

The Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **31 August 2023**

Public Authority: **NHS England**
Address: **Quarry House**
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant has requested, from NHS England, a copy of a report on the findings of an investigation relating to the governance and leadership of an NHS Trust, and compliance with its licence.
2. NHS England disclosed a redacted copy, citing four exemptions to withhold parts of the report. The complainant has challenged the application of sections 31 (law enforcement), 36 (prejudice to effective conduct of public affairs) and 41 (information provided in confidence) of FOIA.
3. The Commissioner's decision is that section 31 is engaged and that the balance of the public interest favours maintaining the exemption. He also finds that NHS England breached section 17(1) of FOIA because it failed to issue its refusal notice within 20 working days.
4. The Commissioner does not require any further steps as a result of this decision notice.

Request and response

5. On 10 November 2022 the complainant requested information from NHS England as below:

“Under [FOIA] please provide me with a copy of the report on the findings of an investigation carried out by [name redacted] of Tamarix People, which was commissioned by NHS England and NHS Improvement in early February 2022. The investigation was in relation to the governance and leadership of North Tees and Hartlepool NHS Foundation Trust [the Trust], and the Trust’s compliance with its licence ... For the avoidance of doubt, I am not asking for the report titled ‘NHS England Regulatory Assessment – North Tees and Hartlepool Hospitals NHS Foundation Trust’, dated 05 September 2022 [the published regulatory assessment] ...”.

6. The published regulatory assessment is available online¹ with a covering letter (it was published by the Trust on its website). Those documents provide some further details about the investigation, NHS England’s regulatory considerations and the actions ultimately recommended. They also state that NHS England’s position “will remain under review” and that “NHS England may yet consider formal regulatory intervention and enforcement action”.
7. NHS England responded on 11 April 2023, following the Commissioner’s intervention in a related case². It disclosed a redacted copy of a ‘Report of Principal Findings’ dated May 2022 (the report) falling within scope of the request. Some of the text in the report was withheld under the exemptions at sections 31 (law enforcement), 36 (prejudice to effective conduct of public affairs), 40 (personal information) and 41 (information provided in confidence) of FOIA.
8. Whilst the complainant requested an internal review on 5 May 2023, complaining about the application of sections 31, 36 and 41 (but not section 40), NHS England did not provide one. The Commissioner has used his discretion to accept the complaint without an internal review.

¹ <https://www.nth.nhs.uk/wp-content/uploads/2023/01/NHSE-regulatory-assessment-and-covering-letter-2022.pdf>

² <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4024549/ic-215906-f5h5.pdf>

Scope of the case

9. The complainant contacted the Commissioner on 5 July 2023 to complain about the way their request for information had been handled.
10. The complainant disagrees with the application of sections 31, 36 and 41 of FOIA.
11. The complainant has clearly stated "No disagreement" regarding section 40.
12. The Commissioner therefore considers that the scope of this case is to decide whether NHS England was entitled to withhold the redacted information in the report pursuant to sections 31, 36 and 41 of FOIA.
13. The complainant also expressed their dissatisfaction with the time taken by NHS England to provide its 11 April 2023 response. The Commissioner will, therefore, also address this procedural matter.
14. During the Commissioner's investigation, NHS England's position changed slightly regarding some of the withheld information. It extended its application of section 31 to all of the redactions that the complainant is disputing in this complaint.
15. The Commissioner will start by considering whether section 31 applies, and he will only consider the other exemptions if he finds that section 31 does not apply.

Reasons for decision

Section 31

16. NHS England has cited section 31(1)(g) of FOIA, with section 31(2)(c).
17. Those provisions of FOIA provide that information is exempt if its disclosure would, or would be likely to, prejudice the exercise by any public authority of its functions, for the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.
18. NHS England has explained to the Commissioner:

"Chapter 3 of Part 3 of the Health and Social Care Act 2012 [HSCA] ... grants NHS England a range of functions for the purposes of regulating, amongst other providers of healthcare services, foundation trusts via the provider licence regime ... Note that, as of 1 July 2022,

NHS England and NHS Improvement merged in statute [the Commissioner's understanding is that here NHS England was referring to the Health and Care Act 2022] to become one single organisation known as NHS England. NHS Improvement was made up of Monitor and the NHS Trust Development Authority. Therefore, any references to Monitor in [HSCA] should be read as a reference to NHS England".

19. NHS England also told the complainant:

"The conditions of the NHS provider licence enable NHS England to regulate the economy, efficiency and effectiveness of NHS foundation trusts under Chapter 3 of Part 3 of [HSCA]".

