

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 July 2020

Public Authority: NHS Wirral Clinical Commissioning Group
Address: Marriss House
Hamilton Street
Birkenhead
Wirral
CH41 5AL

Decision (including any steps ordered)

1. The complainant requested copies of email chains relating to an incident that took place at a maternity centre. NHS Wirral Clinical Commissioning Group ("the CCG") provided some information, but relied on sections 21 (reasonably accessible) and 40 (third party personal data) of the FOIA respectively to withhold information.
2. The Commissioner's decision is that the CCG has now identified all the information it holds within the scope of the request. She also considers that the CCG is entitled to apply sections 21 and 40(2) in the manner that it has. However, the CCG failed to identify all the relevant information it held and failed to issue its refusal notice within 20 working days. It thus breached sections 10 and 17 of the FOIA respectively.
3. The Commissioner does not require further steps.

Background

4. On 7 March 2018, a small group of individuals attended an open day at the Seacombe birthing centre and spoke to staff at the facility. The CCG initially (and incorrectly) identified these individuals as, first councillors, then political party activists, then members of a self-described campaign group called "Defend Our NHS."
5. The CCG eventually ascertained that the individuals involved were not representing the "Defend Our NHS" group – but not before the Chief

Officer of the CCG had sent "Defend Our NHS" an email making clear that harassment of centre staff would not be tolerated.

6. The Chief Officer subsequently apologised to "Defend Our NHS" for the error. It is not clear exactly who the individuals involved actually represented but the Commissioner does not consider that this is relevant to her considerations.

Request and response

7. On 15 August 2019, the complainant wrote to the CCG and requested information in the following terms:

"I ask for copies of emails from March 2018 (7th March to 31st March 2018 inclusive) sent and received by CCG/NHS employees regarding the Open Day held at the prospective Seacombe birthing centre on 7th March 2018 specifically regarding the attendance at the open day of four people from a health campaigns group (referred to as Save our NHS or Defend our NHS).

"This should include:

- [1] An email sent by Carol Fenton (Head of Early Years) about the Open Day. This email was sent at 12.57 on 7th March 2018 to several NHS employees. The email describes the attendance at the open day of four people from a health campaigns group. I request a full list of those who received this email which includes at least one Wirral Councillor.*
- [2] An email sent to CCG Chief Officer Simon Banks on 12th March 2018 which included a forwarded copy of Carol Fenlon's email from a Wirral Councillor who received Ms Fenlon's email above.*
- [3] An email sent by Simon Banks on 12th March 2018 to the leadership of Wirral Council including Cllr Phil Davies.*
- [4] An email from Cllr Paul Stuart to Simon Banks on 12 March 2018 at 20.59.*
- [5] Email exchanges between Simon Banks and Michael Chantler and a copy of any investigatory or other report produced by Mr Chantler or other on the visit of the campaigners on the Open Day.*
- [6] Any email related to the Open Day describing alleged inappropriate behaviour of the four campaigners exchanged*

between Simon Banks, Michael Chantler and Wirral Councillors between the specified dates."

8. On 27 September 2019, the CCG responded. It provided some information and stated that it did not hold some of the information requested. It also withheld some information and relied upon sections 21 and 40(2) as its reason for doing so.
9. The complainant requested an internal review on 1 January 2020. The CCG completed its internal review on 28 January 2020. It revised its position slightly in that it disclosed a small amount of additional information it had previously withheld. It also noted where, in the information it had previously disclosed, some of the items which the complainant believed were missing could be located.

Scope of the case

10. The complainant first contacted the Commissioner on 19 December 2019 to complain about the way his request for information had been handled. The Commissioner declined to investigate the complaint originally until such times as the CCG had had the opportunity to carry out an internal review.
11. Once the internal review had been completed, the complainant asked the Commissioner once again to investigate his complaint. He was unhappy at the CCG's use of redactions and argued that it held further information.
12. At the outset of her investigation, the Commissioner wrote to the complainant to set out her preliminary view of his complaint. She considered it likely that the CCG had applied the exemptions correctly and asked the complainant to identify any additional information, that he believed to be missing, that hadn't already been provided to him and to explain why he believed that the information was likely to be held.
13. The complainant rejected the Commissioner's view and argued that further information was held.
14. The Commissioner considers that the scope of her investigation is to determine:
 - a. Whether the CCG has identified all the information it holds within the scope of the request.
 - b. Whether the CCG has applied the cited exemptions correctly

- c. Whether the CCG complied with the procedural requirements of the FOIA in responding to the request.

