

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 October 2021

Public Authority: NHS Digital
Address: 1 Trevelyan Square
Boar Lane
Leeds
LS 1 6AE

Decision (including any steps ordered)

1. The complainant has requested information associated with a 'Type 2' opt-out error identified in 2018. NHS Digital has categorised the request as a vexatious request under section 14(1) of the FOIA.
2. The Commissioner's decision is as follows:
 - NHS Digital is entitled to categorise the complainant's request of 16 January 2021 as vexatious under section 14(1) of the FOIA and is not obliged to comply with that correspondence.
3. The Commissioner does not require NHS Digital to take any remedial steps.

Request and response

4. On 16 January 2021 the complainant wrote to NHS Digital and requested information in the following terms:

"I write after the attached letter and a statement made. On 2 July 2018 the Parliamentary Under-Secretary of State for Health issued a statement to Parliament in which she stated:

"NHS Digital recently identified a supplier defect in the processing of historical patient objections to the sharing of their confidential health data. An error occurred when 150,000 Type 2 objections set between March 2015 and June 2018 in GP practices running TPP's system were not sent to NHS Digital. As a result, these objections were not upheld by NHS Digital in its data disseminations between April 2016, when the NHS Digital process for enabling them to be upheld was introduced, and 26 June 2018. This means that data for these patients has been used in clinical audit and research that helps drive improvements in outcomes for patients.

Since being informed of the error by TPP, NHS Digital acted swiftly and it has now been rectified. NHS Digital made the Department of Health and Social Care aware of the error on 28 June. NHS Digital manages the contract for GP Systems of Choice on behalf of the Department of Health and Social Care.

TPP has apologised unreservedly for its role in this matter and has committed to work with NHS Digital so that errors of this nature do not occur again. This will ensure that patients' wishes on how their data is used are always respected and acted upon.

NHS Digital will write to all TPP GP practices today to make sure that they are aware of the issue and can provide reassurance to any affected patients. NHS Digital will also write to every affected patient. Patients need to take no action and their objections are now being upheld.

There is not, and has never been, any risk to patient care as a result of this error. NHS Digital has made the Information Commissioner's Office and the National Data Guardian for Health and Care aware."

I have the following questions in relation to the letter and the quote above. These are:

[1] Was everyone subject to the data loss discussed in the attached letter written to in respect to the sharing of any of their personal details or medical data?

[2] How were the people whose data had been lost identified from circa 48 million NHS patients?

[3] Can you explain more about how the error occurred? Is your organisation liable for the data loss? Is the software provider liable or are both jointly liable in law?

[4] Can you explain what a "coding error" is? How did this happen and where does negligence for data lost ultimately lie?

[5] Is it correct that NHS Digital is the data controller and the software provider is the data processor as defined by the relevant law?

[6] Is it the case that each and every person whose data was shared in error as described in the attached was contacted and correctly informed?"

5. On 15 February 2021 NHS Digital responded to the request. It advised that the complainant had not requested specific documents and that his query was general and sought opinions. NHS Digital said its focus was on the COVID-19 pandemic at that time. It directed the complainant to where information of some relevance to his request is published.
6. The complainant requested an internal review on 19 February 2021.
7. NHS Digital wrote to the complainant on 19 March 2021. It first gave an overview of the situation and noted that, at February 2021, it had litigation ongoing with the complainant. NHS Digital explained that it did not consider his correspondence of 16 January 2021 to be a valid request for information under the FOIA. It explained that the FOIA covers information held by public authorities in recorded form and that the complainant had asked questions and asked for opinion and explanation on a litigated matter.
8. NHS Digital then explained that, as such, it had handled his request as 'business as usual' and had directed him to relevant information on its website.
9. The complainant responded to this correspondence on 22 March 2021.
10. NHS Digital provided the complainant with a full response under FOIA on 21 April 2021. It categorised his request of 16 January 2021, and subsequent correspondence of 19 February and 22 March 21, as vexatious under section 14(1) of the FOIA. NHS Digital said the complainant's request of 16 January 2021 was very similar to one he had submitted to it previously and which NHS Digital had addressed.
11. It noted a judgement at a hearing on 10 October 2019 which confirmed that NHS Digital is not a party to the claim against TPP and that the complainant's application to have it added "has no reasonable prospects of success". NHS Digital said that his pursuing that application and a claim against NHS Digital with no realistic prospect of succeeding served only to waste the time and resources of the parties concerned, as well

as the court. NHS Digital provided further reasoning on why it considered the complainant's request to be vexatious.

12. The complainant requested a further internal review on 30 April 2020.
13. NHS Digital provided him with a formal internal review response on 1 June 2021. It maintained its position that the complainant's request is a vexatious request under section 14(1) of the FOIA.

Scope of the case

14. The complainant contacted the Commissioner on 29 January 2021 to complain about the way his request for information had been handled.
15. The Commissioner's investigation has focussed on whether the NHS Digital can rely on section 14(1) of the FOIA to refuse to comply with the complainant's request of 16 January 2021.

Reasons for decision

Section 14– vexatious and repeat requests

16. Under section 14(1) of the FOIA a public authority is not comply with a request for information if the request is vexatious.
17. The term 'vexatious' is not defined in the FOIA, but the Commissioner has identified a number of 'indicators' which may be useful in identifying vexatious requests. These are set out in her published guidance and, in short, they include:
 - Abusive or aggressive language
 - Burden on the authority – the guidance allows for public authorities to claim redaction as part of the burden
 - Personal grudges
 - Unreasonable persistence
 - Unfounded accusations
 - Intransigence
 - Frequent or overlapping requests
 - Deliberate intention to cause annoyance
18. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is vexatious.

19. The Commissioner's guidance goes on to suggest that, if a request is not patently vexatious, the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. In doing this the Commissioner considers that a public authority should weigh the impact of the request on it and balance this against the purpose and value of the request.
20. Where relevant, public authorities also need to take into account wider factors such as the background and history of the request.
21. In its submission to the Commissioner, NHS Digital has first provided a background and context to the request. It has explained that around 150,000 patients who had registered a Type 2 opt-out in GP practices using TPP as their GP system supplier (known as SystmOne) were affected by an incident whereby their opt-outs had not been sent to NHS Digital, due to a coding error in SystmOne. The error was only identified when NHS Digital identified a significant sudden increase in the number of opt-outs created by TPP, following the certification of new clinical coding.
22. A 'Type 2' opt-out had been introduced in 2014 to allow patients who did not want their confidential patient data to be used beyond NHS Digital to register this objection with their GP. This has since been replaced by the national data opt-out, introduced at the end of May 2018, which enables patients to directly register their objection with NHS Digital rather than via their GP.
23. NHS Digital reported the above opt-out incident to the ICO on the 28 June 2018 – the same day that the full magnitude of the incident was discovered.
24. Letters were sent to all affected patients on 11 July 2018 making them aware that the issue had occurred, it had been resolved and ultimately, that no one's NHS care and treatment had been impacted. Consequently, a number of individuals came back to NHS Digital with enquiries, requests for compensation and some threatened or proceeded with legal action.
25. NHS Digital says that the complainant first wrote to it in August 2018 as one of the patients affected, initially requesting further information about how he was affected. This eventually led to the complainant attempting to add NHS Digital as a party to proceedings he initiated against TPP and, incorrectly, against NHS England which focused on the fact that he was a recipient of a Type 2 issue letter. This application was refused by the Court on the basis it had no reasonable prospects of success.

26. NHS Digital assisted the ICO with its investigations when ICO wrote to it on the 25 September 2018. On 8 October 2018, NHS Digital submitted its answers to the questions posed by the ICO. On 1 March 2019, the ICO provided NHS Digital with the outcome of its investigation. Most notably, the ICO's response included the following:

"...NHS Digital did not know, nor could it ought to have known, about the coding error which resulted in Type 2 [objections] not being reported and subsequently upheld.

Furthermore... this incident... does not appear to have caused data subjects to suffer serious detriment, nor are data subjects likely to suffer serious detriment in future. Indeed there is no evidence that the incident has had any impact on data subjects care or treatment nor any evidence that personal data has been accessed or shared without proper authorisation or been made unavailable or been accidentally lost or destroyed."

27. A longer version of this excerpt was set out to the complainant in a letter from DLA Piper on behalf of NHS Digital dated 4 October 2019.
28. NHS Digital notes that the complainant wrote to NHS Digital on 16 January 2021 citing a statement made by the Parliamentary Under Secretary of State for Health to Parliament regarding the TPP issue and raising a number of questions relating to that statement. As the query related to the TPP matter, which was still being litigated at the time, and largely sought opinion and clarification on matters involved in the litigation, NHS Digital forwarded the enquiry to its solicitors, DLA Piper, who had been instructed on the litigation. DLA Piper responded to the letter of 16 January 2021 and a number of subsequent correspondences, which the complainant sent to DLA Piper and NHS Digital regarding his query, including challenging the handling of the query.
29. On 16 February 2021, the Court awarded costs in favour of NHS Digital with the Claimant ordered to pay £23,243.01 in costs to NHS Digital within 28 days. This amount is illustrative of the amount of effort, cost and resources NHS Digital has incurred and expended in dealing with the complainant and his queries in relation to the TPP Type 2 opt-out issue.
30. On 22 March 2021, the complainant insisted that his request should have been dealt with as a Freedom of Information Act request and NHS Digital treated it accordingly. Responding on 21 April 2021 NHS Digital refused to comply with the request on the basis that his request was vexatious under section 14(1). It upheld this decision in its internal review response of 1 June 2021.

31. NHS Digital's submission has gone on to give details on the detrimental impact it considers that complying with the request would have.
32. NHS Digital has referred to the First-tier Tribunal's decision in *Welsh v ICO* (EA/2007/0088). This confirms that when assessing the significant burden it is '....not just a question of financial resources but also includes issues of diversion and distraction from other work....' (Para. 27). Therefore, NHS Digital says it has taken into account the history of the complainant's behaviour in relation to NHS Digital and his pursuit to make NHS Digital liable for the TPP Type 2 opt-out issue.
33. The information requested the complainant in his email of 16 January 2021 is similar to information that he had previously asked NHS Digital for between June 2018 and February 2021, in relation to the TPP Type 2 opt-out matter and the complainant's attempts to have NHS Digital added as a party to proceedings he had issued against TPP. NHS Digital addressed these queries, as appropriate as part of the litigated matter, via email correspondence with the complainant, as well as during the hearing which took place on the 10 October 2019.
34. NHS Digital says it has already spent vast amounts of time and financial resources liaising with the complainant on the Type 2 opt-out matter and defending its position at court (as detailed above), which has diverted vital resources from delivering core services for the NHS. In addition, the burden on NHS Digital's resources is particularly heavy at the current time in which NHS Digital is under significant additional pressure working to support the NHS's response to the COVID-19 pandemic. Dealing with the complainant's request would take vital resources away from supporting the NHS's response to the COVID-19 pandemic and other core NHS services.
35. NHS Digital has next discussed why the above impact would be unjustified or disproportionate in relation to the request's inherent value of purpose.
36. NHS Digital has noted that paragraph 49 of the Commissioner's published guidance on section 14 lists some practical examples of scenarios where the value of a request may be limited. NHS Digital feels that the following are relevant to the current request:
 - Raises repeat issues which have already been fully considered by the authority;
 - Refuses an offer to refer the matter for independent investigation, or ignores the findings of an independent investigation; and

- Continues to challenge the authority for alleged wrongdoing without any cogent basis for doing so.
37. The complainant's request clearly relates to the TPP coding error in relation to the Type 2 opt-out and his long-running interest in seeking to determine NHS Digital's liability for the same. These matters have already been considered and independently determined by a court on 10 October 2019, where it was dismissed on the grounds that the claim against NHS Digital had no reasonable prospects of success; as well as by the ICO on 1 March 2019, where the ICO stated that 'NHS Digital did not know, nor could it ought to have known, about the coding error'.
38. NHS Digital argues that the complainant's request for information relating to the TPP Type 2 opt-out matter, after the matter has been independently considered by both the Court and the ICO, goes beyond the reasonable pursuit of information and is unreasonably persistent. This is supported by the Tribunal's decision in *Rigby v the ICO and Blackpool Fylde and Wyre Hospitals NHS Trust (EA/2009/0103)*, where the Tribunal stated that '...ongoing requests, after the underlying complaint has been investigated [by independent regulators], [go] beyond the reasonable pursuit of information, and indeed persistence'.
39. In addition, NHS Digital says, there is no new information or circumstances which cause this matter to be re-examined or to demonstrate any serious purpose or value in the complainant's request.
40. It says that, as mentioned previously, the questions raised in the complainant's request sought to obtain information which had already been communicated to him in the course of the litigation, through email exchanges and during the hearing which took place on the 10 October 2019. This, coupled with the background between NHS Digital and the complainant, and the fact that the request, viewed as a whole, appears to intend to reopen the issues that have been disputed several times before and determined by the court and the ICO, contribute to NHS Digital's assessment of the request being vexatious under section 14(1).
41. This is supported, in NHS Digital's view, by the First- tier Tribunal decision in *Ahilathirunayagam Vs ICO & London Metropolitan University (EA/2006/0070, 20 June 2007)* where the 'Tribunal found the request to be vexatious taking into account the following matters:
- "... (ii) The fact that several of the questions purported to seek information which the Appellant clearly already possessed and the detailed content of which had previously been debated with the University

