

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 March 2023

Public Authority: NHS Business Services Authority
Address: Stella House, Goldcrest Way
Newburn Riverside
Newcastle Upon Tyne
NE15 8NY

Decision (including any steps ordered)

1. The complainant made a request for the vaccine damage payment scheme medical assessor's GMC number, qualifications, and experience and a copy of the VDPS guidance the medical assessors follow. NHS Business Services Authority (NHS BSA) provided the VDPS guidance the medical assessors follow with some redactions which are not in dispute, it has confirmed it does not hold the medical assessor's qualifications/experience and it has withheld the medical assessor's GMC numbers under section 40(2) FOIA.
2. The Commissioner's decision is that section 40(2) FOIA was applied correctly by NHS BSA in this case to withhold the medical assessor's GMC number and that NHS BSA does not hold the medical assessor's qualifications/experience under section 1(1)(a) FOIA.
3. The Commissioner requires no steps to be taken.

Background

4. Under the Vaccine Damage Payment Scheme (VDPS), if a person is, on the balance of probabilities, severely disabled as a result of a vaccination against certain diseases, they may be entitled to a Vaccine Damage Payment of £120,000. NHS BSA administers VDPS and the process involves an assessment by a medical assessor which is managed by a claims management company, Crawford & Company.
5. Medical assessors are GMC registered doctors who undertake this work on a part time basis in addition to their existing medical duties. Medical assessors provide an assessment of the medical evidence from the

doctors or hospitals involved in the treatment of those claiming to have been injured by vaccinations. Medical assessors are not providing diagnosis, care or treatment when making assessments in respect of VDPS, so records made by the assessors are not "health records" within the meaning of section 205 of the DPA 2018.

Request and response

6. On 3 October 2022 the complainant made a request for the following information under FOIA:
 - "1. Vaccine damage payment scheme medical assessor's GMC number, qualifications, and experience.
 2. A copy of the VDPS guidance the medical assessors follow."
7. On 31 October 2022 NHS BSA responded. It said that it did not hold the information of the description specified in the request. NHS BSA explained that such information was held by Crawford & Company.
8. The complainant requested an internal review. On 21 December 2022 NHS BSA provided the internal review. In summary:
 1. NHS BSA determined that it did hold information of the description requested for the purposes of FOIA, as it was held by Crawford & Company on behalf of NHSBSA.
 2. NHS BSA provided further information to the complainant directly as well as directing him to publicly available information regarding the medical assessment process.
 3. NHS BSA withheld the medical assessor's personal information in reliance upon the section 40(2) (personal information) exemption.
 4. NHS BSA withheld the VDPS guidance in reliance upon the section 31(1) (law enforcement) exemption.

Scope of the case

9. The complainant contacted the Commissioner on 21 December 2022 to complain about the way the request for information had been handled.
10. During the course of the Commissioner's investigation NHS BSA reviewed its position. In relation to part 2 of the request it disclosed the VDPS guidance that medical assessors follow as well as some related information save for some limited redactions.

11. In response to this disclosure the complainant asked a follow up question which NHS BSA responded to and made a new FOIA request which NHS BSA is processing as such. Other than this the complainant thanked NHS BSA for the disclosure but explained that:

"I note that I am still waiting to receive a response to my two complaints:

1. The refusal to provide me with the GMC number and qualifications of the medical assessor who is carrying out/has carried out the assessment;"

The second complaint relates to a concern raised under the Data Protection Act 2018 and so is not relevant to this FOIA Decision Notice.

12. As the complainant had not raised any further complaint regarding the disclosure of the information requested at part 2 of the request, the Commissioner wrote to the complainant to confirm that he therefore intended to issue a Decision Notice on NHS BSA's application of section 40(2) FOIA to the information requested at part 1 of the request.
13. The complainant confirmed that he wanted the Commissioner to issue a Decision Notice on this basis.
14. Upon reviewing NHS BSA's submissions, its position is that it does not hold qualifications/experience of the medical assessors only the GMC numbers.
15. The Commissioner has therefore considered whether NHS BSA holds the qualifications of the medical assessors under section 1(1)(a) FOIA and whether NHS BSA was correct to withhold the medical assessor's GMC numbers under section 40(2) FOIA.

Reasons for decision

16. 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.
17. 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
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¹ As amended by Schedule 19 Paragraph 58(3) DPA.

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 UK General Data Protection Regulation ('UK GDPR').

18. 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.
19. 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?

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

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

21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
22. 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.
23. 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.
24. In this case, NHS BSA has explained that GMC numbers are personal data within the meaning of the UK GDPR because they can be attributed to an identifiable person by the use of additional publicly available information. Entering the GMC number in the GMC's public register of medical practitioners confirms the doctor's full name, primary medical qualification, registration date, gender, designated body, responsible officer, details of inclusion on other registers and registration and licensing history. Disclosure of the medical assessor's GMC number would therefore result in the identification of the medical assessor and link them to particular assessments they had carried out.
25. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
26. The fact that 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 would contravene any of the DP principles.

27. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

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

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

29. 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.

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

30. Article 6(1) of the UK 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” lawful bases for processing listed in the Article applies.

31. 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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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”.

32. In considering the application of Article 6(1)(f) of the UK 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.
33. 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

34. In considering any legitimate interest(s) in the disclosure of the requested information 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.
35. NHS BSA recognises that there is a general legitimate interest in accountability and transparency in relation to VDPS.
36. The Commissioner also understands that the complainant has a personal interest in the requested information.

Is disclosure necessary?

37. '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.
38. The Commissioner considers it would be necessary to disclose the requested information to meet the legitimate interests identified in this case.

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

39. 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.
40. 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.
41. 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.
42. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
43. In this case the medical assessor has refused consent to disclose this information due to safeguarding concerns. This was also advised to the medical assessor within their training for the role.
44. NHS BSA said that also relevant to the reasonable expectations of the medical assessor is the fact that the requested information is not a health record for the purposes of DPA 2018, so the legal presumption in favour of disclosure of health workers' personal data within health records does not apply (Schedule 2, paragraph 17, DPA 2018).
45. Given the damage and distress disclosure would cause to the medical assessor in this case and the limited wider legitimate interest in disclosure of the identity of one medical assessor, 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.

46. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

Section 1(1)(a)

47. NHS BSA has confirmed that it does not hold the medical assessor's qualifications or experience.

48. Section 1(1) FOIA provides 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,"

49. NHS BSA explained that the medical qualifications and experience of the medical assessors are the responsibility of the sub-Processor RTWPlus who have a contract with the medical assessor. The contract NHS BSA has with the processor Crawford and Company does not require details of the qualification of the medical assessors or their experience, only that:

- they are registered with the GMC, with a licence to practice.
- with at least 5 years post graduate experience; and
- have experience of the performance of medical and/or disability assessment, addressing questions of causation and impact in the context of legislative or policy requirements to assist the decision maker.

It said therefore that the medical qualifications and experience of the medical assessors is not held on behalf of the NHS BSA and NHS BSA does not have a business purpose to hold the information.

50. It went on that the Head of Professional and Clinical Services (HPCS) has confirmed she has not requested proof of the qualifications or experience of the medical assessors. As part of a one-off quality assurance of the new processor exercise between March 2022 and May 2022 Crawford and Company provided a list of the GMC numbers of the medical assessors at that time to the VDPS Senior Service Delivery Manager. She then shared this with the HPCS. The HPCS then checked these against the GMC public register to check that they were registered, with a licence to practice and with at least 5 years post graduate experience. This information was not downloaded and is therefore not held. It said that the list of GMC numbers was deleted before this FOI request was received.

51. The only members of staff who may have held any relevant information would have been the HCPS, Head of Assurance Services and VDPS Senior Service Delivery Manager. They confirmed they held no VDPS medical assessors' qualifications or experience data. It said that VDPS Medical Assessors are not NHS BSA employees but contracted by RTWPlus, a sub-processor of Crawford and Company. The HCPS was the only registered medical practitioner employed by the NHS BSA at the time of the FOI request. Therefore, she was then the only employee whose medical qualifications and experience the NHS BSA would have a business need to know.

52. NHS BSA explained that the HCPS undertook the following searches:

Searched on 'GMC', 'medical assessor' and 'qualifications' and the name of the assessor in local drives, One Drive and SharePoint folders. Emails in Outlook searched up to date the request was received for any emails received from the medical assessor as qualifications may be in the signature footer. This returned a negative search result. The Head of Assurance Services and the VDPS Senior Service Delivery manager who have operational responsibility for managing the Crawford contract searched emails as they had not saved any documents to local drives, SharePoint or OneDrive. They search on the keywords 'GMC', 'medical assessor', 'qualifications' and reviewed the emails found in that search confirmed that no information was held on medical assessor's qualifications or experience.

53. NHS BSA summarised that the issue is not whether the information requested can be found in a search but rather that the sub-processor who holds the information does not hold it on behalf of the NHSBSA. NHSBSA has no business reason to hold this information. From a Clinical Governance perspective NHSBSA needs assurance that the supplier is undertaking appropriate checks to ensure medical assessors qualifications and experience meet the requirements specified in the contract with Crawford and Company.

54. Based upon NHS BSA's submissions the Commissioner is satisfied that on the balance of probabilities the medical assessor's experience and qualifications are not held under section 1(1)(a) FOIA. This is because under the contract between NHSBSA and the processor Crawford and Company, it is not required to provide NHS BSA with qualifications and experience, only assurances that certain criteria is met (which was checked by a one off quality assurance audit by the HCPS by obtaining GMC reference numbers only). Furthermore searches were conducted to determine whether emails from the medical assessor held by NHS BSA contained any details of qualifications within the signature footer however no information was located.

Right of appeal

55. 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

56. 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.
57. 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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