

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 January 2022

Public Authority: NHS England
Address: PO Box 16738
Redditch
B97 9PT

Decision (including any steps ordered)

1. The complainant has requested NHS England to disclose all documents held relating to an investigation into a named doctor between March 2018 and March 2019. Initially NHS England refused the request citing section 40(2) of FOIA. However, at the internal review stage it altered its position and confirmed that it is refusing to confirm or deny whether the requested information is held in accordance with section 40(5) of FOIA.
2. The Commissioner's decision is that NHS England is entitled to refuse to confirm or deny whether the requested information is held in accordance with section 40(5) of FOIA. He does not require any further action to be taken.

Request and response

3. On 15 June 2020, the complainant wrote to NHS England and requested information in the following terms:

"I wish to make a request for information pertaining to an NHS investigation into NHS services at a GP practice. In my view this request fulfils the criteria set out in the NHS principles of a culture of Openness and accountability not least relating to matters which are of public interest. I wish to request the documents held by NHS England

regarding the investigation of [name redacted] who was investigated by NHS England between March 2018- March 2019 who worked at [name of practice redacted].”

4. NHS England responded on 9 July 2020. It refused to disclose any recorded information it holds under section 40(2) of FOIA.
5. The complainant requested an internal review on 22 July 2020, stating that any recorded information held could be disclosed with personal data redacted.
6. As he received no response, the complainant chased NHS England on 1 and 15 October 2020, 15 November 2020 and then 21 April 2021. The complainant also referred the matter to the Commissioner on 12 May 2021.
7. NHS England carried out the internal review and notified the complainant of its findings on 17 June 2021. It revised its position and refused to confirm or deny whether any recorded information is held under section 40(5) of FOIA.

Scope of the case

8. As stated above, the complainant first contacted the Commissioner 12 May 2021 to complain about the way his request for information had been handled. The complaint was accepted for full investigation on 16 June 2021. Just shortly after that NHS England issued its internal review response to the complainant.
9. The Commissioner considers the scope of his investigation to be to determine whether NHS England is entitled, or not, to refuse to confirm or deny whether the requested information is held in accordance with section 40(5) of 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. NHS England advised that if it were to confirm or deny whether the requested information is held it would be disclosing whether or not the named individual had been the subject of any investigations. This confirmation or denial would therefore be disclosing personal data (whether or not they have been subject to investigations) relating to the named individual to the world at large.
16. The Commissioner agrees that confirming or denying whether the requested information is held is information which relates to the named individual and is information, if held, which has been used to inform decisions about them and has them as its main focus.
17. 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.
18. The fact that confirming or denying whether the requested 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.

19. 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?

20. 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”

21. 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

22. 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 – or as in this case confirming or denying whether the requested information is held - in response to the request would be considered lawful.

23. 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.

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”.

24. 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;

(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.

25. 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

26. In considering any legitimate interest(s) in confirming or denying whether the requested information is held under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

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”.

27. NHS England confirmed that there is a public interest in knowing whether doctors practising at GP practices are the subject of any wrongdoing which requires an investigation to be conducted. It advised that doctors are in a position of trust and it is expected that they will provide high quality care to their patients. Any investigation which has taken place could bring their ability to practice in England into disrepute.
28. The complainant believes his request fulfils the criteria set out in the NHS principles of a culture of openness and accountability and that it is matter of public interest.
29. The Commissioner acknowledges, and therefore agrees, that there is a legitimate interest in knowing whether doctors are the subject of potential wrongdoing and investigation. Doctors do hold a position of trust and are responsible for delivering appropriate care to their patients. If there are concerns over the care that is being provided, there is a legitimate interest in knowing what those concerns are and how they are being addressed.

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

30. '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.
31. NHS England confirmed that it is under the assumption that the legitimate interest being pursued is whether the named doctor has or has not been under investigation and therefore deemed fit to practice in England.
32. It explained that the General Medical Council (GMC) is an independent body with responsibility for regulating doctors in the UK. It has a statutory purpose under the Medical Act 1983, which amongst other areas, includes setting the standards for doctors and managing the UK medical register. It further states that it investigates and acts on concerns about doctors. When a serious concern is raised about a doctor's behaviour or the way they do their job, they assess whether they need to investigate it. They will usually investigate cases where the doctor is putting the safety of patients, or the public's confidence in doctors, at risk.

33. NHS England explained further that the GMC collects and reviews evidence as part of their investigations. At the end of the process, they may issue advice or a warning to the doctor, or they may agree with the doctor that he or she will restrict their practice, retrain or work under supervision. In some situations, they refer the case to the Medical Practitioners Tribunal Service (MPTS). The MPTS adjudicates on complaints made against any of the doctors in the UK, making independent decisions about a doctor's fitness to practise.
34. If the GMC decides to issue a warning or agree undertakings with a doctor, they proactively publish this information on their website. Similarly, any decision made by the MPTS will be published on their website.
35. NHS England does not consider the 'necessity test' has been met on this occasion, as the GMC, who has statutory powers to regulate doctors, would take any action in relation to doctors and their ability to practise within England. If an investigation results in a warning, undertakings or a referral MPTS, the details are published to meet the legitimate interests identified above.
36. The Commissioner agrees that the GMC has the statutory powers to regulate doctors in the UK and there is a defined process for doing that and publishing what information is considered appropriate and necessary for the public. Details of all investigations are not published and this would seem the correct approach as many will not result in any action being taken and many will be unjustified or not upheld. For those cases that are justified or upheld and result in a warning, undertaking or a referral to MPTS the details are proactively published on the GMC and MPTS' websites. The Commissioner agrees with NHS England (and the GMC) that public disclosure of this type of information is a balanced approach, taking into account the need for transparency and accountability and the rights of the doctor(s) concerned, and meets the legitimate interests identified in this case. For these reasons the Commissioner is satisfied that the 'necessity test' is not met.
37. If the Commissioner is incorrect on this point and disclosure of whether the requested information is or is not held is necessary, the next stage would be to consider the balance between the legitimate interests identified and the named individual's fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial on the named individual. For example if the named individual would not reasonably expect the public authority to confirm or deny whether the requested information is held in response to a FOI request or if such confirmation or denial would cause unjustified harm.

38. Given the role of the GMC as described above and the decision taken on what should be made publicly available and at what point, the Commissioner is satisfied that the named individual would have no reasonable expectation that NHS England would confirm or deny to the world at large whether the requested information is held. There appears to be a defined process in place for investigating concerns and a defined procedure over what information should be made public about these and at what point. To confirm or deny whether recorded information is held would undermine this process and cause any doctor subject to such a request unwarranted harm and distress. The Commissioner agrees with NHS England that any potential distress from confirmation or denial is unjustified in these circumstances given that the GMC plays an active role in regulating doctors. Moreover, the outcome of any investigation that takes place could conclude that the complaint was ultimately unfounded. Just because there is an investigation, does not automatically mean there has been any wrongdoing.
39. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the named individual's fundamental rights and freedoms, and that confirming whether or not the requested information is held would be unlawful.
40. Given the conclusion the Commissioner has reached above on lawfulness, the Commissioner considers that he does not need to go on to separately consider whether confirming or denying whether the information is held would be fair and transparent. The Commissioner has therefore decided that NHS England was entitled to refuse to confirm whether or not it held the requested information on the basis of section 40(5)(B) of FOIA.

Other matters

41. NHS England took just short of 12 months to complete the internal review process. Despite the Covid-19 pandemic and the effects this has had on staffing levels and workloads, the Commissioner considers the delay in processing the complainant's internal review to be excessive and unsatisfactory.
42. The section 45 code of practice recommends that internal review are completed in 20 working days of receipt and certainly no later than 40 working days. The additional 20 working days should only be taken in particularly complex or voluminous cases. The Commissioner does not consider this request was complex or voluminous in nature.

43. The Commissioner would like to remind NHS England of the requirements of the section 45 code of practice and the need to complete internal reviews in a timely fashion in future.

Right of appeal

44. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

45. 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.
46. 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

Samantha Coward
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