

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 04 October 2018

Public Authority: Department of Health & Social Care
Address: 39 Victoria Street
Westminster
London
SW1H 0EU

Decision (including any steps ordered)

1. The complainant requested information on the funding for the NHS Estates and Facilities guidance programme. The Department of Health & Social Care (the DH) confirmed that it did not hold any further information. The complainant considered that more information must be held. The Commissioner's decision is that the DH does not hold any further information in this case. The Commissioner does not require the DH to take any steps.

Request and response

2. On 27 November 2017 the complainant requested the following information:

'Further to the Freedom of Information Act, I should be grateful to receive information that the Department holds about its NHS Estates & Facilities guidance programme prior to its transfer to NHS improvement in February 2017; in particular the:

- (1) funding provided for each of the financial years from 2010/11 through to 2016/17, together with the business plan description(s) for the provision;*
- (2) assessment of the funding needed to fully update the guidance over three years;*
- (3) reports produced and/or commissioned since 2015 on the future and status of the guidance, including new models of production and the Activity Data Base element.'*

3. On 20 December 2017 the DH responded that it does not hold any information relevant to the request. The DH suggested that the complainant direct the request to NHS Improvement.
4. The complainant requested an internal review on 21 December 2017 as he considered that financial information would be held at the DH:

'I'm at a loss to understand why financial information about expenditure over the past few years on a recurrent element of Departmental business, up to its transfer to NHS improvement, is not held by the Department, nor why, for example, a report commissioned in 2016 by the Department and documented on the gov.uk website Contract Finder about ...a new model for the production of guidance and the continued development of ADB.' has led the Department to say: 'DH does not hold any information relevant to your request.'

5. The DH sent him the outcome of its internal review on 23 January 2018.

'In order to respond to your initial request of 27 November, we contacted DH's Records and Legacy team to determine whether the information you requested was held by DH.'

The Records and Legacy team advised that the procedure when a team leaves DH, in this case NHS Estates and Facilities, is that the team's files held by DH's records management, data backup recovery and document management provider are transferred from DH's name to that of the organisation that the team has gone to. This is why our response of 20 December explained that DH does not hold the requested information and that you may wish to contact NHS Improvement with your request.

However, I appreciate that our initial response did not explain DH's records management procedure and that our response would have been more helpful if it had.'

6. On 13 April 2018 the DH responded to an email dated 24 January from the complainant. It informally provided and explained all the budgetary information that it held - the annual budget and actual funding information for the cost centre '14880 NHS Estates and Facilities' - to help the complainant draft a FOIA request to NHS Improvement. The DH explained that it did not hold any 'explicatory material' or 'programme budget information with the specific title referred to' in the request.

Scope of the case

7. On 13 February 2018 the complainant wrote to the Commissioner that he did *'not accept that DH have not retained financial information about*

expenditure on the particular matter requested. To do so would be contrary to any accountancy requirements that I'm aware of.'

8. On 11 May 2018 the Commissioner wrote to both parties outlining the scope of the request.
9. In June 2018 the DH sought an informal resolution by offering a meeting. However, on 20 June 2018, the complainant wrote that he is not willing to meet the NHS Estates and Facilities Team at NHS Improvement (NHSI) to discuss his complaint to the DH in further detail.
10. The Commissioner has considered that the scope of the case is whether the DH has complied with Section 1 of the FOIA.

Reasons for decision

11. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information within the scope of the request, and if so, to have that information communicated to him.
12. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities.
13. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
14. As is the practice in a case such as this, the Commissioner asked the DH a number of questions to confirm/establish if further information is held.
15. In response to the Commissioner's questions about the location of the information, the DH confirmed that it did not hold any further recorded information falling within the scope of the request - that is the funding of the NHS Estates & Facilities guidance programme prior to its transfer to NHSI.
16. As background, the DH explained that *'the NHS Estates and Facilities Team was established by the Department to provide support and guidance for Ministers on all estates matters, including procurement advice and the production of specific guidance for the NHS. The Department's financial recording system captures total salary and other*

direct costs, but does not provide financial analysis associated with individual activities, as requested by [name of complainant].'

17. The Commissioner asked the DH a number of questions to establish what searches had been carried out for information falling within the scope of the request.

18. The DH explained that *'The Records and Legacy Team, Acute Care and Provider Policy Team and the Finance Team have all undertaken searches to identify any information that may be within the scope of the request. These searches were carried out anew each time in an attempt to answer the initial request, the internal review and this ICO complaint. Officials from the aforementioned teams searched the relevant databases using the admin costs centre 14880, NHS Estates and facilities, which consist of costs relating to the funding of a team.'*

19. The Commissioner asked about the DH's formal records management policy on the retention and destruction of records of this type.

20. The DH offered the following information:

'There will be costs associated with the NHS Estates guidance programme, but the information held is not granular enough to show how much expenditure was committed to producing guidance. We are compliant with Government accounting rules and this is consistent with usual practice, as we do not record the time spent by officials on each deliverable set out in the Department's business plan. Other business records may contain relevant unaudited information; these were transferred to NHSI when the team moved there in 2017.'

21. The DH further explained that it is not possible for it to ascertain the requested information from the records held in the DH as the team responsible for the requested information had moved to NHSI: *'the requested information was transferred to NHSI when the relevant team moved to that organisation. We are unable to provide information which we do not hold.'*

22. The Commissioner has also considered the information provided by the complainant including the 'Strategic Business Case for the guidance' and the 'Transition Plan' for the Estates and Facilities function to NHSI and the complainant's comments that *'nowhere in the extensive section on information and data transfer from DH to NHSI relevant to Estates Policy Team's transfer ...is there mention of business planning or financial information of the type I requested'*. His view was that the funding information is still held by the DH.

23. The complainant disputed that all the files were transferred as only certain Estates and facilities functions transferred to NHSI. He considered that *'a wider investigation is warranted into DH's handling of the request and that DH would benefit from the ICO's advice on change management.'*
24. Having considered both the complainant's submissions and the DH's responses to the Commissioner's investigations, the Commissioner is satisfied that any further recorded information on the detail of the funding for the guidance programme that may have been held was transferred to NHSI and therefore, on the balance of probabilities, the DH does not hold any further recorded information within the scope of the request.
25. The Commissioner understands the reasons why the complainant considers further information may be held, but the Commissioner can only consider what is held. It is outside the Commissioner's remit to determine if it should be held, and even if it should be, she cannot require a public authority to create the information under the FOIA.
26. As the Commissioner's decision is that the information is not held, the Commissioner does not require the DH to take any steps.

Other matters

27. Although the DH has apologised to the Commissioner for the delays in this case, the Commissioner is disappointed that the DH failed to respond to her enquiries as soon as possible. The Commissioner wrote to the DH in May and although the Commissioner understands that the DH attempted to meet the complainant informally in June, the Commissioner did not receive the response to her enquiries until 26 September 2018.
28. In the future, the Commissioner would remind the DH to respond to the Commissioner's enquiries promptly so that she is not prevented from carrying out her investigation.

Right of appeal

29. 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: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

30. 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.
31. 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
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