

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 September 2019

Public Authority: NHS England
Address: 4N22 Quarry House
Quarry Hill
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant has requested from NHS England the names and General Dental Council (GDC) numbers of registrants that were panel members involved in decisions made about a dentist following a complaint made about their practice. NHS England withheld the information under section 40(2) (personal information) of the FOIA. The complainant also asked NHS England to identify Dental Practice Advisors (DPAs) involved in the dentist's supervision. NHS England stated that it did not hold the information requested.
 2. The Commissioner's decision is that NHS England has correctly applied section 40(2) of the FOIA to withhold the names and GDC numbers of the panel members. In regard to the identities of DPAs involved in the dentist's 'supervision', it is the Commissioner's view that on the balance of probabilities it is unlikely that any information within the scope of the request is held.
 3. The Commissioner does not require any steps to be taken as a result of this decision notice.
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Request and response

4. On 11 October 2018, the complainant wrote to NHS England and requested information in the following terms:

"You will be aware from the records that I made a protected disclosure to NHSE about the poor practice of [redacted] who works at [redacted].

This resulted in an investigation process which started with a visit by [redacted] dental practice advisor. I was advised that following this visit the matter was referred to Performance Advisory Groups (PAGs) and Performers Lists Decision Panels (PLDPs).

Please identify to me the names and GDC numbers of the GDC registrants who were members of the PAG and PLDPs who were involved in making decisions about [redacted] between September 2017 and August 2018. I also ask you to identify any other Dental Practice Advisors who have been involved in [redacted's] supervision over the last 3 years"

5. On 9 November 2018 NHS England responded. It refused to provide the requested information citing section 40(2) of the FOIA as its basis for doing so.
6. On 5 December 2018 NHS England conducted an internal review and wrote to the complainant maintaining its original decision.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. In regard to the information requested under the first part of the request, during the course of the Commissioner's investigation NHS England provided evidence of information already in the public domain at the time of the request (a press article online) confirming a complaint had been made about the dentist and the conditions imposed on their GDC registration (on the GDC website).
9. In regard to second part of the request, during the course of the Commissioner's investigation NHS England confirmed that dentists are not subject to 'supervision' by DPAs, that Supervisors and DPA's have distinct roles and because of this no information is held. The

Commissioner has therefore considered whether any information is held relevant to the scope of this part of the request.

10. The Commissioner has therefore considered whether NHS England is entitled to rely on section 40(2) of the FOIA as a basis to withhold the the names and GDC numbers of registrants sought under the first part of the request.

Reasons for decision

Section 40(2) of the FOIA – personal information

11. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
12. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
13. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data

15. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or

more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

18. In this case, having considered the withheld information, noting that it consists of names and GDC registration numbers that NHS England has confirmed belong to living individuals, the Commissioner is satisfied that the information relates to identifiable living individuals. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
19. The fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
20. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

21. Article 5(1)(a) of the GDPR states that:

"personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

22. In the case of an FOIA request, the personal data is processed when it is disclosed in response to a request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
23. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
24. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"*¹.

¹ Article 6(1) goes on to state that:-

25. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test: -
- i) **Legitimate interest test:** whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
26. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

27. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include the broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
28. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

29. NHS England said that it recognises that there is a legitimate interest in confirmation that a review had been carried out (following the complaint) and who the review was carried out by. It said that disclosure would enable the public (using the internet / GDC register) to determine whether the panel members were sufficiently qualified individuals and that greater openness and accountability could highlight areas for improvement and lead to better quality decision making.
30. The complainant said that although panel members were presented with graphic evidence that the dentist was harming patients, he believes they failed to take appropriate action to protect the public and because of this patients have continued to be harmed. He is therefore now seeking their names and GDC numbers in order to make complaints alleging misconduct about them to the GDC. Because of this he also said that there is a legitimate public interest in knowing who the review was carried out by.
31. In the circumstances of this case, the Commissioner accepts that there is a legitimate interest in disclosure of the requested information. She notes that the information relates to the identities of the individuals that made decisions in response to a complaint from a member of the public relating to concerns about the dentist's practice harming the public. She also notes the resulting local media coverage and interest in the matter. There is a legitimate interest in knowing who made the decisions, which, could also provide greater public confidence in the review conducted.

Is disclosure necessary?

32. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
33. The Commissioner is satisfied that because the requested information in this case is the names and GDC numbers of the panel members that conducted the review and disclosure of this information would therefore ultimately identify the individuals concerned there are no less intrusive means of achieving the aims identified.

Balancing between legitimate interests and the data subject's interests or fundamental rights and freedoms

34. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In

doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

35. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause;
- whether the information is already in the public domain;
- whether the information is already known to some individuals;
- whether the individuals expressed concern to the disclosure; and
- the reasonable expectations of the individuals.

36. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

37. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

38. NHS England acknowledged that the information relates to the panel members professional / public life, that disclosure would identify them individually and allow their practice history and performance to be searched and viewed using the GDC register and internet. It also said disclosure could foster a greater culture of openness and accountability, reviewers knowing their decisions and/or recommendations are associated with them personally could potentially highlight any areas of improvement leading to better decision making.

39. However, NHS England also explained that the panel members are also dental practitioners carrying out part of their wider role and their involvement in reviews and suspensions is not publicly known and therefore they would not expect this information to be made public. It confirmed that it does not publish panel members' names in relation of reviews they have participated in. It said that whilst it does not explicitly inform panel members that their names will be kept confidential nor is there any agreement that they will be made public, it is generally understood that (review) proceedings are confidential and that information relating to them is only known to the parties directly involved, e.g., the practitioner and the panel. Therefore there is a

reasonable expectation held by panel members that have taken part in reviews that their names will not be made public.

40. NHS England said that it has not been feasible to liaise with each panel member in order to seek individual consent for disclosure of the requested information, in any event there is an expectation of anonymity outside the panel and because of this it does not consider seeking consent necessary as it is highly likely that it would not be given.
41. NHS England explained that it approves appointments to panels and that such decisions take into account the competency and expertise of the individuals being considered. It also said it has not received any general concerns about the panel members' suitability or qualifications and therefore does not consider disclosure of their names and GDC numbers fair and that it would be contrary to their expectations.
42. NHS England said that panel members are not themselves under investigation and disclosure could result in unwarranted scrutiny of each review they have participated in and/or will participate in or of their general decision making by laypeople, complainants and previously reviewed practitioners based on information which is not actually relevant to the matter at hand. It provided the example that a practitioner dissatisfied with a panel member from their own case, could 'track' the panel member and unfairly call into question other panels which the member sat on, on the basis of an unjust criticism (e.g., having qualified too long ago, too recently, or at an institution which the practitioner views unfavourably). This would be distressing to the panel member and cause unnecessary disruption to the review process.
43. The Commissioner acknowledges that greater openness and accountability could contribute to better quality decision making. Other factors include: having a good understanding of the legislative or other frame work decision makers operate within, consideration of advice and evidence, good practice considerations, research, e.g., previous decisions (to ensure consistency), etc. She therefore accepts that greater openness and accountability form part of a number of factors that would lead to better decision making.
44. The Commissioner also accepts that disclosure of the withheld information would enable the public to identify the panel members and undertake searches (of the internet / GDC register) in order to obtain information and that this may go some way to providing greater reassurance of the review conducted and the decisions made.

45. The information in this case relates to the panel members professional lives whilst acting in a senior capacity. NHS England said that the identities of the panel members are likely to be known by the dentist, and although panel members are not given absolute assurance that their details will not be released to the public there is a reasonable expectation of anonymity that information relating to review proceedings is and would remain confidential between them and the practitioner and therefore consent for disclosure is highly likely to be refused. The Commissioner also notes that although information about the review and the action taken is in the public domain, this is only to the extent of a press article and conditions placed on the dentists licence and does not identify panel members.
46. The Commissioner is reminded that panel members are GDC registrants and dental practitioners and disclosure of the requested information under the FOIA is considered to be a disclosure to the world at large. If NHS England was to provide this information to the current complainant it would in effect also have to provide this information to the registrants own patients and other practitioners who have been/are subject to reviews by them. This would make it available to individuals (patients) who may be dissatisfied with the dental care / service provided by registrants and who would use it to unjustly call into question decisions made by them and their professional capability. Other practitioners who have been/are subject to a review could also use the information to unjustly criticize decisions made by the same panel member(s) in their review even though it may not be relevant to the facts of their case.
47. The Commissioner is mindful that dissatisfied individuals may also seek to challenge decisions with panel members directly and that attempts could be made to contact them in their other public places of work, e.g., dental practices. The Commissioner is also cautious of the use and influence of the internet and social media and a disgruntled individual pursuing an internet based campaign against panel members. Not only would this likely to be distressing to the panel members but could potentially impact their ability to carry out their role(s).
48. The Commissioner acknowledges the need for information that is required to enable complaints to be made to the GDC about the panel members in order to ensure any issues with performance or decision making are identified and addressed.
49. The Commissioner also recognises that being the subject of any complaint and particularly one relating to an individual's professional life that calls into question their competency could be very distressing for the panel members. Nevertheless, the Commissioner does accept that because of the work the panel members undertake and the fact people

would hold them responsible for NHS England decisions, they are potentially at risk of attracting more complaints than other registrants.

50. However, the Commissioner notes that the complainant wrote to the GDC about the panel members that conducted the review and his issue with obtaining information about their identity. In the GDC's response to the complainant dated 7 January 2019, it stated that it understands the issue he is having an issue obtaining the names of the panel members but that it is not able to involve itself in a third party's corporate decision making as this is outside its Fitness to Practise department's regulatory remit. It can only investigate individual registrants based on specific information that enables a focussed investigation. The GDC also stated that NHS England and the GDC have an information sharing agreement, which would enable NHS England to share directly with it details of any registrants, including panel members, regarding whom it had fitness to practice concerns, that this provides a route for escalation and scrutiny in those instances where NHS England has concerns that panel members and others have acted in bad faith or outside their delegated authority. The Commissioner also notes that there is no suggestion in the letter that any such concerns about the panel members have been raised by NHS England to the GDC. In any event the Commissioner assumes that the GDC would investigate such complaints particularly those alleging misconduct and harm to the public in a serious, fair and proportionate manner.
51. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

Section 1 of the FOIA – information held / not held

52. Section 1 of the FOIA states that:

"Any person making a request for information to a public authority is entitled –

a) to be informed in writing by the public authority whether it holds the information within the scope of the request,

b) and if so, to have that information communicated to him."

53. In cases where there is some dispute as to whether the information requested is held by the public authority at the time of a request, the Commissioner will consider the scope of the request, seek any

clarification necessary from the complainant, consider actions taken by the public authority to check that the information was held and/or consider any reasons offered by it to explain why it was not held.

54. For clarity, the Commissioner is not expected to prove categorically the information is held, she is only required to make a judgement on whether information within the scope of the request is held on the civil standard of the balance of probabilities.
55. In this case, under the second part of the request, the complainant asked NHS England to identify DPA's involved in the dentist's supervision in the 3 years leading up to the request. NHS England explained to the Commissioner that it interpreted the word 'Supervision' in the ordinary meaning of the word; in reference to day-to-day oversight in the workplace of an employee. It explained that DPAs are not supervisors and that their roles are distinct. DPA's provide episodic/ad hoc input to investigations. Whereas Supervisors are identified by the dentist themselves and the appointment is approved by NHS England, as such DPAs are not supervisors. Accordingly no recorded information is held.
56. The complainant clarified to the Commissioner that he was seeking the identity of DPA's he believes the dentist was subject to "supervision" by. He said that he is seeking the identity of these individuals in order to raise complaints about them to NHS England and the GDC because in his view the dentist continued to harm the public whilst under their supervision.
57. It is clear to the Commissioner that there is a clear distinction between the role of DPA and Supervisor. The Commissioner notes the use of the word "any *other* Dental Practice Advisor" in the request. However, she also notes (in the request) that the complainant refers to a visit by a DPA at the onset of the investigation process (following his complaint) and therefore appears to understand that a DPA is not a supervisor and is only assigned for investigative purposes. She also notes that in the clarification provided by the complainant to her, he confirms that in using the term DPA he is seeking the identity of individuals that he says supervised the dentist. It is therefore the Commissioner's view that although the complainant was seeking information about the identity of individuals he believes the dentist was subject to supervision by, the role of supervisor and DPA are different, and DPAs are not supervisors (as worded in the request) and accordingly on the balance of probabilities no information is held.

Right of appeal

58. 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

59. 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.
60. 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
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