

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 August 2022

Public Authority: Norfolk and Waveney Integrated Care Board
Address: Lakeside 400
Old Chapel Way
Broadland Business Park
Thorpe St Andrew
Norwich
NR7 0WG

Decision (including any steps ordered)

1. The complainant requested information relating to the sending of some greetings cards. Norfolk and Waveney Integrated Care Board ("the Board") refused the request as vexatious.
2. The Commissioner's decision is that the request was vexatious and that the Board was entitled to rely on section 14(1) of FOIA to refuse it.
3. The Commissioner does not require further steps.

Nomenclature and Background

4. The request under consideration here traces its roots back to enquiries the complainant made to the body that commissioned health services in her area. Whilst many of the people involved have remained the same throughout the process, the body responsible for commissioning is now on its third different name in the space of just over two years.
5. Originally the complainant made requests to NHS Norwich Clinical Commissioning Group (NCCG). However, that body merged with several other clinical commissioning groups in April 2020 to form Norfolk and Waveney Clinical Commissioning Group ("NWCCG"). NWCCG was the public authority to whom the request was made and which responded to the request.

6. Whilst the Commissioner commenced his investigation with a letter to NWCCG, during the course of the investigation, on 30 June 2022, that body ceased to exist, with its functions being transferred to the Board – which had been set up to meet the requirements of the Health and Care Act 2022. The Board has, in responding to the Commissioner, taken on responsibility for responding to the request that is the subject of this notice.
7. To make the decision easier to follow, the Commissioner has tried to refer to “the Board” as the public authority dealing with this particular request and “the Board and its predecessor bodies” to refer collectively to the Board, NCCG and NWCCG. However, he does recognise that the constantly-shifting nature of service commissioning (albeit that the most recent shift has been one mandated by law) may have contributed in part to the complainant’s frustration. He has therefore referred to either NCCG or NWCCG where he considers it appropriate and relevant to do so.
8. By way of background, the Commissioner notes that the complainant originally made requests to NCCG in 2017 regarding the manner in which it calculated personal health budgets.¹ The complainant argued that there was a discrepancy between the funding allocated to NCCG to provide her personal health budget and the amount of money she actually received. The requests were aimed at understanding the level of discrepancy and how and why it occurred.
9. NCCG refused to provide this information, which it considered commercially sensitive. The complainant brought a complaint to the Commissioner who upheld NCCG’s decision to withhold the information. The complainant then appealed that decision to the First Tier Tribunal.
10. The First Tier Tribunal upheld the appeal in 2019 (“the 2019 Tribunal decision”). It ruled that NCCG held further information than it had previously identified and that the information it had identified as falling within the scope of the request did not engage section 43 of FOIA. Although some of the information had been disclosed to the complainant

¹ Ordinarily, clinical commissioning groups are responsible for ensuring the health needs of the populations they serve are met. Each group receives a budget based on anticipated need and it must then use that budget to commission services to meet those needs. However, in some circumstances an individual can request to be allocated their own personal health budget – from which they can commission their own services in order to meet their particular needs.

during the course of the appeal, the Tribunal ordered that the remaining information be disclosed to her.

11. NCCG contacted the complainant after the Tribunal judgement had been promulgated. It provided her with some further information, but the complainant was unhappy at the quality of information provided and argued that NCCG had failed to comply with the 2019 Tribunal decision.
12. The Board has informed the Commissioner that NCCG did meet with the complainant to attempt to conclude the matter informally, however this failed to resolve the matter completely and in late 2020, the complainant asked the First Tier Tribunal to certify, to the Upper Tribunal, that NCCG had failed to comply with the 2019 Tribunal decision and was thus in contempt of court ("the contempt certification proceedings"). By this point NCCG had ceased to exist and was the respondent to the proceedings in name only. NWCCG was joined to the contempt certification proceedings as an interested party.
13. Having considered the application for certification, the First Tier Tribunal concluded that NCCG had wilfully failed to comply with the previous judgement. However, as NCCG no longer existed, the judge declined to certify a contempt to the Upper Tribunal as it would involve a disproportionate use of resources. NWCCG could not be held in contempt as it had not been ordered to do anything.
14. During 2018, the complainant had a complaint ongoing with the Parliamentary Health and Social Care Ombudsman (PHSO). In March of that year, three staff members of NCCG received cards via the online retailer Moonpig. These cards contained quotations from various items of correspondence or judgements relating to the complainant. In some cases, they also contained images of the staff members involved that had been "scraped" from NCCG's website. Given the nature of the information the cards contained, NCCG concluded that they had been sent either by, or at the direction of, the complainant – a claim she denies – and wrote to her warning that it would not tolerate such behaviour.

