

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 January 2019

Public Authority: Department of Health
Address: 39 Victoria Street
Westminster
London
SW1H 0EU

Decision (including any steps ordered)

1. The complainant has requested information about a previous complaint he made and information about the controllers of data previously held by a Primary Care Trust (PCT)
2. The Commissioner's decision is that the Department of Health ("DH") was entitled to rely on Section 21 (Reasonably Accessible) to refuse to provide the requested information in respect of element [1] of the request. In respect of element [2] of the request, DH has disclosed all the information it holds. However DH's handling of the request was poor – something which the Commissioner has commented on in the "Other Matters" section of this notice.
3. The Commissioner does not require DH to take any further steps.

Request and response

4. On 24 March 2017, the complainant wrote to DH and requested information in the following terms:

"Please inform me whether or not you hold the information specified below.

"If you do hold the requested information please be so kind as to send me an actual copy.

- 1) *I am requesting a copy of all information you hold in respect of a 2010 investigation by Ashton, Leigh and Wigan Primary Care Trust into a service user's formal complaint about such matters as a General Practitioner's August 2009 behaviour during an appointment at the Dicconson Group Practice Boston House, Frog Lane. Wigan. Lancs. WN6 7LB.*
- 2) *I am requesting a copy of information you hold which states who is the data controller of all the information (including complainant's personal data) processed by ALWPCT during their handling of service user's formal complaints made to ALWPCT at any time from the 01st April 2009 onwards."*

Regarding request number two please also send full contact details.

5. DH responded on 25 April 2017. It stated that it needed clarification as to the identity of the "service user" referenced in element [1] of the request. On 15 May 2017, the complainant confirmed that the service user was, in fact, himself.
6. DH issued its formal response on 16 June 2017. It refused element [1] of the request, citing Section 21 (Information Reasonably Accessible to the Requestor) because the information had previously been provided in response to a SAR which the complainant had made. It provided information in respect of element [2] of the request.
7. The complainant requested an internal review on 25 June 2017. He argued that, even if DH had responded to a SAR, it was still required to provide the information to him under FOIA. He also challenged DH's interpretation of element [2] of the request and argued that DH had failed to provide him with all the information it held.
8. DH did not provide the outcome of its internal review until 28 March 2018. It maintained its position.

Scope of the case

9. The complainant contacted the Commissioner on 26 June 2018 to complain about the way his request for information had been handled.
10. When DH initially responded to the request, in respect of element [2], it prefaced its response with:

*"On the basis that we have interpreted your request to be asking which organisations are now the data controllers for **data that was***

formerly processed by the Ashton, Leigh and Wigan Primary Care Trust, our response is as follows:" [emphasis added]

11. When requesting his internal review, the complainant stated that this interpretation of his request was not correct as DH should not have added extra words to his request. He re-stated the original wording of his request – but did not elaborate further on why he considered DH's interpretation to be incorrect.
12. The Commissioner considers that DH's interpretation of this element of the request was the correct objective reading of that element. She does not consider that DH was obliged to request further clarification of the request and, in any case, the complainant had the opportunity to provide further clarity when requesting an internal review.
13. The scope of this case is to consider whether DH was entitled to rely on Section 21 to refuse element [1] of the request and whether further information was held within the scope of element [2].

Reasons for decision

14. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*

Element [1] of the request

15. Section 21 of the FOIA states that:

"Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information."

16. Whilst responses made under FOIA should, in most circumstances, have no regard to the identity of the person making the request, Section 21 is an exemption where a public authority can have regard to any factors which would make the requested information either more or less reasonably accessible to the particular requestor.
17. In this case, DH has pointed out to the Commissioner that it responded to a SAR request, from the complainant, in 2015. It disclosed 455 pages

of documents relating to the complaint identified in the request, which it considered to be the complainant's personal data. It withheld some personal information which it considered to be exempt from the duty to disclose under Subject Access.

18. As DH has provided this information to the complainant, it therefore believes that the information is reasonably accessible to him.
19. The complainant has argued that DH holds further information relating to the complaint which it has not disclosed.
20. Whilst the complainant has been unable to cite any specific document or type of document which he believes DH would hold, he has pointed to the Commissioner's guidance on the disclosure of complaint files.¹ The Commissioner's guidance notes that whilst much of the information contained within a complaint file *is* likely to be the personal data of the person who made the original complaint, not *all* of it will be. Therefore, when a public authority receives a request for the disclosure of all, or part, of a complaint file, it should consider its responsibilities under both SAR and FOIA when considering what information it should disclose.
21. Therefore, as the Commissioner understands it, the complainant's belief is that DH may hold further information relating to his complaint which would not be his personal data.
22. The Commissioner is not convinced by the complainant's argument which appears to be based on speculation rather than evidence. DH supplied a copy of the covering letter which it included with its earlier SAR response.
23. When the Commissioner pressed DH on this point, DH explained that, whilst it cannot be certain that it inherited everything the PCT held, relevant to the original complaint, that which it does hold was covered as part of the SAR response.
24. The Commissioner further considers that anything that was withheld from disclosure under SAR (as opposed to information which was not within scope) would have attracted the absolute exemption under Section 40(1) of the FOIA (Personal Data of the Requestor).

¹ https://ico.org.uk/media/for-organisations/documents/1179/access_to_information_held_in_complaint_files.pdf

25. The Commissioner therefore considers that all the information DH holds was reasonably accessible to the requestor and therefore DH was entitled to rely on Section 21 to withhold the information.

Element [2] of the request

The Complainant's position

26. As mentioned above, the complainant challenged DH's interpretation of his request – although he did not provide any definitive interpretation of his own. He has stated, both in his request for an internal review and his grounds of complaint to the Commissioner that he believes DH holds further information – although he has provided no supporting rationale for this belief.

DH's position

27. DH explained that the data controller for information created by the Ashton, Leigh and Wigan Primary Care Trust (PCT) was the PCT, from the time of the complaint through to the dissolution of the PCT on 1 April 2013.
28. On 1 April 2013, after the passage of the Health & Social Care Act 2012, Clinical Commissioning Groups (CCGs) replaced Primary Care Trusts. In its initial response, DH had already explained to the complainant that the data which the PCT in question previously held was split between four different organisations, including DH.
29. DH further explained that the information relating to the complaint which it now holds was inherited directly from the PCT following the dissolution, and was not passed through any other organisation.
30. DH was unsure as to what further information it might be expected to hold within the scope of element [2] and it took the view that it had provided that which it held.

The Commissioner's view

31. The Commissioner's view is that DH holds no further information within the scope of this element of the request.
32. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally,

she will consider any reason why it is inherently likely or unlikely that information is not held.

33. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
34. It would be unreasonable to expect a complainant to have a detailed knowledge of all the sorts of information which a public authority holds. However the Commissioner does take the view that, where a complainant believes further information is held, it is reasonable for them to put forward some sort of rationale for that belief to assist the Commissioner in targeting her enquiries.
35. The complainant appears to be suggesting that DH has, in interpreting his request, restricted its scope in a way he neither sought nor intended. Whilst the Commissioner has struggled to follow the complainant's arguments in this respect, her view is that the original wording of the request and DH's interpretation are not materially different from each other in terms of the information that would fall within scope.
36. Furthermore, the Commissioner is not clear as to why DH would be expected to hold further information within the scope of what is a relatively narrow request. The complainant has provided no direction as to any "missing" information, although it appears unlikely that there could be convincing representations made on this point.
37. The Commissioner therefore concludes that DH holds no further information within the scope of the request beyond that which it has provided.

Other matters

Seeking clarification where a request is unclear

38. Section 1(3) of the FOIA states that:

Where a public authority—

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

39. The Commissioner notes that DH did not seek clarification of the complainant's request until the day on which it should have issued its response, which was the twentieth working day following the date of receipt.
40. Whilst the FOIA does not set out a deadline by which clarification should be sought, the Commissioner's view is that, as a matter of good practice, a public authority should seek any clarification it requires at the earliest possible opportunity.
41. It should have been clear to DH, at the outset, that the request required clarification. This clarification could and should have been sought much sooner.
42. Because the clarification was sought within 20 working days and the response to the clarified request was provided on the twentieth working day after the date of clarification, the Commissioner cannot find DH in breach of the FOIA in this respect. However, the Commissioner wishes to record her view that DH's actions amounted to very poor practice.

Internal Review

43. The Commissioner also notes that DH took nine months to complete its internal review. Whilst, again, there is no statutory time limit for completing internal reviews, DH should be well aware that the Commissioner would normally expect such reviews to last no longer than 20 working days and, even in the most exceptional cases, never more than 40 working days. Such extreme delays as were seen in this particular case are unacceptable.

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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.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

Ben Tomes
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