

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 December 2016

Public Authority: NHS Commissioning Board (NHS England)

Address: 4N22 Quarry House
Quarry Hill
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant requested information about the number of Individual or Exceptional Funding Requests (IFRs). NHS England withheld the detailed breakdown of the information, citing the exemption under section 40(2) of the FOIA (third party personal data) as its basis for doing so. The Commissioner's decision is that NHS England has correctly applied this exemption and does not require NHS England to take any steps.

Request and response

2. On 8 March 2016 the complainant made the following request for information under the FOIA:

'How many IFR's (Individual or Exceptional Funding Requests) have been sent to NHS England to date for patients needing a second allogeneic stem cell transplant in England in the following time periods:

2012

2013

2014

2015

2016 to date

In addition – please state per year how many of these IFR's were:

a) Approved

b) Rejected

*c) Patient died before IFR was answered
And – please state which region or trust these IFR's were sent from – in total for all years combined.'*

3. On 1 April 2016 NHS England explained that NHS England has only existed since April 2013 and as such did not receive Individual Funding Requests (IFRs) before this time. It responded:

'There have been 19 IFRs requests received for second allogeneic BMT transplants by NHS England during the period 1 April 2013 to 31 January 2016. NHS England is unable to provide this information in the format you have requested (broken down by year; broken down by outcome and broken down by region or Trust) as we consider this would contravene under section 40(2) (personal information) of the FOI Act. The number of IFRs in each category would be so small that we believe it would be possible to identify individuals as a result.'

4. On 6 May 2016, the complainant queried the answer and requested further details:

'I need to come back to this request – as it was only partially answered. I would like to know – as stated previously:

Out of the 19 IFR's received – overall how many were:

- a) approved*
- b) rejected*
- c) patient died before IFR was answered*

Then, please provide a more precise answer regarding the source of the IFR's.

Which hospital trusts did the 19 IFR's come from?

This level of information will not identify any individuals, as IFR's can be sent by any physicians.

It is very important we know where these came from.

If the exact hospital cannot be named – then at least the region.'

5. NHS England acknowledged the request for an internal review on 10 May and provided updates on the delayed outcome on 2 June and 5 July.

6. On 15 July NHS England provided the outcome of its internal review and upheld the application of the exemption section 40(2) of the FOIA.

7. However, NHS England provided the following breakdown of IFRs as not likely to contravene any data protection principles:

- 6 were approved
- 5 declined at IFR panel

- 5 declined at screening
 - 3 other outcome.
8. In the submission to the Commissioner, NHS England corrected these figures: between 1 April 2013 and 31 January 2016 there have been 19 IFRs received for second allogeneic BMT transplants with the breakdown of outcomes as follows:
- 8 approved at IFR panel (previously the applicant was advised that there were 6 cases in this category)
5 declined at IFR panel
5 declined at screening
1 other outcomes (previously the applicant was advised that there were 3 cases in this category)

Scope of the case

9. The complainant contacted the Commissioner on 29 July 2016 to complain about the way the request for information had been handled.
10. The focus of the Commissioner's investigation is to determine whether NHS England is entitled to rely on section 40(2) of the FOIA as a basis for refusing to disclose the withheld information. The outstanding parts of the request that have been withheld are the breakdown of the number of IFRs by each year and the source breakdown of IFRs (by region or Trust) for the whole period.

Reasons for decision

Section 40(2) – Third party personal data

11. This exemption provides that any third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act (DPA).

Is the withheld information personal data

12. Personal data is defined by the DPA as any information relating to a living and identifiable individual.
13. NHS England has explained to the Commissioner that the numbers of IFRs by each year and by region covers a very small number of individuals. The Commissioner has viewed the withheld information and confirms that the breakdown of the total of 19 IFRs includes very small numbers.

