

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 March 2023

Public Authority: NHS England
Address: PO Box 16738
Redditch
B97 9PT

Decision (including any steps ordered)

1. The complainant has requested copies of contracts for "additional COVID capacity" between NHS England and five private healthcare providers.
2. The Commissioner's decision is that NHS England has correctly applied section 40(2) and 43(2) of FOIA. However, the Commissioner has recorded procedural breaches of sections 1, 10, 16 and 17 of FOIA.
3. The Commissioner does not require NHS England to take any steps as a result of this decision notice.

Request and response

4. On 29 March 2021, the complainant made the following request to NHS England for information under FOIA:

"Could I be provided the contracts for additional COVID capacity between NHSE and the following companies, during the period March 2020 to March 2021:

- 1) Circle Health,
- 2) Spire Healthcare,
- 3) Ramsay Health Care,
- 4) Nuffield Health, and
- 5) HCA International.

I would expect this to include any written agreement between the contracting parties outlining the provision of goods and/or services, so 'the contract', as I have phrased it, in addition to any other 'heads of terms', 'heads of agreement', notice of variation, memorandum of understanding etc etc. I understand these contracts have gone through a number of revisions, amendments and/or extensions, and would request that all versions of the contracts during the period are provided. I would expect this to at least include:

- a) The Initial heads of terms, covering 23rd March to mid-May and early June
- b) The formal contract covering May to August
- c) The revised contract covering August to December
- d) The final contract covering 1st January to 31st March

I am requesting these contracts in their entirety, to include any and all appendices, annexes, financial models and other associated documents."

5. On 17 May 2021, the complainant wrote to NHS England and asked it to conduct a review of its handling of their request on the basis that it failed to comply with sections 10 (failure to comply with the request within the required time) and 16 (duty to provide advice and assistance) of FOIA.
6. On 23 June 2021, NHS England responded to the request. It said that none of the contracts the complainant referred to were solely or specifically for "additional COVID capacity". They provided, among other things, for the provision of inpatient and outpatient clinical services for NHS patients by the providers concerned, for the accommodation by those providers of the NHS clinical teams to deliver services to NHS patients, and for the use of the staff and equipment of those providers in NHS Hospitals.
7. NHS England refused to provide the contracts, citing section 43 of FOIA (commercial interests). It said, amongst other things, that release of the information would be likely to prejudice the commercial interests of NHS England and/or CCGs because they may need to put in place arrangements with providers similar to those provided for in the contracts requested in response to a further pandemic outbreak, and the release of the contracts requested would be likely to prejudice the commercial interests of those parties in that context.

8. On 14 July 2021, the complainant wrote to NHS England and asked it to carry out a review of its handling of their request. The complainant made particular reference to NHS England's compliance with sections 10, 16 and 17 of FOIA.
9. On 13 August 2021, NHS England wrote to the complainant and said that it has not yet concluded its review of the request.
10. NHS England provided the outcome of its internal review on 8 August 2022 revising its position. It stated that, given the passage of time, it considered that the majority of the information that was initially withheld can now be disclosed. It maintained its reliance on section 43(2) and section 41 to withhold some details of the contract variations. In addition, it withheld some personal data contained within the contracts under section 40(2) of FOIA.

Scope of the case

11. The complainant contacted the Commissioner on 20 September 2021 to complain about the way their request for information had been handled.
12. The Commissioner considers the scope of his investigation is to consider whether NHS England can withhold the redacted information under sections 40(2), 41 and 43 of FOIA. He will also consider whether there have been any procedural breaches under sections 1, 10, 16 and 17 of FOIA.

Reasons for decision

Section 40(2) – third party personal data

13. Section 40(2) of FOIA says that information is exempt information if it is the personal data of another individual and disclosure would contravene a data protection principle. The data protection principles are set out in Article 5(1) of the UK General Data Protection Regulation (UK GDPR).
14. "Personal data" is defined under section 3(2) of the Data Protection Act 2018 (DPA 2018) as "...any information relating to an identified or identifiable living individual...".
15. NHS England considers the following withheld information meets the definition of personal data under the DPA 2018:
 - (a) Names of external staff members

