

7 November 2023

IC-263176-V9V2

Request

You asked us, regarding the [Practice Recommendation issued to NHS England](#) on 4 July 2023:

"I note the backlog in the Practice Recommendation that you provided states that there would be an update on September 29th.

Could you provide that update please to see whether significant progress is being made and also if not, let me know what further action the ICO is taking?"

We received your request on 10 October 2023.

We have handled your request under the Freedom of Information Act 2000 (the FOIA).

Our response

I can confirm that we hold information in scope of your request. However, the information you have requested is being withheld from our response due to the fact that it forms part of our ongoing investigation.

Supplementary information provided alongside the update received from NHS England is also being withheld due to prohibitions on disclosure.

Further information on the withheld information and the exemptions used can be found below.

To provide some further information, regulatory action is being taken in the form of a practice recommendation in line with our [FOI and Transparency regulatory manual](#). This remains an ongoing process and investigation.

Information withheld

FOIA section 31

The update provided by NHS England is exempt from disclosure under section 31(1)(g) of the FOIA. We can rely on section 31(1)(g) of the FOIA where disclosure:

"would, or would be likely to prejudice... the exercise by any public authority of its functions for any of the purposes specified in subsection (2)."

In this case the relevant purposes contained in subsection 31(2) are 31(2)(a) and 31(2)(c) which state:

"(a) the purpose of ascertaining whether any person has failed to comply with the law..."

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise ..."

Section 31 is not an absolute exemption, and we must consider the prejudice or harm which may be caused by disclosure. We also have to carry out a public interest test to weigh up the factors in favour of disclosure and those against.

Our investigation into NHS England is still ongoing. To release the information you have requested could prejudice the ICO's ability to conduct the investigation and assess NHS England's progress on our recommendations in an appropriate manner. Disclosure at this stage would discourage our ongoing discussions with NHS England, and may damage our ability to conduct the process fairly and proportionately.

Disclosure is also likely to result in other parties being reluctant to engage with the ICO in the future, and premature disclosure of ongoing progress by NHS England with regards to our recommendations could be misinterpreted.

With this in mind, we have then considered the public interest test for and against disclosure.

In this case the public interest factors in disclosing the information are:

- increased transparency in the way in which NHS England has responded to the ICO's enquiries, and the extent to which they have complied with our Practice Recommendation; and

- increased transparency in the way in which the ICO conducts its investigations.

The factors in withholding the information are:

- the public interest in maintaining the ICO's ability to conduct the investigation and Practice Recommendation as it thinks fit;
- the public interest in maintaining organisations' trust and confidence that their replies to the ICO's enquiries will be afforded an appropriate level of confidentiality;
- the public interest in organisations being open and honest in their correspondence with the ICO without fear that their comments will be made public prematurely or, as appropriate, at all; and
- the public interest in the progress of organisations with regards to Practice Recommendations not being misinterpreted, should that information be disclosed prematurely.

Having considered these factors, we are satisfied that it is appropriate to withhold the information.

FOIA section 44 and DPA section 132

Additional information was provided by NHS England as part of their update, but this has been withheld under section 44 of the FOIA. Section 44(1)(a) states:

"(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it -

(a) is prohibited by or under any enactment"

The enactment in question is the Data Protection Act 2018. Section 132(1) of part 5 of that Act states that:

"A person who is or has been the Commissioner, or a member of the Commissioner's staff or an agent of the Commissioner, must not disclose information which—

(a) has been obtained by, or provided to, the Commissioner in the course of, or for the purposes of, the discharging of the Commissioner's functions,

(b) relates to an identified or identifiable individual or business, and

(c) is not available to the public from other sources at the time of the disclosure and has not previously been available to the public from other sources,

unless the disclosure is made with lawful authority."

Section 132(2) lists circumstances in which a disclosure can be made with lawful authority, however none of them apply here. As a result, the information is exempt from disclosure.

This concludes our response to your request.

Next steps

You can ask us to review our response. Please let us know in writing if you want us to carry out a review. Please do so within 40 working days.

You can read a copy of our full review procedure [here](#).

If we perform a review but you are still dissatisfied, you can complain to the ICO as regulator of the FOIA. This complaint will be handled just like a complaint made to the ICO about any other public authority.

You can [raise a complaint through our website](#).

Your information

Our [Privacy notice](#) explains what we do with the personal data you provide to us, and set out your rights. Our retention schedule can be found [here](#).

Yours sincerely



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