

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 July 2022

Public Authority: NHS England
Address: The NHS Commissioning Board (NHS England)
Quarry House
Quarry Hill
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant has requested information relating to any contracts NHS England (NHSE) awarded to Topwood Limited.
2. NHSE confirmed that it does not hold any information that falls within the scope of the request.
3. The Commissioner is satisfied that, on the balance of probabilities, NHSE does not hold any information that falls within the scope of the request.
4. The Commissioner does not require NHSE to take any further steps.

Request and response

5. On 29 June 2021 the complainant wrote to NHSE and made the following request:

"1. Can you provide a list of NHS England contracts and or assignments and or commissions awarded to Topwood Limited since 1 July 2018. In the case of each contract/assignment/commission can you state the date it was awarded, the value of the contract/assignment/commission; the duration of the contract/assignment/commission, the relevant NHS locality, and the type of work covered by the contract/assignment/commission. Can you also include contracts/assignments/commissions which have been agreed but have yet to become active?"

2. In the case of each contract/assignment/commission approved and or awarded did Matt Hancock and or anyone in his private office and or anyone acting on his behalf write to and or communicate with the relevant section of the NHS about Topwood Limited and the contract. If the answer is yes, can you please provide copies of any correspondence and communication. If any conversations took place by telephone, can you, please provide the date and time of the call. Can you provide any audio recording or transcript of that part of the call which related to Mr Hancock and Topwood Limited? If conversations took place via Zoom or similar, can you, please provide the date and time of the meeting? Can you provide any audio recording or transcript of that part of the meeting which relates to Mr Hancock and Topwood Limited?
3. Irrespective of whether any contracts/assignments/commissions were or have been awarded is NHS England aware of any approaches by Matt Hancock and or his private office and or anyone acting on his behalf in relation to Topwood Limited. If the answer is yes, can you, please provide copies of this correspondence and communication. If any conversations took place by telephone, can you please provide the date and time of the call. Can you also provide an audio recording or a transcript of that part of the conversation which related to Mr Hancock and Topwood Limited? If conversations took place via Zoom or similar, can you please, provide the date and time of the meeting. Can you provide any audio recording or transcript of that part of the meeting which relates to Mr Hancock and Mr Topwood Limited. Please let me know if any relevant correspondence and communications have been destroyed.”
6. On 14 July 2021 NHSE responded, citing section 12 (cost of compliance exceeds appropriate limit) of FOIA. It advised the complainant to refine their request and provided the complainant with some suggestions, ‘if you were to refine your request for information within more specific margins, Question 1 and 2 only or specific teams in respect to question 3 for example, then we may be able to continue processing your request.’
7. On 15 July 2021 the complainant responded and explained ‘After careful consideration I am happy to revise the request. I would like the original request to stand but without question three.’
8. NHSE responded on 23 July 2021 and confirmed that it did not hold any information within the scope of the request.
9. On 27 July 2021 the complainant requested an internal review.
10. NHSE provided the outcome to its internal review on 12 November 2021, upholding its original position.

Scope of the case

11. The complainant contacted the Commissioner on 28 October 2021 to complain about the way that their request for information had been handled.
12. The complainant was specifically concerned that NHSE had failed to address part 3 of the request in its response.
13. The Commissioner notes that NHSE applied section 12 to the complainant's original request and advised the complainant to submit a revised request, which they did.
14. At the point that the complainant submitted their revised request, which omitted part 3 of the original request, they accepted NHSE's application of section 12.
15. The Commissioner will therefore not consider NHSE's application of section 12. The Commissioner will consider whether NHSE is correct when it says that it does not hold any information within the scope of the request. The scope in this instance refers to the revised request submitted on 15 July 2021 and parts 1 and 2 of the request as outlined in paragraph 5.

Reasons for decision

16. Section 1 of FOIA states that:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

17. In this case, the complainant disputes NHSE's position that it does not hold any information that falls within the scope of the request. However, as the Commissioner has already discussed the complainant's concern appears to relate to part 3 of their original request which the complainant themselves agreed to omit from their revised request.
18. In cases where a dispute arises over the recorded information held by a public authority at the time of a request, the Commissioner, following the outcome of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities. This means that the Commissioner will determine whether it is likely, or unlikely, that the

public authority held information relevant to the complainant's request at the time that the request was received.

19. In order to reach his determination, the Commissioner asked NHSE to provide detailed explanations as to why the requested information was not held at the time that the request was received. The Commissioner also asked the NHSE to explain the searches it had undertaken to locate any information that would fall within the scope of this request and to explain why these searches would have been likely to locate all of the information in scope.

NHSE's position

20. NHSE confirmed that, as parts 1 and 2 of the request relates to contracts awarded to Topwood Limited, 'it searched both our current tendering system (Atamis) and archived tendering system (Bravo).'
21. NHSE clarified that 'If any contracts were awarded by the organisation, our central procurement team would record details of the award on our tendering system. Both systems produced a nil return and therefore we concluded NHS England did not hold any contracts with Topwood Limited.'
22. Since the request directly relates to contracts awarded by NHSE, the Commissioner concurs with NHSE that the most logical systems to search are its tendering systems which is used by NHSE's procurement team. NHSE also confirmed that the keyword search used was 'Topwood'.
23. NHSE has also confirmed that there are policies in place for managing and storing procurement information. As part of these policies, procurement information is not held on any personal computers (which is why no personal drives were searched in relation to the request) and is only held on the procurement systems. Again, NHSE searched both its active tendering system and its archived tendering system, both of which returned a nil result.
24. To reiterate, the complainant's concern to the Commissioner focuses on the fact that NHSE had failed to address part 3 of their original request and, specifically, the fact that NHSE had not approached Matt Hancock's private office to ascertain if information within the scope of the request was held.
25. NHSE has clarified 'Contracts awarded by NHS England would be recorded on the procurement system as per our internal policy of which there was a nil return from both current and archived systems, therefore correspondence with private office was deemed unnecessary.'

The Commissioner's view

26. The Commissioner is mindful that the complainant chose to omit part 3 from their revised request. That leaves the scope of the request limited to any contracts actually awarded to Topwood Limited, rather than any information about Topwood Limited that may be held by Matt Hancock or his private office. However, the complainant then went onto raise concerns that no information that would fall within part 3 had been identified.
27. Having considered NHSE's position, it is clear to the Commissioner that it did not award any contracts to Topwood Limited. The Commissioner is therefore satisfied that, on the balance of probabilities, NHSE does not hold any information that falls within the scope of the complainant's request.

Other matters

28. NHSE has explained that 'In our response to the applicant's request for an internal review, we advised that NHS England were aware that NHS Wales has awarded a contract¹ to Topwood Limited and provided the applicant with NHS Wales's contact details should he wish to pursue any requests relating to this topic.'

¹ [Provision of an Onsite Confidential Waste Destruction Service - Find a Tender \(find-tender.service.gov.uk\)](https://find-tender.service.gov.uk)

Right of appeal

29. 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

30. 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.
31. 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

Alice Gradwell
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF