

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 November 2019

Public Authority: NHS England

Address: 4N22
Quarry House
Quarry Hill
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant has requested NHS England to disclose information relating to an investigation about the treatment of black and ethnic minority staff at NHS North East London Commissioning Support Unit (NEL CSU) commissioned in August 2016. A small amount of information was initially disclosed but the remainder (with the exception of question 5 and 7) was withheld under sections 21, 31, 40(2) and 43 of the FOIA. In relation to question 5 and 7 of the request, NHS England initially refused to confirm or deny the information is held citing section 40(5)(b)(i).
2. During the Commissioner's investigation all elements of the request were resolved except questions 5 and 7. In relation to questions 5 and 7 NHS England revised its position, withdrew the application of section 40(5)(b)(i) and disclosed the recorded information it holds. The complainant then disputed that he had received all the recorded information that is held. This then became the focus of the Commissioner's investigation.
3. The Commissioner's decision is that on the balance of probabilities NHS England has disclosed all the recorded information it holds falling within the scope of questions 5 and 7. She therefore does not require any further action to be taken.

4. She has however noted that NHS England failed to respond to the request within 20 working days of receipt and therefore breached section 10 of the FOIA.

Request and response

5. On 16 April 2019, the complainant wrote to NHS England and requested information in the following terms:

"With respect to the investigation about the treatment of Black and ethnic minority staff at NHS North East London Commissioning Support Unit (NEL CSU) commissioned in August 2016 and undertaken by [name redacted], under the Freedom of Information Act I request as follows:

1. Could you provide me with a copy of the statement of work or other document detailing the work undertaken by [name redacted]?

2. NHS England's Standards of Business Conduct Policy denotes that all members of staff (*including interims and contractors*) are required to complete a Declaration of Interest form. This is in order to safeguard individuals from possible accusations that they have acted less than properly and without sufficient probity.

- a) Could you confirm as to whether [name redacted] and [name redacted] who were involved in conducting the investigation completed any Declaration of Interest form?

- b) If Declaration of Interest form(s) were completed, could you provide me with a copy?

3. Could you provide a copy of the statement of work or other document detailing the work undertaken by [name redacted]?

4. A number of the material provided during the investigation mentions the company name "*Development For Success*".

- a) Could clarify whether *Development For Success* have been commissioned to undertake any work for NELCSU between August 2016 and March 2018?

- b) If "*Development For Success*" have undertaken any work, could you clarify the type of work undertaken and provide a copy of the invoice(s)?

5. Could you confirm whether all the grievances highlighted by the complainants' were investigated?

6. With regards to how the investigation was conducted, could you confirm which CSU policies and statutory obligations were followed?

7. NELCSU allege as follows: *"that the participants in the collective complaint process had agreed that the preferred way forward was to work towards resolving the group complaints through mediation with the CSU via the joint resolution process"*, could you confirm, when and how the respective complainants agreed for their grievances not be investigated with mediation undertaken instead?

8. NELCSU allege as follows: *"We explained that this collective mediation process had no right of appeal"*. Could you provide clarity of where it is states in the relevant CSU policy that the complainants have no right of appeal?

9. Could you provide substance that denotes the investigation was carried out correctly and that outcomes are supported by evidence?

10. Could you provide a copy of the recommendations and outcomes as a result of [name redacted] investigation?

11. NHS England (NHSE) states as follows "NHSE is committed to protecting the health, safety and welfare of their employees. In addition, NHSE recognises the importance of promoting positive mental health and wellbeing, through a multi-disciplinary approach whilst ensuring that employees work in a professional, supportive and caring environment".

Could you provide clarity of whether the investigation conducted my [name redacted] addressed the weathering effect on BME members of staff who have experienced bullying, harassment and discrimination and how this lives with them for a long time and affects their trust in the organisation, performance, and mental health?

ED & I Assurance: NHSE as a regulator of NELCSU

12. Could you provide a copy of the minutes of the ED & I Assurance meeting dated August 2017 and any subsequent meetings?

13. Could you provide the dates for the ED & I Assurance meetings arranged for this year (2018)?"

6. NHS England contacted the complainant on 8 May 2018 to seek clarification. Clarification was provided the same day.

7. Further clarification was then requested on 25 May 2018. This was provided on 30 May 2018.

8. NHS England responded to the request on 21 September 2019. It did not respond to question 3, as it stated that this had been disregarded as a result of the clarification the complainant provided. With regards to question 11, it advised the complainant that this question was not a valid request for information under the FOIA. In respect of question 13, NHS England disclosed the requested information. In relation to questions 5 and 7, NHS England refused to confirm or deny the requested information is held in accordance with section 40(5)(b)(i). With regards to all remaining questions, it refused to disclose the requested information citing sections 21, 31, 40(2) and 43 of the FOIA.
9. The complainant requested an internal review on 24 September 2018. He confirmed that he remained dissatisfied with NHS England's handling of questions 2, 4, 5, 6, 7 and 9.
10. The complainant referred the matter to the Commissioner on 25 October 2018.
11. As NHS England had not completed the internal review process, the Commissioner wrote to NHS England on 12 December 2018 and requested that it completes this process in 10 working days.
12. The complainant referred the matter to the Commissioner again on 28 December 2018, as he had still not received the internal review response. He requested the Commissioner to investigate fully.
13. The Commissioner wrote to NHS England again on 17 January 2019. She requested NHS England to complete the internal review and to forward the outcome to her and the complainant and to provide a copy of any withheld information by 31 January 2019.
14. NHS England carried out an internal review and notified the complainant of its findings on 29 January 2019. It upheld its initial decision. It then provided the Commissioner with an additional response on 31 January 2019, as requested.

Scope of the case

15. As stated above, the complainant has contacted the Commissioner at various stages to complain about the way his request for information had been handled. At the beginning of the investigation the complainant confirmed that he remained dissatisfied with NHS England's handling of questions 2, 4, 5, 6, 7 and 9.
16. During the Commissioner's investigation all questions except question 5 and 7 were resolved. In relation to question 2, NHS England revised its

position, withdrew the application of section 21 and issued a fresh response confirming that the information is not in fact held. With regards to question 4, NHS England provided redacted versions of the previously withheld invoices. In respect of questions 6 and 9, NHS England revised its position slightly and confirmed what recorded information is held falling within the scope of these two questions and confirmed that the complainant has either already obtained this information via other means or had access to it at the time of the request by other means (maintaining therefore its application of section 21). The complainant raised no further issues in relation to these questions, only outstanding concerns in respect of questions 5 and 7 which the Commissioner will now address.

17. Addressing questions 5 and 7, initially, NHS England refused to confirm or deny whether the requested information is held in accordance with section 40(5)(b)(i). During the Commissioner's investigation it changed its approach and decided to disclose the recorded information it holds. The complainant disputes that he has received all the requested information and also disagrees with what has been supplied.
18. The remainder of this notice will therefore consider questions 5 and 7 and whether on the balance of probabilities the complainant has received all the recorded information NHS England holds. If the Commissioner considers that he has, NHS England will have met its obligations under FOIA and no further action will be required. If however she finds that he has not, she will then order steps to ensure that NHS England does comply with the requirements of FOIA.

Reasons for decision

Is further recorded information held?

19. Dealing with question 5 first, to recap, the complainant requested:

"Could you confirm whether all the grievances highlighted by the complainants' were investigated?"
20. Initially section 40(5)(b)(i) was applied. Later NHS England withdrew this exemption and issued a fresh response stating:

"NHS NEL CSU can confirm that all of the complaints highlighted as part of the joint resolution process were investigated."
21. On receipt of this revised response the complainant stated that he felt there had been a 'grave' error and/or an attempt to conceal the truth because the investigation into the complainants' grievances and the

joint resolution process were independent processes. He stated that he is specifically referring to the investigation of the complainants' grievances as stipulated in the investigation terms of reference and which was carried out under the terms of reference. He referred to an email dated 21 November 2016 in which the complainants stipulated that they required their grievances to be investigated and meeting notes sent by email on 23 January 2017.

22. The complainant therefore felt that NHS England had still not fulfilled this element of his request and requested the Commissioner to investigate further to ensure that this element of his request is fulfilled.
23. The Commissioner asked NHS England to consider the complainant's concerns and explain what recorded information *is* held falling within the scope of this question and whether this has to date been provided.
24. NHS England explained that it first received anonymous letters detailing various allegations. From this the investigation terms of reference (the document the complainant refers to) was put together. After the investigation terms of reference was put together some of people involved came forward and there was an investigation. This led to an outcome report, which was based on the investigation terms of reference and this made various recommendations. Two of these recommendations were a stage 2 investigation (as outlined in the investigation terms of reference) and joint resolution.
25. NHS England advised that joint resolution was agreed and therefore a joint resolution process commenced (from which the complainant has received the minutes). There was therefore no stage 2 investigation as outlined in the investigation terms of reference. For completeness NHS England also clarified that there is third stage – individual grievances/complaints if indeed these are instigated.
26. NHS England confirmed that the allegations initially made anonymously formed part of the investigation terms of reference. There was an investigation based on that which resulted in the outcome report. All of the allegations were therefore investigated and joint resolution was agreed as the way forward.
27. NHS England's position is therefore that it holds recorded information which confirms that all grievances highlighted were investigated and the agreed route was by joint resolution. It therefore considers it has answered the question posed and met its obligations under FOIA.
28. The complainant again believes there are irregularities and that the matter remains unclear and misleading. He has stated that the stage 2 investigation as outlined in the investigation terms of reference was

about investigating the grievances raised by each of the complainants. The joint resolution process was a separate process.

