

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 22 May 2014

**Public Authority:** NHS England  
**Address:** 8E02 Quarry House  
Quarry Hill  
Leeds  
LS2 7UE

### **Decision (including any steps ordered)**

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1. The complainant has requested all the email messages and reports sent or received by Sir Bruce Keogh in connection with the Leeds Teaching Hospitals NHS Trust from 8 June 2013 to the date of the request. NHS England refused to comply with the request under section 12 of the Freedom of Information Act 2000 (FOIA) as it said it would exceed the cost limit to do so.
2. The Commissioner's decision is that NHS England has correctly applied section 12 FOIA in this case.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Provide the complainant with advice and assistance under section 16 FOIA.
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**

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5. On 16 August 2013 the complainant requested information of the following description:

"In view of the passage of time, please could I submit an additional FoI request for copies of all the email messages and reports sent or received by Sir Bruce Keogh in connection with the Leeds Teaching Hospitals NHS Trust from 8 June 2013 to the present day?"

6. On 2 September 2013 NHS England responded. It said that it was not obliged to comply with the request under section 12 FOIA as it would exceed the cost limit to do so.
7. The complainant requested an internal review on 2 September 2013. NHS England sent the outcome of its internal review on 5 February 2014. It upheld its original position.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 26 February 2014 to complain about the way his request for information had been handled.
9. The Commissioner has considered whether NHS England was correct not to comply with this request under section 12 FOIA.

### **Reasons for decision**

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10. Section 12(1) FOIA states that, "Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit."
11. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Regulations") sets the appropriate limit at £450 for the public authority in question. A public authority can charge a maximum of £25 per hour for work undertaken to comply with a request which amounts to 18 hours work in accordance with the appropriate limit set out above. If an authority estimates that complying with a request may cost more than the cost limit, it can consider the time taken in:
  - (a) determining whether it holds the information,
  - (b) locating the information, or a document which may contain the information,
  - (c) retrieving the information, or a document which may contain the information, and

- (d) extracting the information from a document containing it.
12. NHS England said that to understand and estimate the time it would take to comply with this request, the office of Sir Bruce Keogh reviewed the email and filing accounts. It explained that Sir Bruce Keogh's NHS England email account contains email correspondence from around February 2013 to the present day. It said that on average, based over 7 days, Sir Bruce Keogh receives 40 emails daily. Within Sir Bruce Keogh's email account, and in the absence of a corporate electronic records management/filing system for NHS England, many emails received in the inbox are filed into a large series of sub-folders according to their subject matter. It explained that currently there are an inbox, sent folder and 36 sub-folders on different subject matters in Sir Bruce Keogh's email account.
  13. NHS England acknowledged that it does hold information falling within the scope of the request. However, to ensure any emails in relation to Leeds Teaching Hospitals NHS Trust (LTH), regarding any subject matter are captured, it said it is necessary to review all emails within the specified time frame, as the scope of the request does not allow sufficient narrowing down to focus on specific subject matter folders, as emails in relation to LTH, regarding any subject matter could be located in any of the 36 sub-folders, inbox or sent folder.
  14. Whilst NHS England accepts the initial location as being Sir Bruce Keogh's email account this is not sufficient in locating specific pieces of information which fall in scope of the request itself. NHS England said that to locate the information would involve a review of Sir Bruce Keogh's entire email account for the time frame specified. It said that within the 36 sub-folders the number of emails in each one ranges from a small number in single figures to some having around 1,000+ in them.
  15. It said that it has reviewed the requested time period of 8 June to 16 August 2013. It confirmed that there are roughly 966 emails within this time period that would need to be reviewed. This is without understanding scope or relevancy to the request submitted. Using an approximate and average guide of it taking two minutes to review each email in the inbox over the specified period of time, it estimates that it would take:  
  
(2 minutes) x (966 emails) = 1,938 minutes: 32 hours, 18 minutes.
  16. It said that this is before any sub-folders or the sent folder has been searched/reviewed for emails over the specified time period.

17. Finally NHS England explained that a search function can be used to assist with narrowing the number of emails down, but this would not be a complete solution. It said that simply using a search function on 'LTHT', 'Leeds Teaching Hospitals NHS Trust', or simply 'Leeds' is insufficient as some emails may not actually refer to these, neither in the email heading nor content of the email. For example, they may only refer to a named individual at the Trust, and therefore some relevant emails may not be captured.
18. The Commissioner considers that due to the number of emails falling within the time frame of the request, the wide scope of the request in that it would encompass any emails relating to LTHT and the fact that using specified search terms would not call up all relevant emails, it would exceed the cost limit to comply with the request in this case.

## **Section 16**

19. Under section 16 FOIA, public authorities are obliged to provide complainants with advice and assistance if a request would exceed the cost limit to comply with a request.
20. NHS England said that it attempted to help recommend other ways in which the complainant could narrow down the scope of his request in order for it to comply and respond. It confirmed that to date, the complainant has not chosen to do this.
21. The Commissioner is aware that in its initial response, NHS England said that if the complainant were to refine his request for information within more specific margins, for example, specifying which subject matter(s) within the Leeds Teaching Hospitals NHS Trust his request relates to, then it may be able to continue processing the request.
22. In its response to the Commissioner NHS England has suggested that there may be specific subfolders that the complainant may be interested in. In particular it has referred to a subfolder entitled 'Leeds Heart Surgery' which it has said contains 205 emails. Based upon the time estimates provided above, it would seem likely that the emails in this specific subfolder could be reviewed with the cost limit. The Commissioner considers that NHS England could have been more prescriptive in the provision of its advice and assistance by sharing this information with the complainant. The Commissioner does not therefore consider that NHS England has sufficiently complied with its obligations under section 16 FOIA in this case.

## Right of appeal

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23. 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: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

24. 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.
25. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**