Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 November 2024

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

Decision (including any steps ordered)

1. The Commissioner's decision is that the complainant's request for information associated with 'DCB2212: Drug Patient Level Contract Monitoring (DrPLCM)' is a vexatious request under section 14(1) of FOIA.

2. NHE England (NHSE) isn't obliged to comply with the request and no corrective steps are necessary.

Request and response

3. The complainant made the following information request to NHSE on 13 February 2024:

> "I would like to request a report from DCB2212: Drug Patient Level Contract Monitoring (DrPLCM) under the Freedom of Information Act.
>
> Could I please request a .csv file containing records from this dataset for the single most recent data month available?
>
> Field Number Name of Data Element
> 1 FINANCIAL MONTH
> 2 FINANCIAL YEAR
> 5 ORGANISATION IDENTIFIER (CODE OF PROVIDER)

6 ORGANISATION SITE IDENTIFIER (OF TREATMENT)
19 ACTIVITY TREATMENT FUNCTION CODE
23 THERAPEUTIC INDICATION CODE (SNOMED CT, OR ICD-10, OR TEXT DESCRIPTION)
24 HIGH-COST TARIFF EXCLUDED DRUG CODE (SNOMED CT DM+D)
26 DRUG NAME (HIGH-COST TARIFF EXCLUDED DRUG)
27 ROUTE OF ADMINISTRATION (SNOMED CT DM+D)
28 DRUG STRENGTH (HIGH-COST TARIFF EXCLUDED DRUG)
29 DRUG VOLUME (HIGH-COST TARIFF EXCLUDED DRUG)
30 DRUG PACK SIZE (HIGH-COST TARIFF EXCLUDED DRUG)
31 DRUG QUANTITY OR WEIGHT PROPORTION (HIGH-COST TARIFF EXCLUDED DRUG)
32 UNIT OF MEASUREMENT (SNOMED CT DM+D)
35 COMMISSIONED SERVICE CATEGORY CODE 36 SPECIALISED SERVICE CODE"

4. In its initial response of 11 March 2024, NHSE advised that, under section 12(1) of FOIA it wasn't obliged to comply with the request as to do so would exceed the appropriate cost limit.

5. The complainant requested an internal review on 11 March 2024. They said that NHSE's response was identical to one it had provided to a separate request that was much greater in scope – 24 months as opposed to two months.

6. NHSE provided a review on 4 September 2024. It now categorised the request as a vexatious request and refused it under section 14(1) of FOIA.

Reasons for decision

7. Under section 14(1) of FOIA a public authority isn't obliged to comply with a request for information if the request is vexatious.

8. Broadly, vexatiousness involves consideration of whether a request is likely to cause a disproportionate or unjustified level of disruption, irritation, or distress.

9. To analyse vexatiousness, the Commissioner considers four broad themes that the Upper Tribunal developed in **Information Commissioner vs Devon County Council & Dransfield [2012] UKUT 440 (ACC)**:

- Value or serious purpose
- Motive
- Burden; and

- Harassment to staff

10. The Commissioner will first look at the value of the request as this is main point in favour of the request not being vexatious. He will then look at the negative impacts of the request ie the three remaining themes of burden, motive, and harassment, before balancing the value of the request against those negative impacts.

11. In its internal review response, NHSE explained that its Commercial Medicines Unit (CMU)[1] is responsible for setting up framework agreements covering the supplies of various medicines for the use of NHS secondary care trusts in England. As part of this, the CMU is responsible for buying and securing the supply of medicines prescribed in NHS hospitals in England.

12. NHSE confirmed that it therefore holds the information the complainant has requested in so far as NHSE CMU's activities apply.

13. NHSE went on to advise that, although it has been able to locate the information being requested within the appropriate cost limits (ie 18 hours), it considered processing the request would create a disproportionate burden on its resources. It has therefore applied section 14(1) to the request.

14. NHSE said that if it were to disclose this information in full it would be seen by providers as a breach of trust and could dis-incentivise both current and potential suppliers from taking part in future tendering processes NHSE holds. This would be prejudicial to NHSE's commercial interests as it wouldn't be able to obtain value for money when purchasing medicines.

