

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 March 2024

Public Authority: Department of Health and Social Care (DHSC)

Address: 39 Victoria Street
London, SW1H 0EU

Decision (including any steps ordered)

1. The complainant has requested the DHSC to disclose any correspondence between the DHSC and NHS England that refers to paragraph 1.54 of the Long Term Plan for the six months before 23 December 2020. The DHSC responded, advising the complainant that it does not hold the requested information.
2. The Commissioner's decision is that on the balance of probabilities the DHSC does not hold any recorded information falling within the scope of the complainant's request. He therefore does not require any further action to be taken.

Request and response

3. The complainant has submitted two previous requests to the DHSC on the same subject matter. The first was addressed in the Commissioner's decision notice of 28 February 2023¹. The Commissioner decided here that he was unable to decide if the DHSC held recorded information or not, falling within the scope of the complainant's request, as he felt

¹ [ic-153138-m7c8.pdf \(ico.org.uk\)](https://www.ico.org.uk/153138-m7c8.pdf)

inadequate searches had been undertaken. The notice therefore ordered DHSC to carry out additional searches and issue a fresh response to the complainant.

4. A revised response was issued and this confirmed that the DHSC had decided that the cost to establish whether or not it held recorded information falling within the scope of the request would exceed the cost limit. The DHSC therefore applied section 12(2) of FOIA.
5. This became the subject of a further investigation and the Commissioner issued a second decision notice on 18 April 2023², which upheld the application of section 12(2) of FOIA. It also accepted that the DHSC was unable to offer the complainant with any advice and assistance on how to frame a more refined request which could be potentially complied with, within the cost limit, because it believed it does not hold any recorded information.
6. On 27 August 2023, the complainant wrote to the DHSC and requested information in the following terms:

"Upon receipt of your decision I hereby submit a further FOI request. I do so on the basis of comments included in two of your enclosed documents. Namely:

1) Paragraph 173 of the NHS's recommendations to Government and Parliament for an NHS Bill dated September 2019 states that "In accordance with the Health and Social Care select Committee's recommendation, non-statutory providers would not be able to hold an ICP contract". This is consistent with the basis of my FOI request and with paragraph 1.54 of the NHS Long Term Plan.

2) Paragraph 1 of the Instructions on the draft NHS Bill from the Government Legal Department dated 23 December 2020 states that "these instructions formed part of the original legislative reforms suggested to implement the Long Term Plan". However, the Instructions that you have not redacted do not require providers of ICP contracts to be statutory.

Legal staff do not make policy they recommend instructions to implement policy made by others. On this basis, therefore, the decision not to implement paragraph 173 of the NHS's recommendations was made before December 2020. My initial FOI request was for any information between your Department and NHS England between

² [ic-227184-v0r3.pdf \(ico.org.uk\)](https://www.ico.org.uk/for-organisations/our-work/our-work/227184-v0r3.pdf)

January 2019 and February 2021. This was later reduced to the period between May 2020 and May 2021 and then reduced again to the 6 months before the White paper was published in February 2021. You did not provide any information under all of these FOI requests in terms of Section 12(2) of the FOI Act. I therefore amended my request for you to provide me with any correspondence that dealt with the wording of Sections 21 and 22 of the Health and Care Bill in the six months prior to the publication of the Bill. This was later reduced by you to the two months of January and April 2021 with regard to Section 21 only of the Bill.

I now request that you provide me with any correspondence between your Department and NHS England that refers to paragraph 1.54 of the Long Term Plan. The period to search for this correspondence is the six months before 23 December 2020. If there is a danger of the cost limit of providing this information being exceeded, then I am prepared to limit the period to one of less than six months as decided by you."

7. The DHSC responded on 25 September 2023. It stated that it does not hold the requested information.
8. The complainant requested an internal review on 28 September 2023.
9. The DHSC carried out an internal review and notified the complainant of its findings on 5 October 2023. It confirmed again that it does not hold the requested information.

Scope of the case

10. The complainant contacted the Commissioner on 10 October 2023 to complain about the way their request for information had been handled. They explained the previous information requests they had made on the subject and the decision notices already received and made the following comments:

"The NHS's recommendations to Government and Parliament dated September 2019 states under paragraph 173 that "In accordance with the Health and Social Care Select Committee's recommendation, non-statutory providers would not be able to hold an ICP contract". This is consistent with paragraph 1.54 of NHS England's Long Term Plan (and with the basis of my FOI request). It is inconceivable to me that this requirement was overruled between September 2019 and publication of the Bill in July 2021 without any discussion in relevant correspondence. I am therefore not content with the DHSC's decision on 25 September 2023 and request that you review it."

11. The Commissioner considers that the scope of his investigation is to establish whether or not on the balance of probabilities the DHSC holds any recorded information falling within the scope of the complainant's request.

Reasons for decision

Section 1 – general right of access

12. Section 1 of the FOIA states that any person making a request for information is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request and, if that is the case, to have that information communicated to them.
13. In cases where a dispute arises over whether recorded information is held by a public authority at the time of the request, the Commissioner - following the lead of a number of First-tier Tribunal decisions - applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.
14. The DHSC advised that it searched the relevant director's emails for all correspondence which contained the first few words ("Funding flows and contract reform") of the relevant paragraph (para 1.54) of the NHS Long Term Plan. It then reviewed all correspondence identified in the search but concluded that none of it was actually relevant to paragraph 1.54 of the NHS Long Term Plan. It said that this would have identified any relevant correspondence, as the relevant director would have been addressed or copied in to any correspondence that would have meaningfully discussed the proposals set out in paragraph 1.54 of the NHS Long Term Plan between the DHSE and NHS England.
15. In addition to this, the DHSC confirmed that it consulted with the relevant director directly as well as members of his team. These were team members who were in post at this time and since the publication of the NHS Long Term Plan, as well as up to and throughout the development and delivery of the Health and Care Act 2022. The DHSC said that these consultations identified that there was little chance that any correspondence regarding paragraph 1.54 of the NHS Long Term Plan took place during the period for which the complainant has requested information. This is because any such discussions on the policy content of paragraph 1.54 would have concluded months ahead of the period of time for which information was requested. It commented that this helps to explain why the search undertaken did not identify any information in the scope of the request.

16. The DHSC stated that this consultation also identified that any deliberation within the department concerning paragraph 1.54 of the NHS Long Term Plan would have concluded (and would not have been re-opened) months ahead of the development of the Health and Care Act 2022. It said that it is therefore content that there is unlikely to be any record of a deliberation which links the policy in paragraph 1.54 with the development of the Health and Care Act 2022. To demonstrate this point, the DHSC provided the Commissioner with the original list of policies NHS England asked it to take forward in the development and delivery of the Health and Care Act 2022. It said these are also accessible via the following link:

[NHS England » Legislating for integrated care systems: five recommendations to Government and Parliament](#)

17. The DHSC concluded with confidence that due to the reasons outlined above no recorded information, falling within the scope of the request, would have existed during the time period specified in the request. Nonetheless, it has carried out adequate and appropriate searches to back this up, which have confirmed that no recorded information is held.
18. The Commissioner notes that the DHSC said during his previous investigation that it was unable to offer any advice and assistance to the complainant (in terms of narrowing the scope of the request so as to fall within the cost limit) as it was confident that the requested information does not exist. This is documented in the Commissioner's decision notice of 18 April 2023, reference IC-227184-V0R3.
19. The DHSC has explained why it holds no recorded information and it is confident that this is case. Nonetheless, it has carried out appropriate searches of where the information would be held, if indeed it was, and this has returned nil results. Any information that was returned from the search terms was reviewed and identified to contain no relevant information.
20. The Commissioner is therefore satisfied that on the balance of probabilities the DHSC does not hold any recorded information falling within the scope of the request. He is therefore satisfied that the DHSC has complied with the requirements of FOIA.

Other matters

21. Again it is noted that the complainant has submitted three requests to the DHSC now on this subject and none have been successful in locating any recorded information in scope. The complainant has been patient whilst these requests have been responded to and investigated by the

DHSC and the Commissioner. It is appreciated that the complainant believes recorded information must be held on the topic. But this is not sufficient to demonstrate that recorded information is indeed held by the DHSC.

Right of appeal

22. 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

23. 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.
24. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Samantha Coward
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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SK9 5AF