

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 November 2023

Public Authority: NHS England

Address: Quarry House
Leeds LS2 7UE

Decision (including any steps ordered)

1. In three requests, the complainant requested information about briefing given to the Chief Medical Officer following a meeting associated with the COVID-19 pandemic. NHS England (NHSE) initially advised it didn't hold information within scope of requests 2 and 3 and disclosed information relevant to request 1 with personal data redacted under section 40(2) of FOIA. NHSE subsequently identified information that fell within scope of requests 2 and 3 and disclosed this, having again redacted some personal data.
2. The Commissioner's decision is as follows:
 - NHSE holds no further information within scope of the requests and has complied with section 1(1) of FOIA.
 - NHSE is entitled to withhold the redacted information in two disclosed email exchanges under section 40(2) as it's other people's personal data and disclosing it wouldn't be lawful.
 - NHSE breached section 10(1) and 17(1) of FOIA as it didn't comply with section 1(1) or provide a section 40 refusal notice within the statutory timeframe.
3. It's not necessary for NHS England to take any corrective steps.

Request and response

4. On 21 January 2023 the complainant wrote to NHSE and submitted three requests for information in the following terms:

"1) A briefing for the Chief Medical Officer (CMO) was prepared as the result of the COVID-19 tixagevimab/cilgavimab (Evusheld) pre-exposure prophylaxis National Expert Group Meeting of 19 May. This briefing which is dated 25 May 2022 states (on page 2, item 1, bullet 4) that

"There were concerns that high-risk groups may modify their behaviour to less risk avoidant after taking a prophylactic agent - with particular implications is such an agent is of limited effectiveness"

Please provide the behavioural analysis reports, related data and/or other information provided to this meeting (or to the person(s) presenting this information to the meeting) to explain/support the concern above.

Please include any NHS hospitalisation data forecasts if these were included as part of this consideration."

"2) A briefing for the Chief Medical Officer (CMO) was prepared as the result of the COVID-19 tixagevimab/cilgavimab (Evusheld) pre-exposure prophylaxis National Expert Group Meeting of 19 May.

In this briefing for the Chief Medical Officer there are two recommendations. Recommendation 2 was that "The necessity of generating meaningful clinical data was reiterated. There is the need for more in-human data on the clinical effectiveness of tixagevimab/cilgavimab in the current UK population and present pandemic context. This could be in the form of a pragmatic clinical trial, which would likely be observational using a high-risk patient population. Within such a trial there is an imperative to examine PD/PK data in a sub-group of high-risk patients, so as to helpfully inform clinical pharmacological knowledge."

Please provide the response (whether by memorandum, email or noted conversation) of the CMO to the report.

Please note that this request would have been directed to NHS Improvement prior to its merger into NHS England in July 2022."

"3) In the briefing for the Chief Medical Officer (CMO) which was prepared as the result of the COVID-19 tixagevimab/cilgavimab

(Evusheld) pre-exposure prophylaxis National Expert Group Meeting of 26 April 2022 there are three conclusions

Conclusion 2 was that "The group noted the unmet need of the immunocompromised patients outlined by the IAG and proposed the expeditious establishment of a platform trial to support evidence generation in this group of patients at highest risk within the current UK pandemic context. The group recommended that the study design be future-proofed to enable the addition of other PrEP (or therapeutic) agents to the study and be applicable to other new (sub)variants as they emerge"

Please provide the response (whether by memorandum, email or noted conversation) of the CMO to the report."

5. NHSE responded to the requests on 2 May 2023. It confirmed it held information relevant to request 1 and disclosed this having redacted some (not all) personal data from it. NHSE advised it didn't hold information within scope of requests 2 and 3.
6. Regarding the personal data, NHSE said that it was withholding the names, job titles and contact details of NHSE staff members at or below band 9 and those external to NHSE, as well as the contact details for all other NHS England staff.
7. The complainant requested an internal review on 10 May 2023. They said they hadn't received the clinical evidence they'd requested. The complainant also disputed that NHSE wouldn't hold information within scope of requests 2 and 3 and asked NHSE to detail what searches it had carried out for correspondence between the CMO and Professor Kessel.
8. NHSE didn't go on to provide an internal review and the matter was passed to the Commissioner.
9. As a result of the complaint to the Commissioner, NHSE provided the complainant with an internal review on 30 August 2023. NHSE upheld its original position. It said it had disclosed all the relevant information it held, had searched Professor Kessel's records, had only redacted personal data and didn't hold information within scope of requests 2 and 3. NHSE explained that the CMO isn't an NHSE employee and so it couldn't search their records. NHSE advised the complainant to contact the Department of Health and Social Care (DHSC) for that information.
10. In further correspondence to the Commissioner, the complainant said that:

