

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 November 2013

Public Authority: NHS Commissioning Board
Address: Southside
105 Victoria Street
London
SW1E 6QT

Decision (including any steps ordered)

1. The complainant has made a series of information requests arising from a "Safe and Sustainable" review of paediatric cardiac surgery. The National Specialised Commissioning Team (NSCT)¹ responded by claiming that it was not under a duty to comply with the requests because the cost of doing so when aggregated together would exceed the appropriate limit for the purposes of section 12(1) of FOIA.
2. The Commissioner's decision is that the NSCT properly applied section 12(1) of FOIA. He does not therefore require the NSCT to take any steps as a result of this notice.

Request and response

3. This decision notice concerns multiple requests that were made on a number of different dates in January, February and March 2013. The wording of the requests is reproduced in the annex attached to the
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¹ At the date of the requests the responsible public authority was the NSCT, which was hosted by NHS London (a Strategic Health Authority). However, the requests were received in the lead-up to a major reorganisation of the NHS. This effect of the reorganisation was that NHS London would cease to exist in March 2013 and NHS England (the legal title being the NHS Commissioning Board) would become the successor organisation. Consequently, following NSCT's initial response to the requests, responsibility for the requests was transferred to NHS England. For the sake of clarity, though, this decision notice refers to the NSCT as if it were the public authority.

notice. NSCT effectively dealt with them as two separate groups, referred to as A and B; January and February 2013 requests as A and March 2013 requests as B.

4. NSCT responded to A on 22 February 2013 and confirmed that it held information relevant to the requests. However, NSCT further explained that it would not be disclosing the requested information as the cost of compliance would exceed the appropriate limit referred to in section 12 of FOIA. In reaching this decision, NSCT noted that it was entitled to aggregate the various requests for the purposes of a cost estimate in accordance with regulation 5 of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Fees Regulations"). Notwithstanding its application of section 12 of FOIA, NSCT suggested as a way of meeting its section 16 duty to provide advice and assistance that the complainant may wish to narrow the scope of the requests by being more specific about the particular information he wished to obtain.
5. NSCT responded to B on 28 March 2013. This mirrored its position in respect of A; finding that section 12 FOIA applied based on its estimate of the costs linked to complying with the requests on an aggregated basis. Observing its duty to advise and assist an applicant, however, the NSCT indicated that some of the requested information was likely to be contained in the material that had previously been released to the complainant or was otherwise already in the public domain.
6. There then followed further correspondence between the complainant and the NSCT about the Safe and Sustainable review and other matters connected to this. As part of this correspondence, the complainant asked the NSCT to revisit its decision to apply section 12 of FOIA to A and B.
7. NSCT provided the complainant with the outcome of its internal review on 3 July 2013, which upheld its original position in relation to A and B. However, this was not before the complainant had already submitted a complaint to the Information Commissioner about NSCT's handling of the requests in question; a referral that had been precipitated by the delay associated with the completion of the internal review.

Scope of the case

8. The complainant contacted the Commissioner to complain about the NSCT's decision to apply section 12 of FOIA to A and B.
9. One reason the complainant has for disputing NSCT's position relates to his view that the NSCT incorrectly categorised some points made in his correspondence as requests for information that were eligible to be

considered under section 12 of FOIA. Instead, the complainant considered that the points referred to the handling of earlier requests and were, by extension, simply a continuation of the correspondence on these requests.

10. The Commissioner has assessed this argument as part of his determination. However, he has taken care to distinguish between issues relevant to the application of section 12, which is the focus of the present case, and other issues relating to the quality of NSCT's handling of the earlier requests that are not under consideration here.

Reasons for decision

Section 12 – appropriate limit

11. Section 12(1) provides 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. This limit is specified by the Fees Regulations.
12. The Fees Regulations state that an estimate can only take into account the costs a public authority reasonably expects to incur in: determining whether it holds the requested information; locating the information; retrieving the information; and extracting the information. The Fees Regulations further clarify that the costs associated with these activities should be worked out at a standard rate of £25 per hour.
13. The appropriate limit has been set at £600 for central government departments, legislative bodies and the armed forces and £450 for all other public authorities, which includes the NSCT. This is equivalent to 18 hours work.

Aggregation

14. Section 12(4) of FOIA provides that in certain cases a public authority can aggregate the cost of complying with two or more requests. Section 5 of the Fees Regulations sets out the conditions in respect of which aggregation may be considered; stating that two or more requests can be aggregated if:
 - they are made by one person, or by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign;
 - they are for the same or similar information to any extent; and

- the subsequent request is received by the public authority within 60 working days of the previous request.
15. Looking at the requests in isolation, NSCT considers that compliance with only some of these would exceed the appropriate limit in their own right. However, NSCT has argued instead that the aggregated costs of complying with all the requests would go over the cost threshold and, consequently, was not under a duty to comply with any of them. The first question for the Commissioner is therefore whether the requests in question meet each of the three conditions listed above.
 16. The Commissioner considers that most of the requests clearly fall within that bracket in that they were; made by one person (the complainant), all on the same theme, and received by NSCT within 60 working days of the previous request. However, the Commissioner also acknowledges that some of the requests do warrant further attention.
 17. In particular, requests 5 (8 February 2013; 09:04) and 11 (21 February 2013; 12:48) of A were not submitted by the complainant but by different third parties. NSCT is of the view, however, that each of the third parties was acting in concert with the complainant when making the request and therefore argues that the first condition is still satisfied.
 18. The Commissioner understands that it will not always be straightforward for a public authority to demonstrate a link between persons making requests for information – the fact that the requests may share a common subject does not necessarily prove that applicants are acting in concert or in pursuance of a campaign. Nevertheless, the Commissioner accepts as reasonable NSCT's contention that the person behind request 5 was acting in concert with the complainant. The reason for coming to this view is three-fold.
 19. Firstly, the individual functions in a similar role to the complainant at the same organisation. Secondly, the cover email to the letter containing the requests was copied in to the complainant. Thirdly, the complainant himself has not disputed NSCT's claim. Allowing that all three conditions for aggregation are therefore met, the Commissioner considers that NSCT was correct to include request 5 as part of the cost-estimate.
 20. Turning to request 11, the Commissioner considers that the case for aggregation is perhaps less clear-cut, although he notes that again the person making the request functions in a similar role to the complainant at the same organisation. However, in any event, the Commissioner has determined that the request falls down at the third condition, which concerns the time period within which the relevant requests must be received.

21. At paragraph 48 of his published guidance on section 12², the Commissioner recognises that there is an apparent tension between the 60 working day period specified in the third condition and a public authority's duty under section 10(1) of FOIA to respond to a request within 20 working days. The Commissioner's approach to reconciling these factors is set out in the following paragraphs of the guidance:

49. The Commissioner's approach is to allow the aggregation period to only run up to 20 days 'forward' from the date of any single request under consideration to take into account the requirements of section 10(1).

50. The aggregation period will however be able to run up to 60 days 'backwards' from the date of any single request under consideration.

51. The total aggregation period, (running either forwards or backwards or a combination of both) from the date of any single request must not exceed 60 working days.

22. As can be observed, the earliest request in A to which NSCT has applied section 12 is dated 17 January 2013 and the latest, request 11, was made on 21 February 2013. Running forwards from 17 January 2013, the period between the requests goes over 20 working days. Consequently, in accordance with the Commissioner's approach outlined in his guidance, he considers that request 11 cannot be included as part of the aggregated requests set out in A.

The cost-estimate

23. When considering the application of section 12(1) of FOIA, the Commissioner accepts that a public authority only has to provide an estimate rather than a precise calculation. The task for the Commissioner is therefore to consider whether an estimate is sensible, realistic and supported by cogent evidence.
24. To support its position under section 12, NSCT has addressed each of the requests in turn and provided what it considers to be a reasonable estimate for compliance. Totalling up the figures, NSCT considers that

²http://www.ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/costs_of_compliance_exceeds_appropriate_limit.ashx

conservative estimates of the time needed to produce the requested information at A and B are 138 hours and 96 hours respectively.

