

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 3 October 2018

Public Authority: NHS Digital
Address: 1 Trevelyan Square
Boar Lane
Leeds
LS1 6AE

Decision (including any steps ordered)

1. The complainant has requested information on various types of treatments used on those detained in mental health settings. NHS Digital initially refused the request on the basis of section 21, later amending its position to rely on section 12 as complying with the request would exceed the cost limit.
2. The Commissioner's decision is that NHS Digital applied section 12(1) incorrectly as it did not reasonably demonstrate that the cost of the request would exceed the limit. She also finds that in failing to advise the complainant on how to refine his request to bring it within the cost limit, NHS Digital breached section 16(1) of the FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Write to the complainant with a fresh response to the request that does not rely on section 12(1) of the FOIA.
4. The public authority must take these steps within 35 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 the Act and may be dealt with as a contempt of court.

Request and response

5. On 28 November 2017, the complainant wrote to NHS Digital and requested information in the following terms:
 - **"How often was medical treatment used to treat people detained in mental health settings over the last 12 months (or the most recent 12 month period for which the information is available)?**
 - **How often was electroconvulsive treatment used to treat people detained in mental health settings over the last 12 months (or the most recent 12 month period for which the information is available)?**
 - *How many patients have been sectioned in the last 12 months (or the most recent 12 month period for which the information is available)?*
 - **Of the patients sectioned in the last 12 months, how many made use of an independent mental health advocate?**
 - *How many local authorities currently use mental health nurses in emergency control rooms?*
 - *How many local authorities plan to use mental health nurses in emergency control rooms?"*
6. This was followed up with additional requests later on the same date in the following terms:
 - **"How often was neuro-surgical treatment used to treat people detained in mental health settings over the last 12 months (or the most recent 12**
 - *Please could I also request data for all above requests for the four previous years also (in addition to the most recent year)."*
7. NHS Digital responded on 28 December 2017 and appeared to aggregate all of the requests due to their similar nature. It confirmed that it held data relating to some of the questions (highlighted above in bold). NHS Digital explained that data had not been published in the exact form requested but it *may* be available within the Mental Health Services Dataset (MHSDS) and a formal enquiry should be made. NHS Digital therefore refused to provide the information on the basis of section 21 of the FOIA.

8. For the questions relating to local authority use of mental health nurses in emergency control rooms; NHS Digital stated no information was held. With regard to the request to see all of the data for the last five years, NHS Digital explained that data on the number of detentions and on the use of electroconvulsive treatments (ECTs) could be found online and provided links. NHS Digital explained no further historical data would be held as MHSDS was introduced in January 2016.
9. The complainant requested an internal review on 4 January 2018. He expressed dissatisfaction that NHS Digital had failed to provide any information aside from a link to the number of people receiving electroconvulsive treatment between 2012 and 2015. The complainant stated that applications to MHSDS cost £1000 and this was not a reasonable fee to have to pay.
10. Following an internal review NHS Digital wrote to the complainant on 29 January 2018 with the outcome. It stated that for the majority of the questions its position remained the same. However, for the question regarding the number of patients detained in the last 12 months NHS Digital did provide a figure.

Scope of the case

11. The complainant contacted the Commissioner on 30 January 2018 and the complaint was accepted for investigation on 22 February 2018.
12. The initial scope of the Commissioner's investigation was to determine if NHS Digital had correctly refused to provide information in relation to the highlighted questions on the basis of section 21.
13. However, the Commissioner had some concerns about the application of section 21 by NHS Digital. In particular she drew attention to her guidance on the exemption¹ and the statement that "*a public authority must know that it holds the information in order to be able to apply the section 21 exemption*". The Commissioner informed NHS Digital that this did not seem to be the case as it repeatedly referred to the fact that the information "may" or "might" be held and it would therefore appear that

¹ <https://ico.org.uk/media/for-organisations/documents/1203/information-reasonably-accessible-to-the-applicant-by-other-means-sec21.pdf>

NHS Digital could not know with certainty the information was accessible elsewhere.

14. The Commissioner asked NHS Digital to reconsider its position and, in the event it concluded that the information could not be said to be reasonably accessible via the MHSDS; to consider if the information was held in line with section 1(1)(a) of the FOIA. The Commissioner set out her initial view that as MHSDS is a data set that it seemed NHS Digital may have access to the raw data to answer the request.
15. Following responses from NHS Digital; it amended its position and confirmed it was no longer applying section 21 but instead considered that the request could be correctly refused on the basis of section 12 of the FOIA.
16. The scope of the Commissioner's investigation is therefore to determine if NHS Digital has refused the request on the basis that to respond would exceed the cost limit as set out in section 12 of the FOIA.

Reasons for decision

Section 12(1) – cost of compliance

17. Section 12(1) allows a public authority to refuse to comply with a request for information if the authority estimates that the cost of compliance would exceed the 'appropriate limit', as defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Regulations").
18. This limit is set in the fees regulations at £600 for central government departments and £450 for all other public authorities. The fees regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 18 hours in this case.
19. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) states that an authority can only take into account the costs it reasonably expects to incur in:
 - determining whether it holds the information;
 - locating a document containing the information;
 - retrieving a document containing the information; and
 - extracting the information from a document containing it.

