Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **7 June 2019**

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

Decision (including any steps ordered)

1. The complainant has requested any declarations of interests NHS England received from specific individuals and companies named in the request. NHS England refused to confirm or deny whether this information is held under section 40(5)(b)(i) of the 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)(b)(i) of the FOIA with the exception of the limited companies named in question 5(c) of the first set of questions and question 5(f) of the second set of questions.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

    - NHS England is required to confirm whether the requested information is held or not for the limited companies named in question 5(c) of the first set of questions and question 5(f) of the second set of questions and if it is, to either disclose that information to the complainant or issue a fresh response under FOIA which does not rely on section 40(5)(b)(i).

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 3 May 2018, the complainant wrote to NHS England and requested information in the following terms:

"1. Could you provide details of money spent on *third-party agencies*, companies and contractors employed within ICT department for the period 1st April 2017 to 31st March 2018 and categorise by company name and the job title the company/contractor reports to at NELCSU?

2. Could you provide details of the *number of* and the *money spent on* contractors employed within ICT department for the period 1st April 2017 to 31st March 2018 and categorise by ethnicity and the job title the contractor reports to at NELCSU?

3. Could you provide details of *money paid to* "Pine Tree Technical Services Ltd" for the period 1st April 2017 to 31st March 2018 and categorise by type of work completed?

4. Could you provide details of *money paid to* "Pine Tree Technical Services Ltd" for the last 5 years and categorise by year?

NELCSU has stated as follows: "*In order to comply with NHS England's Standards of Business Conduct Policy all staff (including interims and contractors) are required to complete a Declaration of Interest form. This is in order to safeguard you from possible accusations that you have acted less than properly and without sufficient probity."*

5. Could you forward a copy of the following items:

a) [name supplied]'s completed *Declaration of Interest form and NHS interests register form*?

b) [name supplied] completed *Declaration of Interest form and NHS interests register form*?

c) "Pine Tree Technical Services Ltd" or any other contractor employed by "Pine Tree Technical Services Ltd" completed *Declaration of Interest form and NHS interests register form*?

6. With regards to grievances raised by members of staff for the period 1st April 2017 to 31st March 2018, could you provide the number of grievances raised by members of staff and categorise by ethnicity?

7. With regards to the Consultation commencing on 2 February 2018 and outcome, could you provide the number of members of staff and categorise by ethnicity as follows:

a. That were ring-fenced

b. That were displaced

c. That were slotted in

8. With regards to the Consultation commencing on 2 February 2018 and outcome, could you provide clarity of which job title(s) were responsible for the Consultation, if possible categorise by directorate?

Under the Freedom of Information Act, I politely request as follows:

1. For the period 1st April 2017 to 31st March 2018, could you provide details of the daily rate, for each contractor who is employed in the ICT directorate and categorise by, ethnicity and the job title, provide details of which member of staff the contractor reports to at NELCSU and indicate whether there is a contract end date, if so, specify *(contract end date)*?

2. For the period 1st April 2016 to current date and in relation to the ICT directorate, could you provide the name of the companies that provide managed services?

3. With respect to point 2 for each provider *(of managed service)* could you specify the period of the contract *(managed service)*, value of contract and details of which job title authorised/signed off for the contract?

4. Could you provide details of money spent on "John White PM Ltd" and categorise by the type work/projects undertaken for the last 3 years?

NELCSU has stated as follows: "*In order to comply with NHS England's Standards of Business Conduct Policy all staff (including interims and contractors) are required to complete a Declaration of Interest form. This is in order to safeguard you from possible accusations that you have acted less than properly and without sufficient probity."*

5. Could you forward a copy of the following items:

d) [name supplied]'s completed *Declaration of Interest form and NHS interests register form*?

e) [name supplied]'s completed *Declaration of Interest form and NHS interests register form*?

f) "John White PM Ltd" or any other employees employed by "John White PM Ltd" undertaking work at NELCSU, *Declaration of Interest form and NHS interests register form*?"

