

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 August 2019

Public Authority: NHS Improvement
Address: Wellington House
133-155 Waterloo Road
London
SE1 8UG

Decision (including any steps ordered)

1. The complainant made a freedom of information request to NHS Improvement (NHSI) for the raw data of the Purchase Price Index and Benchmarking Data (PPIB). NHSI refused the request under the section 43(2) (commercial interests) exemption. During the investigation NHSI also cited section 14 (vexatious requests).
2. The Commissioner's decision is that NHSI has correctly applied the vexatious provision at section 14(1) of the FOIA. She does not require any steps to be taken.
3. From 1 April 2019 NHS England and NHS Improvement came together to act as a single organisation. This request was considered by the NHSI before this date. At the time of this notice NHSI still retains its own identity and website and therefore the Commissioner can continue to refer to the public authority as NHSI in this decision notice.

Request and response

4. On 6 December 2018 the complainant requested '*access to all the raw PPIB (Purchase Price Index and Benchmarking) Data that is sent in by the NHS Trusts.*' He explained that

'Many organisations can access far more sophisticated resources than the government department holding the data...I would highlight the Land Registry as a government department who give you access to pull down gigabytes of their data which they know is used in private and public data lakes sponsored by very large organisations. I am not going into any detail on the data as the data on its own is of limited value but

when you start putting it all together with other bigger data sets of a government and non government nature it's a very different proposition.'

5. This was refused by NHSI on 8 January 2019 under section 12(1) of FOIA:

'Regarding the Purchase Price Index and Benchmarking (PPIB) tool, there is not a single source where all the raw data is held. Each month, each trust submits its purchase order data before its cleansed, quality assured and published on the tool. This means there are more than 2,000 raw data files in scope and we consider it would take longer than 18 hours to locate, retrieve and extract the information that you have requested...'

6. On 9 January 2019 the complainant made a revised request for the following:

'I would like to narrow my request to the latest available months data for the all the raw PPIB (Purchase Price Index and Benchmarking) Data that is sent in by the NHS Trusts as per your helpful advice.'

7. On 6 February 2019 NHSI refused to provide the requested information citing section 43, commercial interests:

'The information provided by trusts to NHS Improvement is financial information which, by its nature, is commercially sensitive and disclosure would be likely to be detrimental to the legitimate commercial interests of providers. The [PPIB] tool is the transparency tool for NHS procurement staff to compare prices across a variety of products so they're equipped and empowered to negotiate lower prices. If that data is published disclosed [sic], the NHS would lose its commercial edge and bargaining power as suppliers could adjust prices.'

8. The complainant requested an internal review on 6 February 2019. He advised that he would be willing to receive the information without the cost elements: *'It's also unclear how you can serve the public interest by not allowing the public to see how much of their money is wasted on equipment at such unjustified prices. More importantly I suspect that this will go to the information commissioner and will succeed as it is not the cost element that interests me the most and I will ask the information commissioner for the data with the cost elements removed. This will allow me to run correction algorithms on the purchase order columns that describe the equipment being procured that has been entered in such an inconsistent and inaccurate manner... I did not ask you for the data with the cost elements removed as again you gave no indication that I could not have the data due to commercial sensitivity.'*

9. NHSI sent the outcome of its internal review on 27 February upholding the decision to refuse to provide the requested information citing section 43.

Scope of the case

10. The complainant contacted the Commissioner on 28 February 2019 to complain about the way his request for information had been handled and after providing further information the case was accepted on 19 March 2019.
11. He provided the Commissioner with a copy of a spreadsheet showing a sample of live purchase order data for the letter A to show that this information is already in the public domain. This sample spreadsheet was shared with NHSI. He also stated that he would be willing to receive the data without the cost elements.
12. During the Commissioner's investigation NHSI commented that the complainant's spreadsheet is likely to be data from one NHS Trust only and is not in the public domain:

'The data produced by any one trust is not public data, as far as we are aware. Under the established arrangements with providers, FOI requests relating to PPIB data should be notified to NHS Improvement since we own the data. We have not been made aware of any decision to disclose this information.'
13. In reviewing the complaint, NHSI considered that section 14 (vexatious requests) applied and informed the complainant and the Commissioner.
14. Therefore the Commissioner has focussed her investigation on whether NHSI correctly applied the exemptions under section 14 and 43(2) of the FOIA to the complainant's request. She will first consider section 14.

Background

15. NHSI explained that 'raw data' describes the procurement data which is submitted by over 240 trusts through the PPIB tool.
16. NHSI calculated that for the raw data submitted in December 2018 there are 2,814,644 lines of data. The spreadsheet from the complainant had 180 lines with a total spend of c. £140,000; by way of contrast, NHS procurement spend is around £8bn annually.
17. Until 1 August 2019, NHSI had an arrangement with a third party data analytics service provider which hosted the PPIB tool, cleansed the data

and ran analysis. NHSI would also run analysis of the cleansed data. Trusts would submit the raw data through the PPIB tool each month. The data is submitted in various forms (including Excel spreadsheets).

18. The service provider would 'cleanse' the raw data, which broadly involved standardising the format of the data so that it could be used in the comparative tool and removing (as far as possible) personal data. On average it took 4-6 weeks to provide the 'cleansed' data to NHSI.
19. Neither the raw nor cleansed data are in the public domain.
20. As of 1 August 2019, the hosting of the procurement tool service is now provided by NHS Digital (and is called "Spend Comparison Service": <https://digital.nhs.uk/data-and-information/data-collections-and-data-sets/data-collections/spend-comparison-service>).

Reasons for decision

Section 14 – Vexatious requests

21. Section 14(1) of FOIA states that section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious. There is no public interest test.
22. The term "vexatious" is not defined in the FOIA. The Upper Tribunal considered the issue of vexatious requests in the case of the *Information Commissioner v Devon CC & Dransfield (GIA/3037/2011)*. The Tribunal commented that vexatious could be defined as the "manifestly unjustified, inappropriate or improper use of a formal procedure." The Tribunal's definition clearly establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
23. The Upper Tribunal also found it instructive to assess the question of whether a request is truly vexatious by considering four broad issues: (1) the burden imposed by the request (on the public and its staff); (2) the motive of the requester; (3) the value or serious purpose of the request; and (4) any harassment or distress of and to staff. The Upper Tribunal did, however, also caution that these considerations were not meant to be exhaustive. Rather, it stressed the

"importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests" (paragraph 45).

24. In the Commissioner's view, the key question for public authorities to consider when determining if a request is vexatious is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
25. The Commissioner has identified a number of "indicators" which may be useful in identifying vexatious requests. These are set out in her published guidance on vexatious requests. (<https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>) The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is vexatious.

Is the request a disproportionate burden on the public authority?

26. In this case, the complainant made a request for all the raw data provided by the NHS Trusts to the PPIB for December 2018.
27. NHSI explained that the raw PPIB tool data for December 2018 contains 2,814,644 lines of data. Under the arrangements with providers, personal / patient identifiable data (data which would be exempted under section 40 of the FOIA) should be removed before the data is submitted to NHSI. *'However, we are aware that on occasion raw data has been submitted that would identify a relevant patient'*. E.g. a purchase order raised for a hip prosthesis included the patient's name.
28. NHSI understands that the service provider had some technical programmes to identify and remove personal data but this did not always remove all personal data. Types of personal data which has previously been seen even in "cleansed" data have included staff names and patient-identifiable information.
29. NHSI stated that 'the only way to be assured that personal data (including patient-identifiable data) is not contained in either the raw or cleansed data would be to go through the data line-by-line.' NHSI calculated that if each line took three seconds to check, this would amount to 2814.6 hours (assuming 50 minutes of checking per hour) and if they spent 7.5 working hours every day doing so, the process would take 90 working weeks or 22.5 months or 2 years.
30. NHSI stated that it would require a disproportionate and unjustified level of disruption to its business to check over 2.8 million lines of data to ensure it does not contain personal data. The Model Hospital Procurement team in NHSI who support this work is a small team with only two analysts. To check the data, one analyst would need to be tasked with checking the data and prevented from carrying out their usual work for 2 years.

31. The work carried out by the analysts is valuable to the wider NHS in terms of efficiency and productivity savings: the procurement programme in NHSI (of which the analysts are a part) saved c. £268m for NHS providers in 2018/19 alone.
32. The Commissioner has viewed a sample of the raw data from one small trust for one month. The spreadsheet has 39 columns and 986 rows. The Commissioner notes that it would be possible to quickly remove certain columns that list personal data (names of buyers etc) or columns that list prices as the complainant has suggested. However, the Commissioner is satisfied that there is personal data scattered in other columns especially the column describing the goods and services. The Commissioner saw examples of staff names, the type of treatment with the name of the surgeon and other data that could potentially identify a patient.
33. The Commissioner considers that the estimated time to review each line of data could be reduced to one second per line if the reviewer concentrated on a reduced number of columns. However, this would still total 938 hours or 30 working weeks to prepare this information for the public.
34. The Commissioner has considered her guidance on this matter (https://ico.org.uk/media/for-organisations/documents/1159/information_from_original_sources.pdf):

'Where it is possible to extract the information requested and present it in the form of a list or schedule, this does not amount to the creation of new information.'

'The complexity of the query made of an electronic database is not a factor to take into account in deciding whether or not information is held. All information held in electronic databases is held for the purposes of the FOIA. Any query that can be made of a database amounts to retrieval and extraction of information and not the creation of new information.'

35. The Commissioner refers to her guidance on the costs involved in vexatious requests: <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

'It may apply section 14(1) where it can make a case that the amount of time required to review and prepare the information for disclosure would impose a grossly oppressive burden on the organisation.'

However, we consider there to be a high threshold for refusing a request on such grounds. This means that an authority is most likely to have a viable case where:

- *The requester has asked for a substantial volume of information*
AND
 - *The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the ICO* **AND**
 - *Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.'*
36. Having considered the sample of the withheld information, the Commissioner is satisfied that the public authority has demonstrated that it meets this higher threshold and disclosure would impose a grossly oppressive burden.

**Is the request designed to cause disruption or annoyance?
Does it have the effect of harassing the public authority?**

37. The Commissioner considers that a requester is likely to be abusing the section 1 rights of the FOIA if he uses FOIA requests as a means to vent anger at a particular decision, or to harass and annoy the authority, for example by submitting a request for information which he knows to be futile. When assessing whether a request or the impact of dealing with it is justified and proportionate, it is helpful to assess the purpose and value of the request.
38. The Commissioner has not seen any evidence that the complainant has made this request to abuse the section 1 rights of the FOIA or to use the FOIA request as a means to vent anger at a particular decision.
39. The FOIA is generally considered applicant blind, but this does not mean that a public authority may not take into account the wider context in which the request is made and any evidence the applicant has imparted about the purpose behind their request.
40. The Commissioner has considered the purpose and value of the request. She accepts that the request for the raw data will be of lesser interest to the wider public.
41. NHSI have stated that the complainant's purpose is '*not entirely clear. It appears to have changed over time, and on some occasions there have been apparent inconsistencies in the same communication. The requester has stated that he does not want financial information but also suggests that the purpose of his request is to reveal "unjustified prices" and refers to potential fraudulent and anti-competitive behaviour based on prices... It is not clear how an algorithm could be run on references that are specific to each NHS trust or on textual information. It follows that we cannot see any real public value in the proposal.*'

42. NHSI referred to the complainant's comments to reveal 'unjustified prices' which is '*part of the very purpose of the PPIB tool data. Disclosing the data (even with financial information removed but still showing quantities, for instance) would undermine that purpose, as companies supplying their goods and services to the NHS would be able to amend their prices and target NHS providers accordingly.*'
43. NHSI also referred to the complainant's comments on 'potentially fraudulent activity' and provided the Commissioner with its internal policy on tackling Fraud, Bribery and Corruption which all members of staff are expected adhere to. '*It follows that any cases of suspected fraud should be raised through these channels and there are already existing bodies and mechanisms in place. The (PPIB) tool is ... designed to reduce the risk of suppliers "rigging prices".*'
44. However, the Commissioner understands that the complainant has an interest in collating the raw data from the NHS Trusts with data from a commercial data source to match/confirm each product and then connect to further external sources (including price data sources) to see '*adverse events and adverse event report numbers for a product*' to be able to assess quality as well as price '*to enrich the data. Going beyond the crude price comparison tool that is PPIB. You then just need a front-end tool to display the data in an accessible manner.*' The Commissioner is unable to comment on the feasibility of this but accepts that the raw data would have some value to the complainant even if the purpose of the request is unclear to the public authority.
45. The Commissioner has considered the comments from both parties and considers that the request is not designed to cause disruption or annoyance and does not have the effect of harassing the public authority.

The Commissioner's decision

46. Taking into consideration the findings of the Upper Tribunal that a holistic and broad approach should be taken in respect of section 14(1), the Commissioner has concluded that NHSI was correct to find the request vexatious. She has balanced the purpose and value of the request against the detrimental effect on the public authority and is satisfied that the request places a disproportionate burden on the public authority. The Commissioner has not gone on to consider the exemption at section 43.

Right of appeal

47. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

48. 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.
49. 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

Pamela Clements
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