

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 26 May 2015

**Public Authority:** NHS England  
**Address:** 8E02 Quarry House  
Quarry Hill  
Leeds LS2 7UE

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to the number of hip replacements done by individual surgeons and the types of prostheses used.
2. The Commissioner's decision is that NHS England has correctly withheld the names of the surgeons linked to their performance data by virtue of section 40(2).
3. The complainant also disputed whether all the information had been correctly identified and all the links to where this information could be found provided to him. The Commissioner is satisfied that NHS England did correctly apply section 21 and that no further information is held that falls within the scope of the request other than that withheld under section 40.
4. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

#### **Background**

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5. The information itself is held by the National Joint Registry (NJR) who themselves are hosted by the Healthcare Quality Improvement Partnership (HQIP). HQIP holds a contract with NHS England which was novated from the Department of Health in April 2013. The contract provides that the information generated by NJR for this request is that which falls under NHS England. NHS England has handled this request

as a result. HQIP themselves remain a hosted body of the Department of Health.

## Request and response

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6. On 15 April 2014, the complainant wrote to NHS England and requested information in the following terms:

*"Please supply, in an excel spreadsheet format if possible, the following information. By calendar year the number of hip replacements performed for each individual surgeon (who is to be identified), the prosthesis used and the Orthopaedic Data Evaluation Panel (ODEP) rating of this. If possible this information to also include which hospital these operations were performed in and whether they were done privately or paid for by the NHS."*

7. NHS England responded on 14 May 2014 and stated that some of the information requested was in the public domain and referred to section 21 of the FOIA in its response. It provided appropriate links to the information for the complainant. However, it considered that the individual surgeon level data was exempt by virtue of section 41 of the FOIA.
8. Following an internal review NHS England wrote to the complainant on 4 September 2014 and maintained its position.
9. Following correspondence with the Commissioner NHS England wrote to the complainant again on 5 February 2015. It stated:  
  
*"Since your request, internal review and subsequent ICO complaint, the availability of information has changed. Additional information is now available publicly on NHS Choices website and others, including the information originally exempt under section 41 of the FOI Act. NHS England along with the National Joint Registry (NJR) in line with the openness and transparency agenda has developed considerably in the past 12 months regarding its position on transparency of information. As such, previously exempt information has now in some cases been re-reviewed for release. This has been as a result of organisational direction change in ensuring there is openness and transparency of data and information."*
10. It therefore carried out a review of the original request and provided links to some further information which had previously been withheld by virtue of section 41. A list of the links provided is given in an annex at the end of this decision notice.

11. The Commissioner subsequently contacted the complainant to confirm if the request had been answered. The complainant responded and stated:

*"The information they have not provided is for each individual surgeon (who is to be identified), the prosthesis used and the ODEP rating of this. If possible this information to also include which hospital these operations were performed in and whether they were done privately or paid for by the NHS. The information on the NJR web site now gives percentage of hip replacements that have an ODEP rating. However the ODEP ratings has a number of categories and the web site provides no breakdown of these. As a consequence it is not possible to identify a surgeon's use of the highest quality rated (10A) prostheses."*

12. The Commissioner wrote to NHS England again advising he was proceeding to a decision notice and requested its arguments to support its position.
13. NHS England responded on 14 April 2015 and confirmed it was relying on section 41 to withhold the names of the surgeons. It also claimed late reliance on section 40(2) with regard to the same information.

### **Scope of the case**

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14. The complainant contacted the Commissioner on 27 November 2014 to complain about the way his request for information had been handled.
15. The Commissioner considers the scope of this case to be to determine if NHS England has correctly applied sections 21, 41 and 40(2) of the FOIA to the names of the surgeons linked to their performance data.
16. The Commissioner has also considered whether the complainant is correct in stating that the information in the public domain does not fulfil his request. In particular he has considered whether the following information falls within the scope of the complainant's original request:
  - The category breakdown of the ODEP ratings;
  - The hospital in which these operations were performed;
  - Whether they were done privately or paid for by the NHS.

### **Reasons for decision**

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#### **Section 40(2)**

17. Under section 40(2) by virtue of section 40(3)(a)(i), personal data of a third party can be withheld if it would breach any of the data protection principles to disclose it.
18. Personal data is defined in section 1(1) of the Data Protection Act (DPA) as:  
  
*"data which relate to a living individual who can be identified –  
(i) from those data, or  
(ii) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."*
19. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
20. NHS England considers that the surgeon's names are the personal data of third parties and disclosure of this information would breach the first data processing principle, the fair processing principle contained in the Data Protection Act (DPA), where it would be unfair to that person(s)/is confidential.

*Is the information personal data*

21. The withheld information in this case comprises the names of surgeons carrying out hip replacement surgery. The Commissioner considers that the individuals can be identified from their name coupled with the fact that they are surgeons. The Commissioner is therefore satisfied that the withheld information is the personal data of third parties.