14. It is the position of NHS England that to provide the breakdown of information requested by the applicant would result in patients who had applied for an IFR for second allogeneic BMT transplants being identifiable. This would also by default reveal information in relation to the patients' personal medical treatment, which was provided to NHS England for the express purpose of considering the IFR application.
15. NHS England argued that although the breakdown itself does not constitute the personal data of any individual(s), the low numbers mean that it may be possible for someone with knowledge of this particular subset of patients (e.g. the patients themselves and their friends/family, medical professionals and others) to re-identify individuals based on the information. NHS England considers that this would constitute personal data.
16. NHS England also considers that under section 2(e) of the DPA, the withheld information can also be categorised as sensitive personal data as it relates to the medical condition(s) and treatment(s) of the individuals.
17. In a previous decision notice about bullying ([FS50499612](#)) the Commissioner agreed that 'the disputed information refers to a very small number' and that the 'disputed information could potentially be sensitive personal data' and therefore upheld the public authority's decision to withhold the information under section 40. The Commissioner is satisfied that the same rationale applies in this case.
18. The Commissioner is satisfied that the numbers involved are so small that the individuals concerned could be identified and that medical conditions and treatment is sensitive personal information.

Would disclosure breach the Data Protection Principles?

19. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness.
20. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual, the potential consequences of the disclosure and whether there is legitimate public interest in the disclosure of the information in question.

Reasonable expectations

Consequences of disclosure

21. NHS England state that it is a widely accepted principle that details of individuals' medical condition(s) and treatment(s) are confidential and will not be shared or made known more widely than is necessary. As such, it considers that these individuals had a reasonable expectation that the information would be kept confidential. The release of information which relates to the personal medical treatment of individuals is likely to, by its very nature, be distressing to the individuals concerned.
22. The Commissioner notes that the information in this case falls under section 2e of the Data Protection Act 1998 as it relates to the data subject's medical treatment. As such, by its very nature, this has been deemed to be information that individuals regard as the most private information about themselves. Further, as disclosure of this type of information is likely 'to have a detrimental or distressing effect' on the data subject, the Commissioner considers that it would be unfair to disclose the requested information.

Balancing the rights and freedoms of the individual with the legitimate interests in disclosure

23. Given the importance of protecting an individual's personal and sensitive personal data, the Commissioner's 'default' position in cases where section 40(2) has been cited is in favour of protecting the privacy of the individual. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure which would make it fair to do so.
24. The complainant has argued that the information requested is absolutely necessary as the Department for Health (DOH) has recently opened a public consultation on this topic and 'it is therefore of paramount importance that the FOI information we are requesting be available, in order to reply fully and accurately respond to the DoH/NHS England public consultation.'
(https://www.engage.england.nhs.uk/consultation/af642939/supporting_documents/consultationguide.pdf)
25. The Commissioner accepts that there is a legitimate interest in the overall transparency in the way a public authority such as NHS England conducts its business. However, there is no presumption that this should automatically take priority over personal privacy. The Commissioner judges each case on its merits.

26. In this case, the Commissioner is not convinced that the specific information requested, while of significant interest to the complainant, is of sufficient wider public interest to warrant overriding the protection of the third party personal data.
27. Having considered NHS England's submission and the views of the complainant the Commissioner is satisfied that the complainant's arguments for disclosing the specific information in this case are not as compelling as those that NHS England has put forward for protecting the individuals' personal data, namely:
 - the individual's likely expectation about how their sensitive personal data will be managed;
 - the individual's lack of consent to its release; and
 - the possible negative consequences to the individuals of releasing the information.
28. The Commissioner is satisfied that on balance, the legitimate public interest would not outweigh the interests of the small number of individuals and that it would not be fair to disclose the requested information in this case.

Conclusions

29. Balancing the above, the Commissioner is satisfied that disclosing a further breakdown of IFRs is personal data and that the individuals would have no reasonable expectation that the information in question would be disclosed to the world at large.
30. Therefore, the Commissioner is satisfied that the withheld information is personal and sensitive personal data and that disclosure would breach the first data protection principle as it would be unfair to the individuals concerned. The Commissioner upholds NHS England's application of the exemption provided at section 40(2) of the FOIA.

Right of appeal

31. 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

32. 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.
33. 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

Pamela Clements
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