25. In coming to this position, NSCT has confirmed that each of the estimates making up the total derive either from prior experience of the work that would need to be undertaken to extract the information or the best judgement of those subject matter experts responsible for the information. NSCT has also clarified that to the best of its knowledge the estimates represent the quickest method of gathering the information.
26. It is clear that the estimates exceed a number of times over the appropriate limit of 18 hours. In this regard, the Commissioner acknowledges that some weight should be afforded to a public authority's views on the basis that it can be expected to have the best knowledge of its own records management systems. However, as mentioned above, the Commissioner will test whether a public authority has in fact correctly applied section 12 of FOIA by considering the cogency of the explanations it provides in support of its position.
27. The starting point for the Commissioner is to check that the activities referred to by NSCT as needing to be performed are legitimate activities for the purposes of the Fees Regulations – namely, determining whether it holds the information; locating the information; retrieving the information; and extracting the information.
28. From this point of view, the Commissioner considers there are reasonable grounds for disputing the overall time required for compliance with the requests. This is because in his opinion some of the activities cited by NSCT are not ones that can be taken into account by a public authority for the purposes of the cost estimate. Principal of these is the time that NSCT has factored in to assess whether any of the requested information was subject to an exemption in FOIA.
29. In previous decisions, and as evidenced at paragraph 14 of his guidance, the Commissioner has clarified that the staff time taken, or likely to be taken, in considering whether any exemptions apply does not fall within the list of permitted activities. It necessarily follows then that any time allocated for this activity must necessarily be disregarded under section 12 of FOIA.
30. The effect of this finding is potentially significant and is further compounded by the realisation that NSCT has included in its cost-estimate the time required for scanning information or otherwise organising the information. Again, the Commissioner would disagree that this action would fall within the list of permitted activities; relating as it does to the form in which the information is provided to the

complainant rather than to the time taken in actually gathering the requested information.

31. For example, NSCT has estimated that the time required to comply with request 2 of A would be in the region of 24 to 29 hours. This estimate is made up of 2 hours to locate the relevant documents, 25 hours to scan the several thousand pages of information and review the information for patient identifiable data and a further 2 hours to organise and save documents to a cd. NSCT has also suggested that it would need to contact a number of third parties to seek their views on disclosure, which could take another 30 minutes. Applying the principles about what are and what are not permitted activities under the Fees Regulations, the Commissioner considers that of the total hours allocated to the request, it is likely that only the two hours given over to locating information could legitimately be counted as part of the cost-estimate.
32. Yet, despite having some reservations about parts of the estimates, the Commissioner is also mindful of the overall number of requests concerned and the other permitted activities referred to by NSCT. Even if the original estimates for A and B were halved or cut by two-thirds, the Commissioner recognises that the time needed to retrieve the requested information would still significantly exceed the appropriate limit. It should also be remembered that NSCT considers that the calculations given were conservative estimates.
33. In making this finding, the Commissioner has also had regard to the complainant's arguments against the NSCT's application of section 12:
 - i. A number of points raised do not constitute new requests but instead refer to the handling of past requests (see, for example, requests 1.3, 1.4, 1.5, 1.6 and 3 of A).
 - ii. In many instances the requested information would be held electronically and it should therefore be a relatively simple process to find and extract the information.
 - iii. Where the previous point does not apply, the complainant considers that NSCT would only need to consult with a limited pool of individuals in order to confirm where the requested information is retained (see particularly requests 6 – 10 of A).
34. The Commissioner, however, respectfully disagrees that the combination of these arguments effectively undermines the application of section 12 of FOIA. There are two reasons for this. Firstly, even if the Commissioner was to accept the complainant's argument described at point i in full or in part, this would not seem to ultimately effect whether the estimated cost of compliance would exceed the appropriate limit.

Secondly, the Commissioner has not been provided with any evidence that demonstrates NSCT could have, and perhaps more importantly should have, envisaged a more efficient way of recovering the requested information.

35. The Commissioner does not therefore consider that any of these arguments would militate against finding that section 12(1) is engaged in relation to both A and B. He also recalls that section 12 is not subject to the public interest test. This means that any decision on whether section 12 has been properly applied will not be affected by, or turn to any extent on, the significance of the requested information.

Right of appeal

36. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

37. 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.
38. 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

Rachael Cragg
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex – schedule of requests

Ref	Date	Time	Request
Group A			
1	17/1/2013	23:11	<ol style="list-style-type: none"> 1. Please could you explain the reason for these extremely long, and (in my view) unacceptable publication delays. (opening page) 2. Has there been some recent additional analysis [to explain away the alleged unresolved discrepancies in the Decision Making Business Case]? (para 2.2) 3. I cannot find the final set of HIASG minutes for 3 October 2011 in your paper bundles: these might have been omitted at your end or mislaid at mine, but I would grateful if you could send me another copy. (para 2.3) 4. Please can you confirm whether this was actually the case [ie whether the HIASG considered the public consultation responses]? (para 2.3) 5. JHOSC would like to know what these errors were, and whether they have undermined any other conclusions that were based on the same data sets? (para 2.4) 6. Please tell me when our [JHOSC] report was considered by JCPCT? (para 3.1) 7. Where and how were JCPCT meetings publicised? This was a national reconfiguration affecting the entire country: how were people in Yorkshire expected to discover the agendas and locations of JCPCT meetings? Why are there no resolutions in the JCPCT minutes to justify meeting in private? (para 3.2) 8. JHOSC needs to see NSCT / JCPCT minutes in their entirety. We should also see full reports and all the legal advice. (para 3.6) 9. What is your explanation for this result [re. flow of expenditure to the North East]? (para 4.4) 10. Please could you provide a detailed explanation for this phenomenon [why NSCT spending in London and the North East has increased]? (para 4.5) 11. Please could you also shed more light on the recruitment and membership of the various bodies advising the JCPCT, and their uneven geographical distribution? [...] Where and when were these positions advertised? If they were not advertised, who nominated the people who were approached? [...] What detailed criteria were used to select the members of this board, and all the other boards that advised the JCPCT?

			<p>Please can we see a detailed analysis of recruitment policies and membership of every committee that advised the JCPCT? (para 4.6)</p> <p>12. [...] why option G did not figure in the Public Consultation, when it could easily be identified as a serious contender from an early stage? They also ask why Leeds only appeared within a 6-member group, during the public consultation, which was at an obvious voting disadvantage in a field that also contained 7-member groups? (para 5.1)</p> <p>13. We would value your comments on our Venn diagram, and whether in your opinion it is broadly correct. (para 5.2)</p> <p>14. What do you have to say to this [about accusations of lack of independence]? (para 5.4)</p> <p>15. Who nominated them [lay members]? How many lay members were recruited by public advertisement? What selection criteria were applied? (para 5.6)</p> <p>16. please could you provide more justification for the advice from [named official] that the maternity facilities at Newcastle are adequately co-located, when the majority of relevant local professionals appear to take a different view? (para 5.7(i))</p> <p>17. Which body drafted and approved the assessment criteria for the Kennedy scores? Please can you point me to the relevant minutes whereby this process was agreed? (para 5.7(ii))</p> <p>18. Please could you provide better statistics on "medical" as opposed to "surgical" deaths and morbidity? (para 5.7(iii))</p> <p>19. Please could you explain why no baseline calculations on the current situation were included with the Health Impact Assessment? Please could you also tell me why the HIA calculates national averages, when it should focus on the minority who are directly affected by each change? (para 5.7(iv))</p> <p>20. [...] Please provide justification for the separate consideration being afforded to adult congenital cardiac surgery. Would you agree that the children's decision effectively pre-empts the adult outcome? (para 5.7(v))</p> <p>21. Does NSCT accept that patient choice is a fundamental right, or merely see it as an inconvenience, to be avoided or neutralised whenever the opportunity arises? (para 5.7(vi))</p> <p>22. Where is the enduring justification for this [the closure of the Leeds cardiac unit]? (para 5.9)</p> <p>23. Please explain to me why air transport is now considered acceptable for Northern Ireland when it was previously unacceptable for the Isle of Wight? (para 6.2)</p>
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2	21/1/2013	23:48	Now that you have sent us a breakdown of the scores for the various hospitals that were visited by the Kennedy Panel in 2010, we would be grateful if you could also send us copies of the self-assessment documents produced by all eleven hospitals that the Kennedy Panel were assessing. Electronic copies would be more convenient for all concerned.
3	31/1/2013	18:02	<p>Thank you for your message and attachment, but I believe that the NSCT team are mistaken about the information that your organisation actually holds [...] I have annotated my original request in red [italics] to indicate where you should look:</p> <ol style="list-style-type: none"> 1. file or document name, such that it can be identified on the website <i>already disclosed</i> 2. original creation date as a Microsoft Office document or similar <i>please see below</i> 3. file conversion date into Adobe PDF format for the website <i>this is recorded internally within the PDF file on the website</i> 4. file publication date (i.e. the date when the file was first available to the public for download) <i>please see the server logs</i> 5. file modification dates (if the file has been subsequently modified) <i>please inspect the server logs or server audit trail</i> 6. file integrity (whether or not the original record is complete, or whether parts have been redacted) <i>already disclosed</i>
4	5/2/2013	09:16	If possible, we really would appreciate receiving all the requested information, and electronic copies of the existing disclosures, even at this late stage. It would still save us a great deal of effort, and reduce the possibility of mistakes.
5	8/2/2013	09:04	<p>The Decision Making Business Case (DMBC) for the review of Children's Congenital Cardiac Services can be downloaded from your safe and Sustainable website [...]</p> <ol style="list-style-type: none"> 1. Who prepared the text for the DMBC document, and how much did this cost? 2. Who was responsible for the presentation and layout, and how did this cost? 3. Who printed the published copies, how many were produced and how much did this cost? 4. When was the DMBC text sent to the graphic designers? 5. When was the finished artwork sent to the printers? 6. When was the printed work ready for collection? 7. Please can we have a copy of the invoices

