FOI POLICY REVIEW – FTT/UT/CA decision

Tribunal / Court: Upper Tribunal

FOI or EIR :	Section / Regulation:	Date of decision:	Reference:
FOI	S40(2) S41	6 August 2021	GIA/0136/2021 [2021] UKUT 192 (AAC)

Parties :
  Appellant: NHS Business Services Authority
  First Respondent: Information Commissioner
  Second Respondent: Spivack

Earlier judgement/decision summaries:

ICO decision –
- Date: 07.10.2019
- Reference: FS50832217
- Summary.

The complainant has requested information about the dispensing of Stiripentol. The NHS Business Services Authority (the NHSBSA) refused to provide some of the requested information citing the exemptions under section 40(2) (third party personal data) and section 41(1) (information provided in confidence) of FOIA as its basis for doing so. The Commissioner's decision is that the NHSBSA has incorrectly applied section 40(2) and section 41(1) of FOIA to the withheld information. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation: to disclose columns B and C - the dispenser details where the total number of items fell below 5.

FTT –
- Date: 09 November 2020
- Reference: EA/2019/0407
- Link to policy summary & summarise main points if appropriate.

The decision has been promulgated and dismissed by the First tier Tribunal dated 9 November 2020.

This was an appeal against the Commissioner's decision notice FS50832217 of 7 October 2019 which held that the NHS Business Services Authority (the NHSBSA) was not entitled to rely on s 40(2) and s 41(1) of the Freedom of Information Act (FOIA) to withhold dispensary information relating to an epilepsy medication. The Tribunal dismissed the appeal and ordered NHSBSA to disclose the information.

Summary of Decision :

The appeal has been dismissed by the Upper Tribunal dated 06 August 2021.

The withheld information was dispenser details of childhood epilepsy medication, where the total number of items dispensed was less than 5. NHSBSA withheld information where a dispenser had supplied fewer than five items under s40(2) FOIA (personal data) 'because patients could be identified, when combined with other information that may be in the public domain or reasonably available.' NHSBSA also withheld the information under s41(1) FOIA (information provided in confidence). NHSBSA appealed.

The FTT in EA/2019/0407 dismissed NHSBSA's appeal, upholding the DN and ordering NHSBSA to disclose the withheld information.

The NHSBSA appealed to the UT on the following grounds:

1.   Ground 1 is that the FTT erred in law, in that it wrongly departed from the approach to identification risk set out in leading cases of the higher courts, and also in guidance from the IC itself and from EU data protection authorities which NHSBSA submit encapsulate the right approach. The FTT thereby erred in its analysis and conclusions about whether the withheld information is "personal data".

2.   Ground 2 - The FTT correctly noted that, as regards identification risk, the test was not one of certainty, but it failed to apply that proposition to the facts.

The ICO maintained that the FTT did not err in law, and that in fact did not depart from the approach to identification risk set out in leading cases. The ICO argued that NHSBSA were incorrect to think that an 'educated guess' could bridge the gap between possible identification and correct identification.

The Upper Tribunal dismissed NHSBSA's appeal by going through each of the leading cases on identification and demonstrating how NHSBSA's analysis was incorrect:

"Identifying a pool that contains or may contain a person covered by the data is not sufficient. Saying that it is reasonably likely that someone is covered by the data is not sufficient. Still less is it sufficient to say that it is reasonably likely that a particular individual may be one of the pool. Linking any specific individual to the data in any of these circumstances does not rely solely on the data disclosed and other data available by reasonable means; it involves speculation. This is the point that the tribunal was making when it referred to guessing. Any break in the chain between the information and the data subject can only be bridged by speculating or guessing. That is especially likely to arise when there is a pool of potential subjects." (para 22)

The UT also dismissed NHSBSA's argument that FTT departed from ICO guidance as irrelevant: 'I was referred to guidance, but do not need to refer to it. It is not binding, so it is the law that matters.' (para 8)

(An analysis of the decision, highlighting any differences or similarities in approach, whether or not it aligns with our published guidance)

Headline

This is an important case in respect of whether low numbers within statistical information constitute personal data. It confirms that the test is whether such information, when combined with other available information, will actually identify an individual with a degree of certainty, as opposed to whether it can only be inferred or speculated which individual the information relates to.

Case officers need to consider both, what other information is available which could be combined with the withheld information, and whether it is reasonably likely that such information would be used. This includes an assessment of whether there is likely to be a motivated intruder and, if so, what information the motivated intruder would be able to gather. Once you've assessed what information is reasonably likely to be gathered and combined with the withheld information, the question is, whether an individual can be identified with a degree of certainty from the combined information? If the answer is 'yes', it's personal data.

But if, after the withheld information has been combined with other information, you can still only speculate as to who it relates to, it is not personal data.

This is perhaps best demonstrated by an example, based in part on the evidence presented before the FTT.

