

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 December 2022

Public Authority: Department of Health and Social Care (DHSC)
Address: 39 Victoria Street
London
SW1H 0EU

Decision (including any steps ordered)

1. The complainant has requested the 128 expressions of interest in the government's New Hospitals programme.
2. The Department of Health and Social Care (DHSC) refused to comply with the request, citing section 14(1) of FOIA as it considers that it would impose a grossly oppressive burden to make required redactions under section 35(1)(a) and 43(2) FOIA.
3. The Commissioner's decision is that DHSC has incorrectly relied upon section 14(1) to refuse the request. However redactions would be required under section 35(1)(a) and 43(2) FOIA.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information subject to any redactions under section 35(1)(a) and 43(2) FOIA.
5. 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 FOIA and may be dealt with as a contempt of court.

Request and response

6. The complainant made the following information request on 31 January 2022:

"Today the Health Service Journal reported 'a total of 128 "expressions of interest" had been submitted by trusts hoping to be part of the final cohort of the government's New Hospitals programme.'

Could you please provide a bundle of all 128 bids, as they were submitted by the Trusts.

Section 12 – Cost of Compliance

While I appreciate that the request will result in many pages of documents I would not expect it would be overly onerous to complete. As you know, when making an estimate of the time for compliance under Section 12 it must only take into account the time taken to determine whether the information is held, locate it, retrieve it and extract it.

As I would expect all of these document to be filed in one location, the information should be easy to locate and retrieve. No extraction of information is necessary, as I am requesting whole documents rather than isolated parts. If there is any redaction you feel is necessary, then this cannot be included in the estimates for the time taken to comply with the request."

7. DHSC responded on 23 February 2022. It refused to disclose the requested information under section 35(1)(a) and 43(2) FOIA.
8. The complainant requested an internal review on 24 February 2022. DHSC provided the outcome to its internal review on 24 March 2022. DHSC upheld its original position.

Scope of investigation

9. During the course of the Commissioner's investigation DHSC amended its position. It said that it would impose a grossly oppressive burden to comply with the request and applied section 14(1) FOIA to refuse to do so.
10. The Commissioner has considered whether DHSC was correct to refuse to comply with the request under section 14(1) FOIA and whether redactions would be required under section 35(1)(a) and 43(2) FOIA.

Reasons for decision

Section 14(1) – grossly oppressive burden

11. The Commissioner considers that a request can be vexatious where compliance with the request would incur a grossly oppressive burden on the public authority in terms of the costs or the diversion of resources.
12. Section 14(1) of FOIA is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress.
13. FOIA gives individuals a greater right of access to official information in order to make bodies more transparent and accountable. As such, it is an important constitutional right. Therefore, engaging section 14(1) is a high hurdle.
14. Most people exercise their right of access responsibly. However, a few may misuse or abuse FOIA by submitting requests which are intended to be annoying, disruptive or which have a disproportionate impact on a public authority.
15. The emphasis on protecting public authorities' resources from unreasonable requests was acknowledged by the Upper Tribunal in the leading case on section 14(1), *Information Commissioner vs Devon County Council & Dransfield* [2012] UKUT 440 (ACC), (28 January 2013).
16. The term 'vexatious' is not defined in the FOIA. The Upper Tribunal (Information Rights) considered in some detail the issue of vexatious requests in the case of the *Information Commissioner v Devon CC & Dransfield* (GIA/3037/2011). The Tribunal commented that vexatious could be defined as the "manifestly unjustified, inappropriate or improper use of a formal procedure". The Tribunal's definition clearly establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
17. In the *Dransfield* case, the Upper Tribunal also found it instructive to assess the question of whether a request is truly vexatious by considering four broad issues: (1) the burden imposed by the request (on the public authority and its staff); (2) the motive of the requester; (3) the value or serious purpose of the request and (4) harassment or distress of and to staff.

18. The Upper Tribunal did however also caution that these considerations were not meant to be exhaustive. Rather, it stressed the: "importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests" (paragraph 45).
19. The Commissioner's guidance suggests that if a request is not patently vexatious the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. In doing this the Commissioner considers that a public authority should weigh the impact of the request on it and balance this against the purpose and value of the request.
20. Where relevant, public authorities need to take into account wider factors such as the background and history of the request.

DHSC's position

21. DHSC explained that:

"After further reviewing this request, we are now refusing the information in scope of the request under section 14 of the FOIA due to the burden required to review the documents requested.

To further explain, we have carried out the full searches for information in scope of the request and there are 128 expressions of interests (EOI). To provide some basis as to why section 14 would be applicable for this request we have sampled 4 EOIs which would be in scope of the request. This sample exercise included searching for the information in scope, reviewing the EOIs, assessing whether any valid exemptions would apply and undertaking the relevant redactions. Within this sampling exercise the information contained was subject to future decision-making processes and was also commercially sensitive in nature, so would require redacting under section 35 and section 43 of the FOIA and consideration of the public interest test.

Regarding the sampling exercise to evidence the estimation of how long it would take to review all of the EOIs in scope. We included applying redactions and reviewing exemptions as part of the exercise. As 4 EOIs were reviewed in 1 hour it would roughly mean reviewing 1 EOI every 15 minutes. As an estimate, this would take in the region of at least 32 hours for all 128 EOIs to be reviewed. To further elaborate each EOI needs to be assessed in its individuality, and although the

format is similar, the information within needs to be reviewed and assessed in its entirety, therefore the time spent on each EOI would not decrease. Furthermore, this would also require clearance by an SCS to ensure that there are no errors, which we estimate would take in the region of 10 hours to complete. The time estimated for this request therefore totals to 42 hours."

The Complainant's position

22. The complainant had argued that:

"Broadly speaking, this request has a serious purpose and is not overly burdensome. Section 14 is not applicable here.

While DHSC may argue that there is little public interest in disclosing applications for funding that ultimately did not lead to public spending, this misses the point. The public interest here is in showing what facilities, equipment and other capital investment NHS leaders believe they need, in contrast to the ~6.25% of of [sic] projects DHSC actually agreed to fund.

The context to this request, and the issue of capital spending in the NHS is that National Audit Office's 2020 report on the issue. It concluded, amongst other things, that:

- Parts of the NHS estate do not meet the demands of a modern health service
- That the growth in backlog maintenance is a risk to patients
- NHS leaders assessment of their needs is consistently greater than their allocation
- Capital budgets have been raided of £4.3bn over five years, in order to prop up recurrent spending

These cuts to capital investment budgets have serious real world consequences. In June it was reported that 34 Hospitals had roofs which were a risk of collapse. Burst water mains have caused problems in the Royal Liverpool and Queen Alexandra in Portsmouth, Worcestershire Royal. The backlog maintenance cost, a direct consequence of failing to invest in new infrastructure, reached £10bn for the first time in October.

The information requested here will put these conclusions into context. It will help to contextualise exactly what kinds of facilities and

equipment that £4.3bn should have been paying for over the five years leading up to the pandemic.

It will allow the public to understand exactly what they have been missing out on. As far as I am aware, DHSC made no effort to consult with the public about exactly which of these 128 projects should be funded. I am not aware of even a list of NHS bodies which applied for funding, let alone a description of what healthcare facilities they feel they are missing.

While transparency over the few projects which were awarded funding is important, equally important are details of the projects which NHS leaders say they need to protect the health of their constituents, which DHSC deemed not worthy of funding.

In regard to the burden of this request, it is not excessive.

An estimated 42 hours to review and redact the information represents a FOIA cost of £1,050, less than two FOI requests and 0.000028% of the £3.7bn committed to this round of capital funding."

The Commissioner's position

23. The Commissioner's guidance considers that the key question a public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
24. When considering this issue, the Upper Tribunal in Dransfield asked itself: "Does the request have a value or serious purpose in terms of there being an objective public interest in the information sought?" (paragraph 38).
25. In his guidance, the Commissioner recognises: "The public interest can encompass a wide range of values and principles relating to what is in the best interests of society, including, but not limited to:
 - holding public authorities to account for their performance;
 - understanding their decisions;
 - transparency; and
 - ensuring justice."
26. DHSC recognises that there is significant public interest in the development of NHS infrastructure and that the government's commitment to build 40 new hospitals is a high-profile policy in which multiple parties are invested. It has acknowledged why the public may want to know about:

- i. The schemes which are being considered for the Next 8, as this decision will significantly affect the communities of the schemes which are and are not selected.
 - ii. The options that trusts across the country are considering for the development of their estate; and there may be interest in the potential costs and impacts of these options.
 - iii. The assessment process which is being used to decide on the longlist and then the eight schemes.
27. The Commissioner expects central government departments to absorb a higher level of disruption and cost to comply with a request than a small public authority such as a parish council.
28. The Commissioner is not persuaded that 42 hours work would constitute an oppressive burden.
29. The Commissioner therefore finds that DHSC is not entitled to rely on section 14 in order to refuse to comply with the request.

Section 35(1)(a)

30. Based upon the sample of four EOI's marked up with where the exemptions would apply, the Commissioner is satisfied that DHSC has correctly applied section 35(1)(a) of FOIA to the information it would withhold under this exemption. This is because the EOIs will feed into formulation and development of the policy to build eight new hospitals.
31. DHSC explained that although the high-level policy objective to build eight new hospitals has been agreed, DHSC is still actively formulating the detail of the policy, considering a range of options with different outcomes and wide-ranging consequences. To make a robust decision, free and frank discussion within DHSC and with its partners is critical. It has designed an objective assessment process which considers a wide range of information but aims not to be influenced by external pressures about specific schemes. It has committed on multiple occasions that it cannot comment on individual schemes whilst the assessment process is in progress. By disclosing all the EOIs to the public, the likelihood of attempts to influence the process will significantly increase, resulting in time and attention being diverted away from developing and delivering the process. Trusts will likely also see an influx of interest in their submissions, which in many instances they may not be in a position to discuss publicly. The government and trusts require time to fully consider their options and develop policy objectively, conducting free and frank discussions amongst appropriate partners without any undue influence of wider parties.

32. DHSC went on that the decision of which schemes to select for the longlist and then the eight will not be made on the basis of the EOIs alone; evidence from existing national datasets, as well as discussions with regional NHS leaders and ministers will be used alongside the EOIs to deliver a robust decision. Releasing only part of the information used for the assessment process risks delivering a warped impression of decision-making, which may in turn limit its ability to design and deliver a policy which is understood as fully robust.
33. In terms of the public interest in disclosure, DHSC accepted that the public has a genuine interest in the material within scope of the request, as this information feeds into the decision making process that will affect the communities of the schemes which are and are not selected.
34. The Commissioner does however acknowledge that DHSC's and its partners' candour in sharing policy options open to them would be affected if they considered that the content of such submissions would be disclosed. Prematurely disclosing information protected under section 35 could prejudice these good working relationships. Officials need to be able examine options without fear of having these released prematurely.
35. The relevance and weight of the public interest arguments will depend entirely on the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case. Once a policy decision has been finalised and the policy process is complete, the sensitivity of information relating to that policy will generally start to wane, and public interest arguments for protecting the policy process become weaker. If the request is made after the policy process is complete, that particular process can no longer be harmed.
36. The purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies. In particular, it ensures a safe space to consider policy options in private.
37. At the time of the request in January 2022 assessment of the EOIs was ongoing as part of the process of formulation and development of the New Hospitals programme. The Commissioner is satisfied that at the time the request was made the public interest in favour of disclosure was outweighed by the public interest in maintaining the exemption.

Section 43 – prejudice to commercial interests

38. Section 43(2) of FOIA says that information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
39. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met. First, the actual harm that the public authority alleges would, or would be likely, to occur if the withheld information were disclosed has to relate to the applicable interests within the relevant exemption.
40. Second, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice that is alleged must be real, actual or of substance.
41. Third, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – eg disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather, there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
42. Section 43(2) is subject to the public interest test.
43. DHSC has explained that:

"The Next 8 EOI advised trusts that they were submitting the information on an official-sensitive-commercial basis, stating that:

"Please note by submitting this information to the Department of Health and Social Care, you are agreeing that they are permitted to share the form or extracts of it with relevant officials in NHS England and NHS Improvement and their regional teams, and HM Treasury, on an OFFICIAL-SENSITIVECOMMERCIAL basis."

Publicly releasing this information would breach this statement, as trusts will have provided the information on the basis that it would only be shared with the listed parties. A breach of this statement would likely adversely impact the willingness of trusts to share commercially sensitive information with these parties in the future.

The information provided by trusts in the EOIs was not intended for public disclosure, and thus may include information which requires further context to understand accurately. For example, trusts were advised that any costs or savings detailed in the EOI were indicative, and DHSC recognised that for early-stage schemes estimates were unlikely to be precise. We also noted that the submitted costs would not equate to a bid for that amount of funding. Similarly, other information provided in the EOIs, such as interest in progressing schemes in certain directions, require appreciating the context of the preliminary stages of these proposals. Trusts will have provided the information on the basis that any readers would understand the implications due to their own knowledge of the wider context; without access to this wider context the public risks inferring inaccurate information from the EOIs. Trusts should be able to provide partners such as DHSC with preliminary ideas, proposals and estimates of their commercial activity without the risk of misinterpretation by the public. We would not want to risk reducing public confidence in the healthcare system or particular trusts which would happen if this information were to be released.

Many EOIs include sensitive information about desired or proposed commercial activity which if released to the public, would likely risk undermining trusts' ability to conduct this activity fairly and competitively. This includes information about the acquisition or disposal of land or buildings; the procurement of specific materials or contracts; and the appointment of certain organisations. This would likely impact either live or future negotiations conducted by Trusts with prospective commercial partners, who would have access to information to influence these discussions.

Whilst some of the EOIs represent schemes which are well developed, where significant information is already in the public realm, many EOIs represent schemes which are much earlier in development, where little to no information has been shared publicly. Releasing this information to the public at this early stage of consideration risks affecting the commercial development of the schemes. These trusts may be considering the option submitted for the Next 8 alongside a series of alternative approaches for the hospital. As most of the schemes submitted for the Next 8 will not be selected, many trusts would need to develop and implement these alternative approaches. For these trusts, releasing only one option into the public realm would risk undermining their ability to objectively consider the full set of options and deliver the optimum approach given the context.

The ICO section 43 guidance states that it generally recognises information about procurement as being commercially sensitive. Whilst the Next 8 assessment process to determine the schemes to be

procured for the programme is ongoing, it would not be commercially prudent to disclose this information to the public. The reason for this would be it would harm any future procurement and as this is ongoing it would affect trust in negotiations.”

44. The Commissioner is satisfied that the information DHSC intends to redact under this exemption clearly relates to proposed commercial activity. Disclosure of indicative costings and ideas within the EOIs which were provided at an early stage in the procurement process would be likely to prejudice the commercial interests of the providers due to the likely impact on either live or future negotiations conducted by Trusts with prospective commercial partners, who would have access to information to influence these discussions. The Commissioner therefore considers that section 43 FOIA was correctly applied.
45. As explained above, DHSC accepts that the public has a genuine interest in the material within scope of the request, as this information feeds into the decision making process that will affect the communities of the schemes which are and are not selected. However the EOIs were an extremely early stage of the procurement process and ultimately only eight will be successful. Many Trusts will therefore need to use this information to consider and implement alternative approaches. At the time of the request the Commissioner is therefore satisfied that the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.

Right of appeal

46. 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

47. 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.
48. 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.....

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