"Professor Kessel's emails

NHSE states that they have searched Professor Anthony Kessel's records and all information that was within scope of this request has been released. I have to question therefore why they did not locate the one that I identified from 13 May 2022 which Professor Kessel was cc'd on which refers to the communication from the CMO's office (photographs 1 & 2 attached).

The sender of the email of 13 May is an employee of Specialised Commissioning NHS England and NHS Improvement and has clearly been in contact with the CMO's office so there is additional correspondence that has not been provided.

The time frames to search and retrieve the requested information are quite short - after meetings of 26 April and 19 May 2022, so once an email trail is picked up (as we have for 13 May email) looking at the related correspondence to identify the CMO's responses from the recommendations from the meetings should not be difficult.

The Chief Medical Officer is a position within the Health Service that has an "office", or as he stated at the public inquiry a very small team that works directly for him, so as the 13 May email shows, it would be his office that follows up on points.

CMO's records

I find it very curious that NHSE did not make the following statement in their first reply of 2 May 2023: "Please note, the CMO is not an employee of NHS England and we are unable to search his records. If you have not already done so, you may find it useful to submit a request for information to the Department of Health and Social Care via the contact details on their website".

Please see photograph 3 attached. This shows that the email address of the CMO is "WHITTY, Chris (NHS ENGLAND & NHS IMPROVEMENT - X24)".

I do not therefore understand why NHSE are able to say that as he is not their employee they are unable to search his records when they clearly hold them on their email systems.

I should point out that I have seen correspondence on the whatdotheyknow website from the DHSC clearly stating that they do not hold the CMO's email communications! It was because of this that I requested the information from NHSE."

11. In response to advice from the Commissioner NHSE considered the requests again and provided the complainant with a further response on 27 September 2023. Regarding requests 2 and 3, it had now interpreted these more broadly and included in its search any emails sent from the CMO's office on behalf of the CMO, not just emails sent by the CMO directly. As a result NHSE identified further relevant information which it disclosed to the complainant. This was two email exchanges with some personal data redacted. NHSE confirmed that this was all the further information it had identified.
12. The complainant doesn't accept NHSE's new position. In subsequent correspondence to the Commissioner they confirmed their view that NHSE can't withhold all the personal data it's redacted from two email exchanges that it disclosed. They also consider that NHSE hasn't confirmed whether or not it holds the requested "behavioural analysis reports" and hasn't addressed the matter of the CMO's email address and whether the CMO works for NHSE, in which case NHSE should hold their emails.

Reasons for decision

13. On the basis of the complainant's communications with the Commissioner, this reasoning covers whether NHSE holds further information within scope of the requests and, in relation to two email exchanges it disclosed, whether it's entitled to rely on section 40(2) of FOIA to withhold some of the information the complainant has requested. The Commissioner will also consider procedural aspects of NHSE's handling of the request.

Section 1 – right of access to information held by a public authorities

14. Under section 1(1) of FOIA anyone who requests information from a public authority is entitled a) to be told if the authority holds the information and b) to have the information communicated to them if it's held and isn't exempt information.
15. Regarding the requested "behavioural analysis reports", in a submission to the Commissioner, NHSE has confirmed it doesn't hold such reports.
16. The request for this information reads as if it's information that the complainant considers that NHSE should hold, rather than being information they know that NHSE holds. FOIA isn't concerned with information an applicant considers a public authority **should** hold; only information the authority does nor doesn't hold. NHSE has now considered the request several times and carried out a number of searches for information within scope of the request. It hasn't identified

any information that addresses the request for “behavioural analysis reports”. NHSE has now complied with section 1(1)(a) in respect of the requested reports – in that it’s confirmed that it doesn’t hold such reports. The Commissioner will accept, on the balance of probabilities, that NHSE doesn’t hold that information.

17. Regarding the matter of the CMO’s email address, in information disclosed to the complainant, the CMO appeared to use an ‘NHSE’ email account (as well as NHSI and DHSC email accounts). This suggested to the complainant that NHSE would hold further relevant information.
18. In its submission to the Commissioner, NHSE has explained that DHSC is the organisation which would hold correspondence relating to the CMO for England.
19. NHSE said it has contacted the CMO’s private office at DHSC which has confirmed that the DHSC holds the CMO’s communications. All communications in his capacity as the CMO and relating to government business are sent from the CMO’s DHSC account. The CMO’s private office has advised that the CMO holds an NHS email in his capacity as a practising clinician at University College London Hospitals NHS Foundation Trust.
20. NHSE said it has also made enquiries with the NHSmail team. The NHSmail team was historically part of NHS Digital. However, following the merger with NHSE, this team is now part of NHSE.
21. The NHSmail team has advised that the fact that the email address has the “NHS England and NHS Improvement” tag doesn’t mean that the individual in question was employed by NHSE or even had their email address as part of NHSmail. What it means is that at some point someone has added Professor Chris Whitty’s DHSC email address to the global list as a way of creating a regular contact. As such, the email address is not an NHSE address and isn’t designated as such on NHSmail. It’s a DHSC email and is under DHSC’s control, not NHS England / NHSmail.
22. The Commissioner considers that NHSE’s explanation is satisfactory. He accepts that DHSC is the body that would hold the CMO’s correspondence, not NHSE. Therefore, the Commissioner’s decision is that, on the balance of probabilities, NHSE doesn’t hold any further information relating to the CMO’s correspondence and again, has complied with section 1(1)(a) of FOIA.

Section 40 – personal data

23. Section 40(2) of FOIA provides that information is exempt from disclosure if it’s 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.

24. 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 UK General Data Protection Regulation ('UK GDPR').
25. 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 isn't personal data, then section 40 of FOIA can't apply.
26. Second, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

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

28. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
29. 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.
30. 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.
31. In this case, the information redacted from the emails comprises names, job titles, phone numbers and a working pattern.
32. In the circumstances of this case and having considered the withheld information, the Commissioner is satisfied that the information relates to

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

specific individuals. He's satisfied that this information both relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

33. The fact that information constitutes the personal data of identifiable living individuals doesn't automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
34. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

35. 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".

36. 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.
37. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

38. 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.
39. 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".

40. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it's 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 individuals referenced in the emails (the 'data subjects').
41. 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

42. 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.
43. The complainant has a specific interest in the information. This relates to the Antivirals and Therapeutics Taskforce (referred to in the emails

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".

NHSE disclosed as the 'TTF') but, at their request, the Commissioner doesn't intend to detail the complainant's interest in this notice.

44. The complainant has told the Commissioner that they've reviewed documents on the WhatDoTheyKnow (WDTK) website and have seen that DHSC considers that certain members of the TTF are of a grade which requires their names to be disclosed under FOIA. They say that DHSC has provided these five individuals' names in response to other FOI requests. The complainant has an interest in these names in a particular context and has provided the names to the Commissioner.
45. The Commissioner has considered the complainant's interest in the information and in his view, it appears to be more of a private interest for them. There is, however, a broad general interest in public authorities being open and transparent. Particularly about matters associated with the COVID-19 pandemic.

Is disclosure necessary?

46. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
47. In its submission, NHSE discusses personal data withheld from both the email exchanges and separate meeting minutes which are not considered here. NHSE has noted that it has disclosed the names of the senior staff members who have a decision-making responsibility, both internal and external to NHSE. It has also disclosed the contents of the minutes [and the content of the emails] and confirmed the organisations for which the individual members worked.
48. NHSE doesn't consider further disclosure of the individual names and job titles of external staff members, or non-senior internal staff members, in this instance is necessary to meet the legitimate aim in question. It's not clear to NHSE how disclosing this particular information will add any further context, or explanation, to the information already disclosed.
49. NHSE has therefore concluded that the legitimate interests behind this request have been satisfied through less intrusive means.
50. However, as noted, the complainant has explained to the Commissioner why they consider disclosing the information is necessary.
51. The Commissioner has reviewed the personal data being withheld in the email exchanges against the complainant's list of five names. He's noted

what he's found but doesn't intend to detail this in this notice. He does, however, observe that it's clear from information disclosed that the TTF was represented in the email exchanges. In the Commissioner's view that fact largely satisfies the specific interest that the complainant has.