- (b) Direct email addresses and contact numbers
 - (c) Signatures
 - (d) IP addresses
 - (e) Electronic fingerprint codes
16. The Commissioner has viewed the information being withheld under section 40(2) of FOIA and considers that individuals (data subjects) can be identified from the information. The Commissioner therefore agrees with NHS England that the information being withheld can therefore be categorised as personal data.
17. NHS England also considers that some of the withheld information may be categorised as special category personal data, specifically the electronic fingerprint codes which were created when signing the contracts. NHS England considers that this may be classed as biometric data which can be used for identification. The Commissioner agrees with NHS England that the fingerprint codes can be categorised as biometric data and are therefore classed as special category personal data.
18. The disclosure of personal data under FOIA would constitute "processing" of that personal data. To be compliant with the GDPR, the processing must comply with the principles set out under Article 5(1). If the processing contravenes any of those principles, it is exempt from disclosure under FOIA.
19. The relevant principle is the one under Article 5(1)(a) of the GDPR, which states:
- "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."
- This means that the information can only be disclosed if to do so would be lawful, fair, and transparent.
20. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether one of the conditions under Article 6 of the GDPR has been met. Furthermore, in the case of special category data (which requires additional protection due to its sensitivity), the Commissioner must also consider whether one of the stringent conditions under Article 9 can be met.
21. When considering whether disclosure of personal data under FOIA is "lawful", the relevant condition is the one set out under Article 6(1)(f) of the UK GDPR (legitimate interests). To assess whether Article 6(1)(f) applies, the Commissioner must consider whether there is a legitimate

interest in disclosing the information, whether disclosure of the information is necessary to meet that legitimate interest, and whether the legitimate interest overrides the rights and freedoms of the individual to whom the personal data relates.

22. The Commissioner considers that the complainant is pursuing a legitimate interest in making the request for information.
23. NHS England has acknowledged that there is a public interest in the work that it is involved in. However, it does not consider that the disclosure of the withheld personal data to be necessary. This is because NHS England considers the underlying aim of the complainant's request for information is to understand the terms of the contracts it entered into with the private healthcare providers. It does not consider disclosure of the personal data is necessary to meet this objective or that it adds any further understanding, or context, to the requested information.
24. The Commissioner agrees that the disclosure of this personal data is not necessary to meet the legitimate interests being pursued by the complainant. He therefore considers that there is no lawful basis for NHS England to disclose the personal data that falls within the scope of the request, and that to do so would contravene Article 5(1)(a) of the UK GDPR. As the Commissioner does not consider the disclosure of the personal data to be necessary to meet the complainant's legitimate interest in making the request, it is not necessary for him to consider whether that interest outweighs the rights and freedoms of the individuals to whom the personal data relates.
25. As the Commissioner does not consider there to be a lawful basis under Article 6 of the UK GDPR for disclosing any of the personal data falling within the scope of the request, it is not necessary to consider whether a condition under Article 9 of the UK GDPR would apply to the disclosure of the special category data referred to above. However, for the avoidance of doubt, the Commissioner does not consider that the relevant Article 9 conditions (that the data subject has explicitly consented to the disclosure; or that the personal data in question has manifestly been made public by the data subject) have been satisfied.
26. In view of the above, the Commissioner's decision is that NHS England is entitled to rely on section 40(2) of FOIA to withhold the personal data falling within the scope of the request.

Section 43(2) – commercial interests

27. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
28. NHS England has applied section 43(2) of FOIA to withhold details of sums agreed in the Variation Agreements as guaranteed minimum Private Patient Offset amounts. It explained that the sums agreed were specific to each provider, based on the value of private patient-derived income offset against costs incurred by that provider so as to reduce the sum recoverable from NHS England under that provider's March – December 2020 contract. The sums are based on that value, but not dictated by it, as some providers offered to guarantee a higher minimum Private Patient Offset in order to improve the contractual position for NHS England.
29. NHS England stated that it has also applied section 43(2) to withhold the Total Staffed Capacity Targets for each of the four providers. It explained that the Total Staffed Capacity Target describes the total number of units of capacity that can be operated for each service function per week during the Contract Term. This is based on the aggregate total monthly employed clinical staff contracted hours of the provider's premises, taking into consideration standard annual leave as appropriate.
30. NHS England explained that disclosing the requested information would be likely to prejudice its own commercial interests and those of four of the private healthcare providers.