Reasons for decision

Is further information held?

15. Section 1(1) of the 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.*
16. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, she will consider any reason why it is inherently likely or unlikely that information is not held.
17. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
18. The CCG explained that the incident at the centre had been handled by two individuals within the organisation: the Chief Officer (Mr Banks) and the Assistant Director (Mr Chantler). Both these individuals had searched their inboxes for relevant correspondence. Of the correspondence that had been identified, some had been disclosed and some had been withheld under section 21 of the FOIA.
19. The CCG informed the Commissioner that the matter had been mostly handled via email and therefore any relevant information it held would be recorded in emails. As the officers involved had searched their inboxes, no further relevant information was held.
20. The complainant noted that he had asked which councillors had received copies of a particular email "directly or indirectly". The Commissioner is satisfied that, where emails were sent from the CCG to elected

councillors, the names of the councillors have been left in. If others outside the CCG had decided to forward those emails, this information would not be held by the CCG.

21. The Commissioner considers that many of the documents that the complainant considers to be "missing" are in fact documents that the CCG has relied on section 21 to withhold. However, the complainant did identify one potential gap in the information which had been provided.
22. In the emails which have been disclosed, the Chief Officer notes that he has asked the Assistant Director to look into the incident. However, none of the information disclosed records the Assistant Director informing others of his findings.
23. The Commissioner raised this matter with the CCG which carried out further searches. As a result of these further enquiries, the CCG identified a small quantity of additional information which it disclosed to the complainant.
24. In terms of the results of the investigation, the CCG explained that the Assistant Director had had a telephone conversation with the centre manager. He then reported his findings verbally to the Chief Officer, who sent an email to the "Defend Our NHS" group reporting the outcome and apologising for the mistake.
25. The newly-identified information contained some earlier drafts of the email to "Defend Our NHS" but, as the two key conversations had been conducted verbally, the CCG noted that it held no further information in recorded form.
26. Based on her experience of similar cases, the Commissioner considers that it is not unusual for such an investigation to have been carried out verbally. There may not be official meeting notes, but the outcome is recorded in the letter that the Chief Officer sent to "Defend Our NHS" – that is the information the CCG holds in recorded form and it has been communicated to the complainant.
27. The Commissioner is satisfied that the CCG has carried out adequate searches for relevant information. She therefore concludes that, on the balance of probabilities, the CCG has identified all the relevant information that it holds.

Section 21 – reasonably accessible to the requestor

28. Section 21(1) of the FOIA states that:

Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

29. Information which is already in the public domain will almost always be reasonably accessible to any requestor.
30. However, section 21 is one of the few sections of the FOIA which allows a public authority to consider the specific identity of the requestor when determining its response. In order to attract the exemption, the information need not necessarily be available to *any* requestor, just to the *particular* requestor who has asked for it.
31. The information that the CCG relied on section 21 to withhold consisted of various emails within longer chains. It noted that the emails it had withheld were ones that the complainant had either been an original recipient of, or had been copied into.
32. The complainant argued that he wanted to see the complete, unredacted chains and did not agree that this information was accessible to him.
33. The Commissioner notes that the right of access under the FOIA is the right of access to *information* and not to *documents*. The complainant does not have a right of access to a particular email chain – but he does have a right of access to the information contained within that chain.
34. The CCG furnished the Commissioner with copies of both the redacted and unredacted versions of the email chains. Having inspected the withheld information, the Commissioner is satisfied that all the withheld emails had either the email address which the complainant has used to correspond with her, or another address which he evidently has access to, within either the “recipients” or the “cc” fields.
35. The fact that the complainant may not have the complete email chain does not mean that the information contained within the chain is not reasonably accessible to him.
36. The Commissioner is therefore satisfied that the specific information which the CCG has relied upon section 21 to withhold is information that is reasonably accessible to the complainant – because he received it at the time the information was created.
37. Given that the complainant is clearly active within the “Defend Our NHS” group, the Commissioner also considers that any emails copied to the group would be reasonably accessible to the complainant.
38. The Commissioner is therefore satisfied that the CCG has applied section 21 of the FOIA correctly to the withheld information.

