

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 October 2019

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the experiences black and ethnic minority individuals face as a result of being in environments or being brought up or living in areas where mostly everyone is white. Initially, NHS England advised the complainant that it does not hold any recorded information. However, during the Commissioner's investigation it accepted that it does hold recorded information of the nature specified in the request but considers the cost to comply would exceed the appropriate limit and therefore section 12 of the FOIA applies.
2. The Commissioner's decision is that NHS England is entitled to rely on section 12 of the FOIA in this case. She has however found NHS England in breach of section 1(1)(a), 10, 17(5) of the FOIA. She has also found NHS England in breach of section 16. This is because it claimed a later reliance on section 12, section 12 triggers a duty to provide advice and assistance and to date NHS England has not complied with this requirement.
3. The Commissioner requires NHS England to take the following steps to ensure compliance with the legislation:
 - Provide the complainant with advice and assistance to allow him, if it is possible to do so, to formulate a request which can be answered within the appropriate limit. If NHS England considers it is not possible for the request to be reformulated in such a manner, it is to explain to the complainant why it says that is the case.

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

5. On 21 October 2018, the complainant wrote to NHS England and requested information in the following terms:

“Please confirm whether or not you hold the information specified below and if you do then please send me a copy of all the information you hold fitting the scope of my request.

1.) What is the harm and difficulties that black and minority ethnic individuals can experience as a result of being;

A). In environments (such as waiting rooms, classrooms, the workplace for example) in which mostly everyone else is white .

B). Brought up and/or living in areas in which mostly everyone else is white .

Please note this is a request for information that can be provided under the FOIA it is not a request for personal data.”

6. NHS England responded on 23 October 2018. It stated that it does not hold any recorded information relevant to this request.
7. The complainant requested an internal review on 29 October 2018. He stated that he is of the opinion that NHS England does hold recorded information fitting the scope of his request and NHS England has failed to provide this to him.
8. NHS England carried out an internal review and notified the complainant of its findings on 7 November 2018. It confirmed again that it does not hold any recorded information falling within the scope of his request. It explained that the recorded information it does hold generally relates to the health services it commissions. It confirmed that as the information request does not relate to NHS England’s work, or the services it commissions, it is the conclusion of the internal review that no information relevant to the complainant’s request is held.

Scope of the case

9. The complainant contacted the Commissioner on 8 February 2019 to complain about the way his request for information had been handled. He stated that NHS England has failed to provide the information requested, which it is likely to hold, or provide a proper/valid refusal notice within 20 working days of the receipt of his request. He stated that he firmly believes that, on the balance of probabilities, NHS England does hold information fitting the criteria of his request.
10. During the Commissioner's investigation NHS England sought to rely on section 12 of the FOIA. Initially, it felt confident that it would not hold any information of the nature specified in the complainant's request, for the reasons given to the complainant in its internal review response (please refer back to paragraph 8). However, following further discussions with the Commissioner (which were assisted by the complainant himself in clarifying what he felt would fall within scope and some examples he provided) it accepted that the request could be interpreted differently and based on this alternative interpretation that it will hold relevant recorded information. But on further examination it then realised that the cost to comply with the request based on the alternative interpretation of the request would exceed the appropriate limit prescribed by the FOIA.
11. The Commissioner is satisfied that the alternative interpretation of the request is an objective reading of it. She therefore considers the scope of her investigation to be to determine whether NHS England is entitled to rely on section 12 of the FOIA.

Reasons for decision

12. Section 12 of the FOIA allows a public authority to refuse to deal with a request where it estimates that it would exceed the appropriate limit to comply with it.
13. The estimate must be reasonable in the circumstances of the case. The appropriate limit is currently £600 for central government departments and £450 for all other public authorities. Public authorities can charge a maximum of £25 per hour to undertake work to comply with a request; 18 hours work in accordance with the appropriate limit of £450 set out above, which is the limit applicable for NHS England. A public authority can take into account the time and cost involved in carrying out the following activities under section 12 of the FOIA:
 - (a) determine whether it holds the information;

