



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2018/0145**

**Heard at Sheffield MJC**

**On 4 December 2018**

**Representation:**

**Appellant: The Appellant did not appear**

**Respondent: The Information Commissioner did not appear**

**Second Respondent: Miss Olley (Counsel)**

**Before**

**JUDGE BUCKLEY**

**Between**

**MARK FLEMING**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**NHS ENGLAND**

Second Respondent

**DECISION**

1. For the reasons set out below the appeal is dismissed.

## REASONS

### **Procedure**

1. The appellant was notified of the hearing at the appropriate address and asked on 30 November 2018 by email whether he was attending. He did not reply and did not attend. Applying the overriding objective, I decided it was in the interests of justice to hear the appeal in his absence.
2. During the hearing the second respondent made an application to call a second witness. No witness statement had been served. I took into account the overriding objective and any relevant factors including the lateness of the application and the absence of the other parties. Noting the importance of the evidence to the second respondent's case and the fact that the other parties had had the opportunity to attend the hearing if they wished, I allowed the application subject to giving the other parties the opportunity to comment on the content of that evidence in writing before a final decision was made. A case management order was sent to the parties enclosing a detailed note of that evidence and requiring any further submissions to be filed by 3 January 2019. No further submissions were received.

### **The request**

3. The Appellant made the following initial request on 29 September 2017:  
I would be grateful if you could provide details of all complaints made against One Medical Group or any of the approximately 15 GP practices and other services that the group provides to NHS England over the last 5 years.
4. NHS England replied on 23 October 2017 asking for clarification of what was meant by 'details' and enclosing a link to the NHS England Customer Contact and Complaints Annual Reports.
5. The Appellant replied on 23 October: '... None of the reports... make any direct reference to One Medical Group or the actual GP practices that they "manage" ... [I am] keen to understand how often this organisation (or its many parts) has been the subject of formal complaints, remedial actions or other interventions'
6. NHS England sought further clarification on 20 November 2017 as follows:
  - 1) What is meant by 'details' in the original request?
  - 2) Does the request refer to internal actions (*remedial actions or other interventions*), or other patient complaints (*formal complaints*), or something else?
7. On 20 November 2017 the Appellant clarified the request as follows:  
My definition of "details" includes copies of all complaints documents (anonymised if necessary), detailed statistics, summary statistics, comparative

data (to understand whether OneMedical Group is performing outside the norm, etc), procurement assessments, financial assessments, etc

You ask for clarity regarding “*internal actions (remedial actions or other interventions), or patient complaints (formal complaints), or something else*”. I am a member of the public. I would like to see any and all correspondence, reports or data held by NHS England regarding OneMedical’s (or its GP practices’) financial, medical or other performance compared to its contractual obligations to NHS England, compared to NHS England expectations, and/or complaints about the performance of OneMedical’s directors or its staff or its GPs. Such actions would, by definition include some actions which require actions that are “within” or “internal to NHS England” in its widest sense...

...as part of any procurement assessment of suppliers, NHS England will establish a wider-reaching and holistic view of each of its providers, which would include complaints histories. I would like to see all of these details.

### **NHS England’s response to the request**

8. NHS England responded on 18 December 2017 relying on s 12 FOIA. It stated that responding to the request as currently framed would exceed the cost limit because:
  - 1) Searching for any correspondence within the scope of the request would require every employee of NHS England performing computer searches on a number of computer files covering the period of the request at a minimum of ten minutes per search.
  - 2) NHS England estimates that to locate, retrieve, extract and collate the information requested across all staff will vastly exceed the appropriate limit.
9. NHS England suggested that the Appellant might wish to refine his request by:
  - 1) Focussing on specific geographical areas such as West Yorkshire.
  - 2) Specifying whether the request (i) was limited to One Medical Group’s GP practices or (ii) included other services offered by the company
  - 3) Specifying whether the request (i) was limited to GP practices solely operated by One Medical Group or (ii) included practices which One Medical Group worked closely with.
10. The Appellant requested an internal review on 19 December 2018, stating that:
  - 1) One Medical Group was very small and only operates in 15 GP practices.
  - 2) His primary focus was the GP practices.
11. NHS Trust upheld its decision on internal review on 22 December 2017:
  - 1) Section 12 was applied because of the very broad nature of the request, which asks for “any and all” correspondence, as well as reports, complaints, statistics and other data.
  - 2) Information is likely to be held across a number of different teams at local, regional or national level. The searches required would be on a very large scale.

- 3) Without significantly limiting the parameters of the request by, for example, requesting one distinct type of information such as patient complaints over a short time period, it is not possible to comply within the appropriate limit.

### **The reference to the Information Commissioner**

12. The Appellant complained to the Information Commissioner.
13. NHS England provided the following further information in a letter to the Commissioner dated 23 May 2018:
  - 1) OMG provides services across a number of geographical areas. Searches would require input from multiple national teams as well as the national complaints team.
  - 2) It was not possible to provide a specific time estimate.
  - 3) Searches would have to be made on likely variants of the term One Medical Group and the common name for each GP practice and/or other service.
14. NHS England explained that it had carried out a sampling search using for OMG's GP practices on its case management system. The search took 45 minutes to complete. It identified 54 complaints, which would take 5 minutes each to review to see if within the scope of the request (4.5 hours). Extracting the relevant information would take 20 minutes per case. If 75% of the cases were in scope it would take 10 hours. If all the cases were relevant it would take 18 hours. The total time to locate information related to patient complaints alone was estimated to be between 15.25-23.25 hours.

### **The Decision Notice**

15. The Information Commissioner issued Decision Notice FS50703648 on 17 July 2018, confirming that NHS England had correctly applied s 12 FOIA to the request and had complied with s 16 and requiring no steps to be taken.

### **The Appeal to the Tribunal**

16. The grounds of appeal are:
  - 1) NHS England has exaggerated the amount of time required.
  - 2) A rate of £25/hour is not appropriate.
  - 3) It was not reasonable to include searches for reasonable alternative spellings.
  - 4) It was not reasonable to include reviewing each complaint to see if it was in the scope of the request.
  - 5) The request was for a copy of NHS England's existing analysis of its own complaints database. It is inconceivable that NHS England has not already analysed its own complaints database.
  - 6) The request, as refined, is limited to One Medical Group practices.

- 7) The Commissioner has simply accepted NHS England's explanations without challenging or sense-checking them.

## **Legal framework**

### S 12 Cost of Compliance

17. Under s 12(1) a public authority is not obliged to comply with a request for information where:
  - the authority estimates that the costs of complying with the request would exceed the appropriate limit.
18. The relevant appropriate limit, prescribed by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations') is £450.
19. In making its estimate, a public authority may only take account the costs it reasonably expects to incur in relation to the request in-
  - (a) determining whether it holds the information,
  - (b) locating it, or a document which may contain the information,
  - (c) retrieving it, or a document which may contain the information, and
  - (d) extracting it from a document containing it. (See regulation 3).
20. The Regulations specify that where costs are attributable to the time which persons are expected to spend on the above activities the costs are to be estimated at a rate of £25 per person per hour.
21. The estimate must be sensible, realistic and supported by cogent evidence (McInnery v IC and Department for Education [2015] UKUT 0047 (AAT) para 39-41).

### Section 16 – Advice and Assistance

22. Section 16 provides:
  - '(1) 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.

### The Task of the Tribunal

23. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

## Evidence and submissions

24. I have read and was referred to a bundle of documents and submissions.

## Evidence

25. I read a statement and heard evidence from Christopher Whitehill, Freedom of Information Manager for NHS England. I also heard evidence from Chloe Wilkins, Senior Freedom of Information Case Worker. Mr Whitehill came across as an honest witness and did his best to assist the tribunal but was not aware of sufficient detail to explain the basis for the estimates. Miss Wilkins gave clear and detailed convincing evidence from a position of a full understanding of the the relevant processes. She did not carry out the searches herself but was familiar with the system and gave detailed evidence to explain why different parts of the search would take the time they did.
26. The second respondent carried out two sampling exercises. The first exercise focussed on information held in relation to formal complaints on NHS England's web-based CRM case management system. There were three stages to the search.

### *The first stage*

27. The first stage took 45 minutes. Miss Wilkins explained the method used. There is a 'provider' field and a 'case type' field. To search for complaints against OMG, 'complaint' is entered into the case type field and the relevant provider is typed in the provider field.
28. OMG has a number of GP practices and therefore searches have to be made against each of these provider names. Miss Wilkins explained that the system finds a match with what was originally typed into the provider field. If a search was simply made against the 'true' name of the GP practice, a number of complaints will be missed, because the person who created the record might have typed something different in the provider field. For example, many GP practices have common names and 'true' names. In order to find the complaints both searches have to be carried out. Further there may be two common variants to the spelling of a practice's name e.g. saint/st. These will both have to be searched.
29. Once a search for a particular name has been carried out, the system produces a list of records of complaints against providers with that name. There are multiple practices that share the same name and therefore the list needs to be edited to remove those 'false positives' that relate to a different practice.
30. The provider field only came into existence in 2015. To locate complaints before that date each search and consequent editing of 'false positives' has to be repeated through a free text search of the description field.

31. I accept that this search took 45 minutes, and given the detailed description of what needed to be done above, this is a reasonable period of time.

