

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 June 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 NHS England records of meetings and correspondence between NHS England and the Independent Health Provider Network ("IHPN") between 1 February 2020 and 15 May 2020. NHS England refused to comply with the request citing section 12 (cost limit) of 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 FOIA and is satisfied that NHS England met its obligation under section 16 of FOIA to offer advice and assistance. The Commissioner does not require NHS England to take any steps.

Request and response

3. On 10 September 2021, the complainant made the following request:

"At the outset of the pandemic NHS England negotiated with the Independent Health Provider Network (IHPN) a contract to secure healthcare capacity from 26 private hospital companies. While the total cost has not been disclosed, there are serious concerns about the value for money of this contract, reports of significant under-utilisation of the purchased capacity and successive renegotiations meant that private healthcare capacity was not available when the NHS was under greatest strain during the second wave.

Given these issues, it is important to understand the genesis of this deal, what the government was offered by the providers and what it expected to receive. I am therefore requesting records between the

principle negotiators during the period the deal was being finalised, prior to the initial agreement of the 12th March 2020 up to the point at which the contract was formally signed on the 15th May 2020.

I would like to receive records of meetings and correspondence between the authority and the Independent Health Provider Network (IHPN) during the period 1st February and 15th May 2020. I would expect this to include:

1. All emails to and from the @ihpn.org.uk domain during the period
2. Records of meetings with the IHPN to include but not be limited to:
 - a. A list of dates of any such meetings
 - b. Preparatory briefings/lines to take
 - c. Agendas,
 - d. Minutes or notes,
 - e. Any presentation materials.”
4. On 12 October 2021 NHS England replied and cited the cost limit exemption under section 12 of FOIA; this decision was later upheld via internal review on 9 December 2021.

Scope of the case

5. The complainant contacted the Commissioner on 16 December 2021 to complain about the way their request for information had been handled. The complainant disagrees with NHS England’s application of section 12 of FOIA.
6. The Commissioner considers the scope of this case is to determine if the public authority has correctly cited section 12 of FOIA in response to this request. The Commissioner has also considered whether the public authority met its obligation to offer advice and assistance, under section 16 of FOIA.

Reasons for decision

Section 12 – cost of compliance

7. Section 12(1) of 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 limit" as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations").

8. Section 12(2) of FOIA states that subsection (1) does not exempt the public authority from the obligation to comply with paragraph (a) of section 1(1) (the duty to inform an applicant whether it holds information of the description specified in the request) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.
9. The appropriate limit is set in the Fees Regulations at £600 for central government, legislative bodies, and the armed forces and at £450 for all other public authorities. The appropriate limit for NHS England is £450.
10. 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 to deal with this request.
11. 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.
12. 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 in the case of "Randall v Information Commissioner & Medicines and Healthcare Products Regulatory Agency EA/2007/0004", 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.
13. Section 12 of FOIA is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under FOIA to consider whether there is a public interest in the disclosure of the information.

14. Where a public authority claims that section 12 of 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 FOIA.

Would the cost of compliance exceed the appropriate limit?

15. In its response to the request, NHS England explained to the complainant the type of searches which would need to be conducted in order to respond to their request and estimated that this process would take at least 30 hours (and potentially over 40 hours) to complete and would therefore exceed the cost limit of £450 set out in the Fees Regulations.
16. In its internal review response to the complainant, NHS England provided further details of the process required to locate the information requested. NHS England explained that the period in scope was a time of unprecedented activity where the meetings which took place were often ad hoc and at short notice due to the fast-paced nature of the pandemic during that time. As a result, NHS England explained that it did not hold a list of all individuals involved in the negotiation of the contracts nor the meetings which took place. NHS England was able to confirm to the complainant that the negotiations involved individuals from multiple teams, including high level management, legal, operational, planning, workforce, and finance.
17. In its internal review response, NHS England advised the complainant that it had conducted two sampling exercises, one to identify meetings which took place which would fall within the scope of the request and one to identify emails which would fall within the scope of the request.
18. For the sampling exercise in respect of meetings which might be in scope of the request, NHS England initially identified nine individuals as being those most involved in the negotiations and then undertook a review of the diary of one of those individuals for the time-period in scope. NHS England explained that the individual used for sampling was typically working 7 days a week during the period in scope and attended seven to eight meetings a day. The review of the diary of the individual and the extraction of the meeting dates alone took over two hours and NHS England estimated that considerable additional time would then be required to retrieve and extract the relevant documents, emails, files, and notes requested by the complainant in respect of those meetings. NHS England did not conduct a sampling exercise to locate, retrieve and extract meeting documentation.

19. NHS England estimated that, based on the nine individuals identified as the principal negotiators, approximately 490 meetings took place in the period in question and that the review of their diaries to simply identify meeting dates for the period in scope would take around 20 hours. NHS England also explained to the complainant that, as many other individuals participated in the negotiations, this estimate was on the low side in terms of identifying all of the meetings in scope. In addition, the location, retrieval and extraction of the documents, emails, files, and notes requested by the complainant in respect of the meetings would take many more hours to complete.
20. For the sampling exercise in respect of emails to and from the @ihpn.org.uk domain, NHS England searched the mailbox, calendar, and relevant computer files of one of the nine individuals identified as principal negotiators. The search took four and a half hours and still, to the searcher's knowledge, did not identify all the emails in scope. NHS England therefore estimated that it would take more than four and a half hours to identify and extract all the emails in scope for one individual. Therefore, NHS England estimated it would take more than 40.5 hours to locate and retrieve the emails in scope for just the nine principal negotiators. NHS England also explained that some of the nine principal negotiators have since left NHS England and so the searches of their emails would have to be conducted by colleagues who might be unfamiliar with the individual's files.
21. NHS England therefore provided the complainant with an estimate to comply with their request based on the review of the calendars and emails of nine principal negotiators of 60.5 hours. This estimate did not include the time needed to find and extract the documentation requested in respect of meetings, nor did it include meeting information and emails of other people who were involved beyond the nine principal negotiators identified for the sampling process.
22. The Commissioner notes that even if NHS England's estimate to comply with the request were to be halved, it would still be significantly in excess of the cost limit under FOIA.
23. The Commissioner's overall conclusion is that NHS England has estimated reasonably that to comply with the complainant's request would exceed the cost limit. NHS England was therefore correct to apply section 12(1) of FOIA to the complainant's request.

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

24. Section 16(1) of FOIA provides that a public authority should give reasonable 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). The FOIA code of practice states that, where public authorities have relied on section 12 to refuse a request, they should:

“provide applicants with advice and assistance to help them reframe or refocus their request with a view to bringing it within the cost limit.”

25. A public authority is not required to “lavish ingenuity” on finding ways to reframe the request, but it should be able to explain simple ways of reducing the scope – such as reducing the time parameters or identifying elements of a multi-part request that could be answered within the cost limit.
26. In its initial response to the complainant, NHS England fulfilled its obligations under section 16 of FOIA by advising the complainant to refine their request for information within more specific parameters and made suggestions as to how this could be done.
27. The Commissioner considers this was an appropriate response. He is therefore satisfied that NHS England met its obligation under section 16 of FOIA.

Right of appeal

28. 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

29. 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.
30. 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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