

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 January 2020

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 the information it holds relating to the decision to exclude the eMBED Health Consortium and Optum from the Population Health Management IG Support Tool (PHMIGST) work programme. NHS England disclosed the requested information but redacted the personal data of several of its employees and external individuals in accordance with section 40(2) of the FOIA.
2. The Commissioner's decision is that NHS England is entitled to rely on section 40(2) of the FOIA for some of the withheld information. She has however concluded that section 40(2) is not engaged for the remainder. The Commissioner has also concluded that NHS England breached section 10 of the FOIA in this case.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information contained in the Confidential Annex to the complainant.
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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 25 April 2018, the complainant wrote to NHS England and requested information in the following terms:

"I would like to make a Freedom of Information request for all the data/information held by NHS England relating to the decision to exclude the eMBED Health Consortium and Optum from the Population Health Management IG Support Tool (PHMIGST) work programme. To assist with the retrieval of this data I'd offer the following information:

- I believe the decision was taken in early January 2018
- The issue was on the agenda and discussed at length at the NHS England CSU IG Leads meeting held at Skipton House on 28th March. At this meeting it was noted that North of England Commissioning Support (NECS) had been tasked to deliver the PHMIGST to the Yorkshire & Humber area.

From the above information I would expect as a minimum the emails that relate to the issue from a fairly short time period, early January to now, from the senior Information Governance staff at NHS England to others involved in the decision. I'd expect to see the minutes from the meeting on 28th March and any other relevant document or minutes. I would expect details of the allocation of the PHMIGST task in Yorkshire & Humber to NECS, whether this be a contract, SLA or other document and confirmation of whether this work was allocated through the Lead Provider Framework (LPF) and if not why not."

6. NHS England responded on 5 November 2018. It disclosed the requested information but with personal data redacted under section 40(2) of the FOIA.
7. The complainant requested an internal review on 28 November 2018.
8. NHS England completed the internal review and notified the complainant of its findings on 24 January 2019. It upheld its previous application of section 40(2) of the FOIA.

Scope of the case

9. The complainant first contacted the Commissioner on 31 January 2019 to complain about the way his request for information had been handled. On 21 February 2019 the complainant provided the Commissioner with the documentation she requires to consider the complaint. The complaint was then accepted for full investigation on 22 February 2019.

10. The complainant does not agree that section 40(2) of the FOIA applies to all the withheld information. He considers many of the data subjects are of sufficient seniority to warrant disclosure under FOIA.
11. During the Commissioner's investigation further information was disclosed to the complainant. What remains is the names and job titles of some NHS England staff and the names and, where held, job titles of five external individuals.
12. The Commissioner's decision has therefore focussed on the remaining withheld information and whether it is exempt from disclosure under section 40(2) of the FOIA. She will also consider whether there has been any procedural breaches of the FOIA.

Reasons for decision

Section 40 personal information

13. 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.
14. 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').
15. 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.
16. 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?

17. Section 3(2) of the DPA defines personal data as:
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¹ As amended by Schedule 19 Paragraph 58(3) DPA.

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

18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
19. 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.
20. 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.
21. With regards to the personal data of five external individuals, NHS England has withheld their names and where held, their job titles. Quite obviously data subjects can be identified by their name, so this information is personal data as defined in section 3(2) of the DPA. For three external individuals, NHS England is aware of their job titles. For two of the three, the individuals can be identified from their job title and employer alone. As it leads to the identification of these individuals, it again constitutes personal data. For the remaining individual, it is not immediately possible to identify the data subject from their job title and employer alone. However, given the job title, it is likely to either be a single post holder or a post with very few individual positions. The Commissioner is therefore satisfied that this individual could be identified from this information and other information otherwise available and therefore falls within the definition of personal data.
22. With regards to the remaining NHS England staff, NHS England has withheld their names and job titles. Addressing their names first, again it is quite obvious that an individual can be identified from their name. This information is therefore personal data as defined in section 3(2) of the DPA.
23. Turning now to their job titles, with the exception of two (which the Commissioner will address separately in a moment) NHS England has stated itself that the data subjects cannot be identified from this information alone and suggested that it would be willing to disclose this information. To date this information has not been released although the Commissioner has asked NHS England twice to consider doing so. Given that NHS England's position is that the data subjects cannot be identified from the job titles, the Commissioner can only conclude that this specific information does not fall within the definition of personal data as outlined in section 3(2) of the DPA and therefore section 40(2) of the FOIA cannot apply. This specific information should be disclosed.

