

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 January 2016

Public Authority: NHS Commissioning Board (NHS England)
Address: Quarry House
Quarry Hill
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant made a freedom of information request to NHS England for the costs of suspending a named doctor. In response NHS England refused to confirm or deny if the requested information was held under section 40(5)(b)(i).
2. The Commissioner's decision is that section 40(5)(b)(i) was incorrectly applied and NHS England failed to comply with section 1(1)(a) of the Act by refusing to confirm or deny if the requested information was held.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - NHS England shall inform the complainant whether or not it holds the requested information.
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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 18 February 2015 the complainant made a freedom of information request to NHS England which asked for information about a particular named doctor. The request read as follows:

"Can you please let me know how much it has cost to have Dr [name redacted] suspended, i.e. the total cost, including the cost for locums etc. and the legal and other fees expended by the NHS."

6. NHS England responded to the request on 19 March 2015 when it said that it could neither confirm nor deny if the requested information was held. It explained that it was applying section 40(5)(b)(i) because to confirm or deny if the information was held would reveal whether this individual had been suspended and this would breach the first data protection principle.
7. There then followed some further correspondence with the complainant where he discussed the possibility of obtaining the permission of the doctor concerned to disclose information.
8. On 14 August 2015 the complainant contacted NHS England again enclosing a copy of the passport and letter of authority from the doctor concerned. He said that he trusted that it was now clear that disclosure of the requested information would not breach any data protection principle.
9. NHS England responded to the complainant again on 19 August 2015. It said that its position remained as set out in an earlier letter of 22 July 2015 where it had told the complainant that to confirm or deny whether information relating to disciplinary proceedings is held would breach the DPA rights of the individual concerned and therefore would not be disclosed.
10. On 28 August 2015 the complainant contacted NHS England again to reiterate his request. NHS England appear to have treated this as a request for an internal review and it presented its findings on 1 September 2015. The review upheld the decision to refuse to confirm or deny if the requested information was held under section 40(5)(b)(i).

Scope of the case

11. On 2 September 2015 the complainant contacted the Commissioner to complain about NHS England's decision to refuse to confirm or deny if the requested information was held.

Reasons for decision

Section 40 – Personal information

12. Section 40(2) provides that information is exempt if it is the personal data of someone other than the applicant and disclosure would contravene one of the data protection principles.
13. Section 40(5)(b)(i) provides that the duty to confirm or deny does not arise if to confirm or deny if requested information is held would in itself contravene any of the data protection principles.
14. In deciding whether the exemption is engaged the first step is to consider whether the requested information is personal data, or would be personal data if it were held. Personal data is defined in the DPA as:
“...data which relate to a living individual who can be identified—
(a) from those data, or
(b) 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 intentions of the data controller or any other person in respect of the individual;”
15. The Commissioner is satisfied that the requested information, if held, is personal data given that it relates to an identifiable individual and that the confirmation or denial that would have to be given to comply with the request also amounts to personal data.
16. The next thing to consider is whether to confirm or deny would contravene any of the data protection principles. In this case NHS England argues that to confirm or deny if the requested information is held would contravene the first data protection principle which requires that personal data be processed fairly and lawfully. It explained that to confirm or deny would effectively reveal if the named doctor had been suspended and this would be unfair.
17. In the Commissioner's view, section 40(5)(b)(i) will only apply if confirming or denying if the information is held would reveal that the doctor concerned had been suspended. The Commissioner is limited in what he can say here about the reasons for his decision without revealing whether or not the requested information was held and

thereby effectively denying NHS England the opportunity to appeal his decision. However, he would simply say here that having considered NHS England's arguments he is not satisfied that confirming or denying if the requested information is held would contravene any of the data protection principles and therefore section 40(5)(b)(i) is not engaged. The Commissioner has discussed in more detail the reasons for his decision in a confidential annex to be provided to NHS England only.

18. On a final point, the Commissioner is aware that during his correspondence with NHS England and when submitting his complaint, the complainant had argued that he had the consent of the individual concerned to disclose the requested information. Indeed the complainant provided NHS England with a copy of the individual's passport and an email which he said he had received from this person which gave him, the complainant, permission to pursue his request. Despite this, NHS England continued to refuse to confirm or deny if the requested information was held.
19. The Commissioner has already decided that NHS England should have confirmed to the complainant whether or not the requested information was held. The issue of consent has not informed his decision. However for the sake of clarity and because the complainant specifically mentioned this when he contacted the Commissioner, the Commissioner would make the following comments on this point.
20. NHS England has said that it did not consider that it had sufficient proof that the doctor had provided his explicit consent for NHS England to answer his request. It said that without unquestionable proof it had decided to maintain a position of caution. The Commissioner wishes to make clear that he is satisfied that in the circumstances this was the correct approach to take. It is important that individuals understand the implications of what they are consenting to. In particular it must be remembered that disclosure under FOIA is considered to be disclosure to the world at large. Therefore, in providing consent the data subject must be consenting for the information to be placed in the public domain rather than just to the person making the request. On balance, the Commissioner is not satisfied that the individual doctor who is the subject of the request has provided such consent.

Right of appeal

21. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

22. 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.
23. 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

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