

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 April 2023

Public Authority: NHS England
Address: PO Box 16738
Redditch
B97 9PT

Decision (including any steps ordered)

1. The complainant has requested information from NHS England for the recorded minutes for the UK IPC cell from 23 January 2020. NHS England advised it holds the requested information, however, it was relying on section 12 of FOIA – cost of compliance exceeds the appropriate limit.
2. The Commissioner's decision is that NHS England is entitled to refuse to comply with the request in accordance with section 12(1) of FOIA. NHS England has also complied with section 16 of FOIA – advice and assistance.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 22 November 2022, the complainant wrote to NHS England and requested information in the following terms:
"Could you please provide the recorded minutes for the UK IPC cell from 23 Jan 2020 until the present day".
5. NHS England responded on 19 December 2022. It stated that it holds the information but that it was relying on section 12 of FOIA, as to

extract the information relevant to the request, it would exceed the appropriate limit.

6. Following an internal review NHS England wrote to the complainant on 22 March 2023. It stated that it upheld its original response.

Scope of the case

7. The complainant contacted the Commissioner on 24 January 2023, to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of this complaint is to determine if NHS England was correct to refuse to comply with the request under section 12(1) of FOIA. The Commissioner will also consider if NHS England has fulfilled its obligation under section 16 of FOIA to provide advice and assistance.

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 cost limit.
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 such as NHS England.
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 NHS England.
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;

- 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 decision in the case of *Randall v IC & Medicines and Healthcare Products Regulatory Agency*¹ the Commissioner considers that any estimate must be “sensible, realistic and supported by cogent evidence”. 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. NHS England has explained that it provided the secretariat function for the UK IPC Cell meetings between 2 March 2020 to 31 March 2022, which is a total of 25 months’ worth of meeting minutes. It advised that the meeting initially took place on an ad hoc basis, internal to NHS England from 23 March 2020, moving to daily from February 2020. These meetings then went to weekly from 29 April 2020, before going to bi-monthly and ad hoc meetings when required.
 15. NHS England has also explained that throughout the last three years, there has been frequent staff movement within NHS England to provide support in various clinical cells regionally and nationally in responding to the pandemic. It explained that during this time, it was an extremely high-pressed environment and it was not always possible to diligently adhere to its records management policy. It added that staff (sometimes clinical), were required to facilitate and note meetings when available and did not always have the knowledge of detailed record management processes.
 16. NHS England has advised that during the requested time period, the national IPC Cell were working with reduced capacity and were required to implement new ways of working to meet the needs of the COVID-19 pandemic. It advised that staff within the IPC Cell were working in an extremely fast paced, ever changing environment in response to the emerging pandemic. In addition, clinical and administrative staff from the IPC team were also re-deployed to support health and care systems and at time, were moved to support other priority programmes, often at short notice. This in turn led to a high turnover of staff working within the IPC Cell.
 17. NHS England explained that as a result of the redeployment of staff and resources, it did not collate records of all meetings into a single location. It advised that a large proportion of the recorded minutes are therefore

¹ EA/20017/00041

still located within individual email mailboxes, which would need to be searched to find the requested information.

18. NHS England has advised that thousands of emails were sent and received into the COVID-19 IPC Cell inbox and, where records management processes were not diligently followed, these emails need to be searched to locate where minutes were sent out to attendees of cell meetings. It went on to explain that these are all contained within different folder structures within a SharePoint platform and, in some instances, a search of personal inboxes to access historic emails takes enquiries for records back to January 2020. It added that some staff have now left NHS England and are therefore reliant on their records being saved/captured before leaving the organisation.
19. NHS England explained that it had carried out two sampling exercises, both taking two hours to complete.
20. NHS England explained that during the course of the sampling exercise, it became apparent that many minutes were saved as 'draft'. This meant they were therefore required to search additional records to locate 'final' versions of these records.
21. NHS England explained that the initial search focussed on the period January 2020 to March 2020. It explained that as these were often ad hoc notes sent within emails to record key actions, searches were more extensive to enable location of records in any form for earlier meetings.
22. NHS England explained that the second exercise was carried out to ensure an accurate reflection of officially recorded minutes, focussed on the period May 2020 to July 2020. Whilst it was able to find copies of all minutes during this period, many are saved as 'draft'. It advised that the final versions would be held and it would extend the search time to locate the relevant version of the minutes.
23. NHS England advised that from the exercises, it found 13 sets of minutes, 8 of which were in draft form and 5 were in 'final' form. It explained that this search indicated that it would take approximately 1 hour per set of minutes in the draft version to locate the final version within central mailbox emails, saved within SharePoint folders.
24. NHS England has stated that based on the time taken from both sampling exercises, the request encompasses approximately 134 meetings and it estimates that it would take at least 60 hours to locate and confirm all minutes in the final form. It also explained that this was based on calculations of at least 4 meetings per month, and having completed another survey of minutes, which found around 60 in draft form.

25. The Commissioner considers that, from the evidence provided, NHS England's estimates for the time taken to locate the final versions of the documents is reasonable. Even if NHS England were to take half the estimated times to locate and review each record, due to the amount of information held, it would still significantly exceed the appropriate cost limit of 18 hours.
26. The Commissioner acknowledges the complainant's arguments about NHS England holding the requested information, along with some of the information already being released. However, the Commissioner is satisfied that, due to the unprecedented circumstances of COVID-19, it is likely that the meeting minutes were not stored in line with the records policy.
27. The Commissioner's decision is that NHS England estimated reasonably that the cost of complying with the request would exceed the appropriate limit. Therefore, NHS England is entitled to rely on section 12(1) of FOIA to refuse to comply with the request.

Section 16(1) – the duty to provide advice and assistance

28. Section 16(1) of FOIA provides that a public authority should give advice and assistance to any person making an information request. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 code of practice³ in providing advice and assistance, it will have complied with section 16(1).
29. NHS England advised the complainant that in order to bring the requested information to under 18 hours, they should refine their request to a more specific period. It gave an example of requesting a specific 3-month period and explained it may be able to locate the relevant information.
30. The Commissioner is satisfied that NHS England provided appropriate advice and assistance and has therefore complied with the above obligation.

Right of appeal

31. 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

32. 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.
33. 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

Michael Lea
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