NHS Digital's position

20. Following the concerns raised by the Commissioner about the use of section 21 NHS Digital provided the Commissioner with further explanations about the Mental Health Services Data Set (MHSDS) to add some context to its revised position that the request could not be complied with within the cost limit.
21. NHS Digital explained that MHSDS is a complex relational dataset consisting of over 50 data tables and the complexity of the structure means that the process for novel analysis is extremely complex. NHS Digital confirmed MHSDS is a new dataset with incomplete coverage as it was only introduced in 2016. The completeness varies according to the data item in question and data quality work improvement work is concentrated on national priority areas resulting in large variations in data quality dependent on what is being measured.
22. The Commissioner asked NHS Digital questions to establish if the raw data needed to compile information to respond to the request was held by NHS Digital. NHS Digital explained that information on electroconvulsive therapy (ECT) is within the scope of the MHSDS. However, it stated that statistics on the use of ECT were not available for use as this was not a national priority area. NHS Digital did concede that if ECT was being used by any health providers then information on this should be being submitted to the MHSDS by these providers but it argued it could not confirm the quality of any data held without undertaking a large piece of work.
23. NHS Digital went on to explain the work involved in identifying ECT data within the dataset. This included (but was not limited to): discussions with the relevant clinical teams to understand the coding used and to identify ECT data, analysis by relevant team members, triangulation of the results with other data sources to ascertain data quality/accuracy and discussions with providers to understand their processes and add context to the results. NHS Digital argues that the time needed to undertake these activities would lead to the cost of compliance exceeding the appropriate cost limit. In addition this was only based on identifying and compiling information on ECT. The same process would have to be followed for information on medical treatments, neuro-surgical treatment and advocacy.
24. NHS Digital also consulted with subject matter experts (SMEs) to better understand the process for manipulating and providing the data in a deliverable format. The SMEs provided some additional explanations; primarily that establishing if any relevant data is available would require a two-fold process.

25. The first stage of the process would be development – this is where stakeholders identify national priority areas for NHS Digital to develop. For data just on ECT this would then require working with experts to develop guidance showing how the treatment should be recorded in the MHSDS. National Institute for Health and Care Excellence (NICE) guidelines for ECT date back to 2003 and indicate that ECT may be used in cases of catatonia, prolonged or severe manic episodes or schizophrenia in adults. The output of this would be guidance for MHSDS submitters that shows how information on ECT should be recorded and used to identify treatment that is or isn't compliant with appropriate standards. There are a number of NHS Digital teams involved in this stage, including those with expert knowledge of MHSDS and clinical coding. The SMEs explained that this development stage is usually measured in months and depends on resources and organisational priorities.
26. The second stage would be to conduct a data quality improvement exercise with providers. This involves analysing the MHSDS according to the derived guidance and contacting providers to ascertain whether variations from the guidance are due to variations in practice or data quality limitations. The SMEs argue that this is essential to correct data quality issues and prevent the publication of misleading statistics. To estimate how long this would take an example of perinatal analysis was given. Perinatal analysis was due to enter regular reporting in September 2018 and the first set of exploratory analysis was conducted at the start of 2016. The analysis involved linkage across datasets so was more complex than the requested ECT data but NHS Digital argued this gave an idea of the time needed.
27. The Commissioner considered that these responses from NHS Digital were still a little unclear. In particular; whilst she acknowledged that the MHSDS is a large dataset and manipulation of information to extract and compile what has been requested may require time and expertise it was not clear exactly how this process would work from the explanations provided. The Commissioner asked NHS Digital to provide further details to explain the purpose of MHSDS, how data is collected and from what sources and why there are issues with data quality.
28. The Commissioner also asked NHS Digital to provide a more detailed breakdown of the activities and time needed to identify and collate relevant information as well as a more detailed explanation on how the data would need to be cleaned to ensure quality and why this would be necessary to respond to a request under the FOIA.
29. NHS Digital referred back to its SMEs to answer the further questions presented by the Commissioner. It confirmed that the MHSDS is a large and complex data set used to produce mental health statistics with the

purpose of providing information to support planning, monitoring and delivery of mental health services in England.

30. The MHSDS collected record-level administrative data i.e. operational data which is reused for reasons other than direct patient care. This data is submitted by providers via an online portal into which their??? information on a monthly basis and submission of MHSDS data is mandatory for NHS funded care, including independent sector providers.
31. NHS Digital explained the issues with data quality arise for a number of reasons: not all providers submit data, not all fields are completed in submitted data, and the fields that are completed may not have been completed correctly. This is made all the more likely by the fact that in some areas, including ECT, guidance for providers on how information should be recorded has not yet been developed.
32. The SMEs at NHS Digital stated that before releasing statistics they had to ensure they were not misleading and this is why so many teams were involved and so much time taken to produce the statistics. NHS Digital states it cannot provide specific timings as timings will depend on complexity and this will be different for different data sets e.g. ECT data and neuro-surgical data. However, NHS Digital did confirm that to simplify the process for any new analysis for MHSDS (such as ECT) it works with national bodies to develop guidance for providers so they can code correctly in their submissions. Whilst NHS Digital was reluctant to give specific timescales to this it suggested if ECT data was the focus of development it estimated it would take one month to do this.
33. NHS Digital has then explained the data quality improvement exercise process in more detail and provided the Commissioner with a diagram to assist with her understanding of this.

The Commissioner's decision

34. When dealing with a complaint to the Commissioner under the FOIA, it is not the Commissioner's role to make a ruling on how a public authority deploys its resources, on how it chooses to hold its information, or the strength of its business reasons for holding information in the way that it does as opposed to any other way. Rather, in a case such as this, the Commissioner's role is simply to decide whether or not the requested information can, or cannot, be provided to a requester within the appropriate costs limit.
35. The Commissioner notes that whilst ECT has been referred to throughout this decision notice; the outstanding requests also related to the use of medical treatments and neuro-surgical treatments on those detained in the last 12 months.

36. She has pushed NHS Digital to provide simple coherent explanations of the difficulties it states would be encountered in complying with the request but despite this feels NHS Digital have still failed to persuade the Commissioner that responding to the request would exceed the appropriate limit.
37. The Commissioner is concerned that the approach of NHS Digital seems to be that any FOI request made for information held in the MHSDS will be refused on the basis that at some point it will be published as and when it becomes a priority or it is in line to be considered next. Whilst there are exemptions relating to information intended for future publication (section 22) there must be a clear indication as to when publication will occur and NHS Digital has, on several occasions, indicated there is no timescale on ECT or any of the other data requested being published in this case as it not a national priority.
38. The Commissioner must consider the FOI request separately to this and her only consideration is to determine if it is possible for NHS Digital to comply with the request with reference to the four permitted activities as set out in the Fees Regulations.
39. The basic building blocks needed to answer the request seem to exist in the form of the operational data submitted by providers each month. The Commissioner accepts there may be difficulties collating this information if there are inconsistent methods of reporting this i.e. use of different codes, however, she is not clear on how long it would take NHS Digital to collate this information into a meaningful format to answer the request. The responses from NHS Digital refer to it taking, conservatively, one month to develop guidance on ECT if it was considered a priority area. This does not make it clear how long it would take NHS Digital to collate the necessary information to respond to the request.
40. Whilst the Commissioner can accept that this activity would take some time and can be regarded as an activity covered by the fees regulations, she has difficulty in accepting the time estimate given the lack of detail. The one month cited by NHS Digital has not been broken down much more specifically than stating that other teams would need to be consulted and codes checked. To convince the Commissioner NHS Digital would have needed to provide estimated times for these activities and approximate numbers of data sets to be checked.
41. On another note; the remaining time that NHS Digital considers would be needed is in relation to conducting a data quality exercise. This is to ensure that any published statistics are accurate and not misleading. Any activities following the data being compiled which are related to quality assurance cannot be included in any cost estimate. The

Commissioner can, of course, understand that NHS Digital would want to ensure that any published statistics are accurate however, any steps relating to quality assurance are taken at NHS Digital's discretion and are not an essential requirement in order to provide the requested information under the FOIA.

42. Given the lack of detail in the reasoning of NHS Digital, the Commissioner does not consider herself to be in a position where she can accept the estimate made by NHS Digital was sensible, realistic and supported by evidence. This was despite being informed at the start of the investigation that *"the approach of this office is to give a public authority one more opportunity to justify its position before issuing a decision notice;"* and, in fact, in this case being given an additional opportunity to explain its estimates and give a detailed breakdown.
43. In light of the lack of detail in the description of its cost estimate, the Commissioner's view is that she has no choice other than to find that the cost estimate made by NHS Digital was not reasonable and that compliance with the request would not exceed the cost limit. Her conclusion is, therefore, that NHS Digital relied on section 12(1) incorrectly and at paragraph 3 above it is now required to provide a fresh response to the request that does not rely on section 12(1).

Section 16 – duty to provide advice and assistance

44. Section 16(1) of the FOIA provides that all public authorities are under a duty to provide advice and assistance to any person who has made or who intends to make an information request to it. The Commissioner's published guidance on section 12 sets out the following minimum advice and assistance that a public authority should provide to a requester when refusing a request on cost grounds:
 - either indicate if it is not able to provide any information at all within the appropriate limit; or
 - provide an indication of what information could be provided within the appropriate limit; and
 - provide advice and assistance to enable the requester to make a refined request.
45. In failing to offer any advice and assistance to the complainant on how to refine his request so that it was within the cost limit, NHS Digital breached section 16(1) of the FOIA. As the requirement to remedy this breach has been superseded by the step in relation to the section 12(1) finding, no remedial step in relation to this breach is required.

Reference: FS50723337

Right of appeal

46. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

47. 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.
48. 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

Jill Hulley
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