

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 January 2014

Public Authority: Department of Health
Address: 79 Whitehall
London
SW1A 2NS

Decision (including any steps ordered)

1. The complainant requested correspondence between East Midlands Strategic Health Authority ("the SHA") and United Lincolnshire NHS Trust ("the Trust") and the Department of Health ("DoH") and NHS Executive Authority.
2. The SHA was disbanded on 1 April 2013 and was unable to answer the request so responsibility for responding passed to the DoH as the body with legal responsibility for areas where functions had not been transferred to another body in the new system. The DoH stated the complying with the request would exceed the cost limit as set out in section 12 of the FOIA.
3. The Commissioner's decision is that the DoH has correctly refused the request on the basis of section 12 as to comply would exceed the cost limit.

Request and response

4. On 22 February 2013, the complainant wrote to the SHA and requested information in the following terms:
 - 1) *"All correspondence and emails between yourselves and the United Lincolnshire NHS Trust during the period 2008 to 2011 including specifically, that between Dame Barbara Hakin, Sir John*

Brigstocke on one side and Gary Walker, David Bowles on the other side.

2) All correspondence and emails between yourselves and the Department of Health/NHS Executive Authority for the period 2008 to 2011, relating to matters concerning the United Lincolnshire NHS Trust, including specifically that between Dame Barbara Hakin, Sir John Brigstocke and Sir David Nicholson."

5. The SHA responded on 20 March 2013. It stated that it considered it would hold information within the scope of the request but as the request was very broad it considered the time taken to identify, locate and retrieve the information would exceed the cost limit under the FOIA. The SHA advised the complainant that he could make a new, narrower request which may fall within the cost limit.
6. On 22 March 2013 the complainant wrote to the SHA and refined his request to the information from just 2009. Due to the NHS transition on 1 April 2013, responsibility for responding to the refined request passed to the DoH who responded on 25 April 2013. The DoH explained that the narrowed request would also still exceed the appropriate cost limit to comply with.
7. Following an internal review the DoH wrote to the complainant on 24 July 2013. It stated that it considered section 12 had been correctly applied and compliance with the request would exceed the cost limit.

Scope of the case

8. The complainant contacted the Commissioner on 25 May 2013 and then again on 6 August 2013 following an internal review to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of his investigation to be to determine whether the DoH correctly applied section 12 of the FOIA to the request and that the cost of complying with the request would exceed the appropriate cost limit.

Reasons for decision

10. Section 12 of the FOIA states that a public authority does not have to comply with a request for information if it estimates that the cost of complying with the request would exceed the appropriate limit.

11. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations") sets the appropriate limit at £600 for the public authority in question. A public authority can charge a maximum of £25 per hour of staff time for work undertaken to comply with a request which amounts to 18 hours work in accordance with the appropriate limit set out above. If a public authority estimates that complying with a request may cost more than the cost limit, it can consider the time taken in:
 - a) determining whether it holds the information;
 - b) locating the information, or a document which may contain the information;
 - c) retrieving the information, or a document which may contain the information; and
 - d) extracting the information from a document containing it.
12. To determine whether the DoH applied section 12 of the FOIA correctly the Commissioner has considered the responses provided to the complainant by the DoH and the submissions provided to the Commissioner during his investigation.
13. In its refusal notice of 25 April to the narrowed request, the DoH explained its reliance on section 12 and clarified that information likely to be within the scope of the request was held in a series of boxes of uncatalogued documents. The DoH also clarified that the information was only in hard copy. The DoH considered that each document would have to be examined to determine if it contained information relevant to the request and this would exceed the appropriate limit of £600 (representing 3.5 working days).
14. After the internal review was conducted the DoH provided the complainant with some further detail to explain how it had concluded compliance with the request would exceed the appropriate cost limit.
15. The DoH stated there are five boxes containing correspondence which may be relevant to the request. Each of these boxes contains around 200 pieces of correspondence, giving a total of approximately 1,000 documents across the five boxes. The DoH used an average of three minutes per document to identify if information within the scope of the request is contained within the documents. This totalled over 50 hours of work, taking the cost of complaint over the £600 limit

16. The Commissioner, having considered the information supplied by the DoH in response to the complainant in conjunction with his guidance on section 12¹, determined that he required further information from the DoH to fully consider the application of section 12 and the costs that could be reasonably incurred bearing in mind that the £25 per hour rate is only applicable to costs that are attributable to staff time.
17. The Commissioner therefore asked the DoH some further questions about the estimate provided, in particular about how the five boxes were identified as likely to hold relevant information when the contents were described by the DoH as 'uncatalogued', how the average of 200 pieces of correspondence per box was calculated, the types of correspondence likely to be in each box, and how the average of three minutes for examining each document was reached.
18. The DoH has explained how the five boxes were identified as likely to hold relevant information based on the way they were catalogued. The DoH has stressed that the boxes were catalogued and had a contents listing but the documents within were not properly catalogued. The precise contents listing of the boxes and how the DoH was then able to determine these boxes would need to be searched has not been included in the main body of this decision notice but is detailed in the accompanying confidential annex. However, having reviewed this information from the DoH, the Commissioner accepts that the five boxes mentioned by the DoH would need to be searched to establish if relevant information was contained.
19. The DoH has explained it has reviewed the contents of each box and determined that each held a number of ring binders. All of the boxes were found to contain information within the scope of the request but the correspondence was intermingled with reports, minutes, press articles and other documentation, all organised by theme. As such the DoH argued that it would need to review each page within the box to determine whether it is correspondence within the scope of the request.
20. The DoH has further explained that in producing its estimate it reviewed one box of documents and estimated the proportion that appeared to be correspondence. It had taken correspondence to be letters and emails and established that this was approximately 200 pieces within the box.

1

http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/costs_of_compliance_exceeds_appropriate_limit.ashx

After cross-referencing this with the other boxes and multiplying it the DoH confirmed this was a reasonable estimate of the number of pieces of correspondence in each box.

21. This would then require each piece of correspondence to be reviewed to determine if it fell within the scope of the request. The DoH has not included any time required to extract information within the estimate, it has only included the time taken to locate and identify relevant information.
22. Following the Commissioner's questions, the DoH has re-examined the boxes (each containing between three and seven binders of documents totalling 25 binders) and counted the number of documents in one of the medium sized binders (190 pieces of paper). Of these, some are double-sided; some are email chains with more than one email per side of paper. Having looked at this again, the DoH stands by its initial assessment that each document would have to be individually reviewed to determine if it contains correspondence within the scope of the request.
23. Based on this the Commissioner is minded to accept the DoH's arguments that all five boxes would need to be searched and that the average number of documents in each binder is 190 (based on a medium-sized binder), containing a mixture of types of document requiring each to be individually evaluated. This would amount to 4750 documents which would need to be reviewed (190 documents as an average in each binder x 25 binders across 5 boxes).
24. The Commissioner's next consideration is the amount of time the DoH estimates it would take to review each document to determine if it contains correspondence relevant to the request.
25. The DoH has explained that for the purposes of the original estimate it considered each email chain to be a different piece of correspondence and a six page letter with several appendices to be one piece of correspondence. It calculated it would take an average of three minutes to read each piece of correspondence and determine if it was within the scope of the request. The average was determined by the fact that it would take significantly less time to review an email which is only half a page than a letter with appendices. The DoH has stated that a considerable proportion of the correspondence within the boxes amounted to letters with appendices.
26. The Commissioner has considered the explanations provided by the DoH and has focused his attention on the second step of the process; the identification of the correspondence that is within the scope of the request in each of the boxes. The DoH has been able to provide an

approximate number of documents in each box based on an average in a binder and the number of binders in total. The Commissioner accepts this figure to be 4750 documents, of which the DoH has calculated approximately 200 in each box will be correspondence which may be within the scope of the request.

27. The DoH considers that it would take an average of three minutes to review each item of correspondence to determine if it is within the scope of the request. If this was the case then the Commissioner has calculated the time as follows:

200 items of correspondence x 5 boxes = 1000 items

1,000 items x 3 minutes = 3,000 minutes = 50 hours

50 hours x £25/hour of staff time = £1250

28. If the Commissioner were to accept this estimate then it is clear the cost of complying with the request would exceed the cost limit of £600. The Commissioner has some reservations about accepting the three minute average for identifying if the correspondence is within the scope of the request as it seems unlikely it would be necessary to read the entirety of each letter and all of its appendices to make this determination. That being said, he notes that even if the time taken to examine each item of correspondence was halved (to 1.5 minutes) this would still exceed the cost limit of £600.

29. In addition to this, the Commissioner is aware that the DoH has not included the time it would take to perform the first part of the identification process – identifying the approximately 200 items of correspondence in each box from the documents in each ring binder. Even if this was estimated, conservatively, at 10 seconds per document this would amount to the following:

4750 documents x 10 seconds = 47,500 seconds = 791 minutes = approximately 13 hours

13 hours x £25/hour staff time = £330 approximately.

30. In light of the above, the Commissioner is minded to accept that even without including the costs associated with the initial stage of identifying the correspondence within the documents and, even with halving the amount of time estimated by the DoH to identify correspondence within the scope of the request, the estimate provided by the DoH would exceed the cost limit and therefore the request was correctly refused under section 12 of the FOIA.

Right of appeal

31. 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: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

32. 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.
33. 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

Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF