

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 February 2024

Public Authority: Sheffield Health and Social Care NHS Foundation Trust

Address: Centre Court
Atlas Way
Sheffield S4 7QQ

Decision (including any steps ordered)

1. The complainant has requested information about gender identity services at Sheffield Health and Social Care NHS Foundation Trust (SHSC). SHSC provided some information but stated that it did not hold information relating to parts two and three of the request.
2. The Commissioner's decision is that SHSC does not hold the requested information at parts two and three, on the balance of probability. However, the Commissioner has recorded a breach of sections 1 and 10 of FOIA as SHSC responded and provided information to which the complainant was entitled outside the statutory timeframe.
3. The Commissioner does not require SHSC to take any steps.

Request and response

4. On 10 August 2023 the complainant wrote to SHSC and requested information in the following terms:

"We would like to request the following information under the freedom of Information Act 2000. The below questions pertain to

gender identity services at your trust for adult patients.

1. How many patients are currently on your waiting list for gender identity care?
2. If I were referred today (10/08/2023) how long would I wait to be seen for a first appointment? This figure should be given in months - for clarity we are referring to a first appointment with a psychiatrist or endocrinologist.
3. If I were referred today (10/08/2023) how long would I typically wait for treatment to start? This figure should be given in months - for clarity we are referring to any form of treatment ranging from hormone therapy or surgery.
4. On your current schedule of first appointments, what year and month were those patients referred to your service? For example, the current cohort of first appointment patient were referred in Oct 2018.
5. How many staff currently work for you service? Please can this be broken down by discipline/job role. E.g. 2 x administration, 2 x endocrinologists, etc..."
5. SHSC responded on 28 September 2023 and provided information regarding parts one, four and five of the request, but stated that it did not hold the information requested at parts two and three.
6. The complainant wrote back on the same day, asking if an internal review could be "skip[ped]", and stating the following:

"We know you hold the data, and its disingenuous to suggest that it doesn't exist – we know patients are given estimates of waiting time. The metric of how long a patient has waited is very different to how long someone will wait if referred today.

I would suggest it could be considered negligent if a trust didn't know how long their patents (sic) could be waiting from referral - without that barometer of measurement how could you seek to make or measure improvements? We can never know what is going to happen in the future, but based on current service parameters and resources, you should be able to provide at the very least a considered estimate of waiting time for new referrals..."

Scope of the case

7. The complainant contacted the Commissioner on 5 January 2024 to complain about SHSC not having conducted an internal review, though they had earlier asked if a review could be dispensed with.
8. Following an internal review, SHSC responded on 9 January 2024 (apparently the review had been conducted on 29 September 2023 but not sent out due to an error) and maintained its position. SHSC apologised for this and for its original late response.
9. On 19 January 2024 the complainant confirmed to the Commissioner that they were not content with SHSC's position that the information requested at parts two and three of the request was not held.
10. SHSC sent its response to the Commissioner's investigation investigatory questions on 5 February 2024.
11. The Commissioner considers that the scope of his investigation is whether SHSC held the requested information relating to parts two and three of the request at the time it was received. He will also look at any procedural errors.

Reasons for decision

Section 1 – general right of access to information held by public Authorities

12. 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."

13. In cases where there is a dispute over the amount of information held, the Commissioner applies the civil test of the balance of probabilities in making his determination. This test is in line with the approach taken by the Information Rights Tribunal when it has considered whether

information is held (and, if so, whether all of the information held has been provided). The Commissioner is not expected to prove categorically whether the information is held.

14. The Commissioner had clarified with the complainant that their complaint was solely about the 'not held' response to parts two and three of the request.
15. **Part two** – SHSC maintains that this information is not held:

"It is not realistic to predict how long a referral received today would wait, because individual waiting times vary according to need. In addition, we continuously review the service model with a view to making improvements to waiting times and using service user feedback to improve aspects of their experience.

We can only provide historical information on how long people have waited.

In our service model, we define first appointments differently. A thorough assessment of individuals' situation, history and need are undertaken by clinical staff from a range of disciplines including mental health nurses, physician associates and GPs with extended roles. This allows for formulation of a bespoke plan of support whilst awaiting diagnostic assessment."

SHSC stated that -

"For all individuals who attended an assessment appointment with the clinic during July 2023, the average wait time was 58 months, with the longest wait for an individual being 62 months (as quoted on the website)."

16. **Part 3** – SHSC maintained that this information was not held:

"It is not realistic to predict how long a referral received today would wait, because individual waiting times vary according to need and the types of intervention we offer. The types of contact we offer varies from mental health nurse, voice and communication therapy, psychology and peer support and these clinical staff engage with the person to provide individualised and person-centred care, support and management of risk.

In addition, we continuously review the service model with a view to making improvements to waiting times and using service user feedback to improve aspects of their experience.

We can only provide historical information on how long people have waited, which is provided in the response to the previous question.

We do not offer surgical interventions, so wait times for this would need to be sought from specific providers. We do support service users while they are waiting for surgical treatment, and after.”

17. SHSC takes issue with the complainant’s view that its first response was “disingenuous”. Its internal review concluded that this response was “accurate”, having consulted the “management of the relevant service” and an FOI practitioner from another Trust to get “an independent view”. The reasons for the response were set out in the review but this was not sent to the complainant until later due to an error.

