

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 November 2019

Public Authority: NHS Devon CCG

Address: County Hall
Topsham Road
Exeter
EX2 4QD

Decision (including any steps ordered)

1. The complainant has requested information on a decision to refuse to commission a particular treatment. NHS Devon CCG (the CCG) explained that, as it had not refused to commission that treatment, it did not hold the requested information.
2. The Commissioner's decision is that the clear focus of the request is on a decision to refuse to commission that particular treatment. The CCG has provided evidence to demonstrate it did not refuse to the commission the treatment. Therefore the Commissioner is satisfied it does not hold the requested information.
3. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

4. The history to the request which is the subject of this notice is complicated. The complainant had previously been informed by a hospital trust (a separate public authority for the purposes of the FOIA) that the CCG was reviewing the treatments that should be made available for benign prostatic hyperplasia (BPH). He believes that the CCG had refused to commission a particular treatment known as Prostate Artery Embolisation (PAE) for that condition and wished to understand the reasons behind that decision. He had made an earlier request in an attempt to access this information. However due to the way in which that request was phrased, part of it had been interpreted as a subject access request under the Data Protection Act 2018.

Nevertheless, in response to that earlier request he had been informed that the review of which treatments should be commissioned was due to be completed by the end of May.

5. There followed an exchange of correspondence between the two parties and on 12 May 2019 the complainant made the following request:

"...I am now submitting a new FOI application to avoid further nonsense.

1. Please provide complete details of the group's refusal to commission PAE (Prostate Artery Embolisation at the RD&E. (For clarity I refer to the refusal decision taken in late 2018/early 2019.) Subsequent reviews by the CCG and their outcomes have no bearing on my question.

2. Please provide a valid figure for the total cost of re-organising Devon's local CCG's into a county-wide body, Devon CCG. A budget figure will suffice if no final bill has yet been recorded."

6. On 6 June 2019 the CCG responded. As a general response to the two part request it confirmed it held the requested information. In respect of part 1 of the request it said that it had not refused to commission PAE. The CCG went on to explain that at the time the request was received the CCG was in a commissioning process; that process had concluded week ending 24 May 2019. The CCG said that one of the outcomes of that review had been a decision that PAE would be commissioned.
7. In respect of the second part of the request, the CCG provided its latest estimate of the costs. The complainant is not challenging the response to part 2 and it does not feature any further in this notice.
8. However on 8 June 2019 the complainant emailed the CCG expressing dissatisfaction with the response to the first part of the request, when doing so he provided the CCG with a copy the 'Commissioning Policy' for an alternative treatment to PAE, dated 28 May 2019. As far as the Commissioner understands, the complainant was arguing that the existence of this policy, clearly produced on completion of the commissioning review, and the absence of any such policy for PAE, indicated that PAE had not been commissioned.
9. On 14 June 2019 the CCG emailed the complainant. It explained that the review of treatments for BPH had concluded that the PAE should be made available from selected hospitals for an evaluation period. One of those hospitals which had been selected was the Royal Devon and Exeter hospital; the 'RD&E' referred to in the request. Until that evaluation period had been completed no policy on the use of PAE would be produced. However the CCG re-assured the complainant that the medical directors at local NHS Trusts had been made aware of the

availability of the treatment. It provided the complainant with a link to where minutes of its Clinical Policy Committee were published and directed him to a particular section of the minutes for its meetings of 30 January 2019. These minutes made it clear that the committee had unanimously recommended that PAE be commissioned from selected centres. It advised the complainant that this was its final response to the issues raised by the complainant, by which the Commissioner understands the CCG to have completed its internal review of the handling of the request.

Scope of the case

10. The complainant originally contacted the Commissioner in April 2019 at which time he raised concerns over the CCG's handling of his earlier request. It was not clear at that stage whether the earlier request had been through the CCG's internal review procedure and following exchanges of correspondence between the complainant and the CCG, the complainant ultimately made his fresh request of 12 May 2019.
11. The Commissioner rang the CCG on 12 August 2019 to clarify its position in respect of the request. From that telephone conversation the Commissioner understands that the CCG argues that, as there was never a refusal to commission PAE, it does not hold the information that has been requested.
12. The Commissioner wrote to the complainant on the same day, 12 August 2019, setting out her understanding of the issues. It appeared to the Commissioner that the complainant had been advised that his request for information about the CCG's refusal to commission PAE was based on a misunderstanding and that, if the CCG was correct when it said it had not refused to commission the treatment, it followed it would not hold any information on such a refusal. The CCG had also provided the complainant with minutes of a meeting recording the Clinical Policy Committee's recommendation to commission PAE, by way of confirming that the CCG had not refused to provide PAE. In light of the above the Commissioner asked the complainant to clarify what he considered to be the outstanding issues.
13. The Complainant responded to the Commissioner's email the same day. He acknowledged the complicated history to the request but stated that:

"The fact remains that Devon CCG has failed to answer my simple question, **'why was PAE not commissioned in December 2018'**" (emphasis as per the original)
14. On 15 August 2019 the Commissioner wrote to the complainant again explaining that her investigation would look at whether the CCG failed to

provide him with any information captured by his request of 12 May 2019. When doing so the Commissioner emphasised the fact that the right of access to information only extended to information that had been recorded and that the request sought information relating to a decision to refuse to commission PAE. The Commissioner explained that the investigation would seek to clarify the CCG's position in respect the commissioning of PAE and if a decision was taken to refuse to commission that treatment, the investigation would establish what information documenting that decision was held. However, if no such decision was taken, it followed there could be no recorded information. The complainant was given the opportunity to identify any other issues of concern.

