

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 24 June 2019

**Public Authority:** NHS England  
**Address:** 4N22 Quarry House  
Quarry Hill  
Leeds  
LS2 7UE

### Decision (including any steps ordered)

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1. The complainant requested information relating to an NHS patient survey for out of hour's dental treatment. NHS England disclosed the requested information but redacted the 'free text' boxes under section 40(2) FOIA.
2. The Commissioner considers that NHS England incorrectly applied section 40(2) FOIA to some of the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information identified in the Confidential Annex attached to this Notice.
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

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5. On 14 October 2018 the complainant made the following request for information under the FOIA:

"There was an NHS patient survey for out of hours dental treatment in May this year, which I contributed to.

Could you let me have a copy of the result of this survey please?"

6. NHS England responded on 6 March 2019 and provided the requested information but made some redactions under section 40(2) FOIA.
7. The complainant requested an internal review on 25 March 2019. NHS England provided an internal review on 1 April 2019 in which it maintained its original position. NHS England confirmed that the 'free text' boxes on the survey had been redacted as these contained details of particular patient experiences.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 1 May 2019 to complaint about the way his request for information had been handled as he was dissatisfied with the result of the internal review.
9. The Commissioner has considered whether NHS England was correct to refuse to disclose the information requested under section 40(2) FOIA.

## **Reasons for decision**

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### **Section 40(2) personal information**

10. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
11. In this case the relevant condition is contained in section 40(3A)(a) . This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
12. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
13. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

## **Is the information personal data?**

14. Section 3(2) of the DPA 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. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
17. 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.
18. NHS England has said that the information redacted from the version of the survey results shared with the applicant was ‘free text’ responses provided by survey respondents. The questions asked were about individuals’ experience of dental care. As such, the responses comprise information both about the individuals’ medical care, and their own views and opinions. As the responses are ‘free text’, it considers that respondents would be able to easily recognise their own replies. Similarly, friends and relatives of the respondent, and staff who have been involved in the dental care referred to in the responses, are likely to be able to identify individuals, based on the descriptions of medical conditions, clinical care, and individual experiences. We therefore consider that disclosure of the information would indirectly identify respondents.
19. In this case information has been redacted from ‘free text’ boxes where patients have made comments regarding their experiences in their own words. This may describe individual experiences in such a way that staff or individuals close to the data subjects may be able to identify them from what they have written. The Commissioner has viewed the redacted information and where the respondent has provided detailed information regarding their own medical care the Commissioner is satisfied that this does constitute the personal information of these individuals. She is satisfied that this information both relates to and could identify the data subjects concerned. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.
20. However where the ‘free text’ boxes do not provide details of the respondent’s medical care and the responses provide a very generic comment or view which is fairly common among those responses, the

Commissioner does not accept that these constitute personal data of identifiable living individuals. These types of 'free text' response are more synonymous with the anonymous closed questions which have already been provided.

21. The Commissioner has identified the responses she considers not to constitute the personal data of identifiable individuals in the confidential annex attached to this Notice.
22. For the remaining responses, the fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
23. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

24. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

25. In the case of an 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 if to do so would be lawful, fair and transparent.
26. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

### **Lawful processing: Article 6(1)(f) of the GDPR**

27. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"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" .

28. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the 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 disclosure of the information 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.
29. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

### **Legitimate interests**

30. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
31. 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.
32. NHS England does not consider there to be any legitimate interests in the disclosure of the redacted information. The complainant has not set out any reason that the information is required (other than his personal interest). NHS England has provided the complainant with the answers to the closed questions from the survey and considers that this provides adequate insight into the outcomes of the survey, without jeopardising the personal information of respondents.
33. The complainant has argued that "there is no personal identifiable information in the questions as this was aimed at the general public". As explained above the Commissioner does consider that some of the responses contained in the 'free text' boxes would amount to the respondent's personal data from which they would be identifiable. The complainant has not provided the Commissioner with arguments regarding any legitimate interest in disclosure of this information. The Commissioner does however recognise the broad general public interest in accountability and transparency.

### **Is disclosure necessary?**

34. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
35. The Commissioner does not consider that disclosure of the redacted information which she does consider constitutes personal data would be necessary to meet the legitimate interests set out above. This is because NHS England has already provided the complainant with the answers to the closed questions from the survey and the Commissioner has ordered disclosure of some of the redacted material which she does not consider constitutes personal data. This provides adequate insight into the outcomes of the survey to meet any legitimate public interest in accountability and transparency.
36. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interests in disclosure, she has not gone on to conduct the balancing test. As disclosure of the withheld personal data is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
37. The Commissioner has therefore decided that NHS England was entitled to withhold the redacted information not identified in the Confidential Annex attached to this Notice under section 40(2), by way of section 40(3A)(a).

## **Right of appeal**

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38. 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](mailto:grc@Justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

39. 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.
40. 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 .....**

**Gemma Garvey**  
**Senior Case Officer**

**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**