

24 November 2023

Case reference IC-264959-S0X9

Request

You asked us for the number of personal data breach ("PDB") reports from NHS Trusts to the ICO about a specific matter, and for confirmation of any relevant involvement from NHS England.

We received your request on 18 October 2023.

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

We have reached a decision as to whether an exemption applies to the information you have requested.

Our response

FOIA section 31

We have decided that the exemption applies. We can neither confirm nor deny that we hold the information you have requested.

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 ...”

The duty to confirm or deny does not arise if, or to the extent that, it would prejudice the matters set out in section 31.

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.

Prejudice test

If we commit to confirming that we hold or do not hold PDB information about specified or identifiable factors, parties or issues, then we would create a risk of being overly transparent with what we communicate about PDB matters.

Disclosure of these details is likely to make organisations less willing to share detailed, recorded information with us, and less willing to generally engage with us for regulatory purposes. This will be particularly detrimental for more sensitive or higher risk matters. If we have less recorded information to work with, or if we have to try less efficient ways to obtain the details we need, this makes it harder for us to carry out our regulatory duties and tasks.

Likewise, there is a similar risk in committing to confirming relevant involvements of high profile authorities, such as NHS England, particularly if it would also risk compromising our impartial, independent position. If we decide, at any given time, and at our sole discretion, that we should confirm an involvement of a third-party authority, then this will reduce the trust in the ICO about the extent of identifying information that we may put into the public domain.

There will be instances where we consider it beneficial to confirm or deny certain details connected to our regulatory work, and there may be other factors in other cases which may give rise to different decisions, however, in this case, we would maintain that the prejudice to our regulatory capabilities likely to be caused by disclosure is an overriding factor here.

Public interest test

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 about PDBs which may not already be publicly accessible
- the public interest in having confirmation whether the ICO is aware of specific issues by way of receiving PDB reports

The factors in withholding the information are:

- the public interest in maintaining organisations' trust and confidence that PDB-related information will be afforded an appropriate level of confidentiality

Having considered these factors, we are satisfied that it is appropriate to neither confirm nor deny whether we hold the information you have requested.

We consider that the wider public interest of maintaining a trusting relationship between the ICO and other data controllers is a stronger factor here.

If we maintain a responsible and careful approach to what we disclose and publish into the public domain, we are more likely to get better engagement with the organisations we regulate. If organisations have more trust in us, we can have a better understanding of their data protection compliance which will give us a stronger regulatory position. We consider that by maintaining the exemption we are satisfying aspect of the public interest.

Next steps

You can ask us to review of 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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