

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 12 November 2024

**Public Authority:** NHS England (NHSE)  
**Address:** Quarry House  
Quarry Hill, Leeds, LS2 7UE

#### **Decision (including any steps ordered)**

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1. The complainant has requested NHSE to disclose a copy of one page of a 1939 Transcript Book. NHSE refused to comply with the request citing section 14 of FOIA.
2. The Commissioner's decision is that NHSE is not entitled to rely on section 14 of FOIA. He has also recorded a breach of section 10 of FOIA for failing to respond to the request within 20 working days of receipt.
3. The Commissioner requires NHSE to take the following steps to ensure compliance with the legislation.
  - Issue a fresh response to the complainant which does not rely on section 14 of FOIA.
4. The public authority must take these steps within 30 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 20 December 2023, the complainant wrote to NHSE and requested information in the following terms:

"1. Please exclude point a) from my request for information. It is no longer needed as I now have a sample of index cards.

2. Please exclude point c) from my request for information. My request was not asking for area codes, which seems to be part of your interpretation. This information is reasonably accessible elsewhere and I have viewed and copied a number of lists of area codes held in the records at The National Archives. What I was looking for was information relating to ciphers used, which are different to area codes. I will instead compile a list of the ciphers that I know from other records held at The National Archives.

3. Please provide me with the information at point d) of my request. To be clear, I am asking for one specific page of a Transcript Book. I have provided the schedule and sub-schedule numbers to help you locate the exact page, as the page number is not available in the records available on websites such as via FindMyPast. The page numbers for the double page spreads are found in the top right hand corner of the right hand page. I know this having viewed a sample Transcript Book held at The National Archives. Page numbers were not copied from the physical records held by NHS Digital (now NHS England) when digitised by FindMyPast, so I cannot provide a page number.

The information previously provided would allow you to pinpoint exactly where in the Transcript Book the information is contained. These details allows anyone to look up and retrieve the information. I have done this having only had the area code, schedule and sub-schedule numbers available to me. I have located entries in the Transcript Books where the information was redacted, using only the National Registration number (i.e. area code, schedule and subschedule numbers)."

6. NHSE responded on 2 February 2024. It disclosed some information but withheld the remainder citing section 40(2) of FOIA.
7. The complainant requested an internal review on 2 February 2024. They disputed the application of section 40(2) of FOIA and advised that they required a colour copy of the specific page of the Transcript Book (as previously made clear in earlier correspondence).

### **Scope of the case**

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8. The complainant contacted the Commissioner on 20 May 2024 to complain about the way their request for information had been handled. They confirmed that they had received no response to their request for internal review, were dissatisfied with NHSE's application of section

40(2) of FOIA and decision to only provide a copy of the microfilm record not of the original page from the Transcript Book.

9. The complaint was accepted for full investigation without an internal review on 5 June 2024.
10. During the Commissioner's investigation NHSE issued a revised response to the complainant on 16 August 2024. This confirmed that NHSE no longer wished to rely on section 40(2) of FOIA but wished to claim a late reliance on section 14 of FOIA.
11. The Commissioner considers that the scope of his investigation is to establish whether or not NHSE is entitled to rely on section 14 of FOIA.

### **Reasons for decision**

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12. Section 14 of FOIA states that a public authority may refuse to comply with a request if it considers that request to be vexatious.
13. NHSE confirmed that it accepted that black and white copies of pages of the register books do not contain all of the information contained in the original (colour) documents. It advised that this is because the colour of pen used in the original books denoted certain information; red ink was used for Cancer and Medical Research notifications. Blue ink was used to record National Registration areas, and green ink was used for NHS registrations. NHSE accepted that this information is lost when black and white copies are made and that its original response therefore failed to provide all the information it holds.
14. NHSE stated that it has considered how it could communicate all the information to the complainant and it has concluded that to do so would be disproportionate, to the extent that the request is vexatious.
15. It explained that the original 1939 Register books are held in a secure storage facility and there would be a two step process required in order for it to gain access to the original registers:
  - 1) Locate the relevant codes which refer to the specific FOI request (undertaken by the records team in Southport, using the fiche copy).
  - 2) Transfer that to the records management team responsible for off-site storage, who would submit a request to its third party supplier to retrieve the relevant information (since it is the Leeds Records Management team that manages off-site storage retrievals).

16. NHSE went on to say that after locating the relevant codes, it would then be required to ask its third party supplier to retrieve the relevant boxes from the secure storage facility to its office in either Leeds or Southport to process the request.

17. It confirmed that its supplier will charge the following to retrieve the information:

Retrieval - £0.67 per box

Trip charge, next day delivery - £17.50 per trip

Transportation handling £0.31 per box

18. VAT is applied to the order and a fuel surcharge, which is calculated as a percentage of applicable transportation related service charges. The current fuel surcharges are:

October 14.31%

September 15.44%

August 14.88%

19. Therefore, to retrieve one box via its third party supplier to NHSE's office, and return the box after fulfilling the request, it will cost less than £50.

20. It went on to explain that once the information has been delivered to either offices, it would then need to carry out the following steps:

- Estates team will be required to book in and receive the delivery.
- Porters will be required to deliver the boxes to the relevant area.
- Records Management team will be required to review the boxes and remove the required registers (these are held 5 to a box), locate the required entry and take the required photos (it would not photocopy these due to the fragile condition of the registers).
- The photo will need to be reviewed and it is almost certain some level of redaction will be required to withhold personal data and other sensitive material contained on the right hand pages (and it is for this reason that the joint exercise between The National Archives and Find My Past to scan the registers only scanned the left hand pages).

21. NHSE explained that its records management team recently had a delivery of a small sample of boxes of the registers to its offices in Leeds, and the effort involved (in additional to the retrieval costs) to accession these into the building, and open the boxes and inspect was significant.

22. It estimated that the process took approximately four hours of Records Management staff time, including liaison with the off-site storage provider, and this excluded the effort required to locate any individual entries, undertake copying or redaction.
23. For this particular request however it estimates that it would take between 1 to 1.5 hours to process the request. However, it stated that requests that ask for multiple entries would take much longer.
24. NHSE advised that setting aside the issue of time and cost, it has real concerns about the potential damage that could be inflicted on the register books as a result of the retrieval and copying requested. It argued that the record books are a national record of significant historical importance and many volumes are in a fragile condition, which will require significant conservation work when transferred to The National Archives for permanent preservation. It stated that this is one of the reasons why day to day business utilise the microfiche copies held at Southport, not the original volumes. NHSE has therefore concluded that the risk of damage to the original registers, prior to conservation work, is therefore very real.
25. It confirmed that if it were to access this information in response to this request, it is highly likely that it would receive further requests from the complainant and others for the exercise to be repeated for future requests.
26. The Commissioner asked NHSE to confirm how many requests it had received from the complainant and others, asking for copies of the original records. NHSE advised that from 22 May 2023 to 20 December 2023 it had received seven requests from the complainant and another individual, who it believes is acting in concert with the complainant. It also confirmed that to the best of its knowledge it had only received requests asking for the original record(s) from the complainant and the other applicant referenced.
27. However, NHSE stated that it was aware of a website (linked cannot be provided as this would reveal the identity of the complainant), in which the complainant intends to provide a number of talks which will specifically cover 'Freedom of Information for Genealogy'. NHSE believes there is a significant risk that it will be overwhelmed with similar requests going forward, especially its National Back Office (NBO) and Records Management teams, and to provide copies of the original registries for this request and future requests is a disproportionate use of FOIA.
28. It stated that it would incur the stated burden in this case repeatedly and be exposing the record books to repeated risk of loss and damage.

It explained further that its NBO team provides a national data quality service and it is responsible for the management of NHSE numbers and Personal Demographics Service (PDS) records, investigation and resolution of data quality incidents on PDS demographic records, and provision of a Tracing Service to approved organisations. NHSE advised that if it received an increase in the number of requests, which are complex and time consuming, it will place a significant burden on its NBO team. It will effect its NBO team's ability to conduct its day to day activities, which would ultimately then impact of patient care.

29. As a result, it considers the burden of responding is significant enough to reach the threshold of vexatiousness. It went on to say that it recognised the serious purpose and value in the request. It understood the only place the ink colour information exists is in the original record books and that it was standard practice to record information in certain colours (red ink to record Cancer and Medical Research notifications, blue ink for National Registration areas and green ink for NHS Registrations). However, it felt this information was of limited overall public value. It considers any information recorded in red would be exempt under section 41 of FOIA. With regards to blue and green ink, it stated the following:

"Blue ink denotes National Registration areas, and green ink NHS registrations. There is only a very short (in relative terms) period of time between the creation of the NHS in July 1948 and the end of National Registration in May 1952 where registrations may be recorded in either blue or green ink. All registrations recorded prior to July 1948 are National Registrations, and all after May 1952 are NHS registrations. Name changes are commonly recorded in green ink, but there was no requirement to use a specific colour ink to indicate the reason for a name change. Therefore, in the vast majority of cases (i.e. outside of the narrow window of time where NHS and National Registrations overlap), the colour of the ink does not reveal any new information. "

30. The complainant challenged NHSE's revised position on a number of points.
31. Firstly, the complainant stated that they understood the records underwent conservation when they were digitised, suggesting therefore that they are not now in such a fragile state and could be accessed without damage.
32. NHSE responded to this point and stated:

"Our understanding is that conservatory work has been completed on these records to allow them to be digitised but not beyond that. It is unlikely that the records underwent full conservation treatment (other

than basic work to enable the records to be scanned). It is not known whether the conservation work will cover all records to be transported (and photographed) without being damaged.

The reason we would need to photograph the documents is because the volumes are quite large. Putting these onto a colour photocopier would increase the possibility of damage while handling."

33. The complainant also said that the ICO previously determined that information from the original transcript books should be disclosed under FOIA. They confirmed that this led to the former NHS Information Centre (NHSIC) (later NHS Digital before that then merged with NHSE) establishing a publication scheme which charged for accessing the information. The complainant also stated that NHSIC arranged with The National Archives and Find my past to digitise the records and provide them on Find my past's website.
34. Additionally, the complainant drew attention to their initial correspondence with NHSE, in which they provided the 'relevant codes' for the correct transcript book and to one specific page in that book. They stated that the two-step process described by NHSE in this case would therefore not be required. They stated:

"I do agree that NHS England would have to retrieve the transcript book from the third-party storage facility, but the process of accessing the information once the book is retrieved is simple:

Firstly, locate the transcript book coded DWRB and turn to the page where schedules 99 through 113 are shown. The numbers are sequential in the transcript book so this would take very little time to locate. The transcript book DWRB has 17 pages, which is standard for all transcript books. I do not believe the time taken to locate the information would exceed the cost limit.

I also note that NHS England was perfectly able to redact the page in their original response. Retrieving the information from microfilm would actually take longer, as you would be required to scroll through the microfilm to find the exact place the page is located on the film. There will be multiple transcript books on one microfilm roll, so it would not be possible to turn to the correct page with ease."

35. The Commissioner asked NHSE to provide its direct response to these comments. It replied:

"As per above, our understanding is that conservatory work has been completed on these records to allow them to be digitised but not beyond that. It is unknown whether the conservatory work completed on these

records will allow for these records to be retrieved and photographed without being damaged.

The storage facility has provided NHS England with a lookup tool (Excel) which helps to establish which box contains which books from the Register. The boxes each hold four books, and each box has a unique serial number. If a request is received for records held in one specific book, we will have to identify the box that holds that book and request the entire box to be forwarded to NHS England. To protect the confidentiality of the data, the storage site is unable to remove books from boxes. Therefore, books cannot be transferred individually. This introduces the movement of books where there is no requirement for them to be moved.”

36. The Commissioner considers NHSE has failed to demonstrate that section 14 of FOIA applies in this case. He will now explain why.
37. NHSE has not demonstrated that the burden of complying with this simple request is unreasonable and disproportionate. The threshold for the application of this exemption is high. NHSE has stated itself that it would cost less than £50 to obtain the original records from storage, return it and make the necessary copies for the complainant. It has also confirmed that it would take it 1 to 1.5 hours to comply with the request in full. The burden identified for this request is therefore very limited.
38. NHSE can only consider the circumstances at the time of the request. It has said that to the date of this request it had received seven FOIA requests from this complainant and another individual. It had also only received requests from the complainant and this individual, which asked for access to the original record. The Commissioner does not consider this to be excessive and notes that this request is a refined one, following an earlier application of section 12 of FOIA. There is also no indication that there is going to be a surge of requests from others for access to the original transcript books.
39. NHSE can only speculate on what may or may not happen in the future and such speculation is not sufficient to warrant the application of section 14 of FOIA. Mere speculation does not meet the high threshold the application of vexatiousness requires.
40. There is serious purpose and value to this request. NHSE acknowledges that the ink colour is recorded information for the purposes of FOIA, as the colour dictated specific practices at the time it was entered. Even if the serious purpose and value is limited to the very private interests of the genealogy of the complainant’s family, it is still difficult to argue that such interests are outweighed by the very limited burden NHSE has identified.



41. The Commissioner is also not comfortable accepting the potential damage to a record, as a consequence of accessing it for the purposes of complying with a request, is sufficient to engage section 14 of FOIA or is a factor which carries significant weight in its consideration. To agree that it does would be essentially saying any undesirable outcome from accessing recorded information held by a public authority can be characterised as vexatious.
42. The Commissioner would also question the significance of this argument in any event in this case, considering the conservation work that has already been undertaken for the transcripts books to be digitised and the very fact that compliance with this request only requires access to one specific page of one of those books. Again, NHSE is taking into account the potential damage if requests for the original records increased. It does not know this is going to happen or indeed that such activity is going to cause substantial damage.

### **Procedural matters**

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43. Section 10 of FOIA requires a public authority to respond to an information request promptly and in any event no later than 20 working days from receipt. The Commissioner notes in this case that NHSE failed to respond within the statutory timeframe for compliance. He has therefore recorded a breach of section 10 of FOIA.

### **Other matters**

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44. The Section 45 Code of Practice recommends that public authorities carry out internal reviews within 20 working days of receipt and certainly no later than 40 working days from receipt. In this case it is noted that NHSE failed to complete the internal review process until the Commissioner commenced his investigation.
45. NHSE is reminded of the requirements of the code and of the importance of completing internal reviews within the recommended timeframe.

## **Right of appeal**

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46. 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: 0203 936 8963

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)

47. 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.
48. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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