

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 May 2021

Public Authority: NHS West Sussex Clinical Commissioning Group

Address: Wicker House
High Street
Worthing
BN11 1DJ

Decision (including any steps ordered)

1. The complainant requested from NHS West Sussex CCG (the CCG) information related to its structure and the relationships among some particular teams within the CCG. The CCG disclosed part of the information held, withheld names of some post holders in organisational charts under section 40(2) (personal information) of FOIA and stated that it did not hold further information within the scope of the request.
2. The Commissioner's decision is that:
 - a. on the balance of probabilities, the CCG did not hold any information that would demonstrate the relationship between the NHS WS CCG Medicines Management Team with the West Sussex Continuing Healthcare (CHC) Team; and
 - b. the CCG has correctly applied section 40(2) to the withheld information.
3. The Commissioner does not require any further steps as a result of this decision notice.

Request and response

4. Following correspondence that the complainant had with a number of different entities, including the CCG, on 2 May 2020, he wrote to the CCG to request information in the following terms:

"If there is indeed a separate CCG team (Medicines Management), I would be grateful if you would provide a team structure chart and guidance on how they interact with the CHC team particularly w.r.t. provision of health care for identified / scored need?"

Most importantly but not limited to the bridging role of the commissioner and ensuring care identified at assessment is delivered in practice.

If this information cannot be provided in a chart, procedural documents are sort.[sic]"

5. The CCG responded on 3 August 2020. It provided the complainant with a response which included three documents:

- a. an organisational chart of the CHC;
- b. an organisational chart of primary care and community service - medicines optimisation; and
- c. an organisational chart of Sussex NHS commissioners executive team.

6. Remaining dissatisfied with the response received, on 4 August 2020 the complainant requested an internal review and on another occasion on 19 August 2020 he wrote to the CCG, stating that he believed the second part of his request had not been addressed appropriately, adding that:

"To address this please provide the charts with the current post holders identified, or some other document that allows cross reference."

7. Following an internal review, on 2 September 2020 the CCG wrote to the complainant, stating that *"the Medicines Management Team does not have a remit or function to interact with CHC teams with respect to provision of health care for identified/scored need."* In relation to post holders, the CCG provided the complainant with the names of senior staff of Medicines Management and Continuing Healthcare. However, it decided to withhold the names of the remaining position holders in the organisational charts provided as it considered this information to be exempt from release under section 40(2) of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 12 September 2020 to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation, the complainant confirmed that he was not content with the CCG's decision to withhold the names of some post holders in the organisational charts provided. The complainant also disputed the CCG's position that it did not hold information that would demonstrate the relationship between the NHS WS CCG Medicines Management Team with the CHC teams.
10. The following analysis covers whether the CCG was correct:
 - a. to state that it did not hold any recorded information regarding the relationship between the NHS West Sussex CCG Medicines Management Team with the CHC teams; and
 - b. whether it correctly relied on section 40(2) of FOIA to withhold some names of the position holders in the organisational charts provided.

Reasons for decision

Section 1 - general right of access

11. Section 1 of 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 of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

12. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First Tier Tribunal decisions, applies the civil standard of the balance of probabilities.
13. In this case, the Commissioner has sought to determine whether, on the balance of probabilities, the CCG held any information that would demonstrate the relationship between the NHS WS CCG Medicines Management Team with the CHC teams.

14. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. In addition, she will consider any other information or explanation offered by the public authority which is relevant to her determination.
15. During the course of her investigation, the Commissioner asked the CCG to describe the searches it carried out for information falling within the scope of the request, and the search terms used. She also asked other questions, as is her usual practice, relating to how the CCG established whether or not it held any information within the scope of this part of the request.
16. The CCG stated that it had contacted the relevant teams to source the information requested and explained that "*[t]he teams advised that there is no bridging role or link between the teams but were able to provide the structure charts for the teams and the Executive team that has oversight of the CCG teams.*" The CCG's information management team also contacted the Associate Director of Medicines Management as well as the Deputy Head of CHC to establish what information was held. The relevant directorates conducted specific searches across both electronic and paper records but they advised that no information was held that shows a "*bridging link between the two teams.*"
17. The CCG added that in its searches, the criteria of organisational charts was used in both electronic and paper searches and stated that "*[t]his included publications on the staff intranet, as well as information held on the network drives and emails including all staff communications.*"
18. The CCG was asked to describe the nature of the relationship between the NHS WS CCG Medicines Management Team and the CHC teams. The CCG explained that "*Medicines Management work closely with GP practices, community pharmacies and other clinicians and health professionals to ensure medicines are optimised so our patients receive evidence-based treatments at a price affordable to the local health economy.*" On the other hand "*Continuing Healthcare (CHC) is the name given to a package of care which is arranged and funded by the local Clinical Commissioning Group for people outside of hospital with complex ongoing primary health needs.*" The CCG confirmed that the Medicines Management Team do not have a direct link to CHC Team "*and are not able to advise individual patients on their medicines as the team do not have any access to patient records, nor would it be appropriate for them to have access to patient records.*"

19. The CCG stated that it could confirm that as the information related to this part of the request was not held, no relevant information was deleted or destroyed.
20. The CCG provided the Commissioner with copies of *Sussex NHS Commissioners Records Management Policy* and *Information Governance Alliance's Records Management Code of Practice for Health and Social Care 2016*, which are the main relevant documents that the CCG uses in managing its records and retention of the information.
21. In response to the Commissioner's question whether there is a business purpose or statutory obligation to record and retain the information requested, the CCG stated that as it has concluded that there is no bridging role between the two teams in question, there is no business purpose or statutory obligation to hold such information.

The Commissioner's Conclusion

22. The Commissioner has examined the submissions of both parties. She has considered the searches performed by the CCG, its explanations as to why there is no information held and the complainant's concerns.
23. Having considered the scope of the request, the Commissioner is satisfied that the CCG took all necessary measures and steps to identify the relevant information requested that was held at the time of the request.
24. The Commissioner notes that the information request is based on the belief held by the complainant about the nature of the relationship between different teams within the CCG.
25. Whilst appreciating the complainant's concerns and expectations regarding demonstrating the relationship between the NHS WS CCG Medicines Management Team with the CHC teams, the Commissioner finds the CCG's reasoning as to why there is no information held to be plausible and persuasive.
26. Therefore, on the balance of probabilities, the Commissioner is satisfied that the CCG does not hold this part of the information requested by the complainant, and is satisfied that the CCG discharged its duties in compliance with its statutory obligations under section 1(1)(a) of FOIA when it stated that this information was not held.

Section 40 - personal information

27. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the

requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

28. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ("the DP principles"), as set out in Article 5 of UK General Data Protection Regulation ("UK GDPR").
29. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ("DPA"). If it is not personal data then section 40 of the FOIA cannot apply.
30. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

31. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

32. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
33. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
34. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
35. The withheld information in this case comprises the names of staff members below senior management level. The CCG has disclosed their job title on the organisational structure charts, but withheld the names of junior staff members. The Commissioner accepts that the individuals in this case would be identifiable from the information and that this information would relate to them. Therefore, she finds that the

¹ As amended by Schedule 19 Paragraph 58(3) DPA

information in the context of this request would fall within the definition of "personal data" in section 3(2) of the DPA.

36. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
37. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

38. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

39. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
40. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of UK GDPR

41. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"².

² Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

42. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
43. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

44. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
45. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
46. The complainant is of the opinion that the *"the public have a right to know who holds positions in public authority. Especially when they and their family members (when they lack capacity) are affected by the decisions made or lack appropriate action / care."*
47. The CCG also accepted that there is the legitimate interest of the public to know and understand the teams' structures within the CCG. However, the CCG added that it *"could not identify the legitimate interest in the release of employee names that did not hold a senior or public facing role."*
48. The Commissioner accepts that there is a legitimate public interest in disclosure of information which would promote accountability and transparency. In the circumstances of this case, the Commissioner recognises that there is a legitimate interest in knowing the identities of people who participate in certain stages of decision making in health related matters, since those decisions may have an impact on the lives of members of the public. The Commissioner also appreciates that the

complainant may have a personal interest in disclosure of the withheld information based on the representations he has made.

Is disclosure necessary?

49. "Necessary" means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
50. The CCG stated that the disclosure of the names of junior level staff members *"would not be necessary for the understanding of the public on the service or how it is managed. The structure chart with decision makers would provide the information needed to promote this understanding."*
51. The Commissioner wishes to refer to her guidance on personal information³, which states that when determining necessity, consideration must be put on *"whether disclosure under FOIA or the EIR is necessary to achieve these needs or interests, or whether there is another way to address them that would interfere less with the privacy of individuals."*
52. The Commissioner has also published special guidance on requests for personal data about public authority employees⁴ which is relevant in the circumstances of this case. This guidance states that:

"Organisational structure charts are also routinely made available. For example, government departments publish organograms or structure charts on www.data.gov.uk showing the job titles and reporting lines for all their posts.

This does not mean that there is a requirement to publish the names of all the post holders; usually only the names of senior managers are published. If a request is received for names below this level, the issue

³ <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-regulation-13.pdf>

⁴ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

in terms of section 40 is whether it is reasonable to disclose these in the context of the specific request. It is not possible to establish a single cut-off point for all authorities, below which names will never be disclosed."

53. Further, this guidance provides that *"If a request concerns the reasons for a particular decision or the development of a policy, there may be a legitimate interest in full transparency, including the names of those officials who contributed to the decision or the policy."*
54. In the present case, since the request was not in relation to a policy but rather for individuals' names in an organisational structure, the Commissioner considers that it is not necessary to disclose the names of staff members who are not in senior management roles.
55. In addition, the Commissioner notes that the CCG, as described above in paragraph 7 when it conducted its internal review, disclosed the names of the senior managers responsible for decision-making processes. The Commissioner does not consider that disclosure of names of the remaining staff members would significantly contribute to the CCG's transparency on how their decision making process and the accountability lines are designed and organised.
56. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
57. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in transparency, she does not need to go on to conduct the balancing test and has not done so.
58. Therefore, the Commissioner finds that section 40(2) of the FOIA is engaged in respect of the withheld information.

Right of appeal

59. 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

60. 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.
61. 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

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