

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 20 January 2020

**Public Authority:** NHS Nene Clinical Commissioning Group

**Address:** Francis Crick House  
6 Summerhouse Road  
Moulton Park Industrial Estate  
Northampton NN3 6BF

#### **Decision (including any steps ordered)**

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1. The complainant has requested particular correspondence between a named individual and other parties from NHS Nene Clinical Commissioning Group ('the CCG'). The CCG has confirmed it holds some of the requested information and that this is exempt information under section 36(2)(c) of the FOIA (prejudice to the effective conduct of public affairs), with the public interest favouring maintaining the exemption. The complainant is not satisfied with the CCG's reliance on section 36(2)(c) with regard to the relevant information it holds.
2. The Commissioner's decision is as follows:
  - At the time of the request, the CCG was correct to withhold the disputed information under section 36(2)(c) of the FOIA, and the public interest favoured maintaining this exemption.
  - The CCG breached section 17(1) as it did not issue the complainant with a refusal notice within 20 working days of receiving his request.
3. The Commissioner does not require the CCG to take any remedial steps.

## Request and response

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4. On 10 April 2019 the complainant wrote to the CCG and requested information in the following terms:

*"All correspondence including emails and telephone records, briefing notes, assessments, between Daniel Kane (Chief Executive Officer General Practice Alliance) and any other party employed by or outside of the CCG regarding [Redacted] Nursing Home. [Redacted] Nursing Home, [Redacted]*

*All correspondence including emails and telephone records, briefing notes, assessments, between Daniel Kane (Chief Executive Officer General Practice Alliance) and any other party employed by or outside of the CCG regarding [Redacted] Nursing Home. [Redacted] Nursing Home, [Redacted].*

*All communication between Daniel Kane and other NHS bodies (including NHS England) and Local Authority bodies and their employees relating to [Redacted] Nursing Home registering with a GP Practice to secure generic GP cover for residents discharged to [Redacted] Nursing Home including (but not limited to) correspondence with Daniel Kane GPA."*

5. The Commissioner has redacted the names of two nursing homes from the request. She considers that by combining the names of the nursing homes, the geographic area covered by the CCG and other details given in this notice it would be possible to identify the complainant.
6. The CCG responded to the above request on 12 June 2019 – its reference FOI.19.NEN014. It confirmed it holds some information falling within the scope of the request and that it is exempt information under section 36(2)(c), with the public interest favouring maintaining the exemption.
7. The complainant requested an internal review on 23 July 2019. On 24 July 2019 the CCG advised him that it may take longer than 20 working days to provide a review on this occasion.
8. On 17 September 2019 the complainant advised the Commissioner that he had not received a review. The Commissioner wrote to the CCG on 24 September 2019 instructing it to provide a review within five working days. The CCG did not provide a review and the complaint was accepted for further consideration without one.

## Scope of the case

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9. The complainant first contacted the Commissioner on 19 August 2019 to complain about the way his request for information had been handled.
10. The Commissioner has noted that the complainant has wider concerns about the service provided by the CCG and has sent the Commissioner what he considers to be evidence supporting his complaint to her. The Commissioner has explained to the complainant that her role is to consider the CCG's compliance or otherwise with the FOIA legislation. She also explained that she would only take into account evidence that supports his position that the CCG has not complied with the FOIA in respect of his request.
11. In correspondence to her dated 8 October 2019 the complainant confirmed that he is dissatisfied with the CCG's reliance on section 36 to withhold information within the scope of his request.
12. The Commissioner's investigation has therefore focussed on the CCG's application of section 36(2)(c) to the information it holds and has withheld, and the balance of the public interest. She has also considered the timeliness of the CCG's response to the request.
13. The Commissioner has discussed the matter of the internal review under 'Other Matters'.

## Reasons for decision

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### **Section 36 – prejudice to effective conduct of public affairs**

14. Section 36(2)(c) of the FOIA says that information is exempt information if, in the reasonable opinion of a qualified person, disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
15. Section 36(2)(c) can only apply in instances when the envisioned inhibition or prejudice to the effective conduct of public affairs does not concern the giving/receiving of advice or the exchange of views – those matters are covered by section 36(2)(b).
16. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised, qualified person (QP) for that public authority. The QP's opinion must also be a "reasonable" opinion, and the Commissioner may decide that

the section 36 exemption has not been properly applied if she finds that the opinion given is not reasonable.

17. Other than for information held by Parliament, section 36 is a qualified exemption. This means that even if the QP considers that disclosure would cause harm, or would be likely to cause harm, the public interest must still be considered.
18. The submission the CCG provided to the Commissioner includes a 'Record of Qualified Persons Opinion' document, and associated email correspondence between CCG staff and the CCG's Chief Executive.
19. The Commissioner would generally also expect to be provided with the information that an authority is withholding. In this case, the CCG has explained that the correspondence in question has been archived for a long time and it would take its IT some time to retrieve it. It has made the point that the content of the correspondence may be fairly innocuous but that section 36 concerns prejudice to the effective conduct of public affairs. For reasons that will be discussed in this notice the CCG considers that releasing the requested information would be likely to frustrate its investigation but not because of the content of the correspondence, as such. The CCG has confirmed that the correspondence will be as described in the complainant's request ie it will involve particular individuals and nursing homes. In the circumstances, the Commissioner has not found it necessary to view the withheld information on this occasion.
20. To determine, first, whether the CCG correctly applied the exemption, the Commissioner is required to consider the QP's opinion as well as the reasoning that informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
  - (i) ascertain who was the qualified person or persons
  - (ii) establish that an opinion was given by the qualified person
  - (iii) ascertain when the opinion was given; and
  - (iv) consider whether the opinion was reasonable.
21. The Commissioner has considered the record of the QP's opinion that the CCG provided to her. With regard to the first of the criteria above, the QP in this case was Toby Sanders, the CCG's Joint Chief Executive, and the Commissioner is satisfied that the QP in this case was appropriate.
22. With regard to the criteria at paragraph 20(ii) and (iii), the email correspondence and Record of Qualified Persons Opinion form together evidence Mr Sanders confirming that, in his opinion, disclosing the requested information would be likely to have the effect set out under

section 36(2)(c). She has noted that Mr Sanders has not signed the Opinion form, nor is the form dated. However one of the emails that the CCG has provided is from Mr Sanders and is dated 12 June 2019. In that email Mr Sanders confirms that he is supportive of the "approach proposed" ie the CCG's reliance on section 36(2)(c). The Commissioner is therefore satisfied that an opinion was, in effect, given by the QP and that the opinion was given at the appropriate time; the CCG's refusal notice is dated the same day – 12 June 2019.

23. The Commissioner has gone on to consider whether the QP's opinion is reasonable. It is important to note that this is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it is a reasonable opinion, and not necessarily the most reasonable opinion. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, she must find that the exemption is engaged.
24. In order for the QP's opinion to be reasonable, it must be clear as to precisely how the inhibition may arise. In her published guidance on section 36 the Commissioner notes that it is in the public authority's interests to provide her with all the evidence and arguments that led to the opinion, in order to show that it was reasonable. If this is not done, then there is a greater risk that the Commissioner may find that the opinion is not reasonable.
25. The email exchanges associated with the QP Opinion form evidence that the QP was advised in writing that the request relates to the complainant's ongoing (service) complaint case, which the CCG had committed to independently investigate. The QP was advised that releasing the requested information could have an impact on that investigation. One of the email exchanges evidences that Mr Sanders also had a conversation with members of staff involved with handling the request and the complaint case, about the CCG's proposed application of section 36(2)(c) to the requested information. In its submission to the Commissioner the CCG confirms that Mr Sanders was verbally briefed by one of its senior directors who had a detailed knowledge of the case, the complainant and the investigation.
26. Through the QP Opinion form, the QP is advised that the CCG is in the process of commissioning an independent review into allegations the complainant had made. The form advises that the complainant has sent complex and repeat correspondence to the CCG in relation to the specific issues they have raised. Dealing with this correspondence, the form notes, has the effect of diverting the CCG's resources and removes the 'safe space' that investigations need in order to fully

establish the facts. The form advises that, given the complainant's continuing correspondence, it was considered that the CCG's independent investigation would be hampered, delayed, or otherwise not as effective if the CCG provided the complainant with further information to scrutinise before the investigation's findings were released.

27. Finally, the QP Opinion form evidences that it was considered that inhibition would be likely to occur if the withheld information was to be disclosed, rather than would occur. 'Would be likely' imposes a less strong evidential burden than the higher threshold of 'would'.
28. The Commissioner has reviewed the complaint's request for an internal review on 23 July 2019. This correspondence is not clear but the complainant appears to argue that the fact that the investigation was ongoing at that point is all the more reason to release the information he has requested, in order to demonstrate transparency. He appears not to be confident that the CCG will manage the investigation fairly.
29. As noted, the complainant has sent the Commissioner other material – this appears to broadly comprise communications with the CCG associated with this request, and another request, and what the complainant considers is evidence as to why he needs to have access to the information he has requested. It cannot be said to be a case for the QP's opinion not being a reasonable opinion.
30. The Commissioner is satisfied that the QP had sufficient appropriate information about the request to enable him to form an opinion on the matter of whether section 36(2)(c) was engaged. She finds that all the points at paragraph 20 have been satisfactorily addressed. As a result she must find that the QP's opinion - that releasing the correspondence in question, at the time of the request, would be likely to prejudice the effective conduct of public affairs (by hampering the CCG's ongoing service complaint investigation) - is one a reasonable person might hold and that, therefore, the correspondence engages the exemption under section 36(2)(c) of the FOIA.
31. The Commissioner has gone on to consider the public interest arguments.

### **Public interest test**

#### Public interest in disclosing the information

32. In its submission to the Commissioner the CCG has acknowledged the general principle of openness and transparency in the commissioning of healthcare services, and the complainant's private interest in the information in question.

33. While some of the material the complainant has sent to the Commissioner appears to suggest that he considers the CCG has mishandled his complaint to it, he has not submitted compelling evidence that this is the case. Such evidence might be a public interest argument for releasing the information.

Public interest in maintaining the exemption

32. In the QP Opinion form, it is noted that the public interest favours maintaining the exemption so that: public funds are used effectively; so that the investigation can be conducted in the necessary 'safe space' and because the outcome of the investigation will be made available in a report to the complainant.
33. In its submission to the Commissioner the CCG has argued that is in the public interest for the CCG to be able to operate effectively and efficiently. It noted the level of disruption to the CCG caused by not only dealing with this request but also with a large number of follow up questions from the complainant. The CCG says that the complainant's correspondence to it is frequent and overlapping, and is often repetitive and confusing. Dealing with this correspondence takes the CCG away from its core task of being a commissioner of healthcare services and affects its availability to respond to other requests for information.
34. In the CCG's view, its investigation into the complainant's service complaint was underway at the time he submitted the request that is the subject of this notice and, as such, it was in the public interest to allow any investigation to proceed free from interference.

Balance of the public interest

35. The Commissioner is satisfied that there was greater public interest in this case in the CCG being able to carry out its independent investigation methodically and efficiently. She considers that, at the time of the request, the CCG would have been less likely to be able to achieve this if it released the requested information. This is because there was a strong likelihood that this would have generated further questions and correspondence from the complainant, which would have diverted CCG staff and hampered the investigation in question.
36. The requested information has little wider public interest and such public interest as there is in the CCG's handling of the service complaint that is behind the complainant's request will be satisfied by the knowledge that the CCG was carrying out an independent investigation into the complaint. The CCG intends to provide the complainant with a copy of its associated report.

## **Section 17 – refusing a request**

36. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled under subsection (i) to be told if the authority holds the information and, under subsection (ii) to have the information communicated to him or her if it is held and is not exempt information.
37. Under section 10(1) an authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.
38. In cases where a public authority is relying on a Part II exemption to refuse to disclose information (as in this case), under section 17(1) the authority must issue a refusal notice within the time for complying with section 1(1).
39. In this case the complainant submitted his request on 10 April 2019 but the CCG did not provide a refusal until 12 June 2019. The CCG therefore breached section 17(1) of the FOIA.

## **Other Matters**

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40. Providing an internal review is not a requirement of the FOIA but is a matter of good practice. In this case, the CCG's response of 12 June 2019 advised the complainant to request a review if he was dissatisfied with the review. The complainant did so on 23 July 2019, which the CCG acknowledged on 24 July 2019. However, the CCG did not go on to provide a review, despite being instructed to by the Commissioner. This had the effect of delaying the complainant's ability to submit a complaint to the Commissioner for a decision, and delayed that decision.
41. The Commissioner reminds the CCG that, if an authority offers to provide an internal review, a review should be provided within 20 working days of a request for one. In the most exceptional circumstances only should a maximum of 20 further working days be necessary.



## Right of appeal

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

43. 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.
44. 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**  
**Wycliffe House**  
**Water Lane**  
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