29. The Commissioner has checked again with NHS England what recorded information it holds and it is that which is outlined in paragraphs 24 to 26 above. No further recorded information is held.
30. The Commissioner considers the complainant's ongoing concerns relate to how the allegations were investigated. He disputes that all the complainants agreed to joint resolution and is unhappy that there was no stage 2 investigation. It seems that the complainant is of the opinion that because there was no stage 2 investigation all the grievances were not investigated. NHS England's position is that all grievances outlined in the investigation terms of reference were investigated, as there was an investigation. From that an outcome report was produced with various recommendations and the recommendation agreed as the way forward was joint resolution.
31. The complainant's ongoing concerns are outside the requirements of FOIA and indeed the Commissioner's remit. FOIA provides a right of access to recorded information subject to any exemptions that may be applicable, whether that information is accurate or not and regardless of whether the applicant agrees with its contents or the public authority's interpretation of that information.
32. The Commissioner has made detailed enquiries and discussed the investigation process at length. She is satisfied that on the balance of probabilities the complainant has now received all the recorded information NHS England holds falling within the scope of this question. No further action is therefore required.
33. If the complainant is unhappy that no stage 2 investigation under the investigation terms of reference was carried out, disputes that not all the complainants agreed to joint resolution or indeed disputes the accuracy of the information supplied or NHS England interpretation of it, he will need to pursue such matters by other means.
34. Turning now to question 7, to recap, the complainant requested:

NELCSU allege as follows: "that the participants in the collective complaint process had agreed that the preferred way forward was to work towards resolving the group complaints through mediation with the CSU via the joint resolution process", could you confirm, when and how the respective complainants agreed for their grievances not be investigated with mediation undertaken instead?

35. Initially NHS England applied section 40(5)(b)(i). It then later withdrew the application of this exemption and provided the recorded information it holds.
36. NHS England provided the complainant with an extract from a report named *NEL Commissioning Support Unit (NEL CSU) Report on Investigation into Joint Complaint December 2016* and referred him to paragraph 1.1 of the *Notes of 2nd Joint Resolution Meeting Held on 20th March 2017*.
37. It confirmed that this is all the recorded information it holds falling within the scope of this question.
38. The complainant disputed this and felt that NHS England must hold further recorded information detailing *when* (date) and *how* (by what method) the alleged agreement was made. He suggested that the investigator's record if held would contain this information.
39. The Commissioner again referred the matter back to NHS England and asked it to check exactly what recorded information is held and whether the *when* and *how* is recorded and if this is held in the investigator's record.
40. NHS England confirmed that it has spent a considerable amount of time and resources addressing this request and others and has made detailed enquiries and checks of the recorded information that is held addressing the specific questions the complainant has asked. It stated that the only recorded information that is held addressing this specific question is the information it has already supplied. It does not hold any recorded information detailing *when* and *how* the agreement was reached just that it was and recorded as such in the manner described above in the named documents referred to in paragraph 36.
41. The Commissioner is satisfied that NHS England has carried out the necessary checks and enquiries and that on the balance of probabilities it does not hold any further recorded information to that already provided. She therefore does not require any further action to be taken.

Procedural matters

42. Section 10 of the FOIA requires public authorities to respond to requests for information promptly and in any event no later than 20 working days from receipt.
43. NHS England received the complainant's request on 16 April 2018 but then sought clarification from the complainant before it was able to respond. This was requested on 8 May 2018 and received from the complainant the same day. NHS England then decided that further

clarification was required. This was requested on 25 May 2018. NHS England received the further clarification required on 30 May 2018.

44. The statutory timeframe for compliance stops once clarification is requested. It then restarts on receipt of the clarification required. On both occasions clarification was requested within 20 working days of either the original request or the first provision of clarification. However, on receipt of the complainant's second response providing clarification NHS England had until 27 June 2019 to respond. NHS England did not respond until 21 September 2019. The Commissioner has therefore found NHS England in breach of section 10 of the FOIA.

Right of appeal

45. 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

46. 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.
47. 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

Samantha Coward
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