

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 September 2019

Public Authority: NHS England
Address: 4N22 Quarry House
Quarry Hill
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant has requested information relating to staffing at North and East London Commissioning Support Unit (NEL CSU). NHS England refused to comply with the request under section 12 FOIA.
2. The Commissioner's decision is that NHS England was correct to apply section 12 FOIA and that it was not therefore obliged to comply with the request. The Commissioner does not however consider that NHS England provided the complainant with appropriate advice and assistance in accordance with its obligations under section 16 FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with appropriate advice and assistance based upon NHS England's revised position that it would exceed the cost limit to comply with this request in isolation.
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 1 December 2018 the complainant made the following request for information under the FOIA for:

"With regard to NEL CSU under the Freedom of Information Act 2000, I request workforce information for the financial year 2017 to 2018 as follows:

1. Provide the number of staff and categorise by ethnicity and individual pay band
 2. Provide the number of staff that has been promoted to higher pay bands categorise by ethnicity and indicate initial pay band and pay band gained
 3. Provide the number of staff that has departed the organisation categorise by ethnicity and pay band
 4. Provide the number of staff by directorate, ethnicity and pay band"
6. On 24 January 2019 NHS England responded. It refused to comply with the request under section 12 FOIA.
7. The complainant requested an internal review on 28 January 2019. NHS England sent the outcome of its internal review on 1 March 2019. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 1 March 2019 to complain about the way the request for information had been handled.
9. The Commissioner has considered whether NHS England was correct to apply section 12 FOIA to the request in this case.

Reasons for decision

Section 12 – cost exceeds appropriate limit

10. Section 12 of the FOIA allows a public authority to refuse to deal with a request where it estimates that it would exceed the appropriate cost limit to:

- either comply with the request in its entirety, or
- confirm or deny whether the requested information is held.

11. The estimate must be reasonable in the circumstances of the case. The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. Public authorities can charge a maximum of £25 per hour to undertake work to comply with a request - 24 hours work for central government departments; 18 hours work for all other public authorities. If an authority estimates that complying with a request may cost more than the cost limit, it can consider the time taken to:

- (a) determine whether it holds the information
- (b) locate the information, or a document which may contain the information
- (c) retrieve the information, or a document which may contain the information, and
- (d) extract the information from a document containing it.

12. The appropriate limit for NHS England is £450 or the equivalent of 18 hours work.

13. In this case, NHS England had aggregated this request with three other requests made by individuals with whom it appeared the complainant was acting in concert. It argued that the combination of the aggregated requests would exceed the cost limit under section 12 FOIA.

14. The Commissioner's guidance¹ explains that, when a public authority is estimating whether the appropriate limit is likely to be exceeded, it can include the costs of complying with two or more requests if the conditions laid out in regulation 5 of the Fees Regulations can be satisfied. Those conditions require the requests to be:

- ☐ made by one person, or by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign;
- ☐ made for the same or similar information; and
- ☐ received by the public authority within any period of 60 consecutive working days.

¹ https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

15. The Commissioner would therefore ordinarily establish whether the above criteria could be met and whether the requests could be correctly aggregated.
16. However when providing its submissions to the Commissioner in support of its application of section 12 FOIA, NHS England revised its position and confirmed that it would exceed the cost limit just to comply with the request made by the complainant on 1 December 2018.
17. NHS England explained that the applicant's second question ("*Provide the number of staff that has been promoted to higher pay bands categorise by ethnicity and indicate initial pay band and pay band gained*") would require over 18 hours to complete. The Electronic Management System used across NHS England, including within NEL CSU, can be used to produce various reports. A diversity report can be produced, which sets out the ethnicity information self-reported by staff members. However, this does not allow identification of individual staff, (or, therefore, the employment history of staff) and as such cannot be used to determine which staff have previously been promoted.
18. Similarly NHS England explained that a report can be produced which shows changes made to an individuals' employment record, including job title changes. This can be used to determine whether an individual has been promoted, but does not include ethnicity details. As such, the only way to answer the complainant's question would be to first record each instance of a staff job title change within the relevant time-period (the date of the promotion, the starting pay band and the new pay band), using the staff changes report, then manually examining the individual staff record of each relevant member of staff to record whether the job title change represented a promotion, and to record ethnicity information.
19. NHS England went on that in order to identify the change in job title and/or banding the report which must be run includes any change to an individual's ESR (staff record). NHS England ran this report and identified that there are 160,668 rows of data which would need to be reviewed. It estimated that it would take 20 seconds to review each line of data and remove it from the report. This first part in the extraction of the data therefore exceeds the appropriate limit in itself as it totals 892 hours. NHS England is unable to determine further costs as it would require the outcome of the process detailed above to establish how many posts would need to be matched against ethnicity and investigate further within individual HR records.
20. Based upon NHS England's submissions, the Commissioner would agree that it would exceed the cost limit to comply with part 2 of the request

given the capabilities of its Electronic Management Systems in terms of producing the required reports and the number of rows of data that would need to be extracted. Furthermore given that the work described would still not cover the whole of part 2 of the request or indeed parts 1, 3 and 4, the Commissioner does consider that it would exceed the cost limit under section 12 FOIA to comply with the request in this case.

Section 16 – Advice and Assistance

21. Under section 16 FOIA NHS England is obliged to provide the complainant with advice and assistance to help enable the complainant to refine the request to fall within the cost limit or explain why this would not be possible.
22. In this case NHS England has confirmed that it had advised the complainant that it was aggregating the request with three others and explained that he may wish to consider submitting the request after the 60 consecutive day time frame (referred to at paragraph 17 above).
23. As NHS England has reconsidered its position that this request alone would exceed the cost limit, it has confirmed that alternative advice and assistance could now be provided.
24. As NHS England has not provided appropriate advice and assistance based upon its revised position that this request alone would exceed the cost limit, it has breached section 16 FOIA in this case.

Right of appeal

25. 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@Justice.gov.uk

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

26. 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.
27. 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.....

Gemma Garvey
Senior Case Officer

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