

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 September 2012

Public Authority: Bristol NHS Primary Care Trust
Address: South Plaza
Marlborough Street
Bristol
BS1 3NX

Decision (including any steps ordered)

1. The complainant has requested from Bristol NHS Primary Care Trust ("NHS Bristol") a copy of a presentation related to the provision of pathology services in the Bristol area and data used to compile the presentation. NHS Bristol refused to provide the information under section 22 (intended for future publication).
2. The Commissioner's decision is that NHS Bristol has incorrectly applied section 22 to the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose to the complainant the information that it has withheld under section 22.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 29 October 2011, the complainant wrote to NHS Bristol and made a number of requests for information related to meetings/workshops/events referred to in the September Lay Approach Document. The request which was numbered 14 was for:

"14. Review issue Log 16 "Currently no benchmarking data for current and future pathology service against national centres of excellence (amount of specialisation, research, staffing comparisons, attrition and long term sickness rates, equipment, facilities)" "Impact - Unable to identify where improvements are required and will be unable to demonstrate if any reconfiguration results in benefits" Status as at 9th August - "Current baseline data has been gathered and presentation being pulled together to be shared at project team meeting."

Please provide this baseline data – raw data that was used to compile the presentation as well as the presentation itself."

6. NHS Bristol responded on 25 November 2011 and provided the information that the complainant had requested in the other parts of her request. However, it refused to provide the information requested in request 14 (above). It cited section 21 of FOIA as its basis for not disclosing this information.
7. The complainant requested an internal review on 11 December 2011. NHS Bristol provided the result of its internal review on 6 January 2012. It explained that it was seeking to rely on section 22, rather than section 21, to withhold the information.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way her request for information had been handled, specifically NHS Bristol's refusal to disclose the information in the request numbered 14 in her letter of 29 October 2011.
9. The Commissioner considered whether NHS Bristol was entitled to withhold the information that had been requested under section 22.

Reasons for decision

10. Section 22(1) of FOIA states that information is exempt if:

"(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

(b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a)"

11. Section 22(1) is a qualified exemption and so if it is engaged the public authority must show that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(a) Is the information held with a view to its publication at some future date?

12. In the Commissioner's view, in order to demonstrate that the exemption under section 22(1) is engaged, a public authority must have an intention to disclose information at a future point in time and it must be able to demonstrate what information within the scope of the request it intends to publish.
13. NHS Bristol informed the Commissioner that the data contained in the presentation was collected in July 2011 and that the presentation contained all of the original baseline data that it held. It also informed him that, at the time of the request, it had an intention to publish all of the information that fell within the scope of the request after data had been collected for one year so that a full picture of the project and its outcomes would be available.

(b) Was the information held with a view to publication at the time when the request was made?

14. The Commissioner understands from NHS Bristol that the requested information was held with a view to publication at a later date at the time that the request was made.

(c) Is it reasonable in all the circumstances that the information should be withheld until a later date?

15. NHS Bristol explained that the presentation related to work being undertaken to improve the pathology services in the Bristol area. This work was intended to raise the performance of the service, support public confidence and change the way that staff felt about the improvement process.
16. The decision to apply section 22 was taken to ensure that the baseline data on which the presentation was based was not used in a manner specifically designed to damage public confidence in the service. It was

believed that this was possible due to previous experience of information being used in this negative manner.

17. NHS Bristol informed the Commissioner that an independent inquiry had been commissioned by University Hospitals NHS Foundation Trust into histopathology services in the Bristol area, with the resulting report being made publicly available. It believed that there were still serious concerns on the part of some of the participating organisations that once released the data would be used to try and undermine public confidence in the service as part of a wider campaign to call into question the finding of the inquiry which concluded in December 2010.
18. The inquiry had noted problems with the culture of the service and work was being done to change this. However, the on-going criticism of the service by specific individuals made this process increasingly difficult.
19. NHS Bristol explained that there was a commitment to releasing the data after an agreed period of time so that the baseline performance could be viewed in the context of the progress that had subsequently been made.
20. In NHS Bristol's view, in the context of local pathology services and a campaign which had undermined both staff and public confidence in the services, it was essential that it shared information in a way which encouraged openness from the participating organisations and provided an effective mechanism for commissioners/customers to assess the performance of the organisations. It felt that had the baseline data been shared without the context of the process that was being followed and the evidence of the associated improvement, that it would have been used to undermine the service. It believed that it was in the public interest that it ensured that it could continue to provide a safe service to the public. Without confidence both from the public and staff, it would not be able to provide this service.
21. The Commissioner notes that there has been considerable publicity and debate about the provision of pathology services in the Bristol area and that therefore information related to this issue is necessarily likely to be viewed as of a sensitive nature. He also notes NHS Bristol's concerns that the disclosure of the information at the time of the request, when the work being undertaken in relation to pathology services was still at an early stage, might have resulted in people making unwarranted criticisms of it or other organisations, without the benefit of being able to see the information in the context of improvements that might subsequently have been made. However, the Commissioner does not accept that concerns about potential adverse comment that might result from the disclosure of information, however unwarranted a public authority may believe such comments to be, is a basis for withholding

information under section 22. It is always open to a public authority to try to counter any potential criticism by providing some form of explanation or context to the information when it is released. Consequently the Commissioner does not accept that it was reasonable in all the circumstances for NHS Bristol to withhold the requested information from disclosure until a later date. He has therefore concluded that section 22 was not engaged and that the information should have been disclosed.

Right of appeal

22. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

23. 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.
24. 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

Rachael Cragg
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