

Freedom of Information Act 2000 (FOIA)

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 7 July 2023

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

Decision (including any steps ordered)

1. The complainant has requested information on evaluation and scoring of certain questions relating to a prison procurement. NHS England refused the request on the basis of section 12 – that it would exceed the appropriate cost limit to comply.
2. The Commissioner's decision is that NHS England has correctly applied section 12 to refuse the request and has provided advice and assistance under section 16 of FOIA.
3. The Commissioner does not require further steps.

Request and response

4. On 12 January 2023, the complainant wrote to NHS England and requested information in the following terms:

“Procurement for Integrated Health and Wellbeing Services to Prisons in the South West region, for NHS England and NHS Improvement Health & Justice South West (“Prison Procurement”).

Lot 1 – Bristol, South Gloucestershire and Wiltshire (BSGW) prisons – Find a Tender (FTS) Contract Notice Reference Number: 2012/S 000-015894

Lot 3 – Dorset prisons – Find a Tender (FTS) Contract Notice Reference Number: 2021/S 000-015894

Lot 4 – Devon prisons – Find a Tender (FTS) Contract Notice Reference Number: 2021/S 000-015894

Under the Freedom of Information Act 2000 (the Act), please provide us with:

1. Correspondence relating to the evaluation and scoring of Questions 22 and 23 of the Prison Procurement between the Relevant Dates between:

- a. [name redacted] and any User Voice Individual; and
- b. [name redacted] and any User Voice Individual.

2. Documents and/or Correspondence between the Relevant Dates relating to Changes or proposed changes to the evaluation, moderation or decision-making process with respect to Question 22 and/or Question 23 of the Prison Procurement.

In the case of the information requested in paragraphs 1 to 2 above, in each case as held by or on behalf of NHS England including on personal, non-corporate systems, laptops and/or devices.”

5. NHS England responded on 9 February 2023. It stated that the cost of complying with the request would exceed the appropriate limit under section 12(1) of FOIA. NHS England provided some details on the searches it would need to conduct to locate and retrieve relevant information. Advice and assistance given suggested significantly reducing and refining the scope of the request.
6. An internal review was requested on the same date suggesting the estimate of the time needed to comply with the request was exaggerated as the first request asked for information from or received by only two individuals about just two issues. Similarly the complainant argued the second request is already narrow as it relates to the decision to change part of the Procurement process in relation to just two questions of the Prison Procurement.

Scope of the case

7. NHS England failed to carry out an internal review, despite being chased for a response, the Commissioner decided to exercise his discretion and accept the complaint for full investigation on 21 April 2023.
8. The Commissioner considers that the scope of his investigation is to determine if NHS England has correctly refused to comply with the request as it would exceed the cost limit under section 12 of FOIA to do so.

Reasons for decision

9. Section 12 of FOIA states that a public authority is not obliged to comply with a request if it estimates that it would exceed the cost limit to do so. For NHS England the cost limit is 18 hours or £450.
10. NHS England is permitted to take into account the time or cost of determining if the information is held, locating and retrieving the information and extracting relevant information from non-relevant information.
11. NHS England states it conducted a sampling exercise by asking an NHS England / South West Commissioning Support Unit employee who was involved in the Prison Procurement to conduct a sample exercise of their email inbox to locate any information of potential relevant to part 2 of the request.
12. NHS England advised the employee spent approximately 2.5 hours conducting "key word" searches of their inbox including searches for relevant individuals, organisations and references to relevant questions about the procurement ie Q22 and Q23 and subsequently sifting through the results with a view to identifying email correspondence containing information about "changes or proposed changes to the evaluation, moderation or decision-making process with respect to Question 22 and/or Question 23".
13. NHS England estimated it would have likely taken another 1.5 hours of work to locate and extract from that email correspondence information determined to be of actual relevance to the information request. From this sampling exercise NHS England determined the total time for complying with part 2 of the request to 4 hours. This time was based on one employee locating and extracting relevant information.
14. NHS England states at least 13 employees may hold information relevant to part 2 of the information request so it estimated the total

time for compliance with part 2 of the request alone would be in excess of 50 hours, considerably over the 18 hour/£450 limit for compliance.

15. It further explained that locating information within scope of the request was not straightforward as some of the individuals and organisations referred to in the request worked concurrently across multiple procurement exercises so any keyword searches would likely yield large numbers of results of no relevance to the Prison Procurement.
16. NHS England argued its estimate was in fact conservative as it did not take into account the additional time needed to conduct searches of the relevant employees text messages, WhatsApp messages and MS Teams correspondence. NHS England also considers it would need to search two shared drives and one Commissioning Support Unit shared drive.
17. The estimates provided by NHS England are solely focused on locating information relevant to part 2 of the request. It has aggregated parts 1a and 1b with part 2 in calculating its estimate, although NHS England does not consider it holds any information in scope of part 1b (correspondence between [name redacted] and any User Voice Individual).
18. The complainant argues that their request was deliberately drafted to be narrow and targeting information that should already be aggregated and readily accessible as part of a procurement process.
19. The Commissioner is satisfied that NHS England has explained in sufficient detail why it would exceed the cost limit to comply with the complainant's request.
20. NHS England has conducted a sampling exercise and the Commissioner has no reason to doubt that the estimates provided by NHS England are not accurate. He notes that there will always be some variation if a full search was carried out, some searches may take less time and others more time than that taken during the sampling exercise, however if 13 employees had to conduct keyword searches and then extract relevant information from the results then this is likely to take a reasonable amount of time. NHS England has estimated this to be 4 hours per person taking the total time required to 52 hours. Even assuming this search time could be halved to 2 hours per person this would still amount to time in excess of the 18 hour/£450 limit set for complying with the request.
21. The estimates relate solely to part 2 of the request as this is likely to be the more difficult part to locate information for given it asks for documents and correspondence relating to changes to the decision-making process. Whilst it is narrowed to changes with respect to just two questions of the Prison Procurement, keyword searches would have to be quite broad to return results that might be in scope of the request

and the Commissioner therefore accepts the estimates provided by NHS England are reasonable.

22. For these reasons, the Commissioner is satisfied that section 12 of FOIA applies.

Section 16 – advice and assistance

23. Section 12 of FOIA triggers the duty to provide advice and assistance under section 16, so far as this is reasonable and practicable to do so.
24. NHS England advised the complainant if they reduced the scope of the request it may be able to provide a response. It was not explicit in its advice as to how the scope could be refined given part 2 was already refined to only asking for information on changes to two questions. However, the Commissioner accepts NHS England did make an attempt to offer advice and assistance to the complainant as much as possible to do so in the circumstances.

Other matters

25. The Section 45 Code of Practice advises all public authorities to carry out an internal review within 20 working days of receipt, and certainly no later than 40 working days from receipt. The additional 20 working days should only be required for those requests which are particularly voluminous or complex in nature.
26. NHS England failed to carry out an internal review. This is not acceptable. The Commissioner would therefore like to remind NHS England of the requirements of the code and the importance of carrying out timely internal reviews.

Right of appeal

27. 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

28. 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.

29. 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

Jill Hulley
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