

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 July 2019

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

Decision (including any steps ordered)

1. The complainant has requested declaration of interest form and/or NHS interests register form for four named individuals. NHS England refused to confirm or deny whether the requested information was held under section 40(5) FOIA.
2. The Commissioner considers that NHS England was correct to refuse to confirm or deny whether the requested information was held under section 40(5) FOIA.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 2 October 2018 the complainant requested the following information:
 - 1) A copy of the Declaration of Interest form and/or NHS interests register form of [named individual].
 - 2) A copy of the Declaration of Interest form and/or NHS interests register form of [named individual].
 - 3) A copy of the Declaration of Interest form and/or NHS interests register form of [named individual].
 - 4) A copy of the Declaration of Interest form and/or NHS interests register form of [named individual].

5. NHS England responded and refused to confirm or deny whether the requested information was held under section 40(5) FOIA.
6. On 28 January 2019 the complainant requested an internal review. On 13 February 2019 NHS England provided the result of the internal review. It upheld its original response.
7. NHS England said that, "Where individuals are employed in senior or decision-making roles, information regarding declarations of interest is publicly available. This is to ensure appropriate accountability and transparency on how decisions regarding the spending/allocation of public funds are made. As there is no publicly available information regarding information associated with the individuals named within the request, it can be concluded that they are/were either employed in a non-senior/decision-making role, or are/were not employed or engaged by the organisation. In either case, such an individual would have a reasonable expectation that information regarding their employment (or lack thereof), and any associated declarations of interest (which would, by their nature, reveal information about the private life of the named individuals) would not be made publicly available."

Scope of the case

8. The complainant contacted the Commissioner on 3 March 2019 to complain about the way his request for information had been handled.
9. The Commissioner has considered whether NHS England dealt with this request in accordance with its obligations under FOIA.

Reasons for decision

Section 40 - personal information

10. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
11. Therefore, for NHS England to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request the following two criteria must be met:

- Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
- Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

12. Section 3(2) of the DPA 2018 defines personal data as:-

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

13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
14. 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.
15. In this case confirming or denying whether the requested information is held would confirm that each named individual is or was employed in a non-senior/decision-making role, or is or was not employed or engaged by the organisation. This would therefore disclose personal data relating to living and identifiable individuals.
16. For the reasons set out above the Commissioner is satisfied that if NHS England confirmed whether or not it held the requested information this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.
17. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent NHS England from refusing to confirm whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.
18. The Commissioner agrees that the most relevant data protection principle is principal (a).

Would confirming whether or not the requested information is held contravene one of the data protection principles?

19. Article 5(1)(a) GDPR states that:-

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”

20. In the case of a 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 – or as in this case the public authority can only confirm whether or not it holds the requested information - if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), be fair, and be transparent.

Lawful processing: Article 6(1)(f) GDPR

21. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that “processing shall be lawful only if and to the extent that at least one of the” conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
22. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:-

“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.

23. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under 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;

¹ 1 Article 6(1) goes on to state that:- “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 2018) 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”.

(ii) Necessity test: Whether confirmation as to whether the requested information is held (or not) 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.

24. The Commissioner considers that the test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.

(i) Legitimate interests

25. In considering any legitimate interests in confirming whether or not the requested information is held in response to a FOI request, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.
26. 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.
27. There is a legitimate public interest in transparency and accountability on how decisions regarding the spending/allocation of public funds are made. This is why NHS England makes information regarding declarations of interest where individuals are employed in senior or decision-making roles, publicly available.

(ii) Is confirming whether or not the requested information is held necessary?

28. ‘Necessary’ means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
29. In this case it is arguable that the legitimate interests in disclosure described above can be met by NHS England’s current practice. Where individuals are employed in senior or decision-making roles, information regarding declarations of interest is made publicly available. However there may still be a legitimate interest in

transparency and accountability in disclosure of such information for individuals not employed in senior or decision-making roles. As such the Commissioner will consider this further when balancing the legitimate interests described above and the data subject's fundamental rights and freedoms.

(iii) Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

30. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject(s)' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
31. NHS England explained that confirmation or denial would result in it failing to meet the reasonable expectations of the data subjects in this case. It is NHS England's position that confirmation or denial would not be fair as it would disclose that individuals either do not occupy senior decision making roles or are not employed by NHS England or its hosted organisations. Therefore, disclosure of information relating to them would not be using personal data in ways they would reasonably expect. It went on that these are reasonable expectations in relation to disclosure of such employment information.
32. The Commissioner remains of the view that there is a legitimate interest in transparency and accountability on how decisions regarding the spending/allocation of public funds are made and that disclosure of the requested information would be necessary to meet this legitimate interest. However given NHS England publishes this information for senior decision making roles, this goes some way to meeting this legitimate interest. In this case the data subjects would not expect NHS England to confirm or deny whether they held the information and the legitimate interests in disclosure do not outweigh the rights and freedoms of the data subjects in this case.
33. Given the conclusion the Commissioner has reached above on lawfulness, the Commissioner considers that she does not need to go on to separately consider whether confirming or denying if the information is held would be fair and transparent. The Commissioner has therefore decided that NHS England was entitled to refuse to

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confirm whether or not it held the requested information on the basis of section 40(5)(B) of FOIA.

Right of appeal

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

35. 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.
36. 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

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