

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

### **Decision notice**

**Date:** 5 December 2022

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

### **Decision**

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1. The complainant has requested financial information about the provision of additional healthcare capacity by two private hospitals. Some information within scope of the request has now been published. NHS England has disclosed other information and is withholding the remainder under sections 31, 41 and 43 of FOIA. These concern law enforcement, information provided in confidence and commercial interests respectively.
2. The Commissioner's decision is as follows:
  - NHS England is entitled to withhold entire copies of the actual invoices it holds under section 31(1) of FOIA and the public interest favours maintaining the exemption in that respect. However it would be possible to disclose a little of the information in each of the invoices – as presented in each invoice - without the risk of potential fraud occurring. Section 31(1) is not engaged in respect of that specific information.
  - NHS England is entitled to withhold the validation reports under section 43(2) and the public interest favours maintaining this exemption.
  - NHS England breached section 10(1) and section 17(1) as it did not communicate the information it held to the complainant or issue a refusal notice in respect of exempt information, within the

required timescale of 20 working days following the date of receipt of the request.

3. The Commissioner requires NHS England to take the following step to ensure compliance with the legislation:
  - Disclose the 'Line 1' information in the requested invoices as this information is presented in those invoices, and as discussed in paragraphs 17-21 of this notice.
4. NHS England must take this step 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

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5. The complainant made the following information request to NHS England (NHSE) on 6 April 2021:

### **"1. Invoicing documents**

In relation to the national contracts with the private hospital sector for the provision of additional healthcare capacity, in the period March 2020 to the date of receipt of this request, could I be provided with:

- A) invoices,
- B) 'reconciliation/validation reports', and
- C) payments made;

To and from Circle Health and Spire Healthcare.

In effect, I would like to receive the costs submitted to NHSE by these providers (the invoices), information on how that figure was adjusted based on private activity or other parameters (reconciliation reports) and the sums of money that were ultimately paid out (payments made).

I would expect to receive the original documents or datasets, rather than figures extracted from them.

I would expect the information to be provided in the form of machine-readable digital documents, i.e. word documents or searchable PDF. I would prefer not to receive scanned or photocopied documents, even in digital form, that cannot be searched, but would accept an alternative format if this would incur significant processing time or costs.

## **2. Cost-benefit analysis dataset/s**

Could I also be provided data on the financial impact and value for money of these contracts, in relation to all providers on the national contract for the period March 2020 and the date of receipt of this request. At minimum, this should record the payments made to each provider each month or week.

I would prefer to receive the information in its natural format, i.e. a full copy of whatever dataset the department itself uses to track and analyse the financial impact and value for money on these contracts.

This could be in the form of a curated spreadsheet, an export from financial management software, exports from internal databases or reports prepared for internal consumption. And while I would expect the minimum dataset to record amounts paid to each provider, when the department carries out an analysis of the cost-benefit of these contracts I might also expect to see other fields of data such as: amounts billed, amounts paid, data on provider capacity, provider activity etc.

I appreciate that some of this data may be incomplete in light of the fact contracts are only recently terminated, and in particular the validated final payments. If this is the case, I would like to receive whatever is available on the date of receipt this request.

In summary, I would like to receive the same dataset that the authority uses to analyse the financial impact of these contracts. I cannot be more precise, because the department hasn't furnished the public in general, or me personally with the information to do so."

6. During the Commissioner's investigation some information within scope of the complainant's request was published – payments made to Circle Health and Spire Healthcare over £25,000. NHSE continues to withhold copies of the actual invoices under section 31 of FOIA. NHSE is withholding the requested 'reconciliation/validation reports' under section 41 and 43(2) (and personal data has been redacted under section 40(2)). With regard to the requested cost-benefit analysis dataset/s NHSE referred to the published payment information and also disclosed other relevant information it holds. It confirmed it does not hold any further information that was used to demonstrate 'value for money'.
7. The complainant is dissatisfied that NHSE has withheld some of the information they have requested. They have confirmed to the Commissioner that through their request they are seeking to establish: what two private hospitals under a particular contract billed NHSE (invoices); what costs NHSE's auditors deemed valid (reconciliation/validation reports) and what sums were eventually paid

out to the hospitals (payments made). The complainant does not consider NHSE's response, including the published information and what it disclosed, adequately addresses their request.

## Reasons for decision

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8. This reasoning covers NHSE's application of section 31 to some of the information the complainant has requested and its application of section 41 and/or section 43 to other information. The reasoning also covers the timeliness of NHE's response to the request.

### Section 31 – law enforcement

9. Details of the payments NHSE made to Circle Health and Spire Healthcare have now been published<sup>1</sup>. Under section 31(1)(a) of FOIA NHSE is withholding copies of the original invoices submitted to it by those two providers. This exemption states that information which is not exempt information by virtue of section 30 is exempt information if its disclosure under FOIA would, or would be likely to, prejudice the prevention or detection of crime.
10. In correspondence to the Commissioner, the complainant has said that in their view NHSE has misunderstood this aspect of their request. This is because they were expecting to receive copies of invoices the providers sent to NHSE, and not invoices that NHSE sent to the providers.
11. Perhaps NHSE's response to the complainant was not clear but having reviewed a sample of the invoices in question, the Commissioner notes that they are as above; that is, invoices sent from the providers to NHSE. NHSE says it holds approximately 100 of these invoices.
12. NHSE considers individuals with intent to commit fraud could use the template of the invoices to submit fraudulent invoices to NHS England which is a security risk against the organisation.
13. In its submission to the Commissioner, NHSE has advised that it has had an instance previously where a fraudulent invoice, mimicking that of one of the independent sector providers with which it had contracted, had been submitted to its finance team. NHSE therefore considers there is a

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<sup>1</sup> <https://www.england.nhs.uk/contact-us/pub-scheme/spend/#payments>

real likelihood certain individuals could use the actual invoice template to attempt to commit fraud against it.

14. The complainant considers that NHSE's reliance on section 31 is "somewhat fanciful". They argue that: there is no precedent for this kind of application of section 31; a Google Image search retrieves 100s of actual NHS invoices that are already in the public domain; NHSE has robust processes for validating invoices evidenced through it having identified the fraudulent invoice above; and that NHSE should redact key features from the invoices – but not the financial figures – rather than withhold them altogether.
15. First, as discussed, the invoices are not "NHSE invoices" ie invoices that NHSE submitted to the providers for work NHSE carried out; they are invoices the providers submitted to NHSE for work they carried out. A search that the Commissioner has carried out – using the search term "invoices submitted to NHS England" and "NHS England invoices" – did not retrieve "100s" of examples of invoices that providers had submitted to NHSE; it did not retrieve any that the Commissioner could quickly see.
16. FOIA provides access to information and not necessarily to copies of the original documents holding that information. However, in this case the complainant did request copies of "the original documents". As noted, the complainant's ultimate enquiry is to establish: what two private hospitals under a particular contract billed NHSE (invoices); what costs NHSE's auditors deemed valid (reconciliation/validation reports) and what sums were eventually paid out to the hospitals (payments made).
17. The Commissioner has cross-referenced one of the invoices NHSE sent to him with the information about that same invoice that is in the public domain – the Circle Health invoice number 'CHHLWEEK00' in the published spreadsheet for April 2020. The only potentially useful information in the actual invoice not published is the 'Line 1', information. In the case of both the Circle Health and Spire Healthcare invoices, based on the examples of both NHSE provided to the Commissioner this is a description of the specific period of time for which care provision was provided, and the amount being invoiced.
18. With regard to the complainant's enquiry, as will be discussed below, the Commissioner is satisfied that the validation reports they requested are exempt information. But the sums NHSE paid to the providers have been published. With the 'Line 1' information from the invoices, the complainant could potentially compare what was invoiced with what was paid, which would appear to satisfy their enquiry.
19. The Commissioner is inclined to agree that there is a fraud risk if NHSE were to provide the complainant with entire copies of the actual invoices

the two providers submitted to it and that section 31 is engaged in that respect. A copy of an entire invoice would show how the provider formats and presents their invoices and this template could be copied. However, tools exist that enable parts of an image to be highlighted, copied and pasted into a new document. The Commissioner considers that it would be possible to highlight and copy the 'Line 1' information in the Circle Health and Spire Healthcare invoices and paste these into, for example a Word document, together with each associated invoice number. The Commissioner does not consider that a person intent on committing fraud would be able to accurately reproduce an entire Circle Health or Spire Healthcare invoice based on those small parts of the invoice templates.

20. There are approximately 100 invoices in scope. However, the Commissioner does not consider that the above work would be onerous – at five minutes per invoice, it would take approximately 8.5 hours ie the work would not exceed the time/cost limit under section 12(1) of FOIA.
21. Regarding the public interest in respect of section 31 as it applies to the invoices in their entirety, the Commissioner is satisfied that there is greater public interest in NHSE avoiding making payments against potentially fraudulent invoices. The public interest in transparency about payments NHSE makes is adequately met through the information it proactively publishes.

### **Section 43 – commercial interests**

22. Under section 43(2) of FOIA NHSE is withholding information falling within scope of the complainant's request for 'reconciliation/validation reports'. This exemption states that information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
23. NHSE has provided the Commissioner with the validation reports it is withholding. NHSE considers that disclosing this information would prejudice the commercial interests of Circle Health and Spire Healthcare and would be likely to prejudice its own commercial interests.
24. With regard to the service providers' commercial interests, NHSE has provided the following reasoning:

“We consider disclosure of the validation reports would harm Circle Health and Spire Healthcare's commercial interests.

By way of background, the contracts in question were part of a unique contractual arrangement to support NHS England's response to the Covid-19 pandemic. It required a special exemption under the Competition Act 1998 to be granted by the Secretary of State for BEIS

to enable independent sector providers to discuss and share with each other, and with NHS England, otherwise commercially and competitively sensitive information about their businesses, including: workforce capabilities, clinical specialisms, physical resources and patient volumes. Information about providers' cost bases and private patient revenues was however not shared with other providers, only with KPMG and through KPMG with NHS England. It was understood by all parties (i.e. independent service providers, KPMG and NHS England) that this latter information was commercially sensitive and submitted in confidence with the sole purpose of enabling the administration of the payment mechanism under each provider's contract with NHS England.

The payment mechanism under the contract was a cost-based formula designed to ensure transparency, consistency, and fairness across all private providers who contracted with NHS England. It required each independent service provider to submit detailed cost and revenue information to facilitate verification by an independent auditor (KPMG). This information, particularly that relating to rent, finance costs, staffing costs, supplier contracts, capital expenditures, and private patient revenue represents detail of the most significant drivers of the independent service providers' business models and cost-base. This detailed information is not currently in the public domain for the very reason that disclosing it would prejudice the independent service providers' commercial interests.

The reports requested contain itemisation of individual costs, including staff salaries, rental costs for sites, and other cashflow items. Even the relative ratios of these costs are valuable financial information that could be used by competitors to understand a provider's operating model and cost base. The information contained within the reports gives insight into the operating cost base, including fixed and variable costs, which would all be valuable in the context of takeover bids and competitive tenders for services contracts. It also gives insight into staff costs, ratios and other highly sensitive information. This type of management accounting / business information is not available in the public domain, not even from published accounts, and is closely guarded by all commercial entities."

25. NHSE's submission goes on to provide examples of items of information that Circle Health's validation reports contain. The Commissioner does not intend to reproduce these examples in this notice as NHSE considers that to do so would be prejudicial to Circle Health's commercial interests.
26. NHSE says that similar comparisons can be drawn for the Spire Healthcare reports. As with Circle Health's validation reports, the reports contain details of the actual costs base for delivering the work. NHSE

considers that if this is read in conjunction with other publicly available information, it would be likely to provide an insight into both of the independent service providers' margin for such work. If this information were made known to their competitors and/or the insurance funders it would weaken and undermine the independent service providers' negotiating power for commercial contracts and would adversely affect their ability to compete in local markets. For all of the reasons provided above, NHSE confirmed that it considers that disclosing the validation reports would cause commercial prejudice to both Circle Health and Spire Healthcare.

27. However, NHSE also considers that disclosing the validation reports would also be likely to prejudice its own commercial interests. This is because the terms of the contracts created a clear expectation of costing materials submitted to KPMG being used solely for the purposes of the payment reconciliation process, and not for any other purpose. NHSE says that if it were to disclose this information it would be seen by providers as a breach of trust and of the letter and spirit of their contract with NHSE. In turn, this would be likely to have an adverse impact on their willingness to enter into similar arrangements with NHSE which would be prejudicial to NHS's commercial interests as it would not be able to obtain 'value for money'.

