

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 August 2024

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

Decision (including any steps ordered)

1. The complainant has requested from NHS England (NHSE) information about the performance of Trusts regarding certain objectives. NHSE initially cited section 21 of FOIA, which concerns information that's accessible to the applicant by other means. Later, at internal review stage, it stated that it did not hold the requested information.
2. The Commissioner's decision is that, on the balance of probability, NHSE does not hold the requested information.
3. The Commissioner does not require further steps.

Request and response

4. On 9 November 2023 the complainant wrote to NHSE and requested information.
5. The complainant clarified on 11 November 2023 –
"To provide further clarity on my original request, I would like to elaborate on the specific information I am seeking.

Patients on Waiting Lists:

- Please furnish information on patients currently on waiting lists for treatment who would typically have been seen by now under government waiting targets.

Procedures and Referrals:

- No of. patients who have had procedures cancelled.
- No of. patients experiencing delayed or cancelled referrals.
- No of. patients whose referrals have been refused due to limited capacity. Emergency Care Wait Times:
 - I am interested in the wait times for emergency care, specifically the duration from the decision for care to admission.
 - Please share the monthly number of GP referrals to NHS consultant-led outpatient services using the NHS e-Referral Service (e-RS).

Regarding the plans outlined in my initial request, I am seeking detailed information on:

Preventing Hospitals from Being Overwhelmed:

- Provide insights into strategies, protocols, or measures in place to manage hospital capacity and prevent overwhelming situations, particularly in the context of the ongoing challenges posed by COVID-

Increasing Funding Measures:

- Include details on funding initiatives or financial measures implemented to support the medical workforce. This encompasses information on funding allocations or programmes aimed at retaining and strengthening the medical workforce.

Planning to Increase NHS Capacity:

- Specify plans or actions taken to enhance NHS capacity, including relevant financial considerations and the specific financial years these measures relate to.

Increasing Collaboration Between Primary and Secondary Care Services:

- Please provide information on efforts to increase collaboration between primary and secondary care services.

I hope these clarifications provide a more detailed understanding of my information requirements. If further clarification is necessary,

please do not hesitate to reach out.”

6. On 21 November 2023 NHSE provided a link to some information but made a further request for clarification asking for more specificity about the government waiting targets requested.
7. On 22 November 2023 the complainant clarified as follows -

‘Thank you for your email. With regards to government waiting targets, I refer to the mandate objectives under "Priority 1: cut NHS waiting lists and recover performance”

[The government's 2023 mandate to NHS England - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/the-governments-2023-mandate-to-nhs-england)

as well as the National NHS objectives 2023/24 stated on page 7 within the 2023/24 priorities and operational planning guidance (Version 1.1, 27 January 2023)

For each of the "core services" outlined on page 7, it would be good to also understand the national picture of which trusts are on track to fulfill these objectives, which have some work still to do and which are unlikely to meet these objectives.’

8. NHSE responded to this request on 18 December 2023 and withheld the requested information, citing section 21 of FOIA. NHSE provided a series of links in its response.
9. The complainant asked for an internal review on 19 February 2024:

‘I disagree that "This information is exempt from disclosure under Section 21 of the Freedom of Information Act 2000 (FOIA), as it is already reasonably accessible to you”. The information provided is cumbersome and does not specifically answer the specific questions in my request.

Section 11 of FOIA gives the requester the right to express a preference for how the information is communicated (for example electronic, hard copy or audio form)." I ask for the answers to my specific questions to be self-contained within the response to this request...’

10. The complainant chased a response on 24 March 2024.
11. On 28 June 2024 NHSE provided an extremely late internal review in which it withdrew section 21 and stated that it did not hold the

requested information. In its response NHSE provided the following explanation –

'NHS England has concluded, on the balance of probability, that we [do] not hold any information which sets out "which trusts are on track to fulfil these objectives, which have some work still to do and which are unlikely to meet these objectives". This assurance is based on discussions with national programme teams...'

12. NHSE explained how this error had occurred and provided some advice to the complainant about contacting individual Trusts as they "may conduct their own analyses against the stated objectives".

Scope of the case

13. The complainant contacted the Commissioner on 13 April 2024 to complain about the way their request for information had been handled.
14. The Commissioner wrote to the complainant as their initial complaint had been about the citing of section 21 of FOIA and that exemption had been withdrawn. He provided his initial view that any decision was likely to accept that the requested information was not held. However, the complainant was not content. They expressed their concern about the length of time taken to send a refusal notice and highlighted the lateness of the internal review. Regarding the refusal notice, the Commissioner pointed out that there had been more than one clarification made and that when this occurs the clarification is treated as a new request and the clock starts again.
15. The Commissioner considers that the scope of his investigation is to consider whether NHSE is correct when it says that it does not hold the requested information.

Reasons for decision

Section 1 – right of access

16. 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.

17. Where there is a dispute between the information located by a public authority, and the information a complainant believes should be held, the Commissioner follows the lead of a number of First-tier Tribunal (Information Rights) decisions in applying the civil standard of the balance of probabilities.
18. In this case, the Commissioner considered that he had enough information to enable him to make a decision without seeking further submissions from NHSE.
19. The complainant was not content with the fact that NHSE had cited section 21 of FOIA. They had wanted specific answers to their questions and the information NHSE had provided was "cumbersome".
20. As set out earlier in this decision notice, NHSE had concluded that -

'on the balance of probability, that we [do] not hold any information which sets out "which trusts are on track to fulfil these objectives, which have some work still to do and which are unlikely to meet these objectives". This assurance is based on discussions with national programme teams

The objectives described in your FOI request are national ambitions and are not continually monitored at individual Trust Level by NHS England.'
21. For this reason NHSE explained that it did not hold the specific information the complainant had requested -

"In our original response, we signposted you to published information which relates to trust performance in areas which relate to the objectives you have asked about. However, we accept that this is not the same as information which offers an analysis of which trusts are or are not 'on track'."
22. NHSE apologised for its refusal notice when it had said (inaccurately) that it held the requested information and that it was available to them online.
23. NHSE hoped that the information it had provided would be "useful" even though it did "not specifically address" the request. It suggested that the complainant "may wish to liaise with individual trusts in relation to your request. Individual trusts may conduct their own analyses against the stated objectives". NHSE pointed out that Trust contact information could be found online.

The complainant's view

24. The complainant does not accept NHSE's position as set out above.

"This is concerning, as the requested analysis of trust performance is critical for transparency and accountability. The absence of this data raises questions about how NHS England monitors progress towards national targets and how it communicates this information to the public."

The Commissioner's view

25. Whilst the complainant raises points about transparency and accountability, it is beyond the Commissioner's remit to consider "how NHS England monitors progress towards national targets and how it communicates this information to the public". He can only consider whether this information is held, not whether it should be held.

26. The Commissioner also considers that the final clarification the complainant made was expressed in an imprecise way. This may have contributed to the attempt by NHSE to provide a helpful response via links to some publicly available information, however misguidedly.

27. The Commissioner has no reason to doubt NHSE's explanation that "national ambitions...are not continually monitored at individual Trust Level by NHS England". The complainant's argument that it is "concerning" as it is "critical for transparency and accountability" does not mean that the information is held.

Other matters

28. The complainant has asked the Commissioner to "assess whether NHS England's handling of the request aligns with the FOIA's principles, including the prompt and helpful provision of information".

29. The Commissioner considers that the overall handling of the request was flawed. Though he has not investigated the citing of section 21 of FOIA because it was withdrawn, the complainant was left attempting to find the requested information within a quantity of information when it was not, in fact, held.

30. The lateness of the internal review meant that the citing of section 21 of FOIA was not overturned for an unacceptable length of time. 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 the receipt. In this case NHSE did not provide an internal review for four months, well beyond the recommended timeframe.

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.

Janine Gregory
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF