

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

### **Decision notice**

**Date:** 17 December 2015

**Public Authority:** NHS Business Services Authority  
**Address:** Stella House  
Goldcrest Way  
Newburn Riverside Business Park  
Newcastle Upon Tyne  
NE15 8NY

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

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1. The complainant made a freedom of information request to the NHS Business Services Authority (NHS BSA) for information relating to a specific NHS Protect report. The NHS BSA refused the request under the exemptions in section 30(1)(a)(i) (investigations) and section 40(2) (personal information). The Commissioner has investigated the complaint and found that section 30(1)(a)(i) exemption is engaged and the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

#### **Request and response**

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2. On 3 February 2015 the complainant requested information of the following description:

"As you will appreciate I am not aware of your detailed procedures with respect recording the information that informs your decisions or actions taken when investigating reported suspicions of fraud, so that I am unable to accurately frame my request. It does seem likely however that decisions taken and the reasons for those decisions are recorded. The information I require relates to:

- The validity of my concerns regarding fraud and accountability, with particular reference to the questions posed in paragraph 13.2 of the

report attached to my email of 16th September 2014 (NHS protect report.pdf)

- A list identifying persons or organisations consulted.
- The questions asked of these persons or organisations.
- The responses received (including your own legal advice).
- Decisions taken with regard further action.
- The reasons for those decisions.
- Descriptions of actions taken and their results.

If there is a record (or records) that summarises any or all of the information above in relation to the investigation into my concerns and evidence, please provide a copy. Any other advice you can provide to assist me in more accurately framing my request would be helpful."

3. On 27 February 2015 NHS BSA responded. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:

Section 30(1)(a), (b) and (c) FOIA

4. The complainant requested an internal review on 7 May 2015. NHS BSA sent the outcome of its internal review on 9 June 2015. It upheld its original position in that it withheld the requested information under section 30(1)(a)(i) but no longer said it was relying upon section 30(1)(b) or (c).

### **Scope of the case**

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5. On 22 July 2015 the complainant contacted the Commissioner to complain about the NHS BSA's decision to refuse his request for information.
6. During the course of his investigation NHS BSA informed the Commissioner that it was also seeking to rely on the exemption in section 40(2) (third party personal data) to some of the withheld information.

## Reasons for decision

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7. The withheld information in this case is information relating to an investigation into an allegation of fraud made against individuals providing services to the NHS.<sup>8</sup> NHS BSA has explained that the withheld information is contained in the last 9 pages of a document entitled "Sheil Park Report and Intellishare.pdf". It said that the pages prior to the last 9 pages were supplied to NHS Protect by the requester but were not relevant to the scope of his request for information. NHS BSA has said that the exemptions in sections 30(1)(a)(i) applies to the information in its entirety and that section 40(2) applies wherever any individual is identified. The Commissioner has considered whether the exemption in section 30(1)(a)(i) would apply in the first instance.

### Section 30 – Law enforcement

10. Section 30(1)(a)(i) provides that:

*(1) information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of –*

*(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained –*

*(i) whether a person should be charged with an offence*

11. The phrase "at any time" means that information is exempt under section 30(1) if it relates to an ongoing, closed or abandoned investigation. It extends to information that has been obtained prior to an investigation commencing, if it is subsequently used for this purpose.
12. Section 30 is what is known as a class based exemption. That means that it is not necessary for disclosure of information to result in any prejudice only that the information must fall within the particular class of information described in the exemption.
13. In this case the NHS BSA has explained that the withheld information relates to an investigation into an allegation of fraud made against individuals providing services to the NHS.
14. The NHS BSA's powers to carry out investigations are set out in *The NHS Business Services Authority (Establishment and Constitution) (Amendment) Order 2006* which provides that its functions shall include:

*"the prevention, detection and investigation of fraud, corruption and unlawful activities against or affecting the health service in England and the Secretary of State in relation to her responsibilities for the health service in England including investigations for the purposes of proceedings".<sup>1</sup>*

15. The Commissioner also notes that NHS Protect, a division of NHS BSA, is the lead agency in identifying and tackling crime across the Health Service. It describes one of its three main objectives as:

*"to hold to account those who have committed crime against the NHS by detecting and prosecuting offenders and seeking redress where viable".<sup>2</sup>*

16. Whilst the Commissioner is aware that it would be the police service and the Crown Prosecution Service (CPS) who would ultimately be responsible for investigating the allegations and bringing charges, it is clear that when the withheld information was created it was being used within NHS BSA for the purposes of its own investigation and to consider whether there was evidence of an offence having been committed.
17. Taking into account the above the Commissioner is satisfied that the information relates to a particular investigation which the NHS BSA had a duty to conduct and that therefore the exemption is engaged. The Commissioner has gone on to consider the public interest test.

## **The public interest test**

### **Arguments in favour of disclosure**

18. NHS BSA provided the following public interest arguments in favour of disclosure:
- Public accountability.

### **Arguments in favour of maintaining the exemption**

19. NHS BSA put forward the following arguments which it said supported maintaining the exemption:

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<sup>1</sup> [http://www.nhsbsa.nhs.uk/Documents/Sect\\_1\\_-\\_A2\\_-\\_SI\\_2006\\_amend\\_632.pdf](http://www.nhsbsa.nhs.uk/Documents/Sect_1_-_A2_-_SI_2006_amend_632.pdf)

<sup>2</sup> <http://www.nhsbsa.nhs.uk/3349.aspx>

- Release of the requested information would highlight methods used during investigations and would harm any future investigations undertaken by the NHS BSA.
- Information not in public domain.
- Hamper gathering of intelligence from confidential sources.
- Impede other on-going or future proceedings.

20. The Commissioner has also considered the public interest inherent in the section 30(1) exemption. This is the effective investigation and prosecution of crime, which inherently requires, in particular:

- The protection of sources to ensure people are not deterred from making statements or reports by fear it might be publicised;
- The maintenance of independence of the judicial and prosecution processes;
- Preservation of the criminal court as the sole forum for determining guilt.

### **Balance of public interest arguments**

21. The Commissioner accepts that there is a legitimate public interest in NHS BSA being accountable to the public in relation to the work it carries out to prevention, detection and investigation of fraud, corruption and unlawful activities within the NHS.

22. On the other hand the Commissioner has given particular weight to the arguments surrounding the public interest in protecting the ability of NHS BSA to conduct investigations in future. The withheld information includes details of the methods used by NHS BSA and the Commissioner considers that disclosure would be likely to be of use to any person who may come under investigation for similar allegations in future.

23. The Commissioner has also given considerable weight to the public interest in protecting sources. The information in this case discusses evidence obtained from sources/informants and actions taken by NHS BSA. It explained that such individuals approach NHS BSA in the expectation that the information will remain confidential and not be disclosed outside of a court of law. Disclosure in response to a freedom of information request would discourage other potential sources or informants from providing evidence to NHS BSA.

24. The Commissioner has already said that he accepts that there is a public interest in disclosure. The investigation was complete at the time of the

request which is a factor which weighs in favour of disclosure. However, whilst the investigation was complete the Commissioner has also found that disclosure would prejudice future investigations both by discouraging potential witnesses and providing information about how NHS BSA conducts its investigations. This goes to the heart of what the section 30 exemption is designed to protect and so the public interest in maintaining the exemption must be very strong in such a case. Taking this into account, the Commissioner has decided that the public interest in maintaining the exemption outweighs the public interest in disclosure.

## Right of appeal

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25. 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)

26. 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.
27. 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 .....**

**Gemma Garvey  
Senior Case Officer  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**