6. NHS England responded on 31 July 2018. It dealt with the first set of questions (questions 1 to 8) first. In relation to question 1 it disclosed the requested information and in relation to question 2 it confirmed that it does not hold the information. Concerning questions 3 and 4, NHS England advised the complainant that there had been no expenditure between the parties named for the timeframes specified. In respect of question 5, it refused to confirm or deny whether the requested information is held citing section 40(5)(b)(i) of the FOIA. Concerning questions 6 and 7 it stated that the information is not held. Regarding question 8, it disclosed the requested information.

7. It then dealt with the second set of questions (questions 1 to 5). In relation to question 1 it refused to disclose the information it holds and cited section 40(2) of the FOIA. In response to questions 2 and 3, NHS England disclosed the requested information. Concerning question 4, NHS England confirmed that the information is not held and in relation to question 5 it refused to confirm or deny whether the requested information is held citing again section 40(5)(b)(i) of the FOIA.

8. The complainant requested an internal review on 1 August 2018. The internal review focused on question 5 of the first set of questions and question 5 of the second set of questions.

9. NHS England carried out an internal review and notified the complainant of its findings on 10 August 2018. It again refused to confirm or deny whether the requested information is held citing section 40(5)(b)(i) of the FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 10 August 2018 to complain about the way his request for information had been handled. The complainant disagrees with the application of section 40(5)(b)(i) of the FOIA and refers to a previous FOIA response he received (reference 054553) in which a Declaration of Interest form was disclosed.

11. The Commissioner's investigation has focussed on the application of section 40(5)(b)(i) to question 5 of the first set of questions and question 5 of the second set of questions. No complaint has been made about NHS England's response to the other questions cited in the request.

Reasons for decision

Section 40 - personal information

12. 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.

13. 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?

14. Section 3(2) of the DPA 2018 defines personal data as:-

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

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

16. 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.

17. NHS England confirmed that to confirm or deny whether the information is held would, in itself, reveal personal information about the named individuals. As specific individuals have been named, confirming or denying whether the information is held will reveal some personal data about those individuals relating to their employment or lack of it with NHS England or their engagement or lack of it as a contractor or interim working for NHS England on a specified basis. Dependent upon the response, it could also reveal that the named individuals do or do not have other interests that they need to declare.

18. With the exception of the first element of question 5(c) and 5(f) (which the Commissioner will address separately), the information has been requested for specific named individuals. Confirming or denying whether the recorded information is held would disclose some personal data relating to those individuals regarding their employment or engagement with NHS England or lack of it and, if held, that named individuals had other private interests separate to their employment or engagement with NHS England to declare that could potentially prove to be a conflict of interest.

19. For the above reasons, 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. With the exception of the first element of question 5(c) and the first element of question 5(f), the first criterion set out above is therefore met.

20. Turning now to the first element of question 5(c) and 5(f), these elements of the request ask if two limited companies have submitted declarations of interests, *in addition* to any other employee of these companies not named throughout each question 5. Any other employee of these companies is a living individual as defined in section 3(2) of the DPA 2018 and so is covered by the Commissioner's decision outlined in paragraph 18 and 19 above.

21. However, the two limited companies are not living individuals and so do not fall within the definition of personal data as outlined in section 3(2). For these specific elements of question 5(c) and 5(f) the first criterion set out above is not met and therefore NHS England cannot rely on section 40(5B) of FOIA to refuse to confirm or deny whether the requested information is held.

22. The Commissioner will now continue to consider the application of section 40(5B) of the FOIA to the requested information which has met the first criterion.

23. The fact that confirming or denying whether the requested information 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.

24. The Commissioner considers 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?

25. 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"*

26. 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

27. 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 in response to the request would be considered lawful.

28. 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].

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[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*".

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*".

29. 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.

30. 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

31. In considering any legitimate interests in confirming whether or not the requested information is held in response to a FOI request, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.

32. 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.

