

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 March 2021

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

Decision (including any steps ordered)

1. The complainant has requested reports prepared for the Chief Medical Officer (CMO) relating to NHS surge capacity and population triage / social care in the event of a pandemic. He has also requested correspondence between NHS England and the CMO and the Department of Health and Social Care. By the date of this notice NHS England had failed to provide a substantive response to this request.
2. The Commissioner's decision is that NHS England has breached section 10(1) of the FOIA in that it failed to provide a valid response to the request within the statutory time frame of 20 working days.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - NHS England must provide the complainant with a response to the request in accordance with its obligations under the FOIA.
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 21 December 2020, the complainant wrote to NHS England and requested information in the following terms:

"Please find attached an official document sent by a policy manager at the Department of Health and Social Care to NHS England on 19 May 2020. It was disclosed under the FOIA to a member of the public and maps progress on implementing the Lessons Identified following Exercise Cygnus in 2016.

The comments in the document at sections LI5 and LI6 refer to two reports submitted by NHS England to the former Chief Medical Officer (CMO) [redacted] following Exercise Cygnus:

Pandemic Influenza Briefing paper – NHS Surge and Triage
(completed December 2017) – please provide me with a copy of this report, and date it was submitted to the CMO.

Pandemic Influenza Briefing paper – Adult social care and community healthcare – please provide me with a copy of this report, and date it was submitted to the CMO.

Please provide me with copies of correspondence related to the NHS Surge and Triage document, and which is dated within 3 months following submission to the CMO, between the head or deputy head of NHS England's EPRR group and the CMO.

Please provide me with copies of correspondence related to the NHS Surge and Triage document, and which is dated within 3 months following submission to the CMO, between the head or deputy head of NHS England's EPRR group and civil servants / special advisers at the Department of Health and Social Care."

6. On 21 January 2021, NHS England wrote to the complainant and apologised for not providing a response within the statutory timeframe. It said that this is because of the need to prioritise its resources in dealing with the COVID-19 pandemic, including the re-deployment of staff across the organisation. It said that it will aim to provide a response as soon as possible and that he has the right to apply directly to Information Commissioner for a decision.
7. To date, a substantive response has not been issued.

Scope of the case

8. On 28 January 2021 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He said that the request is urgent because the information is needed by doctors to make decisions involving the allocation of 'scarce' resources during the second wave of the COVID-19 pandemic. He explained that intensive care services are being severely tested and it is important that doctors have population triage guidance for the allocation of limited resources rather than make difficult ethical decision without national guidelines.
9. The Commissioner has considered whether NHS England has complied with its obligations in relation to the time for compliance at section 10(1) of the FOIA.

Reasons for decision

10. 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.

11. Section 10(1) of the FOIA states that a public authority must respond to a request promptly and "*not later than the twentieth working day following the date of receipt.*"
12. On 10 February 2021 the Commissioner wrote to NHS England, reminding it of its responsibilities and asking it to provide a substantive response to the complainant within 10 working days.
13. On 26 February 2021 the Commissioner contacted NHS England by telephone. It said that although her correspondence of 10 February 2021 had been sent to a valid email address (the email address shown under the 'FOI' section of NHS England's website) and had been received, because it was not sent to an alternative email address that the Commissioner sometimes also uses when corresponding with NHS England, that it was not aware of the email/letter or the action it was asked to take. When asked about the status of its response (to the request), it initially said that it does not know when it is likely to be in a position to provide a response. It however then said that it requires a further three weeks to provide the response. It said that this is because

of the pressure on resources during the pandemic and also the need to liaise with members of staff in formulating its response.

14. The complainant was informed of NHS England's reasons for not complying with the action specified in the Commissioner's email of 10 February 2021. He said, the fact that NHS England failed to open an email/letter that was sent to its official FOI email address is unreasonable. That allowing NHS England a further three weeks to provide a response is an unacceptable failure to comply with its legal obligations. He asked the Commissioner to issue a decision notice recording a breach of section 10 of the FOIA and seeking NHS England's rapid compliance with its legal obligations under the Act.
15. The Commissioner wishes to place on record her understanding of the immense pressures placed on public authorities during the coronavirus pandemic. She is sympathetic to the difficult decisions such authorities must make, between prioritising front-line services and continuing to meet their obligations under the FOIA.
16. It is clear however that NHS England did not deal with the request for information in accordance with the FOIA. The Commissioner finds that NHS England has breached section 10(1) by failing to respond to the request within 20 working days and it is now required to respond to the request in accordance with the FOIA.

Right of appeal

17. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

18. 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.
19. 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
Wilmslow
Cheshire
SK9 5AF**