- (b) locate the information, or a document which may contain the information;
 - (c) retrieve the information, or a document which may contain the information; and
 - (d) extract the information from a document containing it.
14. Where a public authority claims that section 12 of the FOIA is engaged it should, where reasonable, provide advice and assistance to help the requester refine the request so that it can be dealt with under the appropriate limit, in line with section 16 of the FOIA.
15. With the assistance of the complainant it has been agreed that the scope of his request would potentially cover the following types of information (although this list is not exhaustive):
- (a) His own complaints to NHS England over recent years and any lessons learnt or actions taken as a result of the specific issues he has raised. As an example the complainant has provided copies of emails to NHS England dated 4 March 2016 and extracts from his clinical notes which were shared with NHS England.
 - (b) The same complaints, correspondence or enquiries from other members of the public and any lessons learnt or actions taken as a result of the specific issues they raised.
 - (c) NHS England's race equality publications and the evidence NHS England used to produce them. He provided the following extracts from one to highlight that recorded information is indeed held and NHS England failed to carry out appropriate searches:

*"There is **irrefutable evidence** globally that people from black and minority ethnic backgrounds (BME) that live in white majority countries like the US, UK, Canada, Australia and New Zealand have poorer life chances and experiences compared to their white counterparts. Across all indicators this is true*

- *Health - More likely to get chronic diseases and die sooner*
- *Wealth – make less money over their life course*
- *Employment – less likely to be promoted*
- *Housing – living in poorer areas*
- *Judiciary – more likely likely to be imprisoned"*

"Micro assaults or stressors

- *Being the only BME person in a room*
- *Not being able to readily get the products for your hair and skin*
- *Not seeing many people that look like you on billboards, magazines and Journals or on TV, few role models*
- *Feeling other as your cultural norms are different*
- *Receiving a reduced service in healthcare and in society generally*
- *Knowing that you have to be twice as good to go half as far*
- *Your children more likely to be stopped by the police*
- *People not believing you or your lived experience"*

"The consequences for people

- *Disillusionment*
- *Unhappiness*
- *Depression*
- *Lack of confidence*
- *Anger/Rage*
- *Lack of belief in the system*
- *Depression*
- *Sadness*
- *Lack of engagement and buy in*
- *Resentment"*

16. The complainant confirmed that these extracts came from one of NHS England's workforce race equality standards publication. NHS England itself was unable to pinpoint the exact publication from these quoted extracts but the complainant has provided screenshots to the Commissioner of the relevant pages, thereby confirming that they are indeed from one of its publications.
17. The complainant wished to point out that he has provided *examples* of potential information held to assist with this investigation. It is therefore not just recorded information held relating to those examples that he

requires but all relevant recorded information falling within the scope of his request. He has said that the information is regarding extremely serious issues (such as chronic illness and death), ones which NHS England appear to have put considerable effort and resources into. He then refers to the NHS Complaints guidance documents which indicate that lesson learning is a very important tool in respect of patient health and patient safety issues. He believes there are legal obligations placed on NHS England in respect of lesson learning and such lessons would have been recorded. He stated that lessons learned information is of limited value if it is not readily accessible and it would make good business sense to ensure that this information is searchable electronically. He went on to say that NHS England has large resources and extremely important legal responsibilities. It is therefore likely that it will have ensured that lessons learnt from patient complaints, especially information that raised equality issues (race and disability) is available via the most practical and least time consuming of methods.

18. The complainant also commented that a cost/burden issue was never referred to previously and he never expected NHS England to have to go through vast amounts of material in order to comply with his request.
19. Firstly, a public authority is permitted to claim a late reliance on a particular exemption and secondly the relevant consideration in terms of section 12 is where and how the information is held and what would be required in order to comply (restricted to the tasks outlined in paragraph 13 above). The complainant may consider that NHS England *should* have this type of information to hand or that it should be more readily accessible. But for the Commissioner it is how and where the information *is* held and what would be required in order to comply that is relevant to her assessment of NHS England's application of section 12.
20. Dealing with examples (a) and (b) first, NHS England confirmed that up to the date of this request it has received 20 complaints or concerns and 6 general enquiries from the complainant himself. It also received 6 FOIA requests from the complainant prior to the information request being considered in this notice.
21. From other members of the public, for 2018/19 alone, NHS England received 122,021 general enquiries, 2326 FOIA requests, 7,967 concerns and 6,395 complaints. This equates to a total of 138,709 contacts in total. There is no specified time limit in the complainant's request so NHS England would have to go back further than 2018/19 (potentially as far back as NHS England's inception in 2013) and consider the total number of contacts it received for the preceding years.

