

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 20 January 2021

**Public Authority:** NHS Digital  
**Address:** 1 Trevelyan Square  
Boar Lane  
Leeds  
LS1 6AE

#### Decision (including any steps ordered)

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1. The complainant requested information relating to the formulation and publication of the Data Protection Impact Assessment for the process by which GPs share Covid-19 data. NHS Digital withheld some information and relied on section 22 of the FOIA to do so. It refused the remainder of the request and relied on section 12 of the FOIA to do so.
2. The Commissioner's decision is that NHS Digital was entitled to rely on section 12 of the FOIA to refuse the request. However, NHS Digital failed to provide meaningful advice and assistance to help the complainant refine his request within the cost limit and therefore failed to discharge its obligations under section 16 of the FOIA.
3. The Commissioner requires NHS Digital to take the following steps to ensure compliance with the legislation.
  - Provide the complainant with meaningful advice and assistance to assist him in refining his request so that it falls within the cost limit.
4. NHS Digital 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 15 May 2020, the complainant wrote to NHS Digital and requested information in the following terms:

*"I note that NHS Digital has issued a Data Provision Notice in relation to 'GPES Data for Pandemic Planning & Research (COVID-19)'.*

*"Presumably, this kind of bulk data collection will have been carefully considered by yourselves, even if it is under the statutory framework of the Health and Social Care Act 2012 and at the direction of the Secretary of State for Health and Social Care. To my knowledge nothing exempts you from conducting a data protection impact assessment (DPIA) under DPA 2018/GDPR, in fact this is the type of processing activity which Article 35 states you should conduct a DPIA for.*

*"Therefore, I would be grateful if you could provide me with the following at your earliest opportunity:*

*[1] a copy of the DPIA including any supplementary documentation;*

*[2] any communication regarding this project, specifically between:*

- your data protection officer;*
- head of information governance if this differs;*
- your director of data access;*
- any external consultant (for legal or information governance) you have used;*
- department for health and social care.*

*[3] any communication with commercial parties interested in this data."*

6. NHS Digital responded on 11 June 2020. It confirmed that it held information within the scope of element [1] but relied on section 22 of the FOIA to withhold it because the document was due to be published at a later date. NHS Digital refused elements [2] and [3] of the request because it considered that they could not be answered without exceeding the cost limit.

7. The complainant sought an internal review on 12 June 2020. He did not believe that the information in respect of element [1] actually existed at the time of his request. He also contested NHS Digital's estimate of the cost of complying with his request which, he believed, had been inflated by time spent on impermissible activities. Finally, he argued that he had not been provided with meaningful advice and assistance.
8. Following an internal review NHS Digital wrote to the complainant on 13 July 2020. It upheld its original position.

### Scope of the case

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9. The complainant contacted the Commissioner on 29 July 2020 to complain about the way his request for information had been handled.
10. Prior to commencing a formal investigation, the Commissioner wrote to NHS Digital on 23 November 2020. In line with her usual practice when dealing with cases involving the section 22 exemption, she asked whether the information that had previously been withheld had now been published. NHS Digital responded to note that the Data Protection Impact Assessment had now been published.
11. The Commissioner then wrote to the complainant on 18 December 2020. She noted that the information within the scope of element [1] had now been published and that NHS Digital had already provided a detailed explanation as to why information falling within the remaining elements of the request could not be complied with without exceeding the cost limit. The Commissioner therefore advised the complainant that proceeding with his complaint would be unlikely to result in further information.
12. The complainant rejected the Commissioner's preliminary view." He argued that:

*"It seems that the Information Commissioner's Office has taken a laissez-faire attitude towards holding organisations to account, during this pandemic, when it comes to protecting people's privacy. I still do not believe NHS Digital conducted the necessary due diligence (including a DPIA) before issuing the relevant notice."*
13. The Commissioner notes that the adequacy of a DPIA is not a matter she is entitled to consider as part of a complaint arising under section 50 of the FOIA. The FOIA obligation on NHS Digital was to provide the information it held at the point the request was responded to, or issue a refusal notice.

14. NHS Digital has published its Data Protection Impact Assessment so the information is now available to the complainant. Even if section 22 had not applied at the point the request was responded to, NHS Digital would still have been entitled to rely on section 12 of the FOIA to refuse all three elements of the request if it could demonstrate that any of the individual elements (either alone or in combination) would have exceeded the cost limit. The Commissioner has therefore decided that she does not need to make a decision as to whether NHS Digital was entitled to rely on section 22 at the point at which it responded to the request – although she has made some further comments on the matter under the “other matters” section of this notice.
15. The Commissioner considers that the scope of her investigation is to determine whether NHS Digital has reasonably estimated that the cost of compliance would exceed the appropriate limit. If it has, she will then consider whether adequate advice and assistance was provided.

## Reasons for decision

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### Section 12 – Cost of Compliance Exceeds Appropriate Limit

16. Section 1(1) of the FOIA states that:

*Any person making a request for information to a public authority is entitled –*

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*

17. Section 12 of the FOIA states that:

- (1) 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.*
- (2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.*

18. The “Appropriate Limit” is defined in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the

Regulations") and is set at £450 for a public authority such as NHS Digital. The Regulations also state that staff time should be notionally charged at a flat rate of £25 per hour, giving an effective time limit of 18 hours.

19. When estimating the cost of complying with a request, a public authority is entitled to take account of time or cost spent 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.
20. 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".<sup>1</sup> 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.

#### *The complainant's position*

21. Despite several assurances that this was not the case, the complainant continued to argue that NHS Digital could only have arrived at its estimate by including time spent on impermissible activities.

#### *NHS Digital's position*

22. In its original response to the request, NHS Digital set out a reasonably detailed estimate that it had made of the cost of complying:

*"One staff member identified in the list returned over 200 emails in their inbox under the search criteria of GPDPPR and a search of GP data returned even more results. Additionally there were a similar*

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<sup>1</sup> <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i136/Randall.pdf>

*number of sent emails. This is at least 800 Emails for one staff member.*

*"A second and third listed party reported 60 and 120 emails in their inbox with a similar number of responses in their outbox. These two staff members accounted for at least 360 emails.*

*"As emails from 3 of the job roles listed above produced approximately 1200 emails at 5 minutes per email to review, it will exceed the appropriate limit of 18 hours to consider the communication relating to all roles listed above." [sic]*

23. When pressed by the Commissioner, NHS Digital confirmed that its estimate of 5 minutes per email had been based on a sampling exercise and that it had not included any time spent considering exemptions.

*The Commissioner's view*

24. The Commissioner considers that the cost of complying with the request would exceed the appropriate limit.
25. Whilst NHS Digital's estimate would have been stronger had it provided more details about its sampling exercise (such as how many emails had been reviewed and how long that had taken), the Commissioner is still satisfied that it has reasonably estimated that the cost of complying would exceed £450.
26. The Commissioner considers that the "keywords" NHS Digital has selected are appropriate – not so generic as to include large volumes of irrelevant information but not so narrow as to risk relevant information going unidentified. There is no reason to doubt NHS Digital's assertion that using such keywords would isolate a preliminary batch of 1200 emails.
27. The fact that a particular email contains a relevant keyword does not necessarily mean that any of the email will fall within the scope of the request. Having identified potentially relevant emails, NHS Digital would still need to look at each one individually to determine the extent to which its contents fell within the scope of the request.
28. Clearly, some emails can be assessed as falling (or not falling) within the scope of the request within a matter of seconds – especially when the emails are short or are duplicated. However, some emails may be lengthy and cover a number of topics. Combing through a lengthy email, with numerous attachments, to determine the information falling within the scope of the request might take considerably longer than the five minutes that NHS Digital has estimated.