6	8/2/2013	21:25	<p>I attach a copy of the Terms of Reference for the NCS Expert Panel that I originally downloaded from the Safe & Sustainable website. You will note that the creation date for this file is 4 July 2012 although it apparently refers to events in 2010 [...]</p> <ol style="list-style-type: none"> 1. Who was the author of the original Microsoft Office version of this document and what was its creation date? 2. Which person or committee reviewed and approved these terms of reference and when did this take place? 3. Which person or committee agreed the composition of the NCS Expert Panel and when did this take place? 4. What were the selection or recruitment criteria for the members of the NCS Expert Panel? 5. On what dates was each member invited to join the NCS Expert Panel, and when did they each agree to serve? 6. Which members of the NCS Expert Panel attended the meeting(s) of the Panel and when did these take place? 7. Which members of the NCS Expert Panel contributed to their final report and when was this produced?
7	8/2/2013	21:40	<p>I attach a copy of the Terms of Reference for the "JCPCT Steering Group" that I originally downloaded from the Safe & Sustainable website. You will note that the creation date for this file is 4 May 2011 although a steering group first met on 1 December 2008, at which time there was no intention to create a Joint Committee of the Primary Care Trusts (JCPCT) [...]</p> <ol style="list-style-type: none"> 1. Who was the author of the original Microsoft Office version of this document and what was its creation date? 2. Which person or committee reviewed and approved these terms of reference and when did this take place? 3. Which person or committee agreed the composition of the Steering Group and when did this take place? 4. What were the selection or recruitment criteria for the members of the Steering Group? 5. On what dates was each member invited to join the Steering Group, and when did they each agree to serve? 6. Please can I have copies of any earlier versions of the attached document that pre-dated the formation of the JCPCT.

8	8/2/2013	21:56	<p>I attach a copy of the Terms of Reference for the "HIA Steering Group" that I originally downloaded from the Safe & Sustainable website. You will note that the creation date for this file is 4 July 2012 although it refers to events in January 2011 or thereabouts [...]</p> <ol style="list-style-type: none"> 1. Who was the author of the original Microsoft Office version of this document and what was its creation date? 2. Which person or committee reviewed and approved these terms of reference and when did this take place? 3. Which person or committee agreed the composition of the HIA Steering Group and when did this take place? 4. What were the selection or recruitment criteria for the members of the HIA Steering Group? 5. On what dates was each member invited to join the HIA Steering Group, and when did they each agree to serve?
9	8/2/2013	22:20	<p>I attach a copy of the Terms of Reference for the "Expert Review Panel" (more commonly known as the "Kennedy Panel") [...] You will note that the creation date for this file is 4 July 2012 although it refers to events in Spring 2010 or thereabouts [...]</p> <ol style="list-style-type: none"> 1. Who was the author of the original Microsoft Office version of this document and what was its creation date? 2. Which person or committee reviewed and approved these terms of reference and when did this take place? 3. Which person or committee agreed the composition of the Kennedy Panel and when did this take place? 4. On what dates was each member invited to join the Kennedy Panel, and when did they each agree to serve? 5. I note that each member of the panel allegedly represented a particular "constituency" although the listed desiderata were not uniformly achieved. Within each constituency, what were the recruitment criteria that determined the selection of each particular post-holder, rather than somebody else? 6. Please can I have copies of the correspondence with the various national bodies which were consulted about this panel?
10	8/2/2013	22:35	<p>I attach copies of two reports or publications from the "Kennedy Panel" that I have downloaded from the Safe & Sustainable website. The creation date for both PDF files is some time after the original events took place. Please could you provide more precise creation dates for the</p>

			original Microsoft Office versions of these documents under the Freedom of Information Act?
11	21/2/2013	12:48	<ol style="list-style-type: none"> 1. Please provide copies of all the baseline activity reports describing current service provision that were submitted in January 2010 to the National Specialised Commissioning Team by the eleven hospital trusts who wished to be considered as future providers of Children's Cardiac Surgery. 2. Please provide copies of all the self-assessment reports, attachments and appendices that were submitted in Spring 2010 to the National Specialised Commissioning Team by the eleven hospital trusts who wished to be considered as future providers of Children's Cardiac Surgery, indicating which of these various documents were considered by all eight members of the Independent Expert Panel chaired by Professor Ian Kennedy, and which of them were not? 3. Which named individuals had access before 1 July 2012 to the detailed sub-scores that were awarded in 2010 by the Independent Expert Panel chaired by Sir Ian Kennedy, for each assessment criterion, at each of the eleven hospital trust who were competing to provide future Children's Cardiac Surgery, and from what dates was such access available?
Group B			
1	8/3/2013	15:25	<p>In relation to the Independent Expert Review Panel chaired by Sir Ian Kennedy, please explain:</p> <ol style="list-style-type: none"> 1. who devised the assessment criteria, scoring scheme and weighting factors used by this panel for their work, 2. when these systems were devised, and 3. whether any of these documents or policies were ever subject to any form of peer review.
2	8/3/2013	15:41	<p>Please provide copies of all official correspondence that is relevant to the Safe & Sustainable review of Children's Cardiac Surgery between NSCT officials and:</p> <ol style="list-style-type: none"> 1. Sir David Nicholson 2. Sir Bruce Keogh 3. The Royal Colleges (for example, The Royal College of Surgeons, Royal College of Nursing etc) 4. Professional Clinical Associations (for example the British Congenital Cardiac Association etc) 5. Participating Hospitals and NHS Trusts

3	9/3/2013	21:39	Please provide copies of all official notices advertising meetings of Joint Committee of the Primary Care Trusts, indicating where and when these announcements were promulgated.
4	9/3/2013	22:10	Approximately how many members of the press and public attended each of the meetings of the Joint Committee of the Primary Care Trusts?
5	11/3/2013	10:31	How much money has NSCT paid to Graylings PR company in each of the last six years, what is the estimated budget for the current financial year, and what are these payments for?
6	15/3/2013	22:10	Please can we have copies of ALL the email correspondence between NSCT officers and members of the Steering Committee, Standards Committee, Kennedy Panel, Specialised Services and Health Impact Assessment Working Groups.