

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 9 November 2011

**Public Authority:** The Department of Health  
**Address:** Room 317  
Richmond House  
79 Whitehall  
London  
SW1A 2NS

#### Decision (including any steps ordered)

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1. The complainant made a number of requests for information to the Department of Health ('the DoH') about the new NHS bill and other issues about its handling of the correspondence. He referred six of these requests to the Information Commissioner ('the Commissioner') who numbered them requests [1] to [6].
2. The DoH confirmed that it had answered request [1] and the complainant agreed to withdraw it. It applied section 12(1) to [2] – [6] explaining that the combined work that needed to be done would exceed the costs limit of the Act. It also applied section 14(2) to request [3] as well.
3. The Commissioner has determined that section 14(2) was applied correctly to request [3], while section 12(1) was applied appropriately to requests [2], [4], [5] and [6]. He also considers that the DoH offered reasonable advice and assistance in all the circumstances of this case. He requires no remedial steps to be taken.

#### Requests and responses

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4. Between 31 December 2010 and 25 January 2011, the complainant made at least six requests for information. He referred six requests for information to the Commissioner and the relevant parts of them are found in Appendix A of this decision notice. They have been numbered as requests [1] to [6].

5. On 11 February 2011 the DoH issued a response (to requests [2]-[6], although the refusal notice was not clear which requests it was answering). It explained that it did not consider that it was required to answer any of the requests that it had received because the work required to find all of the relevant recorded information would exceed the costs limit of £600. It explained that the requests were wide and would take more than an estimated 24 hours' work. It applied section 12(1) and 12(5) of the FOIA.
6. The complainant wrote to the DoH on a number of occasions to express his dissatisfaction about its response. The letters dated 15 February 2011 and 5 March 2011 were correctly seen by the DoH as being requests for an internal review.
7. The DoH communicated the results of its internal review on 21 March 2011. It upheld its position and provided a more detailed explanation. For request [3], it explained that it had already answered a substantially similar request and reproduced the response and explained that it could also apply section 14(2) to this request. It explained that it was open to the complainant to make a complaint to the Commissioner, if he remained unhappy.
8. On 26 April 2011 the DoH also replied to the complainant again to deal with other issues that arose in the handling of the request. It also provided a more detailed explanation about its position for request [3] and offered further general advice and assistance.

### **Scope of the case**

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9. The complainant contacted the Commissioner to complain about the way his requests for information had been handled.
10. On 16 August 2011 the Commissioner confirmed with the complainant that he was only considering the requests that were refused on 11 February 2011. He explained that he understood at this time (after initial correspondence with the DoH) that these were the six requests in Appendix A and listed them.
11. It turned out that request [1] had already been answered in full. The complainant agreed that he would withdraw his complaint in relation to request [1] on 19 October 2011. The Commissioner has therefore considered the operation of the FOIA to requests [2] to [6] in this case.
12. The Commissioner's role is to consider whether relevant recorded information is held and if so, whether it can be provided. There is no right for new information to be generated under the FOIA. The DoH has

explained that the requests often ask for opinions and explanations of policy developments which the complainant did not agree with. The only right under the FOIA is to relevant recorded information that is held at the date of the request. He also wishes to reiterate that the Commissioner is not the appropriate forum to consider how the DoH conducts its normal business.

## Reasons for decision

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13. Section 1 of the FOIA requires that where a request is received by an authority it should respond to the requestor confirming whether it holds relevant information. If it does, it is also required to consider whether that information should be disclosed to the complainant.
14. However, this is qualified by a number of exclusions and exemptions. The DoH needs to only apply one of the exclusions correctly to a request for information for it to not need to answer it.
15. As noted above, the DoH applied both sections 12(1) and 14(2) to request [3]. The Commissioner has considered section 14(2) first.
16. Section 14(2) of the FOIA explains that:

*'Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.'*
17. It follows that for a request to be considered a 'repeated request' it therefore has to be identical or substantially similar to a previous request by the same applicant, without a reasonable interval between compliance with the previous request and the making of the current one.
18. The DoH referred to a request the complainant made on 7 October 2010 which it had already answered. It was worded as follows:

*'I am amazed that your Exchange has instructions to prevent members of the public from speaking to anyone at HQ except your Customer Service staff.'*

*'I would appreciate a copy of any internal instructions on this matter, and the reasons for this restrictive practice'*

19. Both requests were made by the same complainant. The Commissioner considers that both requests are aimed at gathering the same information: the instructions about how the DoH controls its telephone traffic and undertakes its business. The requests are therefore 'identical or substantially similar', as they are requests seeking the same information.
20. The complainant made the first request on 7 October 2010 and as stated below made request [3] on 14 January 2011. The Commissioner considers that, in the circumstances of this case, the space of time between the two requests is not a reasonable interval, '...between compliance with a previous request and the making of the current request.' It asks for information that has not changed between the two dates and concerns how the DoH conducts its business. He also notes that the DoH provided a further explanation on 26 April 2011 and that the complainant has received all the recorded information held in any event.
21. Given that the requests are both for the same information, were made by the same person and there was no reasonable interval between the requests, the Commissioner considers request [3] to constitute a repeat request. The Commissioner therefore accepts that the DoH correctly cited section 14(2) of the FOIA to request [3] and does not need to answer it. The Commissioner will not consider request [3] further.
22. The main exclusion that is being relied on in this case is found in section 12(1) of FOIA which states that:  
  
*'Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.'*
23. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Fees Regulations") provide that the cost limit for central government public authorities is £600. This must be calculated at the rate of £25 per hour, providing an effective time limit of 24 hours.
24. If a public authority estimates that complying with the requests would exceed 24 hours, or £600, section 12(1) provides that the request may be refused.
25. The Commissioner will now consider whether the DoH was entitled to apply section 12(1) to remaining requests ([2], [4], [5] and [6]). What the Commissioner must initially consider is whether the DoH is entitled to combine the work together for these four requests, or whether each request should be considered individually.

26. When considering whether requests can be aggregated or need to be considered individually the Commissioner is guided by Regulation 5 of Fees Regulations that states:

*'5. - (1) In circumstances in which this regulation applies, where two or more requests for information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply, are made to a public authority -*

- (a) by one person, or*
- (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,*

*the estimated cost of complying with any of the requests is to be taken to be the total costs which may be taken into account by the authority, under regulation 4, of complying with all of them.*

*(2) This regulation applies in circumstances in which-*

- (a) the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and*
- (b) those requests are received by the public authority within any period of sixty consecutive working days.'*

27. In order to aggregate all four requests for the purposes of section 12(1) the Commissioner must determine whether they relate to any extent, to the same or similar information.<sup>1</sup>

28. The Commissioner invited the DoH to make its submissions concerning this point. It replied that it believed that all four requests relate to a single theme. It explained that they all concern the reorganisation of the NHS. It explained that the Health and Social Care Bill, health service reforms, NHS Commissioning and GP Commissioning Consortia are all part of the reorganisation. The Commissioner agrees with DoH that the theme of all four requests makes them to some extent similar to one another and this part of the test is therefore satisfied.

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<sup>1</sup> This has been considered by the Information Tribunal in *Ian Fitzsimmons v Department for Culture, Media and Sport* - [EA/2007/0124](#). It emphasised that the words in Regulation 5(2)(a) should be given their natural meaning (at paragraph 43).

29. As well as the four requests being similar it is also necessary for them to be submitted within 60 working days and made by the same person. In this case they were all within the relevant timeframe by the same person and the Commissioner has therefore determined that the public authority is able to aggregate the costs for all four requests.
30. The Commissioner's subsequent analysis into the operation of section 12(1) will have two parts, which are:
  1. To explain DoH's relevant estimate; and
  2. To consider whether that estimate only related to the relevant prescribed activities and whether it is reasonable.
31. The Commissioner will consider each part in turn:

### **What was the DoH's relevant estimate?**

32. The DoH provided the Commissioner with its detailed estimate. While providing its estimate, it explained that it understood that it could only include the work that was outlined in Regulation 4(3) of the Fees Regulations, which allows only the following four activities to be considered:
  - “(a) determining whether it holds the information,*
  - (b) locating the information, or a document which may contain the information,*
  - (c) retrieving the information, or a document which may contain the information, and*
  - (d) extracting the information from a document containing it.”*
33. It also understood that the onus was on it to prove that the work required to process the request would take longer than 24 hours and provided the Commissioner with a detailed explanation about what work would need to be done.
34. It focussed on the work required to answer request [6]. It explained that it was a very broad and wide ranging request for information. It explained that it spans the work of many policy areas at the DoH and would involve a large number of policy teams and workgroups.
35. It could work out roughly the number of groups and/or policy teams that would need to be considered through checking its Business Directory for the key terms that the request would embrace. Its findings follow:
  - Health and Social Care Reform = 397;

- Reform = 38;
  - Health Reform = 5;
  - Care Reform = 2;
  - Commissioning = 101;
  - NHS Commissioning = 9;
  - GP Commissioning = 9;
  - NHS Commissioning Board = 6;
  - Health and Social Care Bill = 5; and
  - Inequalities = 28.
36. The DoH acknowledged that some groups would be caught by more than one term that was searched for. However, 397 policy teams and groups would be the absolute minimum number of departments that would need to be checked for information that the complainant requested.
37. The DoH explained that it would need to check three sets of records for each policy team:
- \* Its electronic files database (called MEDS);
  - \* Shared and local drives and individual's emails; and
  - \* Its registered paper files.
38. The DoH explained that MEDS is a bespoke records management system that uses Lotus Notes as the core technology. It is a distributed system – which means it is partitioned between different departments and every business unit has at least one partition (or database) ascribed to it. It explained that there were 662 databases on MEDS that contain current records and 373 more than contain archived material. In total there are 28 million documents on these systems.
39. The DoH explained that it was a difficult task to search across all the petitions and the relevant search tool would search each database in turn. It explained that it is possible that a search of this breadth would take a number of days and any time the system crashed would mean it would have to start again. It explained that its normal approach was to identify the most appropriate candidate databases and search the right business area. However, this was not possible in this case because of the breadth of the request. The search tool also has a limit of 5000 records and this means that it takes some considerable thought to devise ways of splitting up the request to ensure that the whole request is processed without hitting the limit of 5000 records. It would be an iterative process in that it would require considered refining of the search requests in such a manner that everywhere is searched, but that the 5000 records limit is not reached.



40. As an example, the DoH searched two databases that were likely to contain some relevant information using the search term 'commissioning'. These two practices took seven minutes and returned over 5000 records. It also tried 'health reform' in two other databases and one of those produced more than 5000 records and took ten minutes.
41. Taking a conservative estimate of time needed to undertake a search, an estimate can be taken of the minimum amount of time it would take using optimum searches to look for information relevant to request [6] on MEDS:
- [No of databases] x [Time spend to do one search] x [number of terms]
- [662 (only including active databases)] x [5 minutes (a small amount of time)] x [5 (doing individual searches using the five most likely terms)]  
= **276 hours.**
42. The DoH explained that the search is only the start of the process. It is not a smart search and will capture every incidence that the relevant word is mentioned irrespective of content. Therefore, the DoH would need to manually consider each record to ensure that it has located relevant recorded information and in order to extract it.
43. It provided an example looking at one search term in relation to one database. For that one, through its search it located 2253 potentially relevant records. It explained that to read each of them and to consider whether they fell in the scope of request, so need to be extracted it would take at least two minutes.
44. So for one database alone (in relation to one search term), a minimum estimate for this work was:
- [2253 (no of records)] x [2 minutes (amount of time)] = c. **75 hours.**
45. It explained that it would need to check all of its databases for each of the terms to be sure it had found all the relevant recorded information for request [6]. It would therefore take many multiples of 75 hours – up to a thousand of them – to locate and extract all the relevant recorded information that was merely held electronically.
46. The DoH explained that it would therefore take thousands of hours of work and costing this at £25 per hour (as allowed by the Fees Regulations) would come to many thousands of pounds. It was therefore work that was well in excess of the costs limit of £600 and did not need to be done.



47. This does not include the additional searches that would then need to be done of paper records, personal files and email accounts of at least 397 policy teams. This itself would involve work well beyond the costs limits. The Commissioner has decided not to look at this extra work given the amount of work that has already been accumulated.

### **Was the estimate reasonable?**

48. The issue of what constitutes a reasonable estimate was considered in the Tribunal case *Alasdair Roberts v the Information Commissioner* [EA/2008/0050] and the Commissioner endorses the following points made by the Tribunal at paragraphs 9 -13 of the decision:

- *"Only an estimate is required"* (i.e. not a precise calculation);
- The costs estimate must be reasonable and only based on those activities described in Regulation 4(3);
- Time spent considering exemptions or redactions cannot be taken into account;
- Estimates cannot take into account the costs relating to data validation or communication;
- The determination of a reasonable estimate can only be considered on a case-by-case basis; and
- Any estimate should be *"sensible, realistic and supported by cogent evidence."*

49. Following those points, the Commissioner is satisfied that the DoH has only included the activities that are specified in Regulation 4(3) in its estimate. He is also satisfied that it hasn't included any time for considering redactions or any time taken to consider validating the information.

50. He is satisfied that the estimate is based on the circumstances of this case. The Commissioner has also considered whether or not there are reasonable alternatives in this case.

51. When considering this issue the Commissioner has been guided by the Information Tribunal in the case *Alasdair Roberts v the Information Commissioner* [EA/2008/0042] which provided some general comments on alternative methods of extraction such as whether there is an alternative so obvious to consider that disregarding it renders the estimate unreasonable.

52. The Commissioner has therefore considered whether such alternatives exist in this case. The DoH has informed the Commissioner that it had carefully considered whether there were any alternatives and it could confirm that there were none.

53. The complainant has claimed that it should be easy to find the information that was subject to his request because the DoH would need it for its every day business. The Commissioner considers that the complainant may not understand the size of the DoH and the size of the proposed restructure. The DoH has gathered a very large amount of information about the proposed restructure and to ask for all evidence about one specific outcome of the complainant's choosing in a complex area has meant that it was not practicable for it to find all the information that was relevant to the request.
54. The Commissioner is content that the DoH has used all the tools that are available to it to narrow down the search. In this case, they do not enable the DoH to find all the requested recorded information.
55. Having considered all the relevant evidence above, the Commissioner is satisfied that there are no reasonable alternatives to the work specified above.
56. He is satisfied that the DoH has evidenced that to answer the request it would take more than 24 hours' work and that this estimate is based only on a reasonable assessment of the activities that are allowed by Regulation 4(3) of the Fees Regulations. He is satisfied that this estimate is '*sensible, realistic and supported by cogent evidence.*' He finds therefore that the DoH has applied section 12(1) correctly to the combined work required to process requests [2], [4], [5] and [6] altogether and thus no information needs to be provided to the complainant in relation to these requests.

## **Procedural Requirements**

### *Section 16(1)*

57. Section 16(1) imposes an obligation for a public authority to provide advice and assistance to a person making a request, so far as it would be reasonable to do so. Section 16(2) states that a public authority is to be taken to have complied with its section 16 duty in any particular case if it has conformed with the provisions in the Section 45 Code of Practice in relation to the provision of advice and assistance in that case.
58. Whenever the costs limit has been applied correctly, the Commissioner must consider whether it would be possible for the DoH to provide advice and assistance to enable the complainant to obtain information without attracting the costs limit in accordance with paragraph 14 of the Code. In this case the Commissioner has considered whether it would have been reasonable for the DoH to have advised the complainant to reduce the scope of his request.

59. The DoH argued that it had provided all the advice and assistance possible in this case. In both its internal review dated 21 March 2011 and its additional response dated 26 April 2011, the DoH advised the complainant what the purposes of the FOIA were and how he may consider making a refined request. The Commissioner has considered this advice and assistance and considers that it was reasonable in this case. In this situation, where the complainant was making a large number of requests, the best the DoH could do was offer clear advice about how he may refine his request.
60. The complainant indicated during the course of his investigation that he was prepared to accept answers to just some of his questions. The Commissioner asked him to outline the minimum he would accept in his proposal with a view to seeking an informal resolution. His proposal included request [6] and thus this was not a practicable option for the DoH for the reasons explained in paragraphs 40 to 47 above.
61. Overall, the Commissioner considers that the DoH complied with its obligations under section 16(1) because it offered reasonable advice and assistance in this case.

## Right of appeal

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62. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

63. 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.
64. 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 – Complaints Resolution  
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SK9 5AF**

## Appendix A – schedule of the requests subject to this complaint

Number	Date	Wording of request
1	31/12/2010	I would appreciate details of: (a) planned numbers of doctors likely to be assigned to consortia. (b) their specific responsibilities (c) the extent to which they will take over from the SHAs and PCTs the supervision of Hospital Trusts (d) The proportion of their time they will spend on consortia work. (e) the length of training for this task (f) who will conduct this training (g) total staff now employed in SHAs and PCTs (h) Their planned re-allocation.
2	10/01/2011	I would therefore appreciate the following information: (1) the date by which you hope that the NHS Commissioning Board will become fully operational (2) Since the GMC, the CHRE and the CQC have obviously not been held to account, the precise way you will hold the NHS Commissioning Board to Account (3) What action is being taken meantime to ensure that poorly performing areas are brought up to the standards of the best.
3	14/01/2011	Denial of direct telephone contact: .. I would therefore appreciate: (a) a copy of the relevant instruction (b) the authority for it (c) the reasons for it.
4	17/01/2011	Reiteration of request dated 31/12/2010 and 'Feedback from pathfinder consortia: Clearly any evidence that these 141groups of GPs can provide of [sic] the extra value of this reorganisation will be of the utmost value. I therefore formally request brief details of (a) the information that you have requested them to feed back, (b) the information so far provided.'
5	25/01/2011	Health and Social Care Bill Published on 19 January 2011...(1) I would therefore appreciate confirmation that an updated issue of the National Health Service Act 2006 embodying all amendments will be published as soon as possible after this Bill becomes law.... (2) Duty to Reduce Inequalities - Section 5 and Section 19 (13F & 14N) 'I would appreciate information on (a) what action

		is already being taken to reduce inequalities, as requested by my letter dated 10 January 2011, copy enclosed (b) why this duty is specifically imposed on the Secretary of State, the NHS Commissioning Board, and Commissioning Consortia, yet is not mentioned in the functions laid down for Monitor in Section 54.
6	31/01/2011	What evidence do you have that the proposed huge reorganisation of the NHS will save money and improve efficiency? I therefore formally request details of the evidence that convinces you that this vast reorganisation will achieve a better service at a lower cost.