18. SHSC pointed to the Commissioner’s guidance -

“The Act does not cover information that is in someone’s head. If a member of the public asks for information, you only have to provide information you already have in recorded form. You do not have to create new information or find the answer to a question from staff who may happen to know it.”

Its view is that the complainant’s “questions were prospective -how long would [they] have to wait if [they] were referred on the day of [their] request. This referral is hypothetical and “how long [they] would have to wait would depend on [their] personal circumstances”. There are many variables such as whether the commissioning organisation responsible for” the individual was prepared to fund their treatment. There can be a requirement to accept patients that have transferred from other providers elsewhere in the country and maintain their original referral dates which can then affect SHSC’s own waiting times. SHSC cannot predict the length of time and it argues that it is not obliged to do so under the legislation. It does not provide service users with an estimate of how long they may need to wait at the time the referral is received. They are informed that SHSC is unable to provide specific waiting times and that their GP will be contacted later. Therefore, if an individual had been referred on the same date as the information request, their wait time could not be estimated. Patients referred then would not yet have been allocated appointments.

19. In an effort to be helpful, SHSC provided information that it did hold and what it believed may be relevant “ - this was factual information about actual waits that we do hold and routinely publish”. The latest actual waiting times are at www.shsc.nhs.uk/services/gender-identity-clinic and the complainant was referred to the website. SHSC also explained that it did not offer one of the services mentioned in the request and that this would mean referral to another provider whose services are

outside SHSC's control. Its view is that the complainant had the opportunity to make further requests based on the response, focusing on what information SHSC held rather than pursuing information they believed it should hold.

20. The Commissioner asked SHSC several questions in order to determine, on the balance of probability, what it held falling within the scope of the request. It explained that the request "was raised with the specific service involved". The service understands "the way the service operates, how referrals are processed once received, and how and when appointments are allocated to patients". If appropriate, "analysts can extract information from the system" but, in this case, appointments would not have been booked for individuals referred at the time of the request. There are no expected waiting times for that cohort.
21. SHSC has no details regarding a hypothetical appointment. However, no referral made on the day of the request has a future appointment booked that would enable it to calculate expected waiting times. SHSC states on its website that, "We are currently booking appointments for people who were referred to the service in September 2018". At the time of its response to the Commissioner (5 February 2024) there had been no appointments allocated. Therefore it stated that it will be some time before individuals referred at the time of the request would be given appointments. SHSC explains that the Gender Identity Service was involved in its response to the request and, again when the complainant disputed the response.
22. Reports can be run from the electronic patient information system and data interrogated but no appointments have yet been made for patients referred at the time of the request. SHSC confirmed that appropriate searches had been conducted at the time of the request. All the relevant information is held on the electronic system, any paper documents being scanned onto it. Information relating to waiting times for patients referred at the time of the request will be held as part of a patient's record, once it has been created. The information to calculate waiting times has not been created. SHSC follows national guidance (NHS Records Management Code of Practice). Records are kept to ensure a "safe and effective provision of services" but SHSC does not use legal obligation as its basis for processing.
23. The Commissioner put various points to SHSC that the complainant had raised, such as their view that SHSC must hold the building blocks to respond to parts two and three because it knows how many people are currently on the waiting list and how many people it sees each week. The complainant has stated that, without this information, no health service could carry out future modelling/workforce planning. SHSC responded by stating that the complainant is wrong. It holds -

"the building blocks to calculate actual waiting times for patients who have been seen and we can calculate expected waiting times for people who have already been given future appointments. We also hold information on patients who have been referred but have not yet been given an appointment so we know how long they have waited so far but not how long they will ultimately wait. All of this is useful in managing a service."

24. Actual waiting times are available on SHSC's website and were provided to the complainant. However,

"The waiting time for any specific patient will depend on their particular circumstances, including their medical condition(s) and their funding arrangements which are not clear at the time of referral. Factors beyond our control will also affect waiting times for all of our patients – since this is a specialist service with few providers nationally, we are affected by circumstances in other providers such as the opening or closure of other services which may mean that we are obliged to add other patients to our waiting list, or even transfer them to new providers, and any such unforeseen movements will affect waiting times."

25. SHSC stresses "the actuality of running the service" means that shortages of staff can have consequences on patient waiting times which "can be very long and subject to various factors beyond our control". Therefore SHSC cannot provide a patient with an estimate of how long they may wait at the time of referral.

The Commissioner's view

26. For the reasons provided in paragraphs 15 to 25 the Commissioner accepts, on the balance of probability, that the information requested at parts two and three of the request are not held by SHSC. As explained, SHSC does hold actual waiting times but not in the context of the hypothetical scenario set out in the request. For the same reason it does not hold the building blocks to provide the information.

Procedural matters

27. SHSC failed to respond to the complainant's request within 20 working days of receipt. It therefore breached section 10 of FOIA.
28. SHSC also communicated information to which the complainant was entitled late, the Commissioner has therefore recorded a breach of section 1(1)(b) of FOIA.

Other matters

29. The section 45 code of practice¹ recommends that public authorities complete the internal review process and notify the complainant of its findings within 20 working days, and certainly no later than 40 working days from receipt.
30. SHSC provided a late review to the complainant due to an error. This been recorded for monitoring purposes.

¹ [CoP FOI Code of Practice - Minor Amendments 20180926 .pdf \(publishing.service.gov.uk\)](#)

Right of appeal

31. 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

32. 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.
33. 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

Janine Gregory
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