### **The Commissioner's conclusion**

28. The Commissioner is satisfied first, that the harm NHSE envisages relates to commercial interests; those of the providers in question and its own. Second the Commissioner accepts that a causal link exists between disclosure and commercial prejudice. Disclosing the validation reports would give the providers' competitors an insight into sensitive commercial information about those businesses; their operating model and cost base. This would undermine Circle Health and Spire Healthcare's positions and would not be fair.
29. Finally, from its submission it appears that NHSE considers that the envisioned prejudice would be likely to happen, rather than would happen, and the Commissioner will accept that this assessment and that the envisioned prejudice is more than a hypothetical possibility and is a real and significant risk. The Commissioner's decision is therefore that NHSE was entitled to apply section 43(2) to the withheld information and he will go on to consider the associated public interest test.

### **Public interest test**

30. The complainant considers there is a strong public interest in "...a £2bn contract, effectively offering a blank cheque to 27 private hospital companies, with well documented concerns about cost and efficacy..."



31. NHSE has acknowledged that there is a public interest in promoting accountability and transparency about how public money is spent, specifically with regard to contracts procured during the pandemic. Disclosure would also allow individuals and organisations to understand decisions affecting their lives and to debate or challenge them.
32. However, NHSE has provided the following arguments against disclosing the information:
- Disclosing the vast majority of the content of the contracts and the variations to them largely satisfies the public interest in transparency about the terms on which these providers were contracted by NHSE. Specifically what it was the providers were contracted to provide and accommodate to assist the NHS in responding to the COVID-19 pandemic, and the costs they were entitled to recover from NHSE in return for doing so.
  - NHSE routinely publishes details of items of expenditure over £25,000 on its website, which goes a significant way in promoting accountability and transparency.
  - There is a public interest in ensuring NHSE's and the wider NHS's continuing ability to procure best value in use of public funds, and in retaining the bargaining position and commercial flexibility to do so.
  - The current state of hospital admissions and waiting lists, particularly in the context of the continuing prevalence of COVID-19, and the likelihood of the NHS needing to use the same, or similar, providers to provide similar services, capacity and resources in the foreseeable future.
  - Private providers have an expectation whilst working with public authorities that whilst some information will be disclosed, NHSE would not disclose information damaging to their commercial interests.
  - Information required to assess whether the resilience contract represented 'value for money' ie the amount NHSE paid to independent sector providers in exchange for the services and facilities provided by them to NHSE, and the basis on which such payments were calculated, is already in the public domain and has been independently validated by KPMG. Disclosing individual components of cost items and/or the quantum of private patient revenues is irrelevant to such an assessment.
33. The Commissioner is satisfied that the public interest in this case favours withholding the information to which NHSE has applied section 43(2). This is because he considers that matters associated with

transparency are adequately met through the information NHSE routinely publishes and has released in response to this request. How NHSE manages public funding is also independently audited by KPMG, one of the 'Big Four' accountancy firms. There is greater public interest, in the Commissioner's view, in providers of healthcare services that can potential support NHSE and the NHS generally, being able to compete for such contracts fairly and from a strong position. There is also greater public interest in NHSE having access to as wide a range as possible of potential providers willing to contract with it.

34. Because he has decided that the validation reports are exempt information under section 43(2) of FOIA, it has not been necessary for the Commissioner to consider NHSE's application of section 41 to that information.

### **Procedural matters**

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35. Section 10(1) of FOIA obliges a public authority to communicate non-exempt information to an applicant promptly and within 20 working days following the date of receipt of the request.
36. Under section 17(1) of FOIA the public authority must issue the applicant with a refusal notice in respect of exempt information within the same timescale.
37. In this case the complainant submitted their request on 6 April 2021 and NHSE did not respond to the request at all, including issuing a refusal notice, until 26 August 2021 and did not communicate all of the relevant non-exempt information (ie the cost/benefit analysis data) until the fresh response it provided to the complainant on 14 November 2022. NHSE England therefore did not comply with section 10(1) or section 17(1) of FOIA.

### **Other matters**

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38. The provision of an internal review is not a requirement of FOIA but is a matter of good practice. The complainant requested an internal review on 10 September 2021. NHSE did not provide one and did not go on to provide one in response to the Commissioner's correspondence to it of 10 January 2022. However, NHSE's fresh response to the complainant of 14 November 2022 might be considered to be its internal review. It was provided well outside the 20 working day recommendation and the

Commissioner reminds NHSE of the internal review best practice as set out in part 5 of the Freedom of Information Code of Practice<sup>2</sup>.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/744071/CoP\\_FOI\\_Code\\_of\\_Practice\\_-\\_Minor\\_Amendments\\_20180926\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf)

## **Right of appeal**

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39. 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)

40. 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.
41. 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**

**Cressida Woodall**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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