

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 11 July 2024

**Public Authority:** NHS England  
**Address:** Quarry House  
Leeds  
LS2 7UE

#### Decision (including any steps ordered)

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1. The complainant has requested, from NHS England, information about certain projects, contracts and costs.
2. NHS England's position is that it has disclosed all of the information it holds within scope of the request. However, the complainant considers that NHS England holds further information within scope of the request.
3. The Commissioner disagrees with NHS England's interpretation of the request, and considers that NHS England didn't identify and consider all of the information falling within scope correctly.
4. The Commissioner requires NHS England to take the following steps<sup>1</sup> to ensure compliance with the legislation.
  - Identify all of the information within the scope described in paragraph 26 below, and disclose it or issue a valid refusal notice.

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<sup>1</sup> The Commissioner expects the public authority to take appropriate precautions to protect any personal data when disclosing information in a spreadsheet or similar format; <https://ico.org.uk/for-organisations/eir-and-access-to-information/information-commissioner-s-office-advisory-note-to-public-authorities/>

5. The public authority must take these steps within 30 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 FOIA, and may be dealt with as a contempt of court.

## **Request and response**

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6. On 25 August 2023 the complainant made the below request for information. They made it across four emails, but NHS England handled it as one request.

### **“For the Trauma Outcome Registry Network (TARN)**

When did this go out to tender?  
Where was the tender placed?  
When was the contract awarded?  
Who was the contract awarded to?  
What was the financial value of the contract award?  
What is the length of the contract?  
What is the value of the development cost?  
What is the annual support cost?  
What was the % annual uplift for the most recent financial year?

#### Information format for response

Electronic

#### Relevant sources for information in NHS England

[names redacted]

### **For the Vascular Registry**

When did this go out to tender?  
Where was the tender placed?  
When was the contract awarded?  
Who was the contract awarded to?  
What was the financial value of the contract award?  
What is the length of the contract?  
What was the value of the development cost?

What is the annual support cost?  
What was the % annual cost uplift in the most recent financial year?

Information format for response

Electronic

Relevant sources for information in NHS England

[names redacted]

**For the National Joint Registry (NJR)**

When did this go out to tender?  
Where was the tender placed?  
When was the contract awarded?  
Who was the contract awarded to?  
What was the financial value of the contract award?  
What is the length of the contract?  
What was the value of the development cost?  
What is the annual support cost?  
What was the % annual cost uplift in the most recent financial year?

Information format for response

Electronic

Relevant sources for information in NHS England

[names redacted]

**For the Medical Devices Outcome Registry (MDOR)**

When did this go out to tender?  
Where was the tender placed?  
When was the contract awarded?  
Who was the contract awarded to?  
What was the financial value of the contract award?  
What is the length of the contract?  
What was the value of the development cost?  
What is the annual support cost?  
What was the % annual cost uplift in the most recent financial year?

Information format for response

Electronic

Relevant sources for information in NHS England

[names redacted]”.

7. NHS England responded on 9 October 2023 and provided information in response to most of the complainant’s questions. However, for the questions “What was the value of the development cost?” and “What is the annual support cost?”, NHS England refused in each instance to disclose information, on the basis of section 43(2) of FOIA (commercial interests).
8. NHS England provided an internal review on 17 October 2023, in which it revised its position regarding the ‘value of the development cost’ and the ‘annual support cost’ questions. NHS England said that it doesn’t hold any information. By way of explanation it said that two of the contracts referenced by the complainant were advertised via a ‘find a tender’ portal and that it hasn’t collated the information the complainant requested.

**Scope of the case**

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9. The complainant contacted the Commissioner on 24 October 2023 to complain about the way their request for information had been handled.
10. They believe that NHS England holds further information within scope of the request.
11. They were unhappy that NHS England initially applied section 43(2) of FOIA and later ‘changed its reasons’ for not providing the information.
12. The complainant explained to the Commissioner, with comments and documents, why they believe NHS England holds further information.
13. During the Commissioner’s investigation, the complainant has expressed a desire for some information that wouldn’t be within scope of the request of 25 August 2023. For instance, in March 2024, the complainant said they wanted the “overall total cost of all expenditure

on the projects **to date**" (emphasis added). The Commissioner has explained to the complainant that this case is concerned with the request of 25 August 2023 and information that NHS England held at that time.

14. On 14 June 2024 NHS England confirmed its position, that "the only information we hold which falls within the scope of the request has been disclosed".
15. The Commissioner considers that the scope of this case is to decide whether NHS England holds further information within scope of the request of 25 August 2023. As part of this, it's necessary for the Commissioner to consider how NHS England interpreted the request.
16. The Commissioner won't consider section 43(2), because NHS England is no longer citing that exemption.

## Reasons for decision

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17. As the Commissioner's guidance<sup>2</sup> explains, when he receives a complaint disputing the amount of information a public authority holds, he isn't required to prove beyond doubt that the public authority does or doesn't hold further information. Rather, he makes a decision based on the civil standard of the 'balance of probabilities' – that is, more likely than not.
18. The Commissioner asked the complainant to explain the information they were seeking, through their request of 25 August 2023.
19. When the Commissioner wrote to NHS England for submissions, he asked NHS England to consider his 'information not held' key questions<sup>3</sup>; he also asked how NHS England had scoped the request, and he asked NHS England to consider and respond to the information that the complainant had sent as evidence (in their view) that NHS England holds further information.

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<sup>2</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/determining-whether-we-hold-information/>

<sup>3</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/key-questions-for-public-authorities-foi-act-2000/#section-1>

20. The complainant said “the financial expenditure information for NVR [National Vascular Registry] and NJR that was disclosed in the response is not complete” and directed the Commissioner to some contract details published in March 2023<sup>4</sup>.
21. Regarding that contract, NHS England said “We can confirm [that contract] is all that NHS England has paid NEC Software Solutions for the services stated”.
22. Whilst the complainant clearly has internet access to the published contract information they’ve referenced, the Commissioner asked NHS England whether it held details about that contract at the time of the complainant’s request; said that he considered they would be within scope of the request; and said it wasn’t clear to him whether NHS England had disclosed information about that contract in response to the request.
23. NHS England confirmed that it did hold information about that contract at the time of the complainant’s request. However, NHS England’s position is that the 6 February 2023 – 31 March 2023 contract highlighted by the complainant isn’t within scope of their request.
24. However, the complainant thinks it is, and the Commissioner agrees.
25. The Commissioner considers that NHS England didn’t interpret the request appropriately. NHS England has focused on the complainant’s questions about tender, and has considered whether any payments had been made, when interpreting the request. It has argued that if no tender took place, and no payments had been made, the complainant’s questions weren’t applicable. For instance NHS England said, in respect of TARN and MDOR:

“As there have been no financial payments made in relation to these projects, nor did the contracts go out to tender, the remainder of the [complainant’s] queries in relation to those contracts are not applicable (i.e. NHS England does not hold the information being requested)”.

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<sup>4</sup> <https://www.contractsfinder.service.gov.uk/notice/bb2b90d1-c52c-4388-9159-7e8b8dce3c32?origin=SearchResults&p=1>

26. The Commissioner disagrees with that interpretation. He considers that the complainant was requesting information about contracts and costs relating to those areas specified in the request (TARN, Vascular Registry, NJR and MDOR), regardless of whether the contracts went out to tender and NHS England had made payments in relation to them at the time of the request.
27. The complainant expressed an underlying concern to the Commissioner that "required financial and procurement processes have not been followed" by NHS England, and the Commissioner considers that this point supports his interpretation outlined in the previous paragraph.
28. As explained above, NHS England has confirmed holding information about the contract referenced in paragraph 20, at the time of the request, and NHS England didn't consider or address that information in response to the request.
29. Furthermore, as the Commissioner considers that NHS England didn't interpret the request appropriately, he's unable to conclude (on the balance of probabilities) that NHS England doesn't hold additional relevant information, beyond information about the contract referenced in paragraph 20.
30. The Commissioner considers that in effect, NHS England failed to address the actual request made. In such circumstances, his conclusion is as stated in paragraph 4.
31. On the complainant's questions about development cost and annual support cost, NHS England explained that it doesn't hold the breakdown required to answer those questions:

"as part of the procurement process, NHS England did not collate information on how these third-party organisations will specifically spend the total contract value of the award. Nor has NHS England since collated information on how these organisations breakdown their spend internally ...".
32. The Commissioner considers, and emphasises to the complainant, that where NHS England hasn't collated the level of detail the complainant wants regarding the development cost or annual support cost, it's more likely than not that NHS England doesn't hold information for those parts of the request.

## Right of appeal

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33. 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](mailto:grc@justice.gov.uk)

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

34. 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.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Daniel Kennedy**  
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