20. The Commissioner's guidance specifically gives "the administration of a licensing regime (including the revoking of licences where necessary)" as one example of regulatory action (pages 19 – 20).³

21. The Commissioner is therefore satisfied that NHS England has functions for the purpose stated at section 31(2)(c) of FOIA. Regarding the investigation that NHS England commissioned, NHS England is clearly the public authority with power to make a formal decision to take some action.

22. Regarding the envisaged prejudice, and the likelihood of that prejudice resulting from disclosure, NHS England has told the Commissioner:

"We rely on having a safe space in which providers are freely able to share information in the knowledge that the information, or any analysis derived directly from it, will not be disclosed more widely. To disclose that information more widely is likely to have a detrimental impact on the quality and content of exchanges between NHS England and the bodies it collectively regulates and its ability to make effective and fully informed regulatory decisions".

23. Thus NHS England is claiming the lower level of likelihood (that disclosure 'would be likely to' cause the envisaged prejudice).

24. This means there must be a real and significant risk of the prejudice occurring, even if the risk of the prejudice occurring is less than 50%.

³ <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

25. The Commissioner is satisfied that the envisaged prejudice (harm to the voluntary supply of information to NHS England, and ultimately harm to NHS England's investigations and regulatory decisions) is not trivial.
26. He is also satisfied that there is a causal link between disclosure and the harm claimed, and that the harm is likely to occur, as he explains in more detail below. In line with his guidance, he has considered whether disclosure would be likely to have an impact on the voluntary supply of information; and if so, whether that impact would be likely to prejudice a function of the public authority.

Voluntary supply of information

27. The Commissioner has seen the withheld information and notes that it includes frank comments, as NHS England's response of 11 April 2023 indicated.
28. The Commissioner has considered the timing of the request, in relation to the investigation.
29. The report is dated May 2022, but NHS England's outcome was not shared with the Trust until 5 September 2022. The request was made in November 2022.
30. NHS England's letter of 5 September 2022 says that NHS England's position (the suspension of formal regulatory action) "will remain under review" subject to progress being made by the Trust. The published regulatory assessment says that NHS England "may yet consider formal regulatory intervention".
31. The Commissioner highlights a previous decision notice⁴ relating to the application of section 31 of FOIA by a different public authority, the Charity Commission. In that decision, the Commissioner said (paragraph 84):

"... if an investigation was ongoing at the time of the request then the likelihood of ... disclosure affecting the regulators [sic] ability to gather information from those organisations which it regulates would be high. In this case, the investigation in question had been concluded but only relatively recently: the Charity Commission confirmed it was not taking any further action in November 2006 and the complainant submitted

⁴ https://ico.org.uk/media/action-weve-taken/decision-notices/2009/486500/FS_50184898.pdf

his request in June 2007 ... the likelihood of disclosure impacting on the Charity Commission's regulatory functions remained relatively high".

32. Thus where an investigation has concluded relatively recently, the likelihood of disclosure affecting the public authority's ability to gather information from the organisations it regulates remains relatively high.
33. In the case cited above, the request was made seven months after the investigation had concluded. In the present case, the request came six months after the report dated May 2022 (a similar timeframe); furthermore, to some extent the matter was still live at the time of the request, as NHS England's position remained "under review". The withheld information was part of an ongoing investigative process where co-operation was required.
34. Therefore, disclosure would be likely to have an impact on the voluntary supply of information to NHS England, both generally and in terms of the ongoing investigative process that existed in relation to the Trust.
35. Whilst NHS England could have sought information from the Trust using its formal powers, information was provided voluntarily and NHS England explained to the complainant that using formal regulatory powers to obtain information would lead to delays and inefficiency in the regulatory process.
36. Within its 11 April 2023 response to the complainant, NHS England has said that both providers and subjects of candid comments made during the investigation would suffer detriment (for example being treated differently) if such information were disclosed. The Commissioner considers that such detriment is likely to discourage the future provision of information.

Prejudice to a function of the public authority

37. The Commissioner accepts NHS England's argument that receiving only minimal information in response to its regulatory enquiries would likely reduce the efficiency and quality of its regulatory decision-making.
38. Again the Commissioner highlights that the request was submitted not long after the investigation findings were produced and communicated to the Trust, and when NHS England's position regarding the matter was still "under review".
39. Before accepting that the exemption is engaged, the Commissioner has considered whether any of the withheld information is already publicly available.

40. Having compared the withheld and the published text, the Commissioner has no concerns in that regard.
41. He is therefore satisfied that section 31 is engaged, and will consider the public interest test.

Public interest test – NHS England's position

42. In favour of disclosure, NHS England noted accountability and transparency considerations relating to its role and services provided by NHS trusts.
43. Against disclosure, NHS England said "We have given particular weight to NHS England being able to oversee and regulate trusts effectively, and the need to ensure that trusts are able to share confidential or otherwise sensitive information with NHS England without concern that such information will enter the public domain". NHS England also said it relies on co-operation and openness from trusts; using its formal powers to obtain information would lead to delay and inefficiency in the regulatory process; and disclosure would likely result in trusts providing only minimal information to NHS England. It also noted its disclosure of a redacted copy of the report and said that this satisfies any wider public interest in disclosure.

Public interest test – complainant's position

44. The complainant fundamentally disagrees with NHS England's position that "disclosing the redacted information could lead to future investigations being hampered by reticence" (the complainant's words).
45. The complainant said "the public interest test *in this instance* [sic] is not about the relative ease or difficulty of conducting a future investigation".
46. They emphasised that the information concerns the governance of a public authority, and an investigation and formal report involving public money.
47. The complainant suspects that the withheld information is critical of people "beyond the Non-Executive Director group", whereas the published regulatory assessment "criticises only the Non-Executive Director group". They consider that redactions have been made to the report to avoid people's embarrassment about being held to account.
48. The complainant claims that when comparing the redacted version of the report with the published regulatory assessment, there are "inconsistencies with the conclusions" in the latter; and disclosure of the report without redactions would clarify matters.

49. As an example, the complainant has explained (albeit in their comments disputing section 41 of FOIA, not section 31):

"... [the published regulatory assessment] contains a finding that is not present in [the redacted version of the report], namely "... the level of conduct by some individuals within the Trust NED group was not consistent with accepted standards of professional business conduct." [see paragraph 5.8 of the published regulatory assessment] This is a serious allegation, and it is therefore very much in the public interest to remove the redactions from [the report], to understand whether the allegation has any basis".

Public interest test – Commissioner's position

50. The Commissioner acknowledges a general public interest in disclosing information that promotes accountability and transparency, in order to maintain public confidence and trust in the public authorities responsible for enforcing the law.
51. However, the Commissioner notes that to a large extent, such public interest considerations favouring disclosure are already satisfied by the published regulatory assessment, as well as the redacted version of the report that has been disclosed.
52. Against disclosure, as the Commissioner's guidance cited at paragraph 20 above explains, there is a very strong public interest in protecting the ability of public authorities to enforce the law.
53. Despite what the complainant may feel about the relevance of future investigations (see the comments quoted at paragraphs 44 and 45 above), the Commissioner's guidance is clear. It explains that co-operation between those being regulated and the regulator is important, and that there is a public interest in not deterring the voluntary supply of information, even where the public authority has the power to compel a party to supply information.
54. The Commissioner does not agree with the complainant's claim that the published regulatory assessment "criticises only the Non-Executive Director group". The Commissioner notes that the published regulatory assessment includes some criticism of the Chair of the Trust (paragraph 5.10):
- "... the Chair could reasonably have deferred plans in order to allow time to establish improved working relationships internally and externally and develop a supporting communication and engagement plan".

55. Nor does the Commissioner see any "inconsistencies with the conclusions" in the published regulatory assessment, when compared with the report and, in particular, the withheld information. As far as the Commissioner can tell, the complainant gave just one example of the alleged inconsistencies (quoted at paragraph 49 above). Clearly the Commissioner is not able to disclose any withheld information itself in this decision notice. However, he would emphasise to the complainant that having seen the withheld information for himself, he does not consider that there is ultimately any 'inconsistency' along the lines that the complainant claims. He considers that the withheld information would not add anything substantial to what is already publicly available.
56. The Commissioner agrees with NHS England's position as set out in this decision notice, and considers that the balance of the public interest lies in maintaining the exemption. He therefore finds that NHS England was entitled to rely on section 31 in relation to all of the disputed redactions.
57. Given this finding the Commissioner does not need to consider the other exemptions cited by NHS England.

Procedural matters

58. The Commissioner finds that NHS England breached section 17(1) of FOIA because it failed to issue its refusal notice within 20 working days.
59. The request was made on 10 November 2022 and NHS England's refusal notice for the withheld information was not provided until 11 April 2023.

Other matters

60. NHS England did not provide an internal review. The complainant requested one on 5 May 2023, and NHS England's failure to provide one was a key concern for the complainant.
61. Whilst internal reviews are not a statutory requirement under FOIA, they are a matter of good practice.
62. They should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.

Right of appeal

63. 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

64. 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.
65. 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

Daniel Kennedy
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