Request and response

15. On 13 September 2021, the complainant wrote to the Board and requested information in the following terms:

"Please provide a copy of all information for the period 1st March 2018 to 1st April 2020 inclusive which is held by the CCG in relation to the greetings cards referenced above. This includes (but is not limited to) all emails / correspondence received by or sent from NEL

CSU's PHB and CHC teams and NCCG's senior management team, and copies of the minutes of all meetings in which the cards were discussed.”

16. The Board responded on 11 October 2021. It refused the request as vexatious.
17. Following an internal review the Board wrote to the complainant on 1 November 2021. It upheld its original position.

Scope of the case

18. The complainant contacted the Commissioner on 2 November 2021 to complain about the way her request for information had been handled.
19. The complainant had also made two further requests for information, around the same time, which the Board also refused, either in full or in part, as vexatious. All three requests were referred to the Commissioner. At the outset of the investigation (and at the suggestion of the Board), the Commissioner proposed to deal with all three complaints concurrently – seeking only a single submission from the Board and the complainant. Both parties agreed to this approach, although the Commissioner has issued separate decision notices in respect of each request.
20. The Commissioner considers that the scope of this investigation is to determine whether the request was vexatious.

Reasons for decision

21. Section 1(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.

22. Section 14 of FOIA states that:

Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

23. The term "vexatious" is not defined within FOIA. The Upper Tribunal considered the issue of vexatious requests in *Information Commissioner v Devon CC & Dransfield* [2012] UKUT 440 (AAC). It commented that "vexatious" could be defined as the "manifestly unjustified, inappropriate or improper use of a formal procedure". The Upper Tribunal's approach in this case was subsequently upheld in the Court of Appeal.
24. The Dransfield definition establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
25. Dransfield also considered four broad issues: (1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the requester, (3) the value or serious purpose of the request and (4) harassment or distress of and to staff. It explained that these considerations were not meant to be exhaustive and also explained the importance of: "...adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests." (paragraph 45).
26. The Commissioner has published guidance on dealing with vexatious requests², which includes a number of indicators that may apply in the case of a vexatious request. However, even if a request contains one or more of these indicators it will not necessarily mean that it must be vexatious.
27. When considering the application of section 14(1), a public authority can consider the context of the request and the history of its relationship with the requester, as the guidance explains:

"The context and history in which a request is made will often be a major factor in determining whether the request is vexatious, and the public authority will need to consider the wider circumstances surrounding the request before making a decision as to whether section 14(1) applies".
28. However, the Commissioner is also keen to stress that in every case, it is the request itself that is vexatious and not the person making it.

² <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/dealing-with-vexatious-requests-section-14/>

29. In some cases it will be obvious when a request is vexatious but in others it may not. The Commissioner's guidance states: "In cases where the issue is not clear-cut, the key question to ask is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress."

The complainant's position

30. In her submissions to the Commissioner, the complainant explained that, although this request was similar to a previous one that she had submitted, there was still value in processing it, explaining that:

"Although this current request may seem repetitive in that it seeks to obtain similar information with regards correspondence about the Moonpig cards, it cannot be subject to the same LPP exemption that was engaged in the CCG's³ IR response for IC-126014-G5X4. It was necessary for me to redefine the scope of my request so as to ensure that successful disclosure of sufficient information is made before the PHSO investigates the ongoing discrimination and / or mistreatment of patient(s) by the senior management teams of both NCCG and NWCCG.

"The CCG has not estimated how much time it would take to fulfil this request. However, public interest will increase in direct proportion to an NHS PA that has wasted time and money in its continued preoccupation with greetings cards. After four years of confrontation, accusations and allegations, I can currently see no end to the CCG's obsession with Moonpig cards, and its regular use of public funds to employ its executive team and instruct its lawyers to introduce the subject unnecessarily, unjustifiably and repeatedly into correspondence, meetings, submissions and hearings.

"The origins of this evident wastefulness and lack of rationale must be subject to public scrutiny in order to make the CCG desist from continuing in the same manner, given that no amount of complaints have had any impact."

31. The complainant explained that, in her view, the Board was continuously repeating the Moonpig allegations in an attempt to discredit her and, by extension her complaints to various bodies including the ICO, the PHSO

³ The complainant referred to NWCCG – which was still the body dealing with her request at the point she made her submission to the Commissioner – as "the CCG" in her submissions.

and the Tribunal. She argued that her request would provide evidence that the Board was:

“knowingly harassing a vulnerable patient for deterrent and defamation purposes, and furthermore that its complaints processes are not fit for purpose.”