15. The complainant did not contest the scope of the Commissioner's investigation as set out in her letter of 15 August 2019 and therefore the investigation has progressed on the basis set out in that letter.

Reasons for decision

Section 1 - information held

16. Section 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 described by the request, and
 - b) if that is the case, to have that information communicated to them (subject, of course, to the application of any exemptions).
17. The first issue is to determine what information is captured by the request. The request was for:

"... complete details of the group's refusal to commission PAE (Prostate Artery Embolisation at the RD&E. (For clarity I refer to the refusal decision taken in late 2018/early 2019)."

Interpretation of the request

18. The request focusses on a very specific decision making process and outcome; the decision to refuse, or at least to not commission PAE. If the premise that the commissioning of PAE was refused, is false, the CCG would not hold any information relating that decision.
19. Had the request been couched in more general terms, for example simply seeking any information on the decision whether or not to commission PAE at the Royal Devon and Exeter, it would have captured information on any deliberations that the CCG held regardless of the

outcome of those decisions. However due to the very specific way in which the request is phrased the Commissioner is satisfied that an objective interpretation of the request is that its scope is limited to information on any refusal to commission that treatment.

20. In reaching this conclusion, the Commissioner has been careful to make sure the complainant is not being unfairly disadvantaged. There may be occasions where there has been some confusion over the exact outcome of a decision making process. In such cases it would be appropriate to consider if there were any grounds to justify interpreting the request more broadly, for example, as relating to information on the reasons behind a decision, regardless of what that decision was. This would depend on a number of factors; the context in which the request was made, including associated correspondence from the applicant.
21. However having reviewed the correspondence from the complainant, both his correspondence with the CCG and with the Commissioner, it appears that the complainant is adamant that the CCG made a definite decision not to commission the PAE treatment and that the complainant is seeking information about a decision to refuse to commission that treatment. It is clear that at the time the complainant made his earlier request he was aware that the CCG was reviewing, or had reviewed, which treatments for BPH should be commissioned. In response to that earlier request he had been advised on 9 April 2019 that the CCG expected to complete its review by the end of May 2019. Therefore at the time he made the request which is the subject of this notice, he would have been in a position to phrase his request in more general terms by asking for information on the progress of the review, or the outcome of that review and reasons behind those decisions. However he chose to make a request focussed on a particular outcome which he believed had been made.
22. In responding to his request on 6 June 2019 the CCG advised the complainant that the outcome of the review was that PAE should be commissioned. When seeking an internal review of that response on 8 June 2019 the complainant speculated as to the reasons why the CCG may have decided not to commission PAE. It is clear from this correspondence that the complainant does not accept that the CCG had decided to commission PAE. The Commissioner also notes that in its internal review letter of 14 June 2019, the CCG provided a further explanation of the commissioning process, advising the complainant that it had decided to provide the PAE from selected hospitals (including the Royal Devon and Exeter Hospital) for an evaluation period and provided him with a link to the minutes of the Clinical Commissioning Committee which verified this. Having received these explanations the complainant appears to remain of the view the CCG refused to commission the treatment.

23. In light of this the Commissioner has clarified with the complainant the nature of his complaint and the scope of her investigation as already set out in paragraphs 14 and 15 above. Therefore the Commissioner is satisfied that in this case the issue to be decided is whether the CCG holds information on any decision it took between late 2018 and early 2019 to refuse to commission PAE. It should be remembered that as the request was made on 12 May 2019 it would only capture information on a decision made up to that date. It follows that if there had been no decision to refuse to commission the treatment taken between late 2018 and 12 May 2019, there would be no information held.
24. The Commissioner has also considered the use of the term 'commission' in the request. The Commissioner understands the term to have a particular meaning within the CCG. It is the process by which the CCG decides which medicines and treatments should be procured routinely made available to its population, as well as developing the criteria in respect of which patients the treatment is appropriate for. The CCG has informed the Commissioner that if a clinician considers their patient requires a treatment that has not already been commissioned (and therefore is not routinely available to those meeting set criteria) the patient could access the treatment through the Independent Funding Panel process. This panel meets fortnightly and makes decisions based on the medical needs of individual patients.
25. During the exchange of correspondence between the complainant and the CCG following his earlier request, the complainant made it clear that he was not interested in confidential decisions on how to treat individual patients, but was seeking information a policy decision affecting men with BHP. Therefore the Commissioner is satisfied that the request is not seeking information on whether the CCG had ever refused to fund PAE in respect of individual patients, but whether it had refused to take a positive decision to commission the treatment so that it was routinely available to all patients for whom PAE was appropriate.