33. NHS England has not specifically addressed this point nor has the complainant in his correspondence to it or the Commissioner.

34. However, the Commissioner considers there are the general principles of accountability and transparency as stated above and a legitimate interest in ensuring that any conflicts of interest (if indeed any are declared) are, first being disclosed and second, being addressed appropriately and in accordance with procedure.

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

35. '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 must therefore be the least intrusive means of achieving the legitimate aim in question.

36. Again NHS England has not specifically addressed this point and nor has the complainant in his correspondence.

37. However, the Commissioner has decided that confirming or denying whether the recorded information is held is necessary in this case to address the legitimate interests outlined above. If for example the complainant has genuine concerns that declarations of interests should have been submitted but suspects they have not or believes there may have been a conflict of interest which has influenced decision making, knowing whether the information is held or not (and following on from that having access to what recorded information is held) is necessary to address those legimitate concerns. The legitimate interest could not be met by a less intrusive means.

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

38. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject(s)' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.

39. NHS England explained that declarations of interests are routinely published for employed individuals in senior roles and roles that involve senior decision making to ensure that there is transparency and accountability on how decisions regarding public spending and allocation are made. They are not published for employed individuals below this level or individuals who do not have a role that involves senior decision making. For contracted companies it does not routinely receive declarations of interests, usually the company deals with this for its employees and it would be the company that is contracted not certain individuals and the company would decide who to provide for the specified piece of work. If a specific individual is contracted to carry out a specified role or an interim is employed the same rules that apply to

employed staff apply to them if they join as an substantive employee. For example, if an interim is employed to carry out the role of Head of Finance, the interim is classed as a substantive employee and would be subject to the same rules on publication as an employed individual.

40. It explained that it considers such an approach meets any legitimate interests in disclosure of this type of information. Those that are routinely published relate to employed staff or those that are contracted to act as substantive staff who have sufficient autonomy, responsibility for public funds, staff and/or important decision making on behalf of the authority that warrants public disclosure and transparency. Those that are not would either relate to employees below this level or those classed as a substantive employees below this level.

41. Confirming or denying the requested information is held would reveal some personal data about the named individuals. Dependent upon the response it would be saying something about the named individuals' employment status with NHS England or indeed lack of it and whether or not (if employed or a substantive employee) they had submitted a declaration of interests. For those not employed by NHS England or those that in fact are but are not considered to hold a role that warrants public disclosure about their position on the one hand and whether they have or have not submitted a declaration of interests on the other, disclosing this information (as a direct result of the action of confirming or denying) would be against their reasonable and fair expectations.

42. The Commissioner notes NHS England's general approach to routine public disclosure of this type of information for senior staff and those staff that are responsible for important and significant decision making both employed or employed on a substantive basis. She accepts that such procedures and general approach are required to ensure that other/private interests are declared and that these are assessed accordingly where required to ensure that no conflict of interests will occur. The Commissioner agrees this approach meets the general legitimate interests that could be put forward for this type of information.

43. For employed staff below this level and indeed for those individuals that are not even employed by NHS England, there is a need to protect their right to privacy. These individuals will hold the reasonable expectation that nothing relating to their employment or lack of it will be released into the public domain. Similarly if indeed the named individuals are employed by NHS England or employed on a substantive basis (and again we are not saying that they are or indeed have had any connection with NHS England employment wise at all) they would hold a reasonable expectation that it would not be disclosed into the public domain whether or not they have submitted a declaration of interests.

44. Confirming or denying in this case and what can be drawn from this relating to the specified individuals would amount to an unwarranted intrusion to their lives and would cause them some unwarranted distress and upset, considering that the current procedures in place for senior staff or those that are responsible for significant decision making which warrant such transparency meets the legitimate interests in disclosure of this type of information.

45. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful.

Fairness

46. Given the conclusion the Commissioner has reached above on lawfulness, the Commissioner considers that she 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.

Right of appeal

47. 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

48. 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.

49. 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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