32. Her motivation for seeking the information in all three requests, the complainant noted, was:

“an attempt to obtain information about the CCG’s systemic mistreatment of complainants and furthermore, how it has seen fit to use an unquantified and allegedly unquantifiable amount of public money to harass and malign the character of a vulnerable member of its registered community. In the wider public interest, I also seek to establish how many more victims of its maladministered PHB service it sent unsolicited, accusatory letters to. These patients all have complex healthcare needs, like myself, and are among the most vulnerable members of our community.”

33. She also added that:

“Such mistreatment of complainants rarely happens in isolation. In the wider public interest, it is my intention to expose the internal machinations of an NHS organisation that uses public money to act on the erroneous suspicions and personal grudges of individual employees from a defunct organisation that was evidently providing maladministered and unlawful services. The requested information seeks to identify these failings, thwart the evident victim-blaming culture, and improve complaints processes.”

The Board’s position

34. In its submission, the Board put forward its own version of the events that had preceded the complainant’s request. In its view the complainant was simply using her request as

“nothing more than an attempt to continue to argue matters and further litigate.”

35. The Board felt that it had made reasonable efforts to try to resolve the underlying grievance, but that these had been unsuccessful and therefore it could no longer justify continuing to devote resources to the matter.

36. In addition, the Board noted that the complainant had submitted 20 information requests since 2017, that she “routinely” challenged these requests (eleven requests for internal reviews, ten complaints to the

Commissioner and two appeals to the First Tier Tribunal) and that it considered that, based on previous experience, responding to the request would likely spawn future requests.

37. Finally, the Board considered that the tone the complainant had used in her three requests (in particular her allegations of maladministration and criminal behaviour) was "unreasonable", "without foundation" and "targeted to cause upset or distress."
38. In summary the Board's position was that:

"It cannot...be disputed that the request only serves the private interests of the complainant. The questions are based on their interactions with the former NCCG and handling of [the 2019 Tribunal decision]. This serves no wider public interest.

"There is little, if any, public interest in disclosing this information to the complainant. [The Board] is concerned that disclosure would only serve to set a precedent that the FOIA can be misused."

The Commissioner's view

39. In the Commissioner's view, this is a classic case of vexatiousness by drift. Five years ago, the complainant raised a matter of substantial public interest with one of the Board's predecessor organisations. Unfortunately, in the intervening years, that focus has now drifted: from holding the Board accountable, to attempting to right what the complainant considers to be the wrongs committed against her by the Board, NCCG and NWCCG.
40. Whilst the Commissioner only appears to have been provided with a flavour of the correspondence exchanged between the various parties, it would appear that NCCG and NWCCG did not deal with the complainant's initial concerns as well as they might have done. That – and the process of being passed around a number of NHS bodies – has understandably caused the complainant to be frustrated and has caused her to mistrust the responses she has been given.
41. However, it is now five years on from the original request. It is not clear the extent to which the original underlying matter has now been resolved, but it has certainly spawned a number of satellite processes including complaints, litigation and requests for information. Some of these satellite processes have lost sight of the original issue and are now taking up a disproportionate amount of everybody's resources.
42. The issue regarding the Moonpig cards is an issue solely of interest to the complainant – whether or not she was the person that caused them to be sent. The requested information would have barely any wider

public value even if the request had been made shortly after NCCG had issued its warning in 2018. Three years later, in 2021, it is difficult to imagine what possible purpose could be achieved in the Board responding to such a request.

43. For the avoidance of doubt, the Commissioner expresses no definitive opinion on whether the Moonpig cards were sent by the complainant or not. He merely notes that the cards could only have been created by someone with not only a very detailed knowledge of the complainant's interactions with the Board and its predecessor organisations, but also a peculiar motivation to highlight the complainant's case. If, as the complainant believes, the issues regarding her personal health budget are indeed shared by numerous individuals, it is curious that an apparently unconnected person wishing to draw attention to the wider issue would focus solely on the complainant's own case.
44. That being said, the Commissioner considers that, even if the complainant has been unjustly accused, the requested information would remain of dubious merit. The Moonpig card issue was referenced by NWCCG in its submission explaining why the contempt certificate proceedings should either not be entertained or should be dismissed. The Tribunal had that evidence before it, but did not consider it relevant to the matters it had to decide – indeed the issue is not mentioned at all in the Tribunal's judgement.
45. The Commissioner is therefore confident that independent bodies are capable of giving appropriate weight – no more and no less – to the accusations that the Board has made about the ultimate creator of the Moonpig cards. For the avoidance of doubt, the Commissioner's decision on vexatiousness would have been the same regardless of whether the complainant could have been proved to have sent (or not sent) the cards.
46. The Board has drawn attention to the volume of the complainant's requests. The Commissioner notes that, prior to this request being responded to, only 19 requests had been received (one request post-dates the Board's refusal notice) including the three requests under consideration. Whilst the Commissioner does not consider that 19 requests (even 19 multi-faceted requests) over the course of four years represents an excessive amount, he does recognise that the complainant is likely to submit further requests in future which may or may not be relevant to the original underlying issue.
47. However, the Commissioner is not persuaded that the evidence the Board has supplied demonstrates that the complainant "routinely" refuses to accept the Board's initial response.

48. Prior to the three requests the Trust has refused as vexatious (which, understandably, the complainant wished to have reviewed both internally and by the Commissioner), the complainant had only sought internal reviews of eight (out of 16) requests – usually where the Trust had withheld information. Of those eight internal reviews, seven were referred to the Commissioner, with one complaint being upheld, two resolved informally (after further disclosures or explanations by the Board's predecessor organisations) and the remainder dismissed.
49. Of the four complaints that were dismissed by the Commissioner, one was successfully appealed to the Tribunal (the Commissioner assumes the Board's reference to a second Tribunal appeal to relate to the contempt proceedings – which was only refused on a technicality). That would suggest that the complainant only seeks to argue around half of the responses she has been provided with and that, of the requests that she does pursue, around half of those ultimately result in her being provided with additional information beyond what was originally provided. That is not indicative of a person pursuing information requests unreasonably or making futile complaints.
50. The Commissioner also notes that he is not satisfied the complainant's language is such that it would render the requests vexatious. The references to "maladministration" appear to refer to a previous complaint to the PHSO, on a similar subject, but made by another individual, in which the PHSO concluded that NCCG **was** guilty of maladministration.
51. Equally, the references to "criminal behaviour" appear to relate to the contempt certification proceedings. Contrary to what the Board claimed in its submission, the First Tier Tribunal judge found that NCCGs actions (or, more accurately, its inactions) did amount to a wilful defiance of the Tribunal's decision. In his decision, Judge O'Connor said that:

"In my view the failure to comply with the terms of the Tribunal's Substituted Decision Notice was deliberate, and based in resource and cost considerations. This, and the prolonged nature of the failure by Norwich CCG to comply with the terms of the Substituted Decision Notice, clearly weighs heavily in support of exercising discretion to certify the offence to the Upper Tribunal. The fact that the applicant, albeit belatedly and at the hands of NWCCG not Norwich CCG, has been provided with the information that the Substituted Decision Notice directed is also relevant, but only to a limited extent given the important public interest in protecting the administration of justice, which includes the need for compliance with the orders of the Tribunal. **Absent the unusual feature of this case identified in the following paragraph, I would have exercised**

my discretion to certify an offence of contempt to the Upper Tribunal. [emphasis added]

"The unusual feature of this case, referred to above, is that Norwich CCG no longer exist as a legal entity. This I find to be of significance and a factor which very weighs heavily in my consideration of whether to exercise my discretion to certify an offence by Norwich CCG to the Upper Tribunal. Although there is a strong public interest in the Tribunal ensuring that its orders are complied with, there is also a public interest in ensuring that the Tribunal's resources are used appropriately. The resources that would be expended by the Upper Tribunal should it be required to consider this matter will be considerable and, in my view, the benefit to the public interest even if Norwich CCG are ultimately found to be in contempt, including deterring others from breaching the Tribunal's orders, would be limited given that Norwich CCG is no longer in existence as a legal entity. I have also taken account of the fact that this is not a case in which Norwich CCG have deliberately ceased being a legal entity in order to avoid complying with the Tribunal's order or to avoid punishment, it was as a consequence of matters wholly unrelated to litigation in the Tribunal.

"Looking at all the circumstances of the case, with particular weight being given to those features I have identified above, I have decided not to exercise my discretion to certify an offence by Norwich CCG to the Upper Tribunal despite my earlier conclusion that the requirements of section 61(3) have been met."

52. Given that context, whilst the Board (and, in particular the named individuals) may not appreciate their actions being referred to as criminal, in this case it is not an accusation entirely without merit – although the complainant should take great care when referring to particular individuals, as the judge made no finding in respect of any person, only NCCG as a corporate body.
53. However, having viewed all the circumstances of the case holistically, the Commissioner is satisfied that the request is vexatious as it would require a disproportionate diversion of resources and is a manifestly unjustified use of a formal process. The Board was therefore entitled to rely on section 14(1) of FOIA in order to refuse it.
54. That does not mean that future requests that the complainant may make will automatically be vexatious. The Board should consider any future requests on their own merits, taking into account the value of the request and the resource required to deal with it.

Right of appeal

55. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

56. 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.
57. 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

Roger Cawthorne
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