

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **6 February 2023**

Public Authority: **NHS England**
Address: **Skipton House**
80 London Road
London
SE1 6LH

Decision (including any steps ordered)

1. The complainant has requested NHS England (NHSE) to disclose all the emails in a particular employee's account for the year 2021 with the term 'EDI Glossary' mentioned. NHSE refused to comply with the request, citing section 14(1) of FOIA on the basis of the time and resources to redact the information.
2. The Commissioner's decision is that NHSE is entitled to refuse to comply with the request in accordance with section 14(1) of FOIA. He has however recorded a breach of section 10 of FOIA.
3. The Commissioner does not require any further action to be taken.

Request and response

4. On 23 November 2021, the complainant wrote to NHSE and requested information in the following terms:

"In the internal review of that request, you identified a key individual whom you named 'Employee A' who 'is a Senior Lead within our Equality & Inclusion Function of the National People Directorate.'

You conducted an exercise where you searched Employee A's NHSmail account for the term 'EDI Glossary' for the period February 2020 to present date. Please provide all emails returned by searching Employee A's NHSmail account for the term 'EDI Glossary' filtered for the year 2021. I am not asking you to review or categorise the emails in any way."

This request relates to an earlier request the complainant made via the What Do They Know website.

5. NHSE responded on 16 December 2021. It asked the complainant to revise the request, as it anticipated that it would have to rely on section 14(1) if they did not.
6. The complainant responded on 18 December 2021. He refused to refine his request.
7. A substantive response was not provided until 15 June 2022. NHSE refused to comply with the request in accordance with section 14(1) of FOIA.
8. The complainant requested an internal review on 15 June 2022. This was completed on 10 October 2022 and NHSE upheld its application of section 14(1) of FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 1 September 2022 to complain about the way their request for information had been handled. At this time the internal review had not been completed. The complaint was accepted for full investigation once this was completed on 13 October 2022.
10. NHSE has provided additional submissions to the Commissioner. He is satisfied that section 14(1) of FOIA does apply to the request and the following section of this notice will explain why.

Reasons for decision

11. Section 14 of FOIA states that a public authority may refuse to comply with a request that is vexatious. This exemption can be used by public authorities where the cost and time to redact exempt information would create an oppressive burden on its resources. The threshold for the application of this exemption on this basis is very high. There must be a significant amount of information falling in the scope of the request, the

public authority must demonstrate that it contains exempt information scattered throughout and the task of redaction would be burdensome.

12. NHSE confirmed that there are over 400 emails falling within the scope of this request. Initially it took a sample of 5 randomly selected emails and timed itself to prepare these for disclosure. On average it took 21.2 minutes per email to convert each email and its attachments into PDF, consider and consult the relevant policy teams over their contents and redact the exempt information. The emails in this sample had large attachments and one contained information which NHSE felt may be exempt under section 43 of FOIA. This particular email would require policy team consultation and consultation with third party organisations whose commercial interests may be affected.
13. At this time it was confident, based on this sample, that it would take 18 to 19 working days to process the entire request based on the average of 21.2 minutes per email (including its attachments).
14. The Commissioner asked NHSE to carry out a further sampling exercise of a further 10 emails to ensure that this estimate was a true reflection of the task of redaction across the entire emails falling in scope. The Commissioner was initially concerned that the first sample may have contained emails with very large attachments, which may not be reflective of all or the majority of emails falling in scope.
15. NHSE complied and selected a further 10 emails at random and clearly documented and timed how long it would take it to prepare these for disclosure. The same activities were taken into account and it found that for these 10 emails it took 6.4 hours or 38.75 minutes on average for each. One email alone took 136 minutes but, at the other end of the scale, another took 8 minutes. However, the remaining eight took between 20 and 39 minutes to prepare.
16. In this batch it found information that would need redacting under sections 36, 40 and 43 of FOIA. Again, it stated that it would have to consult the relevant policy teams over the contents of this information and seek the qualified person's opinion in order to rely on section 36 of FOIA. Such consultation would be required as those dealing with FOIA requests are not expected to be experts in the contents of the information requested and would not know the current circumstances in relation to the topics the contents touch on nor whether any elements are particularly controversial or sensitive. Section 36 of FOIA also cannot be applied without the authority of the qualified person's opinion.
17. As NHSE has now carried out an additional sampling exercise at the Commissioner's request and recorded exactly how long the process took, he is satisfied that NHSE has sufficiently demonstrated that the

time it would take to redact all the information falling within the scope of this request would place an oppressive burden on NHSE in terms of time and resources.

18. The second sample highlighted again the general size of the emails and attachments falling in scope and recorded a higher average per email. Taking NHSE's initial estimate of 21.2 minutes per email on average, the request would take 141 hours to process. Even if this was halved to just over 10 minutes per email on average, it would still take 70 hours to process. This would place a significant and overwhelming burden on the resources of NHSE despite any serious purpose or value the request may have.
19. For the above reasons, the Commissioner is satisfied that section 14(1) of FOIA applies.

Procedural matters

20. NHSE failed to provide a substantive response to the complainant's request within 20 working days of receipt. Its initial response suggested section 14(1) of FOIA may apply and asked the complainant to consider refining their request. This was not a full response. The Commissioner has therefore recorded a breach of section 10 of FOIA.

Other matters

21. The Section 45 Code of Practice requires public authorities to respond to requests for an internal review within 20 working days of receipt and certainly no later than 40 working days from receipt. This request was particularly voluminous so it is accepted that 40 working days may have been required. However, in this case NHSE took just short of 4 months to complete the internal review. The Commissioner would like to remind NHSE of the importance of the code and carrying out internal reviews in a timely manner.

Right of appeal

22. 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

23. 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.
24. 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

Samantha Coward
Senior Case Officer
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