

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 April 2021

Public Authority: The NHS Commissioning Board

Address: Quarry House
Quarry Hill
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant requested information from The NHS Commissioning Board (NHS England) relating to a number of letters that the National Data Guardian had advised would be sent from NHSX¹ to organisations to highlight data protection concerns. NHS England had failed to provide a substantive response by the date of this notice.
2. The Commissioner's decision is that NHS England failed to respond to the request within 20 working days and has therefore breached section 10 of the FOIA.
3. The Commissioner requires NHS England to take the following steps to ensure compliance with the legislation.
 - Issue a substantive response, in accordance with its obligations under the FOIA, to the request.
4. NHS England 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 pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

¹ [NHSX: new joint organisation for digital, data and technology - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

Request and response

5. On 7 February 2021, the complainant wrote to NHS England and requested information in the following terms:

"I have previously corresponded with you, the National Data Guardian, the BMA, the GMC, and the ICO, about the fact that organisations (contributing data controllers) across England are unlawfully disclosing personal confidential information to 3rd parties (data processors, and in some cases sub-processors), for purposes beyond direct medical care, in the absence of any legal basis to do so. That is, with no way of satisfying the common law of confidentiality.

No explicit consent is being sought, there is no legal obligation to disclose, and such disclosures have neither Regulation 2, 3, or 5 of COPI 2002 authority. None of these 'projects' is COVID-19 related, most are so-called 'population health management' or 'commissioning' data analytics.

Some of these disclosures are 'buried' within LHCRs, others are 'unrelated' to any existing or planned LHCR (or LHCRE). All these disclosures, if in breach of the CLoC, are also data breaches under GDPR.

As you know, the only organisation to have ever been granted CAG approval for such processing is NHS Southend CCG in 2014. The only LHCR currently seeking any such approval is YHCRE - and it hasn't received such approval to date.

The National Data Guardian has now told me the following:

'Dear [Name]

I wanted to let you know that the NDG wrote to NHS X about this issue in December, asking them to look this issue and citing the instances you provided. The NDG highlighted that some of these were LCHRs.

We have been informed that NHS X will write to each of the organisations to remind them of the need for a clear legal basis for processing data for secondary purposes and flag these concerns.

With kind regards'

So I would like a copy of each of these letters, as sent out by NHSX.

I believe that the organisations/projects concerned are:

- *Disclosure of the personal confidential data of 1.3 million individuals as part of the Connected Care Data Analytics (Frimley ICS LHCR "Share Your Care").*
- *Disclosure of the personal confidential data of 900,000 individuals within the BaNES ICR.*
- *Disclosure of social care data within Bristol North Somerset and South Gloucestershire STP's LCHR, 'Connecting Care'.*
- *Disclosure of the personal confidential data of 584,000 individuals within the Bucks 'My Care Record' LCHR.*
- *Disclosure of the personal confidential data of 270,000 individuals within the Salford Integrated Record.*
- *Disclosure of the personal confidential data of 1,900,000 individuals within the eLPR.*
- *Disclosure of the personal confidential data of 739,000 individuals within the Cheshire Care Record.*
- *Disclosure of the personal confidential data of 1,000,000 individuals within the BNSG CCG System Wide Dataset.*
- *Disclosure of the personal confidential data of 1,000,000 individuals within 'Connected Nottinghamshire'.*
- *The BNSSG CCG PHM programme.*
- *The Sussex Integrated Dataset PHM programme.*

DPIAs for all of these secondary uses projects can be found via www.nhsdatasharing.info

If all such letters are absolutely identical (save for the recipient of the letter) then I would be happy with, and my FOI would be fulfilled by:

- *Just **one** letter - the one sent to **Frimley ICS Connected Care***
- *A simple list of all the other recipients of the template letter (by organisation, I am not interested in the individual within the organisation that the letter was sent to*

Whilst I fully expect each and every one of these organisations to completely disregard your communication, and for such unlawful disclosures and processing to simply continue on regardless, I do want sight of those letters. The ICO is the only regulator that any data controller is ever going to listen to.

If you have not yet sent these letters, then please say so - and I would be grateful if you could let me know when you intend to send them out (so that I can request them from you under FOI after that date).

As per Section 1(4) of the FOI Act (<http://www.legislation.gov.uk/ukpga/2000/36/section/1>) I would like the information in question held at the time when my request is

received (draft or otherwise), except that account may be taken of any amendment or deletion made between now and the latest time by which the information is to be communicated to me, being an amendment or deletion that would have been made regardless of the receipt of my request.

I would be grateful if you would be kind enough to send me the requested information promptly and in any event not later than the twentieth working day following the date of receipt of my request.

I wish to receive the information by email; I believe such a request would be reasonable in these circumstances.

If my request is denied in whole or in part, or specific items within the responses are withheld from disclosure, then you must justify all deletions by reference to specific exemptions of the act, as per Section 17 of the Act

(<http://www.legislation.gov.uk/ukpga/2000/36/section/17>).

Where you rely on a qualified exemption to withhold disclosure, you are obliged to consider the public interest in your decision and the refusal notice must explain not only which exemption applies and why, but also the public interest arguments addressed in reaching the decision. I do not seek any personal data about the recipient/sender of the letters, only the recipient organisation name and the contents of the letter (which I cannot believe should be redacted in any way).

I would be grateful if you would kindly acknowledge receipt of this request as recommended by the ICO ('It would be good practice to acknowledge receipt of requests and to refer to the 20 working day time limit, so that applicants know their request is being dealt with')."

6. NHS England acknowledged the request on 9 February 2021 but had failed to provide a substantive response by the date of this notice.

Scope of the case

7. The complainant contacted the Commissioner on 10 March 2021 to complain about the failure, by NHS England, to respond to the request.
8. In line with her usual practice, the Commissioner contacted NHS England on 25 March 2021 to highlight the outstanding response. She requested that NHS England respond to the request within 10 working days. The correspondence was neither acknowledged nor responded to.

9. The scope of this notice and the following analysis is to consider whether NHS England has complied with section 10 of the FOIA.

Reasons for decision

10. Section 1(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 information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*

11. Section 8(1) of the FOIA states:

In this Act any reference to a "request for information" is a reference to such a request which –

- (a) is in writing,*
- (b) states the name of the applicant and an address for correspondence, and*
- (c) describes the information requested.*

12. The Commissioner considers that the request in question fulfilled these criteria and therefore constituted a valid request for recorded information under the FOIA.

13. Section 10 of the FOIA states that responses to requests made under the Act must be provided "*promptly and in any event not later than the twentieth working day following the date of receipt.*"

14. From the evidence presented to the Commissioner in this case, it is clear that, in failing to issue a response to the request within 20 working days, NHS England has breached section 10 of the FOIA.

Other matters

15. The Commissioner wishes to place on record her understanding of the immense pressures placed on public authorities during the coronavirus pandemic. She is sympathetic to the difficult decisions such authorities must make, between prioritising front-line services and continuing to meet their obligations under the FOIA.

Right of appeal

16. 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

17. 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.
18. 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

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