52. However, disclosing the withheld information would be necessary to meet the complainant's specific interest. For the sake of completeness and because of the broad interest in public authorities being open and transparent, the Commissioner has gone on to consider the balancing test.

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

53. It's 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 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.
54. 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.
55. 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.
56. It's also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
57. The complainant's interest is more specific than wanting to know the names of the members of the TTF. They want to know if any of the five names they've provided to the Commissioner appear in a particular context.
58. Only one individual whose personal data has been redacted from the email exchanges works for NHSE. They appear to be relatively senior

and as such, might expect their personal data to be released. The remaining individuals don't work for NHSE but any individual who's in a relatively senior position might expect the same.

59. In its submission to the Commissioner, NHSE appears to have focussed on personal data in the separate meeting minutes. It said that [all] the individuals whose names have been redacted have a reasonable expectation that when they attended a meeting held by an external organisation, their personal data would remain confidential. During the meeting concerned, attendees agreed not to circulate documents as they are categorised as 'Official Sensitive'.
60. NHSE says it's aware that disclosure under FOIA is effectively disclosure to the world at large. Therefore, releasing the individuals' personal data may result in unwarranted, and unjustified, scrutiny from members of the public.
61. Noting that the public has a right to access information about Evusheld and to understand the official discussions about Evusheld, NHSE argues that, nevertheless, disclosing the names of individual members of staff, who largely originate from outside NHSE, isn't in line with those individuals' legitimate expectations.
62. The complainant considers that all the redacted information should be disclosed and has a specific interest in the names of five individuals, in a particular context. The Commissioner appreciates that's an interest for the complainant, he doesn't consider that there's a significant wider public interest in that matter.
63. NHSE has focussed the arguments in its submission on the personal data in separate meeting minutes that it withheld. However the Commissioner considers that those arguments can be extended to the personal data in the emails and some of the individuals appear in both the emails and the meeting minutes. Those referenced in the information withheld from the emails appear to be relatively senior. But the Commissioner agrees with NHSE that those individuals would still reasonably expect that their names wouldn't be disclosed to the wider world in response to a FOIA request. (Any individuals at a less senior grade would also have that expectation.) This is because the minuted meeting was viewed as sensitive – presumably because it was concerned with COVID-19. As such, the associated emails would also be viewed by those included in them as sensitive and that their personal data would be protected.
64. In addition, NHSE has disclosed the content of the email exchanges. NHSE has also disclosed the names in the emails of NHSE staff responsible for decision making and the names of organisations

represented (where this is shown in the email exchanges). Full disclosure would provide information that would address the complainant's own interest. However, the Commissioner agrees that, for the general public, disclosing the remaining individuals' personal information wouldn't add any great insight to the information that's been disclosed.

65. Finally, the Commissioner agrees that, in the context of strong feelings in the population about the COVID-19 pandemic, treatment and vaccinations, which is likely to have still been present to a degree at the time of the request in January 2023, those involved in an advisory capacity to the Government may have been subject to unwarranted, and unjustified, scrutiny from the public. This would cause distress to those individuals.
66. Based on the above factors, the Commissioner has determined that there's insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The wider public interest in transparency has been adequately satisfied through the information that NHSE has disclosed. The Commissioner therefore considers that there's no Article 6 basis for processing and so the disclosure of the information wouldn't be lawful.
67. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he doesn't need to go on to consider separately whether disclosure would be fair or transparent.

The Commissioner's view

68. The Commissioner has therefore decided that NHSE was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Procedural matters

69. Section 10(1) of FOIA obliges the authority to comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.
70. Section 17(1) obliges the authority to issue a refusal notice in regard to any exempt information within the same timescale.
71. The complainant submitted their request on 21 January 2023. NHSE complied with section 1 and issued a section 40 refusal notice on 2 May 2023. This was outside the 20-working day requirement and so NHSE breached sections 10(1) and 17(1) of FOIA.

Other matters

72. Provision of an internal review isn't a statutory requirement of FOIA but is a matter of good practice. As such, the Commissioner isn't able to make a formal decision on a public authority's handling of a review.
73. However, the Commissioner reminds NHSE that the FOIA Code of Practice advises that internal reviews should be provided within 20 working days of the request for one. And only in exceptional cases should a further 20 working days be necessary. For monitoring purposes, he has recorded NHSE's late review in this case.

Right of appeal

74. 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

75. 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.
76. 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

Cressida Woodall
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Wycliffe House
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