

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 January 2022

Public Authority: The NHS Commissioning Board (NHS England)

Address: Quarry House
Quarry Hill
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant requested from the NHS Commissioning Board (NHS England) information relating to East and North Hertfordshire Trust's compliance with patient safety alerts. NHS England refused to comply with the request citing section 12(1) (cost limits) of the FOIA.
2. The Commissioner's decision is that NHS England was entitled to refuse to comply with the request in accordance with section 12(1) of the FOIA. He also finds that NHS England met its obligations under section 16(1) of the FOIA to offer advice and assistance.
3. The Commissioner does not require NHS England to take any steps.

Request and response

4. On 27 April 2021, the complainant wrote to NHS England and requested information in the following terms:

"East and North Hertfordshire NHS Trust fails to act on NHS patient safety warnings

<https://www.thecomet.net/news/patient-safety-alerts-east-and-north-herts-nhs-trust-ignores-5431630>

Please provide me by email: copies of all documents (to include, but not limited to) emails, minutes, reports, transcripts of phone calls, plus all written and electronic communications between NHS England and The East and North Hertfordshire Trust and any other bodies (such, but not limited to MHRA and CQC) between 1st January 2017 and 27th April 2021, related to the ENH Trust missing key deadlines set by NHS England to act on patient safety alerts triggered by incidents which could have - or did - lead to the harm of patients. This matter was reported by The Comet January 13, 2020, then updated on November 1, 2020."

5. NHS England responded on 26 May 2021 and refused to provide the requested information citing section 12(1) (cost limits) of the FOIA.
6. On 27 May 2021, the complainant wrote to NHS England to request an internal review.
7. Following an internal review, NHS England wrote to the complainant on 11 October 2021. NHS England maintained its reliance on section 12(1) of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 13 October 2021 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of this case to be to determine if NHS England has correctly cited section 12(1) of the FOIA in response to the request.

Reasons for decision

Section 12 – cost of compliance

10. Section 12(1) of the FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate cost limit.
11. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') at £450 for public authorities such as NHS England.
12. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 18 hours for NHS England.
13. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it;
 - and extracting the information from a document containing it.
14. A public authority does not have to make a precise calculation of the costs of complying with a request; instead, only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal decision in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/20017/00041*, the Commissioner considers that any estimate must be "*sensible, realistic and supported by cogent evidence*". The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.
15. Section 12 is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under the FOIA to consider whether there is a public interest in the disclosure of the information.

16. Where a public authority claims that section 12 of the FOIA is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit, in line with section 16 of the FOIA.

NHS England's position

17. As is the practice in a case in which the public authority has cited the cost limit under section 12 of the FOIA, the Commissioner asked NHS England to provide a detailed explanation of its estimate of the time and cost of responding to the request.
18. In its submissions to the Commissioner, NHS England maintained its reliance on section 12(1) of the FOIA and offered an explanation for how it had calculated that the request exceeded the cost limit.
19. NHS England stated that whilst it holds some information within the scope of the request, it considers that the cost of locating, retrieving and extracting this information would exceed the appropriate limit.
20. NHS England explained that the requested information would be held by the regional team who engaged with East and North Hertfordshire NHS Trust ("the Trust") regarding its late compliance with the patient safety alert. This team was the Midlands NHS Improvement team until December 2019 and then the NHS England and NHS Improvement's East Team since early 2020.
21. NHS England went on to explain that some information within the scope of the request has been archived on NHS Improvement's electronic drives. Further information was held on the historical NHS Improvement IT server and has since been transferred to NHS England East's IT server.
22. In total, NHS England estimates that it would have to review approximately 750 to 800 files to determine whether they contained information within the scope of the request.
23. NHS England confirmed that it had carried out a sampling exercise in which it reviewed 55 files within a 2 hour period. Based on that sampling exercise, NHS England estimated that it would take between 30 and 40 hours to review all the files which potentially contain information within the scope of the request.
24. In addition to the information held in files on NHS Improvement's electronic drives and NHS England East's IT server, NHS England explained that further information within the scope of the request is likely to be held within the regional team's email mailbox. NHS England determined that four individuals would have engaged with the Trust in

relation to patient safety alerts and are therefore likely to hold information within the scope of the request.

25. NHS England stated that a search of the email mailbox for one of the individuals, using the search term 'patient safety alerts', resulted in three emails being returned. It took approximately 15 minutes to review the emails to determine whether or not they were in the scope of the request. NHS England explained that this exercise would have to be repeated for the other three individuals who engaged with the Trust to determine whether they held information within the scope of the request. These searches would contribute to the cost limit. As a conservative estimate, therefore, a search of the four individuals' email mailboxes would add around one hour to the total cost of the request.

The Commissioner's position

26. The Commissioner considers NHS England's estimate of 30-40 hours to review the 800 files potentially containing information within the scope of the request to be excessive.
27. Based on NHS England's sampling exercise which determined that 55 files could be reviewed within 2 hours, the Commissioner has calculated that it would take approximately 29 hours to review the 800 files. This is less than NHS England's estimate.
28. However, the Commissioner recognises that his lower estimate of 29 hours to review the 800 files still exceeds the appropriate limit set out in the Fees Regulations by a considerable amount.
29. Furthermore, the Commissioner's estimate of 29 hours does not include the search of four regional team members' mailboxes which may hold further information within the scope of the request. The search of these mailboxes would take the cost of complying with the request even further above the cost limit.
30. The Commissioner's decision is that NHS England estimated reasonably that the cost of complying with the request would exceed the appropriate limit. Therefore, NHS England was correct to apply section 12 (1) of the FOIA to the request.

Section 16(1) – the duty to provide advice and assistance

31. Section 16(1) of the FOIA provides that a public authority should give advice and assistance to any person making an information request.

Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 code of practice¹ in providing advice and assistance, it will have complied with section 16(1).

32. In its response to the complainant, NHS England advised the complainant that he could resubmit a refined request. NHS England suggested to the complainant that he could reduce the scope of his request to within the cost limit, by narrowing the time period of his request to a single financial year. NHS England also suggested that the complainant could limit his request to correspondence between NHS Improvement, and NHS England and Improvement, relating to compliance with Patient Safety alerts during a specific time period only.
33. The Commissioner considers that the advice and assistance NHS England offered the complainant to be adequate. The Commissioner is therefore satisfied that NHS England has complied with its obligations under section 16(1) of the FOIA in its handling of this request.

¹ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

Right of appeal

34. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

35. 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.
36. 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

Michael Lea
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