22. It has explained that it would have to review each individual case file or contact to first establish whether it falls within scope and second, if it does, to determine if any lessons were learnt or action taken as a result of the issues raised. This is where the requested information would be held. If any broad lessons were learnt or action taken as a result of a complaint, concern, FOIA request or enquiry, it is also likely that this would be fed back to the wider business area. It argued that it would not be possible to establish which business areas may have received feedback or learning without first knowing the details of the antecedent complaint, concern, enquiry or FOIA request. For example, a complaint about a patient's engagement with a nurse may highlight shortcomings in national guidance issued to nurses on how to communicate in that particular circumstance. This may be fed back to the national Nursing Directorate. However, a similar request may highlight issues with the way that subject is being managed locally, and feedback in that case would be more likely to be shared locally or regionally.
23. It stated that there is no single place in which NHS England could search for this information. It considers that it would not be efficient to ask all areas of the business whether they hold any information about lessons learnt or action taken which relate to or are the result of the experiences of individuals who identify as BME. Instead it argued that it would be more efficient to review individual case files or contacts to identify any lessons learnt or action taken and then trace those forwards.
24. NHS England explained that only complaints are categorised and these are categorised based on K041 data criteria, which can be accessed here:

<https://digital.nhs.uk/data-and-information/publications/statistical/data-on-written-complaints-in-the-nhs/2017-18>).

FOIA requests, concerns and enquiries are not categorised at all. NHS England stated that even if we took the complaints' categories and looked at them it would still be impossible to identify complaints which are specific to the experiences of people who identify as BME.

25. The complaint categories are as follows:

- Anaesthesia
- Appointment (Obtaining inc 0844 numbers)
- Appointment Availability/Length
- Care Planning
- Charging / Costs
- Clinical Treatment (inc Errors)
- Communications
- Confidentiality (Breach etc)

- Consent to Treatment
- Delay in Diagnosis
- Delay in Failure to Refer
- Disability Issues (Access etc)
- End of Life Care
- Equipment (Quality)
- Failure to Diagnose
- Follow-up Care
- Hygiene (Equipment)
- Hygiene (Hand etc.)
- Inaccurate/Incorrect Records
- Loss of Records
- Loss of/Failure to Send Sample
- Misdiagnosis
- Out of Hours and other remote service provision
- Practice Management
- Premises (inc. Cleanliness, Condition)
- Prescribing Error
- Prescription Issues
- Privacy and dignity
- Refusal to Allow Access to Records
- Refusal to Prescribe
- Refusal to Refer
- Refusal to Visit
- Removal from List
- Repeat Prescription Process
- Staff Attitude/Behaviour/Values
- Surgery Hours
- Treatment Not Available
- Waiting Time for Appointment
- Other

26. It argued that while some are likely to be irrelevant, it does not consider that any could be fully disregarded. It stated that there are many which could be argued as 'most likely' to encompass a complaint of the nature specific in the request, particularly the following:

- Communications
- Failure to Diagnose
- Follow-up Care
- Out of Hours and other remote service provision
- Practice Management
- Privacy and dignity
- Staff Attitude/Behaviour/Values
- Other

However, even restricting searches to these categories would not be sufficient. It uses one of the complainant's own complaints to NHS England (reference C-282560) to highlight this point. This is recorded against the category "inaccurate/incorrect Records" as it related to a subject access request he made to his practice. However, that subject access request is related to his earlier complaints and subject access requests, which include comments about his personal experiences. As such, this complaint, which prima facie appears unrelated, would actually fall within the scope of the request.

27. NHS England stated that there is simply no means of filtering the records held by NHS England into FOIA requests, complaints, concerns or enquiries which are definitely not relevant, those which are definitely relevant and those which are potentially relevant. Therefore, the only means of identifying and retrieving the requested information from this source would be a manual review of each individual case file or contact and then to trace forwards to the relevant business areas any lessons learnt or action taken as a result of the issues raised. It argued that the complainant's request is so broad that there is no meaningful way in which it could limit its considerations of this information in order to reduce the amount of material to be reviewed.
28. It confirmed that even if we assumed that each individual case file or contact had one document to review (which is highly unlikely) and it would take one minute per document to establish whether it fell within the scope of this request (which again is very unlikely) it would take 2311 hours for NHS England to consider each and every contact made in 2018/19 alone. It would then need to consider whether any action was taken as a result of the issues raised or lessons learnt and trace this forward to the relevant business area and retrieve and review this information. This would also, then, need to be done for the preceding years, as there is no time limit specified in the request. It argued that this would quite clearly grossly exceed the cost limit prescribed by FOIA.
29. NHS England also stated that on reflection a wide range of other information could fall within the scope of the complainant's request. For example programmes of work focussed on patient engagement (which typically takes place locally), patient and public events (which may occur locally or nationally) and consultations in relation to clinical activity which disproportionately affect BME individuals (e.g. sick cell anaemia, Cardiovascular Disease) would give opportunities for patients and members of the public to make incidental comments about their personal experiences. It stated that it hosts a wide range of groups, task forces, forums and boards which invite patient and public participation, any of which could include incidental comments or feedback from individuals.

30. Dealing with part (c) now, NHS England confirmed that all work carried out and linked to the Workforce Race Equality Standard (WRES) team would be potentially relevant. It advised that it publishes a wide range of WRES work on its website (accessible here: <https://www.england.nhs.uk/about/equality/equality-hub/equality-standard/>), all of which would need to be interrogated in order to locate any information which is held by the team but which is not already published. The WRES team would also need to review all other work (outside of what has been published) in order to locate and retrieve any information which relates to people's personal experiences.
31. NHS England explained that there are 67 documents on NHS England's website tagged as "Equality and Diversity" and which pre-date the complainant's request. Each of these would need to be reviewed to consider firstly whether they fall within scope and secondly if they do which sections and whether there is any other information outside of what is published that is relevant (what the complainant has referred to as evidence used by NHS England to produce the publication).
32. Using the 'Employment engagement, sickness absence and agency spend in NHS Trusts' publication as an example (accessible here: <https://www.england.nhs.uk/wp-content/uploads/2018/03/wres-engagement-absence-agency-spend.pdf>), NHS England stated that it was not immediately apparent how this document related to Equality and Diversity. However, after an initial review of the Executive Summary, the section headers and the Summary of Findings, some potentially relevant information was located:
- "An interesting angle that is not possible to examine with the current data is whether the findings here are consistent across different demographic groups of staff. The recently-published report "Links between NHS staff experience and patient satisfaction: Analysis of surveys from 2014 and 2015" suggests that certain negative staff experiences have particularly damaging effects on outcomes, especially for staff from a Black and Minority Ethnic (BME) background. In particular, perceptions of unequal treatment and discrimination were especially damaging. Therefore future research may explore whether low engagement levels amongst BME staff are particularly associated with sickness absence amongst this group, as it may be that their experiences disproportionately contribute to the spend on agency and bank staff." *Section 7: Summary of Findings*"
33. NHS England explained that the initial review took around 3 minutes to complete. It stated that this took a negligible amount of time to locate. However, the information, data gathering or evidence used to produce the "Links between NHS staff experience and patient satisfaction: Analysis of surveys from 2014 and 2015" report would fall within the

scope of the request and would therefore require review. Additional time would need to be taken to carry this task out.

34. Another example it referred to is the publication named 'Improving through inclusion: Supporting staff networks for black and minority ethnic staff in the NHS' (which can be accessed here: <https://www.england.nhs.uk/wp-content/uploads/2017/08/inclusion-report-aug-2017.pdf>). It confirmed that out of the three publications it reviewed in support of its application of section 12, this document most clearly falls within the scope of the complainant's request. It advised that there is a total of 41 references (some duplicated) in the document. The following 23 references are also listed in this publication which, to a layperson, appear to be potentially relevant to the scope of the request:

- Leading by Example: The Race Equality Opportunity for NHS Provider Boards (2014)
- West et al (2012) NHS Staff Management and Health Service Quality: Results from the NHS Staff Survey and Related Data (West et al)
- Kline, R. (2014) The "snowy white peaks" of the NHS: a survey of discrimination in governance and leadership and the potential impact on patient care in London and England.
- Archibong, U et al (2010) Archibong U. and Darr A. 2010 The Involvement of Black and Minority Ethnic Staff in Disciplinary Proceedings, Centre for Inclusion and Diversity, University of Bradford
- Lintern, S (2012) Black midwives disproportionately disciplined, Nursing Times
- <https://www.england.nhs.uk/wp-content/uploads/2014/10/WRES-Data-Analysis-Report.pdf>
- West et al (2001) NHS Staff management and health service quality
- <https://www.england.nhs.uk/wp-content/uploads/2013/11/eds-nov131.pdf>
- Leading by Example: The Race Equality Opportunity for NHS Provider Boards (2014)
- TRUST: an essential ingredient for effective and inclusive leadership in the NHS. Royal College of Nursing
- <https://www.england.nhs.uk/nhs-standard-contract/17-18/>
- Leadership and Engagement for Improvement in the NHS - The Kings Fund Leadership Review 2012
- West et al, NHS Staff Management and Health Service Quality (2009)
- Canadian Centre for Diversity and Inclusion (2013)
- "Aboriginal Peoples: Practices in the Area of Aboriginal Employee Networks," Canadian Centre for Diversity and Inclusion (2013)
- Geren, C (2015). "Why Employee Resource Groups Need Support," Web Long Post

