

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 December 2019

Public Authority: Care Quality Commission
Address: Citygate
Gallowgate
Newcastle Upon Tyne
NE1 4PA

Decision (including any steps ordered)

1. The complainant has requested information from the Care Quality Commission (CQC) about NHS organisations and concerns relating to NHS Key Performance Indicators (KPIs). The CQC refused the request, citing the cost limit as set out in section 12(1) of the FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that the CQC is entitled to rely on section 12(1) of the FOIA to refuse the request. The Commissioner also considers the CQC to have fulfilled its duty to provide advice and assistance further to section 16 of the FOIA.
3. The Commissioner does not require any further steps to be taken.

Request and response

4. On 8 August 2019, the complainant wrote to the public authority and requested information in the following terms:

"Under the terms of the Freedom of Information Act please share with me the NHS organisations that the CQC has knowledge of concerns in relation to the integrity of National NHS Key Performance indicators such as waiting list figures and A&E figures.

Please list the information by date the concern first became known to the CQC and the organisation name.

Date Organisation Name"

5. The public authority responded on 13 August 2019 and refused the request citing section 12 of the FOIA (the cost of compliance exceeds the appropriate limit) as the basis for doing so.
6. Following an internal review the public authority wrote to the complainant on 22 August 2019. It maintained its reliance on section 12 as its basis for refusing the request.

Scope of the case

7. The complainant contacted the Commissioner on 22 August 2019 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of this case to be to determine if the public authority has correctly cited section 12(1) of the FOIA in response to the request.

Reasons for decision

Section 12 – cost of compliance

9. Section 12(1) of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the "appropriate limit" as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations')¹.

¹ <http://www.legislation.gov.uk/ukxi/2004/3244/contents/made>

10. The appropriate limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations') at £450 for public authorities.
11. 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 for the public authority.
12. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:
 - determining whether the information is held;
 - locating the information, or a document containing it; retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
13. A public authority does not have to make a precise calculation of the costs of complying with a request; instead only an estimate is required. However, it must be a reasonable estimate. In accordance with the First-Tier Tribunal in the case of *Randall v Information Commissioner & Medicines and Healthcare Products Regulatory Agency* EA/2007/0004, the Commissioner considers that any estimate must be "sensible, realistic and supported by cogent evidence"². The task for the Commissioner in a section 12 matter is to determine whether the public authority made a reasonable estimate of the cost of complying with the request.
14. Section 12(1) is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under FOIA to consider whether, despite this being the case, there is a public interest in the disclosure of the information.

The CQC's Position

15. It is the CQC's position that to locate, retrieve and extract all of the information it holds within the scope of this request would clearly exceed the appropriate cost for compliance.
16. The CQC went on to state that any concerns in relation to the integrity of National NHS Key Performance indicators (such as waiting list figures

² <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf>

and A&E figures) are shared with the relevant inspector with responsibility of the NHS Trust in question.

17. The CQC explained that this information would be then be saved in their Customer Relationship Management system by the inspector as a concern to consider at the next inspection. In light of this, the CQC state that it would have to review all of the concerns it held for each of the 152 acute NHS Trusts to determine if concerns existed.
18. The CQC pointed out that, as the complainant did not originally specify a time period for the information he is seeking, they would be required to search a significant number of records. At internal review, the complainant confirmed that they were seeking all of the information held within the scope of his request since 1 January 2014.
19. At internal review, the CQC argued that to review the information it held for one Trust alone since 1 January 2014 would exceed the appropriate limit.
20. According to the CQC, there are no specific requirements placed on them to categorise concerns raised about NHS Trusts in a particular way or against certain fields. CQC stated that, as an organisation, it is appropriate for concerns to be logged without the need for further granular breakdown. Concerns are then reviewed by an inspector who assesses these concerns for any patterns or common themes.

The Complainant's Position

21. It is the complainant's position that his request is specific enough to locate information without the CQC needing to apply section 12.
22. According to the complainant, the CQC is unable to comply with the request because it does not store information correctly. For clarity, the Commissioner has addressed the wider records management issues raised by the complainant in the 'Other Matters' section of this Decision Notice.

The Commissioner's Position

23. The Commissioner is satisfied that complying with the request would clearly take the CQC more than 18 hours. In reaching this conclusion she has taken into account the broad scope of the request and the sampling exercise carried out by the public authority.
24. The request in this case seeks information about NHS organisations of which the CQC has knowledge of concerns in relation to NHS KPIs. At internal review, the complainant confirmed that he is seeking all of the information held within the scope of the request since 1 January 2014 which covers a significant amount of time in the eyes of the CQC.

25. The CQC explained that, whilst most of the intelligence it received concerning NHS KPIs was relevant to its statutory role, it does not have a specific responsibility to monitor NHS waiting lists. Information concerning waiting lists is passed onto the relevant inspector for review but it would not be coded or flagged on its Casework Relationship Management system in a way that would allow it to be centrally collated. In light of this, the CQC stated that it would require a detailed review of the data it had received through all routes (scanned copies of correspondence, inspection notes, data sets, correspondence from partner bodies held on colleagues email systems etc) in order to locate all of the information it held within the scope of the request.
26. Due to the way this information is stored, the CQC state that it would have to review all concerns related to individual enquiries for each of the 152 NHS Trusts held since 1 January 2014. In light of this, the CQC stated that it would have to determine if concerns existed within these enquiries and the date these were received. On this basis, the Commissioner is confident that it would exceed the appropriate cost limit for the CQC to locate all of the information it held within the broad scope of the request.
27. As a sample exercise the CQC focused on one NHS Trust. For this Trust alone there existed 382 enquiries that were recorded as allegations, complaints, concerns, safeguarding and whistleblowing since 1 January 2014. However, the CQC explained that these enquiries would not take into account all of the concerns falling within the scope of the request. The CQC stated that it would have to review all of the 1,441 enquiries recorded for this Trust alone since 1 January 2014 and that to review each individual enquiry for specific concerns would take between 5 and 10 minutes.
28. Using the CQC's more conservative estimate of 5 minutes, the Commissioner notes that it would take 1 staff member 120 hours to review all of the 1,441 enquiries for this individual Trust. Due to the complexity of some of these enquiries, the Commissioner is confident that this is a reasonable estimate on the basis that each enquiry would have to be reviewed to establish if concerns exist. The estimate to review all of the information the CQC holds for one Trust would therefore exceed the appropriate limit of 18 hours.
29. The CQC went on to explain that it drew its estimate of 5-10 minutes for each enquiry from extensive past experiences of reviewing enquiries stored in the CRM system. It explained that many enquiries contained extensive information that was complicated and difficult to interpret. Furthermore, information may be held within an enquiry file that show concerns came to light after the initial contact with the CQC. As stated previously, some concerns (such as those related to NHS waiting list figures) may be stored in a way that does not permit automated

searching. The CQC therefore considered the estimate of 5-10 minutes to review each enquiry to be conservative.

30. As previously stated, a public authority does not have to make a precise calculation of the costs of complying with a request in order for section 12(1) to be engaged. The Commissioner can take the view on whether the estimate is "reasonable". The Commissioner considers that, taking into account the scope of the request and the nature of the information held by the CQC, the estimate is reasonable in this case.
31. In light of the above, the Commissioner is satisfied that the CQC is not obliged to respond to the request in reliance of section 12(1).

Section 16 – advice and assistance

32. The CQC provided advice and assistance in its original response to the complainant, directing the complainant to review specific inspection reports for NHS Trusts as this may contain some information within scope of the request.
33. However, the Commissioner notes that the CQC did not provide any advice on narrowing the request that would bring it within the cost limits. The Commissioner does also note though that if enquiries for the 152 NHS Trusts took 5 minutes to review then only 216 enquiries of the 1,441 enquiries held for one Trust alone could be reviewed within the cost limit. Therefore narrowing the request would not have provided the complainant with the information requested.
34. The Commissioner concludes that the CQC have complied with section 16 of the FOIA.

Other matters

35. Although not forming part of the formal decision notice the Commissioner uses 'Others Matters' to address issues that have become apparent as a result of a complaint or her investigation of that complaint.
36. In their complaint to the Commissioner the complainant stated that, by refusing his request under section 12(1), the CQC had failed to maintain good records management practices as set out in section 46 of FOIA.
37. The Commissioner notes that the code of practice issued under section 46 of FOIA (the "code") contains recommendations as to good practice in relation to the creation and maintaining of records by public authorities³.

³ <https://ico.org.uk/media/for-organisations/documents/1624142/section-46-code-of-practice-records-management-foia-and-eir.pdf>

Right of appeal

38. 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

39. 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.
40. 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

Mr Phillip Angell
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Wycliffe House
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