- (iii) The tendentious language adopted in several of the questions demonstrating that the Appellant's purpose was to argue and even harangue the University and certain of its employees and not really to obtain information that he did not already possess
 - (iv) The background history between the Appellant and the University...and the fact that the request, viewed as a whole, appeared to us to be intended simply to reopen issues which had been disputed several times before..."
42. NHS Digital concludes its submission by confirming that, against the broader context of the complainant's dealings with NHS Digital on the TPP Type 2 opt-out matter, NHS Digital considers that the effort that would be required by NHS Digital to comply with the complainant's request and the level of disruption doing so would cause, would be unjustified and disproportionate, balanced against any serious purpose or value in providing the information requested.
43. For his part, in his correspondence to the Commissioner the complainant has indicated that he considers that NHS Digital is attempting to get its solicitors to "frighten" him away from making the request or taking it further. He considers that this is fundamentally against the spirit of information sharing.
44. The complainant has also provided a background to the matter. His view is that NHS Digital has misled a civil court in relation to "data provided". He says that the information he has requested would - if provided - show this clearly and re-open the case. The complainant considers that this is why NHS Digital is "attempting to evade" releasing the information and that it has flouted relevant information rights laws in so doing.

The Commissioner's conclusion

45. The Commissioner has considered the complainant's arguments but, in the absence of any evidence to support the allegations he has made, she does not find those arguments compelling.
46. More likely, in the Commissioner's view, the complainant is using the FOIA to keep live a matter – his 'Type 2' opt-out error concern and a claim against TPP – that, at the time of his 30 April 2021 correspondence with NHS Digital, had concluded, with the Court having found against him.
47. Prior to the request, NHS Digital had been the subject of an ICO investigation. That investigation had found in 2019 that NHS Digital did not have a case to answer.

48. The Commissioner understands that – also in 2019 - the Court had refused the complainant's application to add NHS Digital as a party to proceedings he initiated against TPP (and NHS England) on the basis it had no reasonable prospects of success. However, at the point that the complainant submitted his request on 16 January 2021 NHS Digital was going through a litigation process with the complainant.
49. On 16 February 2021, one month after the request was submitted, the litigation process concluded with the Court awarding costs in favour of NHS Digital. At the point of his correspondence to NHS Digital on 22 March 2021 and 30 April 2021, the Commissioner considers it was therefore very likely that the complainant was aware both of the Court's earlier rejection of his application and its awarding of costs in favour of NHS Digital – in addition to the ICO's investigation and findings. However, he chose to persist with his FOIA request, and then to submit a complaint to the Commissioner.
50. In addition to the above, the Commissioner has taken account of the fact that NHS Digital has been corresponding with the complainant about his concerns about the 'Type 2' opt-out error since 2018. During this period NHS Digital says the complainant has submitted requests for similar information which NHS Digital has addressed as appropriate: as part of the litigated matter; via email correspondence with the complainant; and during the [Court] hearing which took place on the 10 October 2019. And NHS Digital's solicitors had provided the complainant with a response to his 16 January 2021 correspondence as usual course of business. The Commissioner also notes that the current request appears to be drifting away from the opt-out error as it affected the complainant directly, and into matters more broadly associated with that error.
51. The Commissioner considers that it was reasonable for the complainant to have a concern about the consequences of the TPP 'Type 2' opt-out for him in 2018, and to raise that concern with NHS Digital. However, at the time of the complainant's current request and internal review request, the complainant had been corresponding with NHS Digital about that matter for approximately three years. The circumstances of the opt-out error had been subject to an independent ICO investigation and the matter of the complainant's concern about NHS Digital role in that error had been considered by the Court, with the Court awarding costs against the complainant.
52. For the reasons above, the Commissioner is therefore satisfied that at the time of the complainant's correspondence to NHS Digital, the request's value was minimal and that the burden to NHS Digital of complying with the request was disproportionate to any value it did have.

53. The Commissioner also agrees that the complainant is demonstrating unreasonable persistence; seeking to keep live a matter that has been independently investigated and concluded. As such, the Commissioner has decided that the complainant's request of 16 January 2021 can be categorised as a vexatious request and NHS Digital is not obliged to comply with it.

Right of appeal

54. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

55. 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.
56. 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

Cressida Woodall
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