

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 July 2023

Public Authority: Business Services Organisation
Address: 2 Franklin Street
Belfast
BT2 8DQ

Decision (including any steps ordered)

1. The complainant submitted a request to the Business Services Organisation (BSO) for information relating to the general legality of personal data sharing as part of the Northern Ireland Electronic Care Record.
2. The Commissioner's decision is that BSO was entitled to rely on section 12(1) of FOIA to refuse the request and that it also met its obligations under section 16(1) of FOIA.
3. The Commissioner does not require any steps as a result of this decision notice.

Request and response

4. On 5 October 2022, the complainant made a request for information under FOIA. BSO failed to respond, and after a decision notice was served, a response was provided on 9 January 2023.
5. On 17 January 2023, the complainant made the following refined request for information to BSO:

“This is a rewritten/narrowed scope of my earlier FOI Request:

This is a Freedom of Information Request for copies of all discussions and communications, both internal and external, relating to the general legality of personal data sharing as part of the Northern Ireland Electronic Care Record (NIECR), specifically regarding compliance with current and previous Data Protection laws, and any compliance concerns or highlighted non-compliance or potential non-compliance by any participant organisation(s) including BSO.

The reference to NIECR above includes ECS and KIS records processed as part of the NIECR system/sharing.

The reference to ‘general legality’ above includes regarding having defined lawful purposes and changes/extensions to those purposes, regarding having defined lawful bases/condition(s) and changes/extensions to those with formal agreements were/are in place between any and all Data Controllers, whether contracts were/are in place with any and all Data Processors including BSO, whether Data Processing Impact Assessments (DPIAs) were carried out as required by law, and the publishing of Privacy Notices to meet fairness/transparency requirements.”

6. A response was provided on 2 February 2023, in which BSO stated that this request was similar to the previous one and applied section 12(1) of FOIA.
7. Upon receiving this response, the complainant requested an internal review on 8 February 2023. On 23 May 2023, BSO provided its internal review in which it maintained its original response.

Reasons for decision

Section 12 – cost of compliance

8. Section 12(1) of FOIA states 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 cost limit.
9. The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. Public authorities can make a notional charge of a maximum of £25 per hour to undertake work to comply with a request; 18 hours work in accordance with the appropriate limit of £450 set out above, which is the limit applicable to BSO.
10. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it;
 - and extracting the information from a document containing it.
11. A public authority does not have to make a precise calculation of the costs of complying with a request; instead, only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal decision in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency EA/20017/0004*, the Commissioner considers that any estimate must be “sensible, realistic and supported by cogent evidence.”
12. Section 12 is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under FOIA to consider whether there is a public interest in the disclosure of the information.
13. Where a public authority claims that section 12 of FOIA is engaged, it should, where reasonable, provide advice and assistance to help the complainant.

The Complainant's position

14. The complainant believes that BSO's reliance on section 12(1) is a "convenient excuse to avoid providing documents that may prove problematic" with regards to their compliance with NIECR.
15. In raising concerns with BSO's estimation of 150 hours, the complainant highlights that as their information request relates to legal compliance, then it was reasonable to assume that its Department of Legal Services and Data Protection Officer would "have such information indexed in some fashion that would reduce document search time".

BSO's position

16. In correspondence to the Commissioner, BSO explains that there have been over 40 staff employed by the BSO on the delivery and/or administration of the NIECR, hence a "wide range of system users over the life of the project".
17. BSO explains that the requested information is not held in a central system and therefore each staff member's mailbox would need to be searched manually.
18. It further explained that as "almost every single email is likely to directly or indirectly reference 'NIECR' 'Care Record' etc", this would result in a manual search of each email, for the terms sought within the request.
19. As BSO does not hold the information in a retrievable format, it estimates that it would take a minimum of 150 hours to search the above, to determine what information is held within the scope of the request.
20. BSO detailed some of the work that would need to be undertaken:
 - Identify any potential members of staff who may hold information relevant to the request
 - Search files stored outside of email, such as committee files, correspondence, minutes of meetings.
21. BSO went on to explain that it did not conduct a sampling exercise, due to the way the information is held (in individual email accounts), as it "would not necessarily be indicative of what information may be held".

22. In its internal review, BSO explained to the complainant that whilst they believe “that the BSO Data Protection Officer should have all the information you seek”, its Data Protection Officer had only been in existence since 2018, and that the information they seek is from 2010. The Commissioner clarified this date, as the complainant had not stated a date in their refined request. BSO explained that as the complainant had stated 2010 in their original request, and as no time period was stated in their refined request, BSO assumed that “the original date range applied”.

The Commissioner’s decision

23. The Commissioner acknowledges the complainant’s frustrations regarding the delays in the handling of their requests by BSO. However, he is satisfied that from the information provided, BSO reasonably estimated that it would take more than 18 hours to respond to the request, and that even if it was possible to take half the time estimated, it would still easily exceed the cost limit to comply with the request.
24. The Commissioner agrees with the complainant, that no timescale was mentioned in their refined request, however, the Commissioner would assume that as no time period was indicated, then the scope of the request would go back to May 2013, when the NIECR came into existence.
25. The Commissioner’s decision is that BSO estimated reasonably that the cost of complying with the request would exceed the appropriate limit. Therefore, BSO was correct to apply section 12(1) of FOIA to the request.

Section 16-Advice and assistance

26. Section 16(1) of FOIA provides that a public authority should give advice and assistance to a person making an information request.
27. The Commissioner notes that the request was a refined request and that its initial response, BSO advises that it is unable to offer the complainant advice on how it could refine “such a wide-ranging request”.

28. The Commissioner's guidance¹ states that a public authority should either indicate it is not able to provide any information at all within the appropriate limit or provide an indication of what information can be provided or provide advice and assistance.
29. Therefore, if a public authority cannot offer any meaningful advice as to how to refine the request, the only advice and assistance which could be offered would be to say that no information could be provided under the appropriate limit. The Commissioner is therefore satisfied that BSO did meet its obligations under section 16(1) of FOIA.

Other matters

30. There is no obligation under FOIA for a public authority to provide an internal review process. However, it is good practice to do so and, where an authority chooses to offer one, the section 45 Code of Practice sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
31. In this case, the complainant requested an internal review on 8 February 2023 and BSO provided the outcome of its review on 23 May 2023, 73 working days later. The Commissioner reminds BSO of the Code of Practice and urges it to respond in a timely manner.

¹ https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

Right of appeal

32. 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

33. 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.
34. 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

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