The providers' commercial interests

31. NHS England considers that disclosing the sums agreed as the minimum financial information relating to the Private Patient Offset amounts, and the Total Staffed Capacity Targets for Circle Health, Spire Healthcare, Ramsey Health Care and Nuffield Health, would be likely to prejudice those providers' commercial interests.
32. NHS England explained that the agreed minimum Private Patient Offset values were specific to each provider and were derived from the actual Private Patient Offset amounts generated in the month prior to the variations being finalised. These agreed values have never been shared by NHS England or between providers.
33. The values, if read in conjunction with other information which has been made public, provide an insight into the ratio of NHS to private work for each provider and its cost base. To disclose the agreed minimum values would be to disclose into the public domain details of each providers'

operating model. The offset, when added back to the total amounts paid by NHS England to each provider, could reveal the actual cost base of each provider for delivering NHS work and its providing capacity. Disclosing the actual cost base of each provider for delivering NHS work and its capacity to provide for such work could be used by that provider's competitors when developing pricing models.

34. Similarly with the Total Staffed Capacity Target, this provides a breakdown of the provider's ability to resource a particular site. The provider's competitive position could be adversely affected were its competitors able to adjust their operating models based on this information.
35. NHS England therefore considers it likely that there is a real risk that disclosure of the requested information would be adverse to the providers' individual commercial interests in relation to each other and other competitors in the healthcare market.

NHS England's commercial interests

36. NHS England considers disclosing details of sums agreed in the Variation Agreements as guaranteed minimum Private Patient Offset amounts would be likely to also prejudice its own commercial interests.
37. NHS England explained that the contracts in question were negotiated and put in place, and then varied, at pace during the early stages of the pandemic to help meet the needs of the NHS as they were then understood and projected. NHS England considers there to be a likelihood that it or other NHS organisations may need to put in place similar arrangements with independent sector providers in response to a further pandemic outbreak and/or its impact on NHS services.
38. NHS England considers that disclosing this information would be likely to be detrimental to its ability (or that of the NHS more widely) to agree similar arrangements and/or to procure best value in use of public funds in doing so.
39. In particular, NHS England considers that disclosing the requested information would jeopardise any possibility of securing arrangements with providers involving payment on an open-book, cost-recovery basis, or of any terms which involve providers disclosing information which reveals, or from which could be extrapolated, their cost base or business model. It considers that potentially limiting the bargaining position and commercial flexibility of NHS England (and the wider NHS) in this way would be inherently prejudicial to its commercial interests.

Public interest test

Public interest arguments in favour of disclosing the information

40. NHS England accepts that the disclosure of the withheld information promotes accountability and transparency in the spending of public money, especially when it relates to contracts procured during the Covid-19 pandemic. It also helps the public to understand decisions affecting their lives and to debate or challenge them.

Public interest arguments in favour of maintaining the exemption

41. NHS England considers that disclosing the vast majority of the content of the contracts and the variations largely satisfies the public interest in relation to understanding the terms under which the providers were contracted by NHS England (specifically, what it was they 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 NHS England in return for doing so).
42. NHS England stated that it routinely publishes details of expenditure over £25,000 on its website, which it considers to contribute significantly to promoting accountability and transparency.
43. NHS England highlighted the public interest in ensuring its, and the wider NHS', continuing ability to procure best value in use of public funds, and of retaining the bargaining position and commercial flexibility to do so.
44. NHS England also argued that the current state of hospital admissions and waiting lists (particularly in the context of the continuing prevalence of Covid-19) meant that there was a likelihood of the NHS needing to use the same or similar providers to provide services, capacity, and resources in the foreseeable future.
45. Finally, NHS England stated that private providers have an expectation whilst working with public authorities that whilst some information will be disclosed, NHS England would not disclose information damaging to their commercial interests.
46. The Commissioner accepts that there is a general public interest in public authorities being open and transparent, particularly in relation to the spending of public money relating to contracts procured during the Covid-19 pandemic. However, there is a wider public interest in NHS England being able to procure best value in the use of public funds, and of retaining its bargaining position and commercial flexibility. On balance therefore, the Commissioner finds that the public interest favours maintaining the section 43 exemption in this case.

47. As the Commissioner has found that section 40(2) applies to the withheld third party personal data, section 43(2) applies to the remaining withheld information, and that the public interest favours maintaining the section 43(2) exemption, it has not been necessary for the Commissioner to consider NHS England's application of section 41 in this case.

Procedural matters

Sections 1, 10 and 17 – time for compliance

48. Section 1(1) of FOIA says that an individual who asks for information from a public authority is entitled to (a) be informed whether the authority holds the information and, if so, (b) to have that information communicated to them.
49. Section 10(1) of FOIA says that a public authority should comply with section 1(1) promptly and no later than the twentieth working day following the date of receipt.
50. Section 17(1) of FOIA states that where a public authority refuses a request for information, it must provide the applicant with a refusal notice explaining the exemptions relied upon and why they apply (if not apparent), no later than 20 working days after the date on which the request was received.
51. NHS England acknowledges in its internal review decision that it breached FOIA by providing its response to the complainant's request outside the 20 working day time limit.
52. The Commissioner therefore considers NHS England to have breached section 1(1), section 10(1), and section 17(1) of FOIA in this case.

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

53. Section 16(1) of 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).

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

54. The complainant is concerned that NHS England did not understand what he was requesting and did not ask for clarification, despite the request being open for over a year, the complainant making approximately 20 telephone calls to speak to an FOI officer to no avail, and sending numerous follow-up emails that were not responded to.
55. The complainant also referred the Commissioner to a line in NHS England's initial response to the request, which stated that "None of the contracts to which you refer were solely or specifically for additional COVID capacity" (whatever it is you mean by that).", indicating that it did not have a full understanding of what the complainant was asking for. Despite this, it did not ask the complainant for further clarification of exactly what information they were seeking.
56. NHS England has accepted that there were shortcomings in its handling of the original request and it stated that it has implemented processes to prevent this from occurring again in the future. The Commissioner notes that in its internal review decision, NHS England apologised to the complainant for the lack of engagement in relation to clarifying the scope of their request.
57. NHS England also referred the Commissioner to a recent First Tier Tribunal (ref: EA/2022/0178) outcome which relates to this topic, in which the Tribunal stated that:

"...It is not in our view unreasonable for a public authority not to engage in separate discussions outside the framework of response and internal review in order to provide that reasonable advice and assistance. It is not, in our view, necessary for a conversation to take place either orally or by email..."
58. The Commissioner accepts that a public authority is not required to engage in separate discussions outside the framework for handling requests for information. However, if a public authority is not sure what is being requested, it must contact the requester as soon as possible for clarification in accordance with section 16 of FOIA.
59. The Commissioner therefore considers that NHS England failed to provide adequate advice and assistance and has therefore breached section 16(1) of FOIA.

Other matters

Internal review request

60. The Commissioner notes that the time taken for NHS England to respond to the internal review request exceeded 40 working days. Although there is no statutory time set out in FOIA within which public authorities must complete a review, the Commissioner takes the view that a reasonable time for completing an internal review is 20 working days, and in no case should the total time taken exceed 40 working days. The Commissioner therefore recommends that NHS England review the Section 45 code of practice².
61. Finally, the complainant has raised a query about whether a requester can make a request for internal review before an initial response has been provided (for example, if the complainant is unhappy about procedural matters or the way in which their request has been handled rather than the substance of the response).
62. FOIA does not prevent a requester from asking for an internal review at any stage of the request process. However, as there is no obligation under FOIA for a public authority to carry out an internal review then, in turn, there is no obligation for a public authority to carry out an internal review before an initial response has been provided to the requester.
63. Whilst we consider it good practice for a public authority to respond to requests for internal review within 20 or 40 working days (as detailed above), this is based on the assumption that the complainant has received the initial response. Where a complainant has requested an internal review before the initial response has been provided, we do not consider it unreasonable for the public authority to wait until it has provided that response so that the review can also cover any concerns the requester has about the substance of the response.
64. However, the Commissioner recognises that it is reasonable for a requester to chase a response which is overdue. The above paragraph should not therefore be taken to mean that public authorities can ignore such chasers.

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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

Right of appeal

65. 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

66. 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.
67. 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

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