*The second stage*

32. The first stage produced a list of 54 complaints in some way related to any GP practice that is related to OMG. The second stage is removing any complaints that are clearly not about OMG or its practices. The list would include complaints by OMG patients who, for example, got a prescription from an OMG practice but then went to the pharmacy and the pharmacist got the prescription wrong. At this stage a review of the description field might enable the complaint to be taken out of the list. This takes 5 minutes on average – there are probably cases that take much less time, and other cases where it is not immediately apparent and the additional field might be lengthy but ultimately unhelpful. There is no guidance as to what should be included in the description field. It might be everything in complaint letter or it might be a brief note taken over the phone.
33. I accept that it would have taken 5 minutes, on average, to check the additional field in relation to each complaint as described above.

*The third stage*

34. Even after the provider search and the 5-minute review there is still a chance that once the complaint documentation is looked at, it will show that the complainant was not complaining about what appeared in the description field. The only place that the details of a complaint exist are within the documents attached to the complaint. That is where the information is held that tells you if the complaint is actually about One Medical Group or about, for example, someone who was rude to a patient in the waiting room. This information will not necessarily be apparent from the first document. The 20 minutes is an average. In some cases, it will be clear from the first email, in some cases a lot of documents will need to be read in order to make a decision.
35. The broad scope of the appellant's complaint would, in my view, mean that all information and documents related to complaints about OMG fell within scope. The original evidence from the CCC stated that 'in order to provide the appellant with the level of detail requested' 20 minutes would be needed to 'extract the relevant information'. I would not have accepted this. The appellant's request was so wide that no information needed to be extracted – it would all fall within in scope as long as it was a complaint about OMG or its practices.
36. However, I accept that the provider search results would have included cases where the complainant's GP was part of OMG, but the complaint was not about OMG or the GP practice. These complaints would not have fallen within the scope of the request and it was reasonable to check each complaint in detail

to ensure that it was within scope. I accept Miss Wilkin's evidence that this would have taken, on average, 20 minutes per case.

37. The second respondent carried out a further sampling exercise using the same provider search terms, but for the case-type 'general enquiries'. I accept that simply carrying out a search for complaints would not have located all the information in the scope of the request. I accept Miss Wilkin's evidence that NHS regulations are very prescriptive about what constitutes a 'complaint', and that the broad nature of what Mr Fleming had requested might not all have fallen within that category.
38. Because of the larger number of and the nature of general enquiries I accept that this search would have produced many more 'false positives' than the first search and that the amount of time taken was reasonable.
39. There are other types of information contained in the request. Mr Fleming asks for 'any and all correspondence, reports or data held by NHS England regarding OneMedical's (or its GP practices') financial, medical or other performance compared to its contractual obligations to NHS England'. I accept the evidence of Miss Wilkins that this information would be held by the contract teams and would not be on the case management system.
40. In relation to the statistical information, I accept that NHS England does not hold centrally collated statistics. Statistics or might not be held by local teams.

## **Submissions**

41. NHS England highlighted the broad scope of the request as follows:
  - 1) Information about complaints that may have been made.
  - 2) Specific statistical analyses he assumed had been undertaken in relation to that information.
  - 3) 'Any and all' correspondence, reports and data relating to multiple aspects of One Medical Groups's performance.
  - 4) Analyses which he assumed had been undertaken in relation to that information.
  - 5) Information in relation to a wide range of One Medical Group's personnel (directors, staff, and GPs).
  - 6) Information in relation to OMG as a whole and its GP practices as a whole.
  - 7) Information on a time-unlimited basis including in relation to any historic complaints prior to 1 April 2013.
42. NHS England has set out the facts and assumptions upon which its estimate is based. It is sensible, realistic and supported by cogent evidence. 45 minutes was the time it took to conduct the search. 'Efficiencies' cannot be applied until the relevant data is isolated. It is not clear what efficiencies the appellant refers to. The respondent's explanations have to be judged against the present reality, not



against procedures or practices they should have. The hourly rate is laid down in the 2004 Fees Regulations with no distinction according to geographical area.

## **Discussion and Conclusions**

43. I accept the evidence about the sampling exercises carried out by NHS England for the reasons set out above. I accept that it was reasonable to search for common variants. I have dealt above with the issue of reviewing the complaints to see if they fell within the scope of the request. I accept the witness evidence on what analyses do or do not exist and it is not part of my remit to order them to create information that does not currently exist. Whether or not the Commissioner appropriately challenged the evidence, I did so in detail at the hearing and I conclude that the estimate is reasonable, that it is not exaggerated and that it is based on cogent and reasonable evidence.
44. Locating the information in relation to this part of the request alone would exceed the relevant limit. The hourly rate is fixed by statute. I accept that there is significant further work to be undertaken in relation to other aspects of this request. In my view it is clear, on the basis of the evidence provided, that it would take far in excess of the required limit to find the information in response to a request of such a broad nature.
45. Mr Fleming was given the opportunity to narrow his request which, I find, satisfies NHS England's obligations under s 16.
46. For these reasons the appeal is dismissed.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 14 January 2019