29. NHS Digital has confirmed that its estimate does not include any time that might need to be spent separating exempt from non-exempt material and the Commissioner is satisfied that this is the case.
30. NHS Digital has produced a central estimate of five minutes per email – suggesting that some emails can be assessed more quickly and others will take longer than that. The Commissioner considers that such an estimate is high – however, she notes that, even if NHS Digital were able to reduce the time required from five minutes per email to one minute per email, it would still need around 20 hours to identify and extract all relevant information. 20 hours of staff time would still exceed the cost limit.
31. Furthermore, the Commissioner notes that this estimate does not include any time spent considering correspondence exchanged with the remaining two of the original five parties listed in element [2] of the complainant's request.<sup>2</sup> Nor does it include any time that would need to be spent identifying information held within the scope of element [3].
32. On that basis, the Commissioner can see no compelling evidence that would suggest that NHS Digital's estimate is sufficiently flawed as to be unreasonable. The Commissioner is therefore satisfied that NHS Digital was entitled to rely on section 12 of the FOIA to refuse the request.

#### Section 16 Advice and Assistance

33. Section 16 of the FOIA requires a public authority to provide "reasonable advice and assistance" to those making or wishing to make a request.
34. In cases where a public authority considers that a request could not be answered within the cost limit, the Commissioner would normally expect advice and assistance to be provided to help the requestor bring their request within the cost limit.
35. When providing its original response, NHS Digital informed the complainant that:

*"If you are able to modify or limit your request in any way which would allow us to extract the information you require within the cost limit, such as specifying just the particular documents of interest, please resubmit your request. NHS Digital will then review*

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<sup>2</sup> The wording of the correspondence indicates that these parties are any external consultants and the Department of Health and Social Care – although NHS Digital has not been clear about this.

*the re-submitted request against relevant information held by the organisation and provide the information if the organisation holds it and no FOIA exemptions apply.” [sic]*

36. In the Commissioner’s view it will rarely be acceptable for a public authority to discharge its section 16 obligations by merely advising a requestor to “be more specific.” Most requestors are unlikely to know exactly what information a public authority holds or the manner in which that information is held. Requestors therefore design requests that they think are best designed to focus on what they think that they want. If they knew what specific documents were of interest, they would presumably be able to identify them already.
37. When a public authority considers that a request is too broad or too unfocused, its section 16 obligations are engaged.
38. In considering whether NHS Digital has provided adequate advice and assistance, the Commissioner has had regard, not just to the specific reference to refining a request but to the contents of the refusal notice as a whole.
39. In the Commissioner’s view, a public authority can meet its section 16 obligations if its estimate is sufficiently detailed as to demonstrate the particular parts of a request which are burdensome. For example, if a public authority receives a request in ten parts and informs the requestor that it is refusing the request because the tenth part exceeds the cost limit, it may still have met its obligations because the requestor can use that information to make a refined request for the remaining nine parts. Even if the public authority has not advised the requestor specifically to eliminate the tenth part of the request, if its response indicates clearly that it is the tenth part which causes the request to exceed the cost limit, the requestor will be aware that removing this element is likely to produce a successful outcome.
40. Whilst NHS Digital did produce a breakdown of its estimate of responding to this request, the Commissioner does not consider that this is sufficient to assist the complainant in refining his request. The estimate does not identify which of the parties, from the complainant’s original list, held 800 relevant emails, which held 60 and so on – this is information that the complainant could, if he so wished, have referenced in submitting a refined request, had it been provided.
41. The Commissioner therefore considers that NHS Digital did not offer the complainant any meaningful suggestion (such as adding time parameters) which would have reasonably assisted him in submitting a fresh request which would be likely to fall within the cost limit.



42. The Commissioner therefore considers that NHS Digital did not discharge its section 16 obligations in responding to the request.

### **Other matters**

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43. Given that the DPIA had been published by the time the Commissioner was able to investigate the complaint, the Commissioner considers it likely that, had she been required to investigate, she would have found that section 22 was engaged in respect of element [1] – although she makes no formal finding on this or on the balance of the public interest. However, she notes that neither the refusal notice nor NHS Digital's internal review contained any details of the public interest balancing exercise that it should have carried out in order to rely on the exemption. Section 17(3) of the FOIA states that a public authority relying on a qualified exemption must provide details of its public interest test in its refusal notice.

## Right of appeal

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44. 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](mailto:grc@justice.gov.uk)

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

45. 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.
46. 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

**Phillip Angell**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**