24. Dealing with the two job titles from which the data subjects can be identified, the Commissioner is satisfied that this information does constitute personal data. It is information from which they can be identified from a simple internet search.
25. The fact that some of the remaining withheld information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure of this information would contravene any of the DP principles.
26. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

27. 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".

28. In the case of an 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 if to do so would be lawful, fair and transparent.
29. 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.

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

30. 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"².

² 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) provides that:-

31. 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.
32. 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

33. 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 broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
34. 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.
35. NHS England stated that it has not been able to identify any legitimate interest in the disclosure of the remaining withheld information. However, it notes the legitimate interest the complainant identified in his correspondence, which is the need to know and understand the seniority of individuals involved in the decision making process.

"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".

Is disclosure necessary?

36. '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.
37. NHS England has stated that it has now disclosed the names and job titles of the most senior members of NHS England staff involved in the decision making process. It considers the disclosure of the remaining NHS England staff information and the personal data of external individuals is not necessary or required in order to meet the legitimate interest the complainant has identified.
38. With the exception of one member of staff (which the Commissioner will address in a moment), the Commissioner accepts that the disclosure of the names of remaining NHS England staff is not necessary to meet the legitimate interest identified by the complainant. He has stated that he requires to know the seniority of individuals involved in the decision making process. Again, with the exception of one member of staff (which will be addressed in a moment), NHS England has now disclosed this information and this allows the complainant to understand more fully who was involved in the decision making and what their seniority was. It is not necessary to disclose the names of the remaining staff, as these are more junior employees which would not be accountable for the decisions made to the same extent as those for whom the data has been disclosed.
39. With regards to one of the job titles referred to in paragraph 24, although the job title does lead to identification if it is put into an internet search, in this particular case it is noted that the individual has a fairly junior role and had no involvement in the discussions or decision making that took place. NHS England has confirmed that this individual was just copied into one of the emails sent. Disclosure of this individual's job title is not necessary to meet the legitimate interest the complainant has identified. As stated above, this interest is met by the disclosure of the names and job titles of the most senior individuals.
40. For this specific information, the Commissioner is satisfied that disclosure is not necessary to meet the legitimate interest in disclosure. She will not therefore go on to consider the balancing test for this specific information. As she has decided that disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a). Section 40(2) of the FOIA therefore applies to this information.

41. What remains however is the names and, where held, job titles of five external individuals and the name and job title of one employee of NHS England. Dealing with the NHS England employee first, in the Commissioner's opinion, they hold a senior role within NHS England. Disclosure is therefore necessary to meet the legitimate interest identified by the complainant. There is no other way or less intrusive means of achieving this.
42. With regards to the external individuals, the Commissioner considers the same legitimate interest identified by the complainant applies here too – there is a legitimate interest in knowing which external individuals took part in the discussions and their level of seniority for the organisation they represented. From a necessity perspective, disclosure is necessary to meet this legitimate interest. There is no other way or less intrusive means of establishing who externally was involved and their level of seniority and no information has to date been disclosed (as far as the Commissioner is aware) that would meet this legitimate interest. For this information it is therefore now necessary to consider the balancing test.

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

43. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects 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.
44. 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 individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
45. 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.

46. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
47. Dealing with the external individuals first, NHS England has confirmed that it has not approached these individuals or their employer about the request and the possibility of disclosure. It has just argued that it would not be appropriate to disclose the personal data of external individuals.
48. For two of these individuals the Commissioner notes that their employer openly discloses on their website who they are and what role they perform. The profiles also contain personal information about them and a picture. Given what information is published, the Commissioner considers it is hard to conclude that they would have no expectation of public disclosure in a work capacity. The requested information relates to them working in an official capacity and the Commissioner has not been made aware of any particular sensitive or controversial issues in the information requested that would warrant more privacy or protection.
49. Additionally, the Commissioner cannot see how disclosure of their names and job titles in this instance (when already publicly disclosed) would be likely to cause them distress or upset.
50. Based on the above factors, the Commissioner has determined that there is sufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of this information would be lawful.
51. With regards to the three remaining external individuals, unlike the two individuals discussed above they do not openly disclose their employment and role and nor does their employer. They are also not readily identifiable by either their name or their job title, where this is held. Given this clear difference it can be argued that they will hold an expectation of privacy and confidentiality in terms of their engagement with NHS England and their employment and this would appear reasonable. Although they have engaged with a public authority, they represent a private organisation and whilst a private organisation should expect a degree of transparency and public accountability for its dealings with the public sector, it is difficult to say individual employees should too. Particularly, as in this case, they do not openly disclose their employment with the private organisation and their background.
52. Given the likely difference in their perception to public disclosure, it is also reasonable to say that should public disclosure occur this may cause them a degree of distress and upset.

53. For these reasons, the Commissioner has concluded that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. For this information, the Commissioner considers there is no Article 6 basis for processing and so disclosure of this information would be unlawful.
54. Turning now to the name and job title of the NHS England employee, the Commissioner considers this individual holds a position of sufficient seniority to warrant accountability and public scrutiny. They were acting in an official capacity; not a private capacity and the Commissioner is not aware in this case of any particular sensitivity or controversy around the decision making that took place. If there was, there may be a valid reason to afford more protection and expect privacy.
55. NHS England has drawn the Commissioner's attention to its policy on releasing the personal data of its staff and confirmed that its policy says it will disclose the personal data of staff at Director level and above. It states therefore that anyone below this level will hold the expectation that their personal data will not be disclosed and remain private. For the Commissioner, while this is useful, the issue is whether such expectations are reasonable in a given situation.
56. The Commissioner considers this individual is of sufficient seniority to warrant accountability and should therefore reasonably expect holding a fairly senior role in the public sector public scrutiny to an extent, particularly when they are acting in a purely official capacity.
57. The Commissioner also notes that NHS England has recently disclosed the name and job title of another member of staff at the same level. The Commissioner put this to NHS England and it stated that this individual was happy for this information to be disclosed while the other was not. Again any objections in this regard are useful when assessing where the balance lies, but they are not a determining factor in themselves. The issue is again whether those objections are reasonable. NHS England confirmed that there were no specific objections; just that this individual was not happy with public disclosure. Given the seniority of this individual, the fact that they were working in an official capacity and there is no sensitivity around the decision making or controversial issues, their objections do not outweigh the legitimate interest in disclosure.
58. Based on the above factors, the Commissioner has determined that there is sufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of this information would be lawful.

59. For the information where the Commissioner has concluded that disclosure would be unlawful there is no need to go on to consider whether disclosure would be fair and transparent.
60. However for the information where the Commissioner has concluded that disclosure would be lawful (name and job title of two external individuals and the name and job title of the NHS England employee) there is a need to go on to consider whether disclosure would be fair and transparent. The following section is just for that.

Fairness and transparency

61. Even though it has been demonstrated that disclosure of the personal data of two external individuals and the personal data of one remaining NHS England employee under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).
62. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.
63. The requirement for transparency is met because as a public authority, NHS England is subject to the FOIA.

The Commissioner's view

64. In relation to the names and job titles of two external individuals and one of the remaining NHS England employees the Commissioner has decided that NHS England failed to demonstrate that the exemption at section 40(2) is engaged.
65. For the names of all remaining NHS England staff and the personal data of three external individuals, the Commissioner has decided that NHS England was entitled to withhold this information under section 40(2), by way of section 40(3A)(a).
66. For the job titles of all other NHS England staff, the Commissioner has decided that NHS England failed to demonstrate how this information falls within the definition of personal data as outlined in section 3(2) of the DPA and has therefore failed to demonstrate that section 40(2) applies.

Procedural matters

67. Section 10 of the FOIA requires all public authorities to respond to information requests promptly and within 20 working days of receipt. In this case the request was made on 25 April 2018. However, NHS

England did not respond until 5 November 2018. The Commissioner has therefore found NHS England in breach of section 10 of the FOIA in this case.

Other matters

68. Under the section 45 code of practice, public authorities are recommended to complete requests for an internal review within 20 working days of receipt. A maximum of 40 working days is permitted for particularly complex or voluminous requests. The Commissioner does not consider this to be one of them.
69. The internal review was requested on 28 November 2018 however it was not completed until 24 January 2019. The Commissioner would therefore like to remind NHS England of the importance of adhering to the code of practice and in completing internal reviews within the recommended timeframes.

Right of appeal

70. 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

71. 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.
72. 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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