

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 23 March 2017

**Public Authority:** NHS Commissioning Board  
**Address:** 4N22 Quarry House  
Quarry Hill  
Leeds  
LS2 7UE

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to correspondence between NHS England and a particular dental practice.
2. NHS England refused to comply with the request under section 12 FOIA as it said that it would exceed the cost limit to do so.
3. The Commissioner's decision is that NHS England was correct to apply section 12 FOIA and that it was not therefore obliged to comply with the request. It did not however provide the complainant with sufficient advice and assistance in accordance with its obligations under section 16 FOIA.
4. The Commissioner requires the following steps to be taken:
  - NHS England should provide the complainant with appropriate advice and assistance or explain why this would not be possible.
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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6. On 9 January 2017 the complainant requested information of the following description:

"Under the Freedom of Information Act 2000, please provide me with copies of the following: Copies of all correspondence and e-mails between Officials of NHS England (internal and external), [named dental practice] regarding the practice (changes, plans, proposals, opinions etc.) since October 2012."

7. NHS England requested clarification from the complainant in respect of the following points:

- Please clarify what you mean by 'Officials of NHS England'. Are you referring to all NHS England staff, Board Members, Very Senior Managers (VSM), spokespeople or something else?
- Please clarify what you are meaning by 'internal and external' in respect of NHS England Officials.
- Please clarify, specifically what recorded information you are requesting when you refer to 'etc'.

8. The complainant clarified his request as follows:

"I wish to explore the manner in which the practice has been treated regarding changes proposed since October 2012. It is therefore necessary to examine communications that may have occurred regarding the practice (and its proposed changes) within both the local Area Team and potentially further within the NHS England structure.

In answer therefore of your queries:

A. In order to achieve the complete picture and to avoid a further FOI request due to an oversight, but yet reasonably limit the request, I mean: Deputy/Assistant Managers, Managers, Very Seniors Managers (VSM), Board Members (if commenting, instructing or voting for a decision regarding the practice) and other higher officials of NHS England (as per Board Members). This should include anyone acting in a management role for this matter.

B. By internal and external, I mean communications within the local Area Team (internal) and to other departments (BSA and higher levels of NHS England (external)). This is partly due to lack of notice over termination of the contract, but also to explore who (if anyone) made decisions regarding the practice plans.

C. Since the actual number of communications is likely to be low (at least based on those received at the practice end) I wish to ensure no piece of relevant information is missed based on my limited terminology, hence the use of 'etc.'."

9. NHS England confirmed that it considered both the original request and the points of clarification in providing the FOI response.
10. NHS England provided a response on 11 October 2016, indicating that it was refusing the request under Section 12 FOIA.
11. The complainant was dissatisfied with NHS England's response and submitted an internal review request on 11 October 2016. Within the internal review request the complainant also submitted a further request for information. NHS England has confirmed that this has been responded to separately.
12. NHS England provided the internal review on 8 November 2016 and upheld the original decision.

### **Scope of the case**

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13. The complainant contacted the Commissioner on 15 November 2016 to complain about the way the request for information had been handled.
14. The Commissioner has considered whether NHS England was correct to apply section 12 FOIA to the request.

### **Reasons for decision**

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15. Section 12 of the FOIA allows a public authority to refuse to deal with a request where it estimates that it would exceed the appropriate cost limit to:
  - either comply with the request in its entirety, or
  - confirm or deny whether the requested information is held.

16. The estimate must be reasonable in the circumstances of the case. The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. Public authorities can charge a maximum of £25 per hour to undertake work to comply with a request - 24 hours work for central government departments; 18 hours work for all other public authorities. If an authority estimates that complying with a request may cost more than the cost limit, it can consider the time taken to:
  - (a) determine whether it holds the information
  - (b) locate the information, or a document which may contain the information
  - (c) retrieve the information, or a document which may contain the information, and
  - (d) extract the information from a document containing it.
17. The appropriate limit for NHS England is £450 or the equivalent of 18 hours work.
18. In assessing the request NHS England explained that it considered that although it was likely that information was held it was not known exactly who within the organisation would hold relevant information. Therefore, in order to locate any information relevant to the request it would be necessary to establish which individual colleagues hold information coming within the scope of the request. This is because the applicant requested "Copies of all correspondence and e-mails between Officials of NHS England (internal and external) and [named dental practice] since October 2012".
19. On being asked for clarification in respect of what he considered as "Officials" the complainant indicated that he was referring to "Deputy/Assistant Managers, Managers, Very Seniors Managers (VSM), Board Members (if commenting, instructing or voting for a decision regarding the practice) and other higher officials of NHS England (as per Board Members)" and further indicated that this should include "anyone acting in a management role for this matter". Therefore NHS England considered that individuals at Band 6 or higher would come within the scope of this element of the request. This is due to the likelihood that individuals at this level and above, within the organisation, would have managerial responsibilities for people, finance or performance; falling within the "manager" definition provided by the complainant.
20. In addition the complainant had also indicated within the request (and clarification) that he was requesting all information in respect of "the practice (changes, plans, proposals, opinions etc.) since October 2012.....I wish to ensure no piece of relevant information is missed based on my limited terminology, hence the use of 'etc.'."

21. It was NHS England's consideration, therefore, that it was not possible to narrow the search for relevant information to any individual team or group of individual colleagues. The reason being that information may be held by many different teams across the organisation and by individuals who, due to the broad timeframe of the request, had changed roles within the organisation over time. As such, NHS England considered that in order to fully respond to the request it would be necessary to search for relevant information across the whole organisation.
22. Once the correct cohort of individuals, who may hold relevant information, could be identified those individuals would be required to perform a computer search for any files, emails, documents or records relevant to the request. It is considered that, at a conservative estimate, this would take approximately 2 minutes per person.
23. It was confirmed at the time of the request that there were over 4100 employees on the NHS England payroll, at Band 6 or above, who would come within the remit of the request. In order to confirm that the search had encompassed all possible sources of information NHS England would be required to contact each individual member of staff who came within that remit.
24. The number of relevant individuals within the organisation who would come within the proposed remit of the request was calculated by carrying out a check on the electronic staff record (ESR). The calculation at the time of the request was that there were approximately 4113 individual colleagues who would need to be contacted and asked to perform a search of their computer in order to establish whether they held any information relevant to the request.
25. It went on that individual members of staff would then need to be contacted by email and asked to perform a computer search of both emails and document files with two particular keyword searches. It was the overall time for all individual colleagues to conduct a search of their computer systems combined, (both in respect of email accounts (active and archived) and document files), that led to the time estimate provided.
26. The calculations in respect of the timeframe were based on an estimate of one individual performing 4113 computer searches, with a time estimate of 2 minutes each. On this basis it was calculated that it would take a minimum of 8226 minutes for one individual to confirm all relevant information had been located. This translates to at least 137

hours (or a cost of £3425) in order to enable NHS England to ensure that all relevant information which was held had been located.

27. It said that the estimate provided in the response is based on electronic searches of computer records as this is considered to be the quickest method of locating relevant information.
28. NHS England said that the complainant was advised that the extent of the request was likely to result in a refusal under section 12. At that time NHS England advised the applicant as follows: -

"Please note that if your request relates to all NHS England staff, it is likely that Section 12 of the FOI Act (time/cost compliance) will be applicable. As such, when clarifying your request you may wish to refine it to specify individual staff members or teams."

29. Upon receiving the applicant's clarified request the complainant was again advised as follows: -

"If you were to refine your request for information within more specific margins, as was indicated in our clarification, for example, to a specific individual, team and/or department within NHS England, then we may be able to continue processing your request. Please note that we cannot guarantee that Section 12(1) or any other exemptions will not apply to any information requested."

30. As indicated above, on considering the complainant's internal review request, NHS England considered that the he was submitting a refined request due to his inclusion of the following wording: -

"Perhaps then you would limit initially all communications from and to [named individual] (and her immediate superior and junior), Primary Care Manager at Gloucestershire Health. I would remind you I will be carefully assessing all time lines and paths to ensure no communications that may be pertinent to my enquiry are missed out."

31. As mentioned above NHS England informed the complainant within the internal review response that it was progressing this as a refined request. In considering this refined request NHS England is in a position to provide all correspondence which falls within the refined scope. In responding to this request alone NHS England has considered and provided over 253 individual pages of emails and documents to the complainant.

## Section 16 – advice and assistance

32. Under section 16 FOIA NHS England is obliged to provide the complainant with advice and assistance to help the complainant refine the request to fall within the cost limit or explain why this would not be possible.
33. As set out above NHS England has explained to the complainant that a request relating to all NHS England staff (internal and external) was likely to engage section 12 and therefore the complainant may wish to refine the request to a particular individual, team or department. NHS England has confirmed that the complainant has submitted a refined request relating to a particular individual.
34. The Commissioner considers that the advice and assistance provided by NHS England was not however sufficient to comply with section 16 FOIA. This is because, as asserted by the complainant, “I cannot be expected to know the names of all the employees of the NHS, and so grouped them based on their ability to comment on the matters I was referring, namely the proposed changes to the practice”. NHS England may be in a more informed position to suggest particular individuals, teams or departments that are more likely to hold the required information and therefore to whom the complainant may wish to refine the request to. If NHS England was not able to provide this more detailed advice it should have explained why this would not be possible.
35. Whilst in this case the Commissioner is aware that the complainant has made a refined request, specifying a particular named individual, this does not negate from the fact the NHS England did not provide sufficient advice and assistance or explain why this would not be possible. It therefore breached section 16 FOIA in the handling of this request.

## Right of appeal

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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: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

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** .....

**Gemma Garvey**  
**Senior Case Officer**

**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**