Example

The withheld information reveals that one prescription for an epilepsy drug is dispensed every month from a pharmacy identified only by its dispenser code. However the dispenser code can be linked to the name and address of the pharmacy from other NHS data which is publicly available. Furthermore it's also reasonably likely that a family member of someone who had epilepsy, would know of their relative's condition and where they lived. If the epilepsy patient lived in the vicinity of the pharmacy identified in the statistics, that family member may well speculate that the statistics related to their relative and so assume they now know what medication their relative was using. However there are alternative explanations. The epilepsy patient may find it more

convenient to collect their prescription from a pharmacy near where they or their parent work, or they could be receiving private treatment, or obtaining their prescription directly from the clinic treating them. Therefore, even after combining the withheld information with other information, you are left having to speculate that it relates to a particular individual. Therefore it is **not** personal data.

This is in line with our [Anonymisation code](#) - Identification and the educated guess (page 26).

> Data protection law is concerned with information that identifies an individual. This implies a degree of certainty that information is about one person and not another. Identification involves more than making an educated guess that information is about someone; the guess could be wrong. The possibility of making an educated guess about an individual's identity may present a privacy risk but not a data protection one because no personal data has been disclosed to the guesser.

(note the Anonymisation code is currently being revised and consulted upon [here](#))

Interpretation of the leading cases on anonymisation in more detail

The UT starts by setting out the relevant legislation, including the definitions of personal data in section 3 of the DPA 2018 and in Recital 26 of the GDPR. Although GDPR had now been superseded by the UK GDPR, Recital 26 has been retained intact. The UT then states at para 12 that,

> "Section 3 of the 2018 Act creates a binary test: can a living individual be identified, directly or indirectly? If the answer is 'yes', the data is personal data. Otherwise, it is not."

At paragraphs 14 to 33, the UT then discusses the five leading cases on anonymisation. The UT found these establish data has to be able to identify an individual with a degree of certainty for it to be personal data. When considering whether an individual can be identified account should be taken, not just of the data itself, but of any additional information which is available. However it has to be 'reasonably likely' that the additional information is available and would be used to aid identification.

NHSBSA argued for a different interpretation. NHSBSA considered data would be personal data even if it was only 'reasonably likely' that someone could be identified from that data and any other available information. That is, NHSBSA argued that the 'reasonably likely' element of the test applied to the level of certainty with which someone could be identified, rather than the likelihood that other information was available and would be used to aid identification.

The UT was very clear that the NHSBSA's interpretation was incorrect. It found that the 'reasonably likely' element of the test relates to how plausible it is that the additional information, needed to create the links between the withheld information and a specific

individual, is available and would be used. If any of the links are missing, the withheld information is not personal data, because as the UT put it at para 22,

> "Any break in the chain between the information and the data subject can only be bridged by speculating or guessing."

Applying that interpretation to the facts of the case

The UT then applied this approach to the facts of the case including evidence presented by one of the NHSBSA's own statisticians before the FTT. The statistician acknowledged that,

> "…. the matches [between the withheld information and an individual] are 'likely' and not certain, because there could be other explanations for the information available that do not link it to a specific individual. For example, the person identified may not be receiving treatment on the NHS or may be receiving different treatment or receiving medication through a hospital." (para 35 of UT decision)

The UT found this "fatally flawed" NHSBSA's argument that the withheld information was personal data.

Motivated intruder

At the outset of its decision (at para 3), the UT acknowledged the presence of a motivated intruder. By identifying who those likely intruders may be, it, in effect, went some way to identifying why the information may attract a motivated intruder. Those motivated intruders included:

- someone who wished to market cannabis-based medication to a patient who has been prescribed Stiripentol (the epilepsy drug that the request related to);
- researchers;
- lobbyists and journalists; or
- a family member of a patient who wished to identify the medication being prescribed.

The FTT decision is also worth reading as it discusses the sources of 'other information' which could be combined with the withheld information and, importantly, whether it was reasonably likely that such sources would be used. In particular the FTT did not accept arguments that it was appropriate to take account of the knowledge of someone who might have overheard someone being prescribed a particular drug in a doctor's surgery. Nor did it accept account could be taken of the knowledge of an individual who might have been present in a pharmacy and witnessed someone picking up a prescription of that drug. (para 87 of the FTT decision).

Significance of Decision :	Status of Decision :
• **Of significance**	• **Binding** (UT decision)

External guidance:

(An indication as to whether the decision will feed into, reinforce or result in changes to any existing or new guidance. Following any changes to guidance, or identification that a decision could reinforce guidance, this section will be updated to provide links to any relevant guidance.)

It is not anticipated at this stage that the decision will be used in external guidance.

Some thought may be given to whether this decision can inform the production of either standard questions for case work, or internal guidance on our approach to anonymisation cases.

Date:	Appeal status:	Author:
9 December 2021	Not appealed	RM