*Would disclosure contravene the first data protection principle?*

22. Having accepted that the information requested constitutes the personal data of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles. He considers the first data protection principle to be most relevant in this case. The first data protection principle has two components:
  - personal data shall be processed fairly and lawfully; and

- personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.
23. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

*Would disclosure be fair?*

24. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
- the individual's reasonable expectations of what would happen to their information;
  - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); and
  - the balance between the rights and freedoms of the data subject and the legitimate interests of the public.
25. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public.
26. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in its disclosure.

*Reasonable expectations of the data subjects*

27. NHS England stated that the individuals have not consented to their personal information being placed into the public domain with a direct link to their performance data in relation to information they have voluntarily given regarding product use and outcome.
28. It also considered that there are no reasonable expectations in disclosure of this information. The surgeons do not expect to have their identity linked with performance data such as this to be placed into the public domain. This was not the intention of the provision of this information by the surgeons, nor was it directly agreed or implied by them with the NJR.

29. NHS England explained that the giving of this information to the NJR by surgeons was voluntary and done so to better monitor products not the performance of surgeons. Placing this information into the public domain without suitable and fair consultation would breach the data protection principles in the fair processing of their data and their reasonable expectations in being made aware and having the full ability to challenge any disclosure.
30. NHS England confirmed that a sample has been communicated with - members of the NJR Steering Committee, including the NJR's Medical Director and members of the ODEP committee, all of whom confirm consent has not and is not being provided.

#### *Consequences of disclosure*

31. As to what may be the consequences of disclosure the Commissioner recognises that disclosure in contravention of their reasonable expectations could be distressing for them. If this information was disclosed on its own or linked to information already in the public domain it has the potential for the public to make incorrect assumptions about a particular surgeon's personal performance within their profession. NHS England considers that release of their names exposes not only their identity in relation to products used in surgery but performance from this, which in turn could negatively impact them personally and commercially through their profession.

#### *The legitimate public interest*

32. The Commissioner considers that there is a legitimate public interest in openness and transparency. He therefore asked NHS England to consider the sixth condition of schedule 2 of the DPA which states:

*"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."*

33. NHS England explained that as the request asks for all surgeon names it had not gone on to assess the sixth principle. It considered that this principle predominantly relates to a subject access request whereby the information directly relates to the individual.
34. However, the Commissioner does not consider this to be the case. The DPA recognises that there may be legitimate reasons for processing personal data that the other conditions for processing do not specifically deal with. The "legitimate interests" condition is intended to permit such processing, provided certain requirements are met.

35. The first requirement is that the information must need to be processed for the purposes of the legitimate interests of the data controller or for those of a third party to whom it is disclosed to.
36. Once this has been established the second requirement is that these interests must be balanced against the interests of the individual(s) concerned. The "legitimate interests" condition will not be met if the processing is unwarranted because of its prejudicial effect on the rights and freedoms, or legitimate interests, of the individual.
37. The Commissioner considers that the complainant has a legitimate interest in the information. However, this has to be balanced against the legitimate interests of the individuals.

### *Conclusion*

38. The complainant has asked for all surgeon names and from the information already published this would give a direct link to their performance. In order to reach a view on whether the disclosure would be fair, the Commissioner has considered the nature of the information itself. In this case disclosure of the information would reveal each individual surgeon's performance and therefore the Commissioner considers this would be unfair.
39. The Commissioner does not consider that disclosure of the individual surgeon's names would provide greater understanding. As can be seen by the links provided at the end of this decision notice, NHS England now makes available a significant amount of information relating to this type of surgery. Although not all this information was available at the time of the request, the Commissioner maintains that to disclose the individual surgeons' names would have been a breach of the DPA. The Commissioner therefore accepts that the rights and freedoms of the data subjects outweigh the public's legitimate interest in disclosure of this information.
40. The Commissioner has concluded that disclosure of this information would be unfair and in breach of the first data protection principle. As such section 40(2) is engaged and the further information relating to the individual's names should be withheld.

### **Section 21 – Information accessible to the applicant by other means**

41. Section 21(1) provides an exemption for information that is already reasonably accessible to the applicant. It is an absolute exemption and as such no public interest test needs to be applied.
42. In its original response to the complainant NHS England cited section 21 and provided a number of links to some of the requested information.



The Commissioner has reviewed the information available via these links and is satisfied that NHS England was correct to apply section 21(1) to this part of the request.

43. NHS England acknowledge that the information requested is not in the same format as the complainant requested but considers he could manipulate the data to meet his needs.
44. Having therefore considered the above, and in the absence of any conflicting evidence provided by the complainant, the Commissioner has concluded that part of the withheld information is reasonably accessible to the complainant by other means, and that NHS England has correctly applied section 21(1).
45. As the Commissioner has concluded that the information is already reasonably accessible to the complainant and therefore exempt under section 21 of FOIA, section 11 of the FOIA (means of communication) does not apply.

### **Section 1(1) – Duty to make information available on request**

46. Section 1(1) states that any person making a request for information is entitled to be informed by the public authority whether it holds the information, and if so, to have that information communicated to them. This is subject to any exemptions or exclusions that may apply.
47. The FOIA provides a right of access to information in recorded form, and only that which exists at the time of the information request. The FOIA does not require a public authority to generate new information, such as in the form of an explanation of opinion, in order to respond to a request.
48. The complainant stated that further information he had requested had not been provided, namely;
  - The prosthesis used and the ODEP rating of this;
  - The hospital in which these operations were performed;
  - Whether they were done privately or paid for by the NHS.
49. The complainant stated that the information on the NJR web site now gives the percentage of hip replacements that have an ODEP rating. However the ODEP ratings have a number of categories and the web site provides no breakdown of these. As a consequence it is not possible to identify a surgeon's use of the highest quality rated (10A) prostheses."



50. The Commissioner has reviewed all the links NHS England has provided to the complainant. He also sought further clarification from NHS England with regard to the availability of the breakdown of ODEP ratings.
51. NHS England advised that it is not a straightforward question/answer. It explained that it can provide the ODEP rating of the components used, but it should be noted that the ODEP rating held on the NJR is the current rating, not necessarily that at the time of surgery.
52. The Commissioner has considered the wording of the original request:

*"By calendar year the number of hip replacements performed for each individual surgeon (who is to be identified), the prosthesis used and the Orthopaedic Data Evaluation Panel (ODEP) rating of this."*
53. The Commissioner considers that the further information detailed by the complainant in paragraph 48 above does not fall within the scope of the original request as the complainant simply asks for the ODEP rating. The complainant did not request a list of hospitals where the operations were performed or a breakdown of the categories neither did he clarify if he required the rating at the time of surgery or the current rating. The information held on the NJR website is the current rating.
54. Having reviewed the information currently in the public domain it appears clear that, aside from the surgeon's names, the request can be answered through this, albeit not necessarily in the format of a spreadsheet as requested.
55. The Commissioner therefore considers that NHS England has correctly withheld the identities of the surgeons by virtue of section 40(2) and that the remainder of the information requested is available in the public domain.

## Right of appeal

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56. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

57. 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.
58. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**

## **Annex**

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The consultant-level data published in October/November 2014 is available on:-

[www.njrurgeonhospitalprofile.org.uk](http://www.njrurgeonhospitalprofile.org.uk) and [www.nhs.uk/my NHS](http://www.nhs.uk/my NHS)

This covers a 12-month and 36-month prior to March 2014 and includes volumes of hip primary and revisions procedures carried out.

These figures represent total practice for each surgeon and the data was extended to include proportional use of all ODEP-rated hip cup and hip stem prostheses. Please see the websites for further detail.

Consultant surgeons published as part of the NHS England Consultant Outcomes Publication (COP) initiative, were eligible for conclusion if they had carried out one or more NHS England-funded hip, knee, ankle, elbow or shoulder procedure between 1 April 2013 and 31 March 2014. Consultant surgeons outside of scope of publication have been given opportunity to voluntarily opt-in to the data publication initiative.

The publication of surgeon data was commensurate with mandatory guidance published by the Healthcare Quality Improvement Partnership (HQIP) on behalf of NHS England.

Please see:- [www.hqip.org.uk/consultant-outcomes-publication](http://www.hqip.org.uk/consultant-outcomes-publication)

NHS Choices provides further information on their website regarding COP

<http://www.nhs.uk/service-search/performance/Consultants#view-the-data>

Please also be aware of NJRs link to their guidance notes on COP:-

<http://www.njrcentre.org.uk/njrcentre/Surgeons/FAQsOrthopaedicoutcomes2014/tabid/357/Default.aspx>

The original links provided were:-

Direct link to 10th NJR Annual Report (PDF)

[http://www.njrcentre.org.uk/njrcentre/Portals/0/Documents/England/Reports/10th annual report/NJR%2010th%20Annual%20Report%202013%20B.pdf](http://www.njrcentre.org.uk/njrcentre/Portals/0/Documents/England/Reports/10th%20annual%20report/NJR%2010th%20Annual%20Report%202013%20B.pdf)

Direct link to NJR website re Annual Reports

<http://www.njrcentre.org.uk/njrcentre/Reports,PublicationsandMinutes/Annualreports/tabid/86/Default.aspx>

Direct link to Surgeon Profile website

<http://www.njrsurgeonhospitalprofile.org.uk/>

Direct link to NJR website re information about the Surgeon Profile website

<http://www.njrcentre.org.uk/njrcentre/Surgeons/tabid/340/Default.aspx>

Direct link to StatsOnline

<http://www.njrcentre.org.uk/njrcentre/Healthcareproviders/Accessingthedata/StatsOnline/NJRStatsOnline/tabid/179/Default.aspx>

Direct link to StatsOnline FAQs

<http://www.njrcentre.org.uk/njrcentre/Healthcareproviders/Accessingthedata/StatsOnline/StatsOnlineFAQs/tabid/177/Default.aspx>

With regards to the ODEP rating, it would be possible to access this information by downloading all of the historical copies of the annual report. Please be aware that ODEP ratings shown in each year's annual report are those in operation at the time of the data extract and may be very different to those that applied at the time of surgery.

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