

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 11 August 2016

**Public Authority:** NHS Commissioning Board (NHS England)  
**Address:** 4N22 Quarry House  
Quarry Hill  
Leeds  
LS2 7UE

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to notes made at a patient engagement meeting about Sudbury surgery. The Commissioner's decision is that the NHS Commissioning Board (NHS England) has correctly applied sections 1 and 22(1) of the FOIA in its response to the request. The Commissioner does not require NHS England to take any steps as a result of this decision notice.

#### Request and response

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2. On 18 November 2015 the complainant requested the following information:

'In the meantime, your colleague (I believe [name redacted]) took copious notes at our meeting /presentation on Friday 13 November. May we have the notes please for distribution to the patients?'

3. On the same day NHS England replied under their normal course of business and explained that:

*'The engagement event with patients last week was one part of a wider engagement that included feedback on line and on surveys distributed in the practice. As such once the engagement has closed after the 22nd November all the responses will be collated and form part of the documents that are sent to bidders, they will also be published and patients will be able to access them at the same time.'*

4. The complainant repeated the request under FOIA on 20 November 2015:

*'All the patients at the event knew that copious notes were being taken. They shared their thoughts on the basis that these notes would be made available. They are also entitled to know that the meeting was recorded and to see that record. Otherwise there will be concern (however unjustified) that the process is not transparent. In any event, they may think that their position is - or should be - of rather more importance to NHSE than that of the prospective bidders, their GP's having been made pretty well aware of their position.'*

*May we please have the full notes of the meeting now?*

*Contemporaneous notes are clearly important in context of checking; I have already had feedback that patients should have taken their own notes but we have said that we can rely on [name redacted]'s scribing. I would hope that these could be provided without delay but I am also now making the request under the Freedom of Information Act.*

*I look forward to an early response but, for the avoidance of doubt, also with a FOI reference number and a confirmation of the date by which I may expect a response (which I calculate as 18th December 2015). I note the FOI email is not in terms an FOI address but have taken it from the NHSE website as [england.contactus@nhs.net](mailto:england.contactus@nhs.net) . As the tendering is a joint exercise and for the avoidance of doubt, I have included the ccg FOI email address.'*

5. On 18 December 2015, NHS England responded that it only held some information relevant to the request.

*'It may help if we explain that there were no minutes taken with regard to your request and as such, NHS England does not hold this information.'*

*A full patient feedback report will be published in the near future. We are withholding this information under section 22 of the FOI Act, which states that public bodies are not obliged to disclose information that is intended for future publication.'*

6. NHS England then went on to provide more information about the wider engagement process.

*'The engagement event at the Sudbury practice was one part of a wider engagement with stakeholders including patients of the practice. The engagement process offered options for people to feed back to us in a variety of ways. At the time of writing to patients before the meeting, all were informed that the feedback that was received would be published on line. The publication will include feedback from meetings, electronic*

*and paper surveys, telephone calls, letters and emails, providing a comprehensive report of all stakeholders' views that we have received. Providing partial information at this time will not reflect all stakeholders' views who have kindly contributed to this process and may lead to confusion or a belief that their views were not taken into account.*

*For these reasons, we believe withholding the information outweighs the public interest in releasing the information. Equally, as this information is to be published soon, we feel that it is best and reasonable to keep to this timeframe rather than disclose earlier where error or duplication may occur. On publication, this information will be freely available from NHS England's website, on or before 8 January 2016.'*

7. On 24 January 2016 the complainant disputed that there were no notes taken at the meeting by NHS England staff.

*'The meeting was the primary means of engaging the patients, and was called as such and for that purpose by NHS England. The notes must exist. They were taken by members of staff of NHS England, and the patients who participated ... are entitled to see that their views were reflected... all we are trying to achieve is that patients' feedback was correctly recorded.'*

8. The complainant also expressed dissatisfaction that the 'full patient feedback report' was not accessible at the web link provided.
9. NHS England assessed this as a request for an internal review and on 3 March 2016, NHS England sent the outcome of its internal review upholding its position.
10. On 5 March 2016 the complainant lodged a complaint to NHS England that the notes (subject to an FOIA request) had been destroyed.
11. On 10 March NHS England answered the complaint in an attempt to confirm and assure the complainant of its response and handling. It apologised that the complainant was still unhappy that it was not able to provide copies of contemporaneous notes taken at the patient engagement meeting at Sudbury practice in November 2015. NHS England confirmed that their response still stands. It also stated that the feedback report had been published and provided a link to it.

## **Scope of the case**

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12. The complainant contacted the Commissioner on 5 March 2016 to complain about the way the request for information had been handled, and after providing further documents, the case was accepted.

13. The Commissioner considers that this request has 2 parts: the notes taken at the November feedback meeting (section 1) and the incorporation of the information from the notes into the full patient feedback report published in January 2016 (section 22). Therefore the Commissioner will focus her investigation on determining if NHS England correctly applied sections 1 and 22 of the FOIA in its response to the request for information.

## Reasons for decision

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### Section 1

14. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information within the scope of the request, and if so, to have that information communicated to him.
15. These rights only apply to the information held by the public authority. This means that there is no explicit right to copies of original documents. (See the Commissioner's guidance on the right to recorded information: <https://ico.org.uk/media/for-organisations/documents/1621/the-right-to-recorded-information-and-requests-for-documents.pdf>)
16. Paragraph 50 of the guidance also refers to section 11 (means of communication): section 11 of the Act gives the requester the right to express a preference for the means by which the information is communicated (for example electronic, hard copy or audio form). However, there is no provision to express a preference to receive copies of original documents.
17. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities.
18. As is the practice in a case such as this, the Commissioner asked NHS England a number of questions.
19. In response to the Commissioner's questions about the location of the information, NHS England confirmed that:
  - the notes taken at the meeting no longer exist. They did not exist at the time of the request being received and as such are not held by NHS England.

20. The Commissioner asked NHS England a number of questions to establish what searches had been carried out for information falling within the scope of the request:
- There were some hand written notes taken at the meeting which were then fed into the published report. As the information was transferred into the report the hand written notes were placed into the confidential waste bin as the feedback noted was reflected in the published report.
21. NHS England stated that the questions on electronic searches were not applicable:
- These were hand written notes. No minutes were taken/transcribed.
  - This information is not held, the record of the meeting is within the published report.
22. The Commissioner asked questions on whether any recorded information ever held relevant to the scope of the request had been destroyed. NHS England answered:
- There were notes taken that were transferred into the final report, these were then disposed of as per our records management standard operating procedure.
23. The Commissioner asked if recorded information was held but is no longer held, when did NHS England cease to retain this information. NHS England answered:
- We did not record a date.
24. The Commissioner asked about NHS England's formal records management policy on the retention and destruction of records of this type. NHS England referred to its policy:
- 5.16.7 Short-lived documents such as telephone messages, notes on pads, post-its, e-mail messages, etc do not need to be kept as records. If they are business critical they should be transferred to a more formal document which should be saved as a record.
25. The Commissioner asked about the business purpose for which the requested information should be held. NHS England answered:
- The information was transferred to the final formal document and published on 6 January 2016: <https://www.england.nhs.uk/london/wp-content/uploads/sites/8/2016/01/sudbury-surgery-procurement-report.pdf>

26. Having considered NHS England's responses to the Commissioner's investigations, the Commissioner is satisfied that the handwritten notes were destroyed in line with the record management retention policy at the time and that the information within the notes was transferred to the full patient feedback report.
27. The Commissioner is satisfied that the complainant had no explicit right under FOIA to copies of the original documents and that NHS England complied with section 1 of FOIA.

## **Section 22 Information intended for future publication**

28. *(1) Information is exempt information 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).*

29. In order to determine whether section 22 is engaged the Commissioner therefore considered the following questions:
  - When the complainant submitted the request, did NHS England intend to publish the information at some date in the future?
  - If so, had NHS England determined this date when the request was submitted?
  - In all the circumstances of the case, was it 'reasonable' that NHS England should withhold the information from disclosure until some future date (whether determined or not)?

## **Was the information held with a view to its publication at a future date?**

30. On 5 October 2015, NHS England sent a letter to all patients to provide them with some information about GP services at Sudbury Vale Surgery and to invite them to give their views on how these could be provided in future.
31. The letter confirmed the intention to publish the findings of the engagement and the outcome of the selection process in two ways:

- We will publish information online at <http://www.england.nhs.uk/london/>
  - We will write to you again to let you know the outcome of the selection process.
32. In its original response to the complainant on 18 December 2015, NHS England confirmed that a full patient feedback report would be published early January 2016.
33. Therefore the Commissioner has considered the above and accepts that at the time of the request there was a settled intention to publish the patient feedback report which would include the information from the notes taken at the patient engagement event in November 2015.

### **Was it 'reasonable' to withhold the information?**

34. However, for this exemption to be relied on section 22(1)(c) requires that the application is 'reasonable in all the circumstances' of the request.
35. The complainant stated that the 'notes are clearly important in context of checking' and 'patients who participated ... are entitled to see that their views were reflected... all we are trying to achieve is that patients' feedback was correctly recorded.'
36. In its initial response to the complainant, NHS England explained that the publication will include the feedback from all participants and *'providing partial information at this time will not reflect all stakeholders' views who have kindly contributed to this process and may lead to confusion or a belief that their views were not taken into account.'*
37. Having considered the representations provided by the complainant and NHS England the Commissioner considers that it was correct to apply section 22 as at the time of the request there was a settled intention to publish and that it was reasonable to withhold the information.

### **The public interest test**

#### **What public interest arguments in favour of disclosing the information were taken into account?**

38. The Commissioner is aware from the authority's submissions that it acknowledges the importance of public authorities operating in an open and transparent manner, and that this is a factor that has been considered as part of its public interest reasoning.



### **What public interest arguments in favour of maintaining the exemption were taken into account?**

39. NHS England considers that releasing information intended for publication ahead of its planned publication date could lead to disruption of the communications plan and put duplicated or inaccurate information within the public domain. This would be misleading to those viewing the information.
40. For these reasons, NHS England believed that withholding the information outweighed the public interest in releasing the information. Equally, as the information was to be published soon (it was published on 6 January 2016), NHS England felt that it was best and reasonable to keep to this timeframe rather than disclose earlier where error or duplication may occur.

### **The balance of the public interest arguments**

41. The Commissioner has considered the detailed context to the request provided by the complainant and the arguments provided by NHS England in order to assess whether the public interest is weighed more heavily for or against disclosure. The fact that the information was due to be published so soon after the request was made weighs strongly in favour of disclosure at the planned date. The Commissioner considers that, on balance, it remained reasonable to withhold the information and concluded that the public interest favoured non-disclosure at the time of request.
42. On the basis of the above factors, the Commissioner has concluded that at the time of the request the authority was correct to withhold the information under the exemption provided by section 22.



## Right of appeal

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43. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

44. 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.
45. 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** .....

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
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