request

had been made prior to the board meeting, when the authority was in deliberation.

34. Other than safe space arguments the public authority has not explained how this exemption would otherwise be engaged or why the public interest would otherwise favour maintaining this exemption. It has also not made any argument that the background papers may be relevant to future discussions that will take place for future resource allocation.
35. The Commissioner therefore feels that he can only rightly reach the view that the public interest in disclosure outweighs the public interest in favour of maintaining the exemption in this case.

Procedural issues

36. Section 10 of the FOIA states that a public authority must comply with section 1(1) promptly and in any event no later than the twentieth working day following the date of receipt.
37. Although part 1 of the complainant's request is not the subject of this notice, as the requested information was later disclosed to the complainant, it is apparent that the public authority first wished to rely on section 22 (information intended for future publication) of the FOIA. This initial refusal should have been communicated to the complainant within 20 working days of the receipt of the request. However, it was not. It was issued after the statutory time for compliance had expired. The Commissioner therefore finds the public authority in breach of section 10 of the FOIA.
38. In relation to parts 2 and 3 of the complainant's request, again the public authority failed to issue its partial refusal (engaging section 36 of the FOIA but needed more time to consider the public interest test) within 20 working days of the request. It was not issued to the complainant until the statutory time for compliance had expired. Again, the Commissioner considers this is a breach of section 10 of the FOIA.

Other matters

39. The Commissioner notes that the public authority took just over 12 weeks to respond to the complainant's request for an internal review – it was requested on 5 February 2013 but it was not completed by the public authority until 2 April 2013. Although there is no statutory time set out in the FOIA within which public authorities must complete a review, the Commissioner considers that a reasonable time for

completing an internal review is 20 working days from the date of the request for review, and in no case should the total time taken exceed 40 working days. Where it is apparent that determination of the complaint will take longer than the target time, the authority should inform the applicant and explain the reason for the delay. The Section 45 Code of Practice contains comprehensive information on how an internal review should be conducted.

Right of appeal

40. 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: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

41. 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.
42. 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

Rachael Cragg
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF