

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 7 September 2021

Public Authority: NHS North Central London CCG
Address: 1 Lower Marsh
London
SE1 7NT

Decision (including any steps ordered)

1. The complainant has requested all information held relating to a decision making process to have one provider (rather than more than one) to deliver a particular contract and all information held relating to a decision making process to use a restricted list-based procurement process with regard to a particular contract. NHS North Central London Clinical Commissioning Group (the CCG) has confirmed that no further information is held falling within the scope of the request other than that which has now been provided or withheld under section 40(2) FOIA.
2. The Commissioner considers that on the balance of probabilities, there is no further recorded information held by the CCG under section 1(1)(a) FOIA falling within the scope of the request other than that which has already been provided or withheld under section 40(2) FOIA. The Commissioner also considers that the CCG was correct to redact the names from the information provided under section 40(2) FOIA.
3. The Commissioner requires no steps to be taken.

Background

4. The CCG explained that NHS Enfield CCG (the body to whom the requests were originally made) is no longer a statutory body. The CCG has been dissolved as part of CCG restructuring in North Central London. The CCG merged with four others (NHS Barnet, NHS Camden, NHS Haringey and NHS Islington CCGs) on 1 April 2020 to become NHS North Central London CCG. Any information held by NHS Enfield CCG was transferred to NHS North Central London CCG. NHS North Central

London CCG has therefore continued to handle this complaint as it has taken over commissioning responsibilities for the Enfield area.

Request and response

5. The complainant made two requests on 28 February 2018 for the following information:

Request 1

"I wish to make a request under the Freedom of Information Act (2000) regarding the Enfield Single Offer contract, as awarded to Enfield Healthcare Cooperative Ltd. Please supply me with all information held relating to the decision making process to have one provider (rather than more than one) to deliver this contract. I would expect that the CCG would hold recorded information relating to their decision to proceed on the basis of having one provider, and that this may be located in emails, minutes"

And

Request 2

"I wish to make a request under the Freedom of Information Act (2000) regarding the Enfield Single Offer – Locally Commissioned Services contract, as awarded to Enfield Healthcare Cooperative Ltd. Please supply me with all information held relating to the decision making process to use a restricted procurement process with regard to this contract. I would expect that the CCG would hold recorded information relating to their decision to proceed on the basis of a restricted procurement process, and that this may be located in emails, minutes of meetings, memoranda, records of decision taken and other records."

6. The CCG responded to both requests on 29 March 2018 – using its references FOI.17.ENF222 (request 1) and FOI.17.ENF221 (request 2). With regard to both requests the CCG said the information the complainant had requested was already reasonably accessible and was therefore exempt information under section 21(1) of the FOIA. The CCG provided the complainant with a series of links to where it said relevant information is published.
7. The complainant requested reviews of both responses on 8 April 2018. The complainant said her request concerned the decision-making

process behind the use of a restricted procurement process and that she had not received information about this.

8. Following intervention by the Commissioner, the CCG provided a review of request 1 on 3 December 2018. The CCG maintained its reliance on section 21 with regard to some information falling within the scope of the request, but said it had identified it holds further information that it acknowledged it should have communicated. This was a draft version of a procurement template for the Enfield Single Officer and the CCG provided a link to where this information was published. The CCG also provided the complainant with updated links to published information on the CCG's procurement decision to launch a restricted list-based procurement for care closer to home services (ie the Enfield Single Offer) and information on the contract award by the CCG to Enfield Healthcare Cooperative Limited.
9. In addition the CCG released an excerpt from the minutes of a meeting dated 7 June 2017 where the particular recruitment route was approved. Finally, the CCG said that it had searched its records and could confirm that it does not hold any email correspondence that falls within the scope of the request as the matter was discussed and approved through the procurement committee rather than in email exchanges. Following intervention by the Commissioner, the CCG also provided a review of request 2 on 3 December 2018 which duplicated the review for request 1.
10. The complainant made a complaint to the ICO on 21 June 2018 regarding the handling of the requests. The Commissioner investigated whether the CCG had complied with section 1(1) of the FOIA with regard to both requests. She also considered whether the CCG complied with its obligation under section 10(1). The Commissioner issued a Decision Notice on 5 March 2019 under reference FS50758483 and FS50758484. The Commissioner decided that on the balance of probabilities, the CCG held no further information falling within the scope of the requests and had complied with section 1(1)(a) of the FOIA. She did however order the CCG to provide any of the new information identified as falling within the scope of the request within its response to the ICO dated 4 March 2019 to the complainant with any personal data redacted in order to comply with section 1(1)(b) FOIA. The Commissioner also found that the CCG breached section 10 in its handling of the requests.
11. On 16 April 2019 the complainant appealed the Decision Notice to the First-tier Tribunal Information rights as she identified 19 documents or categories of documents which she submitted came within scope of her request but had not been disclosed. During the appeal the CCG

identified further information held falling within the scope of the requests. The CCG provided some of this information to the complainant, some was redacted under section 40(2) FOIA and some was deemed to be out of scope but as specifically mentioned by the complainant would have been withheld in full under section 43(2) FOIA (if it were in scope). The CCG also submitted that section 12 (cost of compliance exceeds appropriate limit) applied, although it did not seek to rely on this.

12. Despite the updated response, the complainant wished to proceed with the appeal as she considered further information was still held and fell within the scope of the request and also disputed the application of the exemptions. The First-tier Tribunal found that the Decision Notices were not in accordance with the law as the CCG had accepted that further information was held. The First-tier Tribunal invited the Commissioner to investigate whether the CCG had now complied with its obligations under section 1(1)(a) FOIA given the further information identified (some of which was provided) and whether it had applied the exemptions cited correctly as set out in its letter to the Tribunal of 12 August 2019.

Scope of the case

13. The complainant asked the Commissioner to investigate whether any further information is held under section 1(1)(a) FOIA other than that which has now been provided and whether the exemptions had been applied correctly to the information withheld. She also asked the Commissioner to investigate whether section 12 FOIA was applicable in this case.
14. During the course of the Commissioner's investigation the CCG clarified that the information it had indicated would be withheld under section 43(2) FOIA did not fall within the scope of the complainant's request.
15. The Commissioner has therefore considered whether any further information is held which has not been located and either already provided or withheld under section 40(2) FOIA. Whether section 40(2) FOIA has been applied correctly to withhold information. Finally whether the information to which the CCG indicated section 43(2) FOIA would apply would actually fall within the scope of the request.
16. The Commissioner has not considered whether it would exceed the cost limit to comply with this request as the CCG has not sought to rely on section 12 FOIA in this case.

Reasons for decision

Information falling outside the scope of the request

17. The CCG has explained that it no longer considers that the information it had withheld under section 43(2) FOIA falls within the scope of the request.
18. The CCG considers the scope of the request to be the commissioning intentions and the decision to award a single contract via a restricted list-based procurement. The request related to the decision to use this procurement method. It did not relate to the party who was subsequently awarded the contract or the mobilisation period once the contract was awarded.
19. The decision to launch a restricted list-based procurement, which included the requirement for a single provider, was made at the Procurement Committee on 12 July 2017. For this reason the CCG considers information created beyond this date to be out of scope of the original FOI request.
20. The complainant does not agree with the CCG's assertion that 'the scope of the original request does not encompass the award or tendering process, but the decision which led to the particular procurement route'. She considers that all documents pertaining to the process up to the actual awarding of the contract are within scope.
21. The Commissioner considers that the requests are limited to information relating to the decision to award a single contract via a restricted list-based procurement. Information relating to the party who was subsequently awarded the contract or the mobilisation period once the contract was awarded would fall outside the scope of these requests. Should the complainant wish to obtain information between the decision on the procurement route and the awarding of the contract she should submit a new request specifically for this information.

Section 1

22. Section 1(1)(a) of FOIA states that, "Any person making a request for information to a public authority is entitled – to be informed in writing by the public authority whether it holds information of the description specified in the request". Section 1(1)(b) of FOIA states that, "If that is the case, to have that information communicated to him".

23. The CCG explained that it carried out electronic searches of the email accounts of the members of staff who were involved in the procurement process. The search terms used were "Enfield Single Offer" and "Single Offer". This did not generate any results. The matter was discussed and approved through Procurement Committee meetings rather than in email exchanges so this was not considered unusual.
24. Using the same search terms referenced above, the CCG also undertook electronic searches of its shared drive. This identified seven new documents which were provided to the complainant. The above searches were conducted as part of the first ICO complaint process.
25. However, the complainant submitted an appeal to the Tribunal where she identified 19 documents or categories of documents which she believed to be within scope of the request. This included the CCG's Procurement Committee meetings. As a result of the appeal, the CCG searched the network folders of each of the Procurement Committee meetings that was mentioned by the complainant or that otherwise fell within the timeframe of the request. This identified three sets of minutes that the CCG agreed fell within the scope of the request and should have been provided to the complainant. These were provided to the complainant as part of the August 2019 CCG submission within the appeal proceedings. The decision to use a restricted list-based procurement was made by the Procurement Committee at these Procurement Committee meetings. The CCG would not expect any further information to be held within any other meeting folders.
26. However, the CCG did search the folders of the other meetings that were mentioned by the complainant. These included the Finance and Performance Committee and the Clinical Reference Working Group. The purpose of the Finance and Performance Committee is to approve funding for a particular service, project or business case. They do not design service specifications or approve the actual procurement process, method or successful tendering party. It was therefore unlikely that any minutes would have been within the scope of the requests.
27. The search of these additional folders did however identify one further document (a business case) that the CCG agreed fell within scope of the request and should have been provided to the complainant. This was provided to the complainant as part of the August 2019 submission referred to above. No further documents were found as a result of these searches.
28. The Clinical Reference Working Group (formerly known as Clinical Reference Group) reviews service specifications to ensure that they

meet the necessary clinical requirements. As with the Finance and Procurement Committee, the Working Group is not involved with deciding the procurement route or process. However, again the CCG did search these folders as part of the August 2019 submission so any information would have been captured from those searches.

29. Given that the CCG has now searched email accounts, shared drives and looked through the relevant meeting network folders manually, it considers it has now exhausted all search requirements and has identified all relevant information with regards to this request. The CCG has also confirmed it would not hold any manual records in relation to this request, they would all be electronic. No information would have been destroyed that would be in scope of this request.
30. Based upon the CCG's submission and the wider searches conducted as part of the appeals process, the Commissioner considers, on the balance of probabilities, that there is no further recorded information held falling within the scope of the request under section 1(1)(a) FOIA.

Section 40(2)

31. 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.
32. 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 the General Data Protection Regulation ('GDPR').
33. 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.
34. 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.

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

Is the information personal data?

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

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

36. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
37. 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.
38. 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.
39. The information redacted under section 40(2) FOIA is the name of an Executive Assistant and Administrator.
40. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subject(s). She is satisfied that this information both relates to and identifies the data subject(s) concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
41. 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. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

42. 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".

43. 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.

44. 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 the GDPR

45. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that “*processing shall be lawful only if and to the extent that at least one of the*” lawful bases for processing listed in the Article applies.
46. 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.

47. 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;

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”.

- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
48. 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

49. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
50. The CCG cannot identify a legitimate interest in the public or applicant having access to the withheld information. It has included all names of more senior of public facing members of staff.
51. The complainant has not disputed the CCG's application of section 40(2) and has presented no legitimate interests in support of disclosure of the redacted information.
52. The Commissioner does not consider that disclosure of the names of junior members of staff would further public debate or contribute towards accountability of the CCG in relation to a decision making process to have one provider (rather than more than one) to deliver a particular contract and a decision making process to use a restricted list-based procurement process with regard to a particular contract.
53. As the Commissioner does not consider there is a legitimate interest in disclosure of the redacted information she has not gone on to consider whether disclosure was necessary or the balancing test.
54. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
55. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

56. The Commissioner has therefore decided that the CCG was entitled to withhold the redacted information under section 40(2), by way of section 40(3A)(a).

Right of appeal

57. 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

58. 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.
59. 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.....

Gemma Garvey
Senior Case Officer

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF