

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 February 2023

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

Decision (including any steps ordered)

1. The complainant requested information from the Department of Health and Social Care ("DHSC") about pay information for consultants by pay threshold, gender, ethnicity and age.
2. The Commissioner's decision is that DHSC has not demonstrated that complying with the request would impose a grossly oppressive burden and consequently it is not entitled to rely on section 14(1).
3. The Commissioner requires DHSC to take the following step to ensure compliance with the legislation.
 - To respond to the request again, without relying upon section 14(1) of FOIA.
4. DHSC 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

5. On 15 October 2021 the complainant wrote to DHSC and requested information in the following terms:

"This is a Freedom of Information Act request relating to the pay of NHS Consultants.

Relevant background

The basic pay scales for consultants (2003 contract) in England from 1 April 2020 are as follows (<https://www.nhsemployers.org/sites/default/files/2021-06/Pay-and-Conditions-Circular-MD-22020.pdf>):

Threshold Value £

- 1 (starting salary) 82,096
- 2 (after 1 year completed as consultant) 84,667
- 3 (after 2 years completed) 87,238
- 4 (after 3 years completed) 89,809
- 5 (after 4 years completed) 92,372
- 6 (after 9 years completed) 98,477
- 7 (after 14 years completed) 104,584
- 8 (after 19 years completed) 110,683

NHS Digital has published data on Equality and diversity in NHS Trusts and CCGs dated March 2021 (<https://digital.nhs.uk/data-and-information/publications/statistical/nhs/workforce-statistics/march-2021>).

This data includes a breakdown of Consultants by protected characteristics but it does not break this information down by Threshold of the consultant (2003 contract).

We understand that this information is held by the Department of Health and Social Care (DHSC) and/or by other organisations on behalf of the DHSC.

As you will be aware, section 3 of the Freedom of Information Act 2000 provides that information is held by a public authority if it is held by another person on behalf of the authority.

Request for Information

Please would you provide the most recently available following information showing:

1. A breakdown for England for each pay of the consultant (2003) pay thresholds 1 – 8 by the following protected characteristics: ethnicity, gender and age band
2. A breakdown for all Trusts in England which employ consultants for each of the consultant (2003) pay thresholds 1 – 8 by the following protected characteristics: ethnicity, gender and age band”
6. DHSC responded on 10 November 2021 and advised that as it had not previously sought to extract the information from its Electronic Staff Record it did not consider that it holds the requested information.
7. The complainant expressed dissatisfaction with that response on 21 December 2021.
8. Following an internal review, DHSC wrote to the complainant on 26 January 2022 and upheld its original decision.

Scope of the case

9. The complainant contacted the Commissioner on 30 March 2022, to complain about the way their request for information had been handled.
10. On 3 January 2023, during the course of the Commissioner’s investigation, DHSC revised its position and informed the complainant that it was relying on section 14(1) of FOIA (burden).
11. The complainant expressed dissatisfaction with the revised response on 31 January 2023.

Reasons for decision

Section 14(1) – vexatious requests

12. Section 14(1) of FOIA allows a public authority to refuse to comply with a request if it is considered to be vexatious.
13. In the Commissioner's view, section 14(1) 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. This will usually involve weighing the evidence about the impact on the authority and balancing this against the purpose and value of the request. This should be judged as objectively as possible; in other words, would a reasonable person think that the purpose and value are enough to justify the impact on the public authority.
14. In particular, the Commissioner accepts that there may be cases where a request could be considered to be vexatious because the amount of time required to review and prepare the information for disclosure would place a grossly oppressive burden on the public authority. This is the position adopted by DHSC in this case.
15. The Commissioner believes that there is a high threshold for refusing a request on such grounds. This means that a public authority is most likely to have a viable case where:
 - The requester has asked for a substantial volume of information and
 - The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the Commissioner and
 - Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material¹.

¹ This approach is set out in the Commissioner's guidance on section 14(1) of FOIA <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/dealing-with-vexatious-requests-section-14/how-do-we-deal-with-a-single-burdensome-request/#section12>

DHSC's position

16. DHSC explained that it believes that the request is a burden due to the searches that would be required along with the amount of time it would take to identify, compile and quality check the information obtained via searches in comparison to that requested. In this instance DHSC estimated that to comply with the request it would take a minimum of 28 hours and 7.5 minutes in total. The task itself would involve searching existing records, design and execution of a tailored query on the Electronic Staff Record system, data analysis, compilation and quality assurance.
17. When explaining the work required to create the search query DHSC explained its process:

“Designing the query for what data we would intend to extract (e.g., how are people on a particular contract going to be identified? How do we identify the pay point? What is the organisational coverage, and what are the equality variables and other filters such as specifying what FTE requirements to set/and do we need to apply earnings requirements?). This time estimate would include the time required to accurately identify staff on the 2003 consultant contract and associated demographic information while limiting to staff working at trusts in England as well as the time required to run the extract. Prior to running the main extract, we would also conduct test extracts on a section of the workforce (e.g. at a single trust) to assess the reliability of the extract.

Data analysis – After running whatever query is designed you will have a CSV file that requires analysis and potentially additional processing. As the Data Warehouse is a raw transfer from the live systems the data can often be very “messy” reflecting the complexity of a system with approaching 1.5 million people who join/leave/move on a regular basis in addition to other steps to generate things like age-bands, ethnicity groups or pay groupings.

The base extract would identify more than 55,000 consultants working in the Hospital and Community Health Sector in England which would be identified by the extract. For each consultant we would then need to assign them to a combination of trust, pay-point & demographic information based on fields within ESR as there is no single variable to identify “pay-threshold”. A system would be needed to map from other fields in ESR (e.g., Step Point) to assign people to relevant pay points.

Categories of “age band” and “ethnicity group” would need to be derived from other fields in ESR – ESR contains a Date of Birth field

that would be used to derive age band. The ethnicity field is based on census categories which would need reducing to the headline groups. Additional processing would then be required to determine staff who may be on ESR but, for whatever reason, are not in active service or have actual pay that is different from what would be expected for someone in that pay point who should be removed from the analysis.

Work would also be needed to sense check output against other data sources such as NHS Digital Workforce statistics.”

18. DHSC explained that pay data is sensitive and particular care would be required to prevent the disclosure of individual salary information.
19. In considering its revised position, DHSC also considered the purpose and value of the request. It agreed that information which breaks down the consultant workforce in England by protected characteristic may be of public interest as it helps people to understand who the most senior doctors employed in the NHS are. However, DHSC pointed out that this information is already publicly available on the NHS Digital website and regular updates are published. Information about consultant earnings could also be of public interest for people who wish to understand more about how NHS funding is spent. This information is also regularly published by NHS Digital.
20. DHSC stated that it did not consider that there was an objective public interest that could be determined in information which breaks down the protected characteristics of consultants for each pay point at a national level or for each Trust in England. This is because all consultants start on the first pay point and then pass-through pay points at intervals as they progress through their careers. The progression process is set out in the consultant terms and conditions. Progression is the norm and there is an appeals process for those who fail to progress.

The Complainant's position

21. The complainant has expressed dissatisfaction with DHSC's revised position citing section 14. Concerning the value and purpose of the request, the complainant has stated:

“The request has a valuable and serious purpose in that it relates to the extent to which the basic pay scales for consultants may disadvantage groups with protected characteristics. In particular there is a legitimate concern that the pay scales, which requires individuals to complete 19 years' service in order to reach the highest pay point, could amount to indirect discrimination. As a public body, DHSC has a statutory duty to comply with the Public Sector Equality Duty, contained in section 149 of the Equality Act 2010, which includes a

duty to eliminate discrimination and a duty to advance equality of opportunity between persons who share a relevant protected characteristic and those who do not share it.”

The Commissioner's position

22. In reaching a decision in this case the Commissioner has considered the detailed submissions provided to him by DHSC and the arguments presented by the complainant.
23. In the context of a single burdensome request, the public authority needs to make a holistic assessment which takes into account all the relevant circumstances specific to the case and consider them objectively in the relevant context. Amongst the relevant circumstances, the public authority can take into account the way in which it chose to store the relevant information and the cost retrieving it would entail. This is consistent with the approach taken in the context of section 12 of FOIA.
24. The Commissioner would expect DHSC to have considered the following in order to make an holistic assessment when citing section 14(1):
 - The amount of information asked for and the extent to which this would constitute a disproportionate use of FOIA in the sense of a “manifestly unjustified, inappropriate or improper use of a formal procedure” (Lee v Information Commissioner and King’s College Cambridge EA/2012/00155 as approved by the UT in Dransfield at paragraph 27);
 - The extent to which the request has value or a serious purpose – the higher the public interest served by the request, the higher the threshold for vexatiousness would be. This consideration would not apply in the context of section 12 where the public authority is entitled to disregard public interest considerations if it is satisfied that the cost of compliance exceeds the appropriate limit;
 - The likelihood that the information to be searched matches the description of the requested information;
 - The likelihood that the information contains exempt information – the authority would need to be able to substantiate any such claims if asked by the Commissioner;
 - Any advice and assistance they have provided to the applicant to help them make a less burdensome request. As explained by the UT in Ms McInerney v Information Commissioner and Department for Education [2015] UKUT 0047 (ACC) (29 January 2015), the

fact that a public authority considers a request to be vexatious does not mean that they are "entitled to ignore section 16".

25. It is the Commissioner's conclusion that, when refusing a request on grounds of the (financial) burden that complying with the request would impose, where possible the authority should look at applying section 12 in the first instance.
26. The Commissioner appreciates that the complainant has made a detailed case for why, in their view, there is a compelling interest in the disclosure of the requested information. For these reasons, the Commissioner accepts that the complainant's request does have a clear purpose and value.
27. The Commissioner accepts that there are cases where a request could be considered to be vexatious because the amount of time required to review and prepare the information for disclosure would place a grossly oppressive burden on the public authority. Due to the volume of information in the scope of the request, and the fact that potentially sensitive information would be contained within the query results, the Commissioner acknowledges that compiling the requested information would require some care. However, in this case DHSC has not provided sufficient evidence to demonstrate that the burden in complying with the request will be a grossly oppressive one. 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. In light of the above, the Commissioner is not persuaded that 28 hours and 7.5 hours work would constitute an oppressive burden. The Commissioner therefore finds that DHSC is not entitled to rely on section 14 in order to refuse to comply with the request.

Right of appeal

29. 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

30. 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.
31. 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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