15. NHSE continued that it considered disclosure would be likely to cause commercial prejudice to the suppliers of these medicines as it could prejudice the suppliers' market competitiveness. However, it noted, in line with Information Tribunal decision in the case Derry Council v Information Commissioner (EA/2006/0014), the Commissioner doesn't consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Therefore, NHSE said, it was unable to establish whether

[1] https://www.england.nhs.uk/medicines-2/commercial-medicines/commercial-medicines-unit/

the third parties will encounter definite commercial detriment without contacting all relevant suppliers.

16. Based on its previous experience, NHSE said it is aware some suppliers may not consider all of this information to be commercially sensitive whereas some suppliers are of the view this information is commercially sensitive to their organisations. Due to the way the information is collated and stored, there is no straightforward method to extract information which allows the data to be broken down by the suppliers who have consented to disclosure versus non-disclosure. NHSE explained that this is because when this dataset was being created and the information is collated, it was not designed to accommodate for this type of FOIA request.

17. As such, to respond appropriately to the request, NHSE said that its Data and Analytics team and Commercial Medicines Unit would be required to take a number of steps to determine what can be disclosed and what needs to be withheld.

18. NHSE confirmed that there are approximately 567 high cost drugs in its database which fall in scope of the request. It then provided a table that detailed what it would need to do to ascertain whether any suppliers had agreed that details of their products on the Framework Agreement would be exempt from FOIA, in relation to every drug. This table is reproduced in the Appendix to this notice.

19. For some of the actions in the table, NHSE said it was unable to provide a detailed estimate but based on the proposed action that would be required, it was confident it will take a significant amount of time (eg to write out 500 suppliers to ascertain their views).

20. Moreover, NHSE said, the table doesn't take into account the discussions that have already taken place (and will need to take place if the request were processed in full) between the relevant business areas (subject matter experts) who hold this information (ie NHS England's Data and Analytics team and Commercial Medicines Unit) and the FOI team.

21. The FOI team has the requisite knowledge to be able to advise on whether certain exemptions are engaged. But NHSE said that discussions would still be required between the subject matter experts to understand any potential harm from disclosure and whether those harms engage an applicable FOI exemption – for example section 43 of FOIA which concerns commercial interests. Furthermore, the FOI team has access to the required specialist software to be able to redact material so that it can't be unredacted.

22. NHSE advised that it's also important to note that the Medicines Procurement and Supply Chain (MPSC) Systems are standalone, separate and cannot be compared to other systems (such as the Business Services Authority). This means that reporting infrastructure and capabilities will be different to other systems. It said that the information held by MPSC regarding tenders and supplier awards is held in standalone systems that only MPSC have access to. As it had explained, to fully process the complainant's request the MPSC would be required to seek the views from the relevant suppliers in relation to commercially sensitive information.

23. Furthermore, NHSE said, the data that MPSC hold relevant to this request isn't held in an easily downloadable database but would require the locating of specific tender response documents (primarily Word, PDF, and Excel documents) and examining the document set for each supplier on each tender to note their wishes. This would further increase the time it would take to process the request in accordance with FOIA.

24. Taking these factors into consideration, NHSE estimated that to process the request it would take at least 70 hours.

25. NHSE acknowledged that the complainant may not have intended for their request to result in causing a disproportionate burden on its resources and considered there may be a serious purpose for the complainant requesting this information. But NHSE referenced the Commissioner's decision in IC-189709-N2G5[2]. In that decision, the Commissioner stated that "it would still take 70 hours to process [the request]. This would place a significant and overwhelming burden on the resources of NHSE despite any serious purpose or value the request may have." The Commissioner has noted that the request in that case was for different information.

26. In correspondence to the Commissioner on 20 September 2024, the complainant said that they hadn't requested full disclosure of the data set or particular commercial confidential information. They said their information request "deliberately excluded commercial information" and didn't include any cost or pricing information fields; only the volumes of medicine issued. The complainant said that the volumes of medicine issued are routinely released in response to FOIA requests as this information isn't considered commercially confidential.

[2] https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024108/ic-189709-n2g5.pdf

27. The Commissioner asked NHSE to address this argument.

28. NHSE confirmed its view that high cost drugs data is commercially sensitive as is the volume of their usage by provider site and therapeutic indication. It said that this information would be invaluable for anyone who wants knowledge of the market, and it will provide a competitive advantage, particularly for drug companies wishing to market a specific drug at certain hospitals.

29. NHSE gave the following example. If a drug company were trying to develop a new high-cost drug, it would first need to understand the demand for this product and the 'volume of drugs' is one of those indicators. Among other things, the company would want to know how much was being used in terms of numbers of administrations to patients, the strengths of the drug, what clinical indications is it being used to treat, which hospitals it was being used in, is it widely available and being used by all hospitals or just in a few.

30. NHSE said that providing the volume of medicines of high cost drugs alongside the organisation identifier, name of the drug, its strength (and so forth) will provide vital information to new entrants for specific drug production. Competitors could use this information to market new drugs at specific hospitals in a tailored approach. For example, if this information were provided and a competitor discovered that a particular type of drug was taken in the form of an injection, the company may develop something that could be taken orally in tablet form which is easier to administer. If the competitor's drug is just as effective, this will impact the supplier's ability to buy or sell services.

31. NHSE confirmed that it would be unable, however, to confirm which specific suppliers found this information to be commercially sensitive without approaching each supplier, for each drug.

32. Regarding the complainant's assertation that volumes of high cost drugs are routinely disclosed alongside the various identifiers being requested, NHSE says that, to the best of its knowledge, it hasn't disclosed this information into the public domain.

33. NHSE said that it has already advised the complainant that this type of information is available to certain individuals under its Data Access Request Service (DARS)[3]. DARS can offer clinicians, researchers, and commissioners the data required to help improve NHS services and they

[3] 36. https://digital.nhs.uk/services/data-access-request-service-dars.

will have to agree to a contract as it's critical in controlling the purposes for which data can be used.

The Commissioner's conclusion

34. NHSE isn't relying on section 12 of FOIA in this case as it has been able to locate the requested information within the appropriate cost limit. Section 12 only takes account of the time involved in certain activities, namely determining whether the information is held, locating, retrieving, and extracting the information.

35. NHSE has categorised the request as vexatious under section 14(1) as the particular activities it would need to undertake before it was able to disclose any of the requested information would take an amount of time that's disproportionate to the request's value.

36. NHSE has confirmed the volume of information in scope and explained, in its submission and the table in the Annex to this notice, what it would need to do before it could release any information and how long these activities would take. It estimates it would take 70 hours to do this work. The Commissioner sees no reason to doubt this estimate is reasonable. Even if it took half that time, 35 hours is still almost double the 18 hours that is judged to be the maximum amount of time a public authority such as NHSE should spend dealing with a request, in relation to section 12.

37. The request has a value to the complainant, but the Commissioner doesn't consider that it has sufficient wider public interest to justify the burden that complying with it would cause NHSE. He's satisfied that NHSE is entitled to refuse the request under section 14(1) of FOIA.

Other matters

38. As NHSE is aware, an internal review should be provided within 20 working days of the request for one and, in exceptional circumstances only, within a maximum of 40 working days. NHSE exceeded both these limits in this case and the Commissioner has recorded this for monitoring purposes.

Right of appeal

39. 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

40. 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.

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

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APPENDIX

Action required	Estimated Time
Establish whether NHS England has a Framework Agreement tendered for a particular drug.	It is difficult to provide an accurate estimation for all of these activities (e.g. finding a full contact list of all suppliers, tracking their responses and recording their outcomes is difficult to quantify). We have considered these and have estimated to perform these actions for 567 different products will take at least 40 hours.
Which supplier has responded to the tender.	
Ascertaining whether a supplier has stated that they want their details to be exempt from FOIs.	
In the absence of any suppliers confirming their details being disclosed, NHS England would need to contact those suppliers (potentially over 500 suppliers) individually to seek their views.	
This process would need to be carried out again for any suppliers which are not on the Framework Agreement.	
A significant proportion of the dataset is coded with a SNOMED code only i.e. no drug name description. The data set would first need to be pre-processed to assign drug names to all records where these are either missing or where the given drug name does not match with the supplied SNOMED code: • Locate the relevant SNOMED look-up tables • Write a query to assign a name to all records • Run the query • Quality assure the result set to ascertain the extent to which a match has/has not been made and rectify cases where possible	 1 hour 1 hour 1 hour 5 hours
Once all records had been assigned a textual description allowing for a selection criteria to be made based on which suppliers had consented to disclosure of their data: • Write a query based on fuzzy text matching for each supplier-consented drug combination • Run the query • Quality assure the result set to ascertain whether any extracted rows contained data that could enable the identification of a patient e.g. therapeutic indication and certain blood factor products	 4 hours 2 hours 5 hours

• Redact any records containing data that might enable patient identification through triangulation with other data sources	4 hours