

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 June 2022

Public Authority: NHS Improvement
Address: Skipton House
80 London Road
London
SE1 6LH

Decision (including any steps ordered)

1. The complainant has requested information about the NHS's Equality, Diversity and Inclusion Glossary. NHS Improvement ('NHSI') refused the request as it considered that compliance with it would exceed the cost limit under section 12 FOIA.
2. The Commissioner's decision is that NHSI has correctly cited section 12(1) FOIA in response to the request. It has also complied with its duty to provide advice and assistance in line with the requirements of section 16 FOIA. He finds that NHSI breached section 10(1) FOIA by failing to respond to the request within the statutory time for compliance.
3. The Commissioner does not require NHSI to take any steps.

Background

4. The Equality, Diversity and Inclusion Glossary ('EDI Glossary') was an A to Z list of diversity terms. The Commissioner understands that it was included on the NHS Leadership Academy section of the NHS website under inclusion, equality and diversity resources.
5. The complainant has told the Commissioner that he believes that 'around a tenth of it' was copied word for word from a glossary of LGBTQ+ terms produced by Stonewall.

6. On 5 June 2021, the existence of the EDI Glossary became known publicly. In the following days, the EDI Glossary received negative attention in various newspapers and on social media.
7. The Commissioner understands that the NHS took down the EDI Glossary from its website, on or around 5 June 2021. A previous link to it now returns a '404 error'.

Request and response

8. On 5 June 2021, the complainant requested information in the following terms:

"This is a FOI request about the Equality, Diversity and Inclusion Glossary available at <https://people.nhs.uk/equality-diversity...>

The copyright holder is NHS Leadership Academy. Can you confirm that NHS Leadership Academy is part of NHS Improvement?

If so, please provide me with copies of all internal and external communications relating to the glossary and falling in these categories:

1. Communications leading to and including the decision to create the glossary
2. Communications about the drafting of the glossary
3. Communications about the publication of the glossary, or about updating it
4. Internal development documents and advice notes
5. Communications with stakeholders
6. Reports and papers created for meetings
7. Minutes of meetings

Further, please answer the following:

1. When was the glossary first published, and when was it published in its current state?
2. What is the purpose of the glossary?
3. Who is directed to read it?
4. Is the glossary intended to be viewable by the public? If not, why not?"

9. When the complainant did not receive a response to his request, he complained to the Commissioner. On 23 August 2021, after the Commissioner's intervention, NHSI responded to the request. It confirmed that it held some of the information requested but advised

that compliance would exceed the cost limit at section 12 FOIA. The complainant requested an internal review on the same day.

10. After further intervention by the Commissioner, NHSI provided an internal review response to the complainant on 22 November 2021. NHSI maintained its reliance on the cost limit at section 12 FOIA.

Scope of the case

11. The complainant contacted the Commissioner on 23 November 2021 to complain about the way the request for information had been handled. In particular, the complainant was concerned that the cost estimate in the internal review had used the dates of February 2020 to the 'present date' (i.e. 22 November 2021) when NHSI should have used February 2020 to the date of the request (i.e. 5 June 2021).
12. The Commissioner considers the scope of this case to be to determine if the public authority has correctly cited section 12(1) FOIA in response to the request. He has also considered whether NHSI breached section 10(1) FOIA by failing to respond to the request within the statutory time for compliance and whether it complied with its duty to provide advice and assistance under section 16 FOIA.

Reasons for decision

Section 12 – cost of compliance exceeds the appropriate limit

13. Section 12(1) 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.
14. 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 NHSI.
15. 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) FOIA effectively imposes a time limit of 18 hours for NHSI to deal with this request.
16. 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; and
 - extracting the information from a document containing it.
17. 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 (EA/20017/0004)*, the Commissioner considers that any estimate must be “sensible, realistic and supported by cogent evidence”.
18. Section 12 FOIA is not subject to a public interest test; if complying with the request would exceed the cost limit then there is no requirement under FOIA to consider the public interest in compliance.
19. Where a public authority claims that section 12 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 FOIA.

Would the cost of compliance exceed the appropriate limit?

20. During the course of the Commissioner’s investigation NHSI confirmed that the date range used in the internal review was incorrect. It conducted a fresh sampling exercise with the correct date range (i.e. February 2020 to 5 June 2021) but remained of the view that compliance with the request would exceed the cost limit.
21. NHSI explained to the Commissioner in its revised cost estimate that it conducted a sampling exercise using a key member of staff who worked on the EDI Glossary (‘Employee A’). Employee A’s NHSmail email account was searched using the keyword ‘EDI Glossary’ for the period 1 February 2020 to 5 June 2021. A total of 388 emails were returned from the search.
22. However, NHSI explained that not all information within each email identified by the key word search would necessarily fall within scope of the request. Therefore, each email would have to be examined individually to identify, and then extract, the in scope material.

23. NHSI explained that it sorted the 388 emails into three distinct categories:
 - Category A: covered roughly 50% of the emails and were relatively straightforward to review: 30 seconds per email or 97 minutes;
 - Category B: covered roughly 40% of the emails and required more consideration: 90 seconds per email or 233 minutes;
 - Category C: covered roughly 10% of emails and were more complex or lengthy: 3 minutes per email or 116 minutes.
24. In total, therefore, to identify and extract the relevant information held by Employee A in the 388 emails, NHSI estimated it would take 7.4 hours.
25. NHSI have advised the Commissioner that they have identified 12 staff members who would be most likely to hold information in relation to the request (the 'core project team'). Therefore, the time estimate above of 7.4 hours would need to be multiplied by 12. This brings the time estimate to 88.8 hours.
26. In addition to conducting a sampling exercise for the core project team's emails, NHSI explained that it would also need to conduct a sampling exercise using a keyword search for relevant documents within the core project team's shared drive on SharePoint. 105 document files were found of varying sizes in the shared drive. Three files were selected at random. To identify and extract in scope information from these three files took 21 minutes. Therefore, NHSI estimated that it would take 12.25 hours to identify and extract the information from all of the document files of the core project team.
27. NHSI's total cost estimate was 101 hours for the core project team to identify, and then extract, the in scope material.
28. The Commissioner is satisfied that in the circumstances NHSI's search strategy was reasonable and proportionate. The Commissioner is also satisfied that the cost estimate of the core project team has been based on the quickest method of gathering the requested information.
29. In addition, the Commissioner notes that the request is a broad, catch-all one – for 'all internal and external communications relating to the glossary.' Therefore NHSI would need to undertake further searches in addition to those described above, in order to ensure that all relevant information was located. This is because NHSI are expected to search those areas where it is reasonable to expect that the information (if it existed) would be found.

30. Having carefully considered the search strategy adopted and the specific estimates provided by NHSI as set out above, the Commissioner's overall conclusion is that NHSI has estimated reasonably and cogently that to comply with the complainant's request would exceed the cost limit. The Commissioner notes that, even if this cost estimate was reduced by half to 50 hours, it would still be far in excess of the cost limit of 18 hours.
31. NHSI was therefore entitled to apply section 12(1) FOIA to the complainant's request.

Section 16 – advice and assistance

32. Section 16(1) FOIA provides that a public authority is required to provide advice and assistance to any individual making an information request where it would be reasonable to do so. Section 16(2) clarifies that, providing an authority conforms to the recommendations as to good practice contained within the section 45 code of practice¹ in providing advice and assistance, it will have complied with section 16(1).
33. In general, where section 12(1) is cited, in order to comply with this duty a public authority should advise the requester how their request could be refined or reduced to potentially bring it within the cost limit.
34. The Commissioner notes that NHSI suggested ways the complainant may wish to consider refining the request on 23 August 2021, and again on 22 November 2021. It suggested that the request could be refined by reducing the time period of the request to one month, specifying the types of documents that the complainant required or by limiting the request to Employee A only. (The Commissioner is aware that the complainant then made a fresh request for information held by Employee A only and that NHSI is dealing separately with this request).
35. The Commissioner considers these were appropriate responses in the circumstances given the broad nature of the original request. He is therefore satisfied that the NHSI met its obligation under section 16 FOIA.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Section 10 – time for response

36. Section 10(1) FOIA states that a public authority must respond to a request promptly and in any event not later than the twentieth working day following the date of receipt.
37. The request for information was made on 5 June 2021. NHSI responded with a refusal notice on 23 August 2021, and only after the Commissioner's intervention. As this was more than 20 working days after the request was made, the Commissioner finds that the NHSI breached section 10(1) FOIA.

Other Matters

Internal review

38. As regards the internal review, the complainant also complains that NHSI was late in responding. The complainant requested a review on 23 August 2021 and NHSI replied on 22 November 2021.
39. There is no statutory time set out in FOIA within which public authorities must complete a review. The Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. However, in his guidance, the Commissioner has said that the maximum amount of time taken should not be more than 40 working days.²
40. In this case, NHSI completed its review well after 40 working days. The Commissioner recognises and appreciates that the resource and staffing pressures caused by the Covid-19 pandemic have meant that some internal reviews have taken longer than usual to be completed. However, the Commissioner is of the opinion that a delay of several months in completing an internal review, is unreasonable. Further, NHSI did not keep the complainant informed about the delay, despite the complainant twice chasing NHSI. It should have done this as a matter of customer service.

² <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/#20>

Right of appeal

41. 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

42. 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.
43. 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

**Sarah O’Cathain
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Information Commissioner’s Office
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SK9 5AF**