

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 March 2024

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

Decision (including any steps ordered)

1. The complainant has requested information about defined contribution pension schemes and the usage of annual leave entitlements by NHS staff. NHS England confirmed that it did not hold the requested information under section 1(1)(a) of FOIA.
2. The Commissioner considers that on the balance of probabilities NHS England does not hold the requested information under section 1(1)(a) FOIA.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 13 August 2023, the complainant wrote to NHS England and requested information in the following terms:

“Under the Freedom of Information Act, I would like to request the following information:

- (1) Please can you share any assessment you have made, if any, of:
 - (a) the costs of implementing defined contribution pension schemes for

NHS staff/employees and (b) costs compared with pre-existing defined benefit pension schemes available to NHS staff/employees?

(2) Please can you share the results of any surveys conducted or commissioned by NHS England, if any, indicating interest in or demand for (non-contributory) defined contribution pension schemes among NHS staff/employees?

(3) Please can you share a summary of any findings/results (including underlying methods/methodologies, where feasible) regarding past and planned work by NHS England which explores and/or captures usage of annual leave entitlements by NHS staff/employees across NHS Trusts and other NHS employers?"

5. NHS England responded on 7 September 2023 and advised that it did not hold the requested information. It signposted the complainant to its publication scheme for the types of information it holds and suggested that the NHS Business Services Authority (NHSBSA) may hold the requested information. NHSBSA describes its function as follows: "We are an Arm's Length Body of the Department of Health and Social Care (DHSC). We are responsible for providing platforms and delivering services which support the priorities of the NHS, government and local health economies and in so doing we manage around £48 billion of NHS spend annually."
6. NHS England wrote to the complainant on 26 January 2024 with its internal review response and maintained its position that it did not hold the requested information.

Scope of the case

7. The complainant contacted the Commissioner on 18 November 2023 to complain about the way their request for information had been handled. At that time, the complainant expressed dissatisfaction that they had not received an internal review response, and that NHS England had advised the requested information was not held.
8. The Commissioner considers the scope of his investigation is to determine whether NHS England holds the requested information under section 1(1)(a) of FOIA.

Reasons for decision

Section 1 – general right of access to information

9. Section 1 (1) 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.”

10. Section 1(1) requires that a public authority must inform a requestor, in writing, whether it holds information falling within the scope of the request. If it does hold relevant information, it also requires that it communicates the information to the requestor, subject to any exclusions or exemptions applying.

11. In scenarios where there is some dispute between the amount of information held which a public authority says it holds, and the amount of information that a complainant believes is held, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.

12. In other words, in order to determine such complaints, the Commissioner must decide whether, on the balance of probabilities, a public authority holds any - or additional - information which falls within the scope of the request (or was held at the time of the request). For clarity, the Commissioner is not expected to prove categorically whether the information is held.

13. The Commissioner has therefore sought to determine whether, on the balance of probabilities, NHS England holds the requested information.

The complainant's position

14. In their request for an internal review, the complainant has stated that they are sceptical NHS England does not hold any information that is relevant to their request. They also stated that they found it difficult to understand how or why NHS England would have no visibility or involvement whatsoever regarding NHS pensions and annual leave usage across the NHS in England.

15. The complainant acknowledged the suggestion that NHSBSA may hold the requested information but added that they thought NHSBSA was just responsible for administering the pension scheme.

NHS England's position

16. NHS England explained in its response that NHS England is not the same as "the NHS in England" and that it is made up of a number of different organisations like hospitals, integrated care boards and ambulance trusts.
17. In its internal review response NHS England further explained its original response. It advised that, regarding the first two questions of the request, these queries should be directed to NHSBSA, part of the Department of Health and Social Care, which is responsible for the NHS Pension Scheme. It also advised that NHS England was not aware of any analysis work it had carried out in relation to pension schemes of NHS staff. In response to question 3, it stated that it was not aware of any work having been carried out at NHS England "which explores and/or captures usage of annual leave entitlements by NHS staff/employees across NHS Trusts and other NHS employers".
18. In its submission to the Commissioner, NHS England stated that it is not responsible for the NHS pension scheme and therefore it does not hold the requested information. NHS England confirmed that it had conducted searches within its Workforce, Training and Education (WTE) Directorate. It explained that it considered that this would be the only directorate within its organisation which would have potentially held information in relation to the request. It explained that the WTE directorate included the Human Resources and Organisation Design sub-directorate.

The Commissioner's position

19. The Commissioner notes the complainant's reasons for believing that it is unlikely that NHS England would not hold any information relevant to the request.
20. He also notes that NHS England has explained why, due to its structure, the information is not held. The Commissioner recognises that the structure of the NHS means that different functions are carried out by a number of organisations and not by NHS England itself.
21. He further notes that NHS England has offered advice to the complainant as to which organisations may hold the requested information.

22. The Commissioner's decision is that on the balance of probabilities, NHS England does not hold information within the scope of the request.

Other matters

23. The Commissioner notes that NHS England failed to carry out an internal review within 40 working days. The Section 45 Code of Practice advises all public authorities to carry out internal reviews in a timely manner and within 20 working days. A total of 40 working days is permitted in particularly complex cases only.
24. NHS England is reminded of the requirements of the Code and of the importance of carrying out internal reviews in a timely manner and in accordance with the timeframes specified in the Code.

Right of appeal

25. 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

26. 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.
27. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Keeley Christine
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