Section 40(2) – third party personal data

39. Section 40(2) of the FOIA provides an exemption from disclosure for personal data where such disclosure would, if it occurred outside of the FOIA, breach any of the data protection principles. One of the data protection principles is that any processing of personal data must be lawful.
40. In particular, in order for disclosure under the FOIA to be appropriate, a specific lawful basis for processing must exist which allows the information to be made available to the world at large. If no lawful basis exists, processing cannot be lawful.
41. The information that the CCG has withheld under this exemption is the names and email addresses of a small number of junior employees who were copied into the emails. Names of the senior officers and elected councillors were originally redacted, but disclosed at the internal review stage.
42. There is no evidence to suggest that any of the junior officials involved have already given their consent to have their personal data disclosed. The CCG would not be required to obtain (or even seek) consent in order to satisfy a FOIA request.
43. The wording of the FOIA specifically prevents public authorities from relying on either “meeting a legislative requirement” or “performance of a public task” as a lawful basis for disclosure under the FOIA. The Commissioner therefore considers that the only other lawful basis likely to be applicable to such processing would be if the processing was necessary to satisfy a legitimate interest pursued by the data controller.
44. For disclosure to be lawful, it must satisfy a legitimate interest. It must also be *necessary* to satisfy that legitimate interest and, if both those tests are met, the legitimate interest must be strong enough to also outweigh the rights of the data subject(s).
45. The Commissioner can only identify two possible legitimate interests in disclosure in this particular case: the first would be the general interest in transparency and demonstrating that the CCG was acting appropriately. The second legitimate interest would be in demonstrating that decisions were being taken at an appropriate level of seniority.
46. However, the Commissioner does not consider that disclosure in this case would satisfy either of the legitimate interests she has identified.
47. Any legitimate interest in transparency would have been met by disclosure of the *contents* of the emails themselves. Revealing the

names of any junior officials who may have been copied in would not provide any greater degree of transparency.

48. Equally, the legitimate interest in understanding the level of seniority at which decisions were taken has already been met by the CCG disclosing the names of its senior officers and of elected officials. Disclosing names of junior officials copied into correspondence would not, by definition, demonstrate that senior officials were any more (or any less) informed about events than would be clear from the information that has already been disclosed.
49. The Commissioner is therefore satisfied that disclosure would not satisfy a legitimate interest. As the first step of the test has not been met, there is no need for the Commissioner to determine whether disclosure would be necessary. No lawful basis exists for processing the personal data and thus disclosure would be unlawful.
50. As disclosure of this information would breach the data protection principles, the CCG is entitled to rely on section 40(2) of the FOIA to withhold it.

Procedural Matters

51. Section 10 of the FOIA states that a public authority should comply with its section 1(1) duty "*promptly and in any event not later than the twentieth working day following the date of receipt.*"
52. During the course of the Commissioner's investigation the CCG identified that an email which it considered fell outside the scope of the request actually contained some attachments which were within scope. This information was not identified within the 20 working day deadline set out in the FOIA.
53. Whilst the Commissioner is required to record a breach of section 10 of the FOIA in such circumstances, as the complainant has now received the newly-identified information, no remedial steps are required.

Section 17 – Refusal Notice

54. Section 17(1) of the FOIA states that when a public authority wishes to withhold information or to neither confirm nor deny holding information it must:

within the time for complying with section 1(1), give the applicant a notice which—

- (a) states that fact,*
- (b) specifies the exemption in question, and*

(c) states (if that would not otherwise be apparent) why the exemption applies.

55. The CCG did not issue its refusal notice within 20 working days of receiving the request. It thus breached section 17(1) of the FOIA.

Right of appeal

56. 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

57. 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.
58. 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

Phillip Angell
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