Is information held on a decision to refuse to commission PAE

26. The CCG's position is that it has never refused to commission PAE and therefore does not hold the requested information. It has explained that prior to its recent review of treatments for BPH, the CCG had never made a decision on whether to commission PAE. It is therefore not the case that the treatment had once been available but had then been withdrawn. The first time the CCG considered whether to commission PAE was as part of its wider review of treatment for BPH which was underway at the time of the request.
27. The CCG has advised the Commissioner that PAE is a relatively new procedure and it first became aware of this treatment as a new service that hospitals would like to offer when it was contacted by a clinician at

one of the local hospitals in June 2018. The CCG has provided the Commissioner with a number of documents which collectively record the discussions and decision making process that ensued. These include a Devon Urology meeting of 24 September 2018, a letter from the CCG to local specialists inviting them to contribute to the CCG's decision making process through attendance of a meeting of the CCG's Clinical Policy Committee. The CCG has also provided the Commissioner with a copy of the minutes of that Clinical Policy Committee held on 30 January 2019 (the CCG has already directed the complainant to a copy of this document). The recommendations of that committee were submitted to a business meeting of the Commissioning Directorate held on 4 March 2019 and were also considered during a meeting the Commissioning Directorate on 9 May 2019, again the CCG has provided the Commissioner with copies of the minutes of those meetings. Following those meetings a letter dated 28 May 2019 was sent from the CCG to medical directors informing them of the availability of PAE.

28. Having studied these documents the Commissioner is satisfied that rather than refusing to commission PAE as a treatment for BPH, the CCG decided that the service should be commissioned.
29. The Commissioner notes that the service has been commissioned on what the CCG calls an 'in service evaluation' basis and which the complainant has referred to as "a limited number of trials that have not publicised". The CCG has advised the Commissioner that the treatment is available to all patients within its catchment area if their clinicians deem it appropriate for them. The ongoing evaluation of the service is not to determine whether to continue offering the treatment, but to consider which patients the treatment is most appropriate for and therefore what eligibility criteria should be adopted for the treatment in the longer term. Only after that evaluation process has been completed will the CCG be in a position to publish the 'Commissioning Policy'. As the Commissioner understands it, these documents are published on the CCG's website and identify the treatment which is available and who is eligible for the treatment, as well as providing some details relating to the treatment.
30. In light of the above the Commissioner understands that as of 28 May 2019 the PAE was commissioned and available to those patients whose clinicians thought it appropriate for. Even if some decisions still had be made in respect to the provision of the service, it is clear that the CCG had not refused to commission the treatment.
31. Although the letter to Medical Directors informing of them of the decisions that had been taken was not sent out until 28 May 2019, it is clear from the minutes of the business meeting of the Commissioning Directorate of 9 May 2019, that this decision had been taken by the time

of the request. It follows from this that the CCG does not hold any information relating to a refusal to commission the treatment.

32. The Commissioner notes that when originally responding to the request on 6 June 2019 the CCG stated that it held the requested information. She therefore asked the CCG to explain the apparent contradiction between this statement and the argument, which it has otherwise consistently maintained, that the information is not held. The CCG has acknowledged that its initial response could have been clearer and that with hindsight it should have advised the complainant that it only held information in respect of part of the request, i.e. part 2 of the request which sought information on the costs of its re-organisation. The Commissioner is satisfied with this explanation. In any event, any confusion that may have been caused by its initial response does not alter the fact that the CCG has provided evidence which makes it clear it did not refuse to commission PAE.

Other matters

33. Although not forming part of the formal decision notice the Commissioner uses 'Other matters' to discuss other issues raised by her investigation. The CCG has engaged constructively with the Commissioner during her investigation. The CCG has advised the Commissioner that it has identified information that it would be happy to disclose to the complainant which relate to the initial stages of its review into the treatment of BPH. For the reasons already explained in the main part of the notice, this is not information captured by the request as it does not relate to a decision to refuse to the commission the PAE. It does however relate to discussions that were held when considering whether the treatment should be commissioned and therefore may be of some interest to the complainant. The information in question is from the Devon Urology meeting of 24 September 2018 and the letter from the CCG to local specialists inviting them to contribute to the CCG's decision making process through attendance of a meeting of the CCG's Clinical Policy Committee, both of these documents are referred to in paragraph 27 above and both relate to the initial stages of the decision making process. The CCG has prepared versions of these documents which focus solely on the discussions around the PAE treatment and from which any personal data has been redacted. If the complainant wishes to access this information he should contact the CCG. If he wishes to access the other documents referred to in paragraph 27, he is free to make a fresh request for them.

Right of appeal

34. 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

35. 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.
36. 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

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