- Guest, D (2007) Towards a new psychological contract. Human Resource Management
 - Leading by Example: The Race Equality Opportunity for NHS Provider Boards (2014)
 - Stincelli, E, (2015) Help Employees Find Their Voice
 - Releasing the potential of BME Staff Networks, Royal College of Nursing (2006)
 - Bullying: a growing workplace menace. Mistry M and Latoo J (2009). Available from: <http://www.bjamp.org/content/bjampmarch-2009-volume-2-number-1>
 - Loppis, G (2012) 7 Ways to Enable Your Employee Resource Groups into a Powerful Advancement Platform
 - Alexander, N (2016) The Importance of Allies
 - Accountability in the NHS: Implications of the government's reform programme, Maybin J, Addicott R, Dixon A, and Storey J - Kings Fund (2011)
 - Inclusion, engagement and productivity: the fundamental business case for inclusive workplaces, Glendenning, S (CBI North East) (2016)
35. NHS England advised that it took 11 minutes to review this publication, identify that it potentially fell within scope and identify the various links and references it refers to. A considerable amount of additional time would be required in order to review such references to establish if they do fall within scope.

The Commissioner's view

36. The complainant has directed the Commissioner to the types of information he considers may fall in scope and where NHS England could potentially search in order to comply, although he has stressed that this should not be considered exhaustive. The Commissioner appreciates that initially NHS England interpreted the request more restrictively and felt that it would not hold information of the nature specified in the request. However, it is the Commissioner's view that the complainant's interpretation of his request is an objective and reasonable interpretation and so it is this interpretation that she should consider.
37. While the complainant is of the view that NHS England *should* hold the requested information more accessibly due to its very importance, NHS England has explained in detail (as outlined above) where the information is likely to be held and what would be involved if it were to comply. Dealing with the complaints, concerns, enquiries and FOIA requests NHS England has received, NHS England has estimated that it would take 2311 hours to review those referred to it for 2018/19 alone based on a very conservative estimate of one minute per file/contact. Even if NHS England were to just focus on complaints alone, it would

still take NHS England 106 hours to comply based on one minute per file. The Commissioner considers this is a reasonable and fair estimate based on what the complainant considers falls within scope, where this information is held in NHS England and what would be involved in trying to identify and retrieve it. And this is without considering the various publications highlighted by the complainant (part (c)). NHS England has explained in detail what would be involved and that there is no other meaningful and less labour intensive way of retrieving the requested information.

38. The appropriate limit is 18 hours for NHS England. It is clear to the Commissioner from what NHS England has said that it would grossly exceed the appropriate limit in this case were it to comply with the request. She is therefore satisfied that section 12 of the FOIA applies.

Section 16 – duty to provide advice and assistance

39. Section 12 triggers the duty to provide advice and assistance to the applicant. Section 16(1) states that:

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.”

40. As NHS England has claimed a late reliance on section 12 of the FOIA it has not to date provided advice and assistance to the complainant. The Commissioner requires NHS England to consider section 16 of the FOIA so far as it is reasonable to expect it to do so. It should consider what information could potentially be provided within the appropriate limit and inform the complainant of this to enable him to reconsider what he has asked for and whether he wishes to submit a fresh request which could be met within the cost limit.
41. The Commissioner wishes to point out that even if a public authority does not consider in a given case that it can offer any appropriate advice and assistance, it is still good practice and in accordance with section 16 to inform the applicant of this and ideally explain why.

Procedural matters

42. As NHS England initially stated that the requested information is not held, but then later identified that it was but it would exceed the appropriate limit to comply, the Commissioner has found NHS England in breach of section 1(1)(a) and 10 of the FOIA. This is because NHS England failed to confirm that it *does* hold recorded information of the nature specified in the request within 20 working days of the receipt of the request.

43. The Commissioner has also recorded a breach of section 17(5). As NHS England claimed a late reliance on section 12 of the FOIA it failed to provide a notice to the complainant stating that section 12 applies within 20 working days of his request.

Right of appeal

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

Website: 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

Samantha Coward
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF