

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 01 August 2012

**Public Authority:** NHS Information Centre  
**Address:** 1 Trevelyan Square  
Boar Lane  
Leeds  
LS1 6AE

#### Decision (including any steps ordered)

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The complainant requested statistical information from the NHS IC relating to obesity surgery and drug use in expectant mothers. The NHS IC refused to disclose this information, citing section 21 of FOIA (information reasonably accessible to the applicant by other means). The Commissioner's decision is that the NHS IC has incorrectly applied section 21 to the requested information as he has decided that the NHS IC does not hold the requested information. Therefore the Commissioner orders no steps to be taken.

#### Request and response

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1. On 19 July 2011 the complainant wrote to the NHS IC and requested information in the following terms:

"In a response to a Parliamentary Written Answer [Ref: 272786 – 15 May 2009 : Column 1078W] you provided data on the numbers of babies suffering from neonatal withdrawal symptoms from maternal drug use. Please could you provide me with updated figures for both 2008/09 and 2009/10 showing the total finished consultant birth episodes? In relation to 2009/10 could you also provide a breakdown by PCT area for the numbers occurring in each area.

"In a response to a Parliamentary Written Answer [Ref: 195452 – 3 Apr 2008 : Column 1294W] you provided data on the count of deliveries by drug dependent mothers. Could you provide the same data but updated to include 2006/07, 2007/08, 2008/09 and 2009/10. Please ensure that you break down the totals by the type of drug used as per the Parliamentary Written Answer."

On the same date he also made the request below. These requests are being treated as one for the purpose of this decision notice: -

1. You have previously provided information in the form of a Parliamentary Written Answer [Ref: 13830 – 4 Oct 2010 Column 1327W] on the number of surgical procedures carried out on people who had a primary diagnosis of obesity. Could you provide me with updated figures on that inquiry to include 2009-10 financial year.
2. You have previously provided information in the form of a Parliamentary Written Answer [Ref: 14783 – 15 Sept 2010 : Column 1119W] on the number of children having obesity surgery. Could you please provide me with updated information to include the 2009/10 financial year."
2. The NHS IC responded to both requests on 1 August 2011. It stated that it was applying section 21 of FOIA to the requested information as its publication scheme provided a link to a website where the complainant could request the information via a bespoke report at a charge.
3. Following an internal review the NHS IC wrote to the complainant on 3 October 2011. The reviewer upheld the original decision.

### **Scope of the case**

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4. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
5. The NHS IC has applied section 21 of FOIA (information which is reasonably accessible to the applicant by other means). The Commissioner has considered firstly whether the NHS IC holds the requested information.

### **Reasons for decision**

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#### **Does the NHS IC hold the requested information?**

6. Section 1 provides that any person making a request for information to a public authority is entitled (a) to be informed in writing by the public authority whether it holds information of the description specified in the request and (b) if that is the case to have that information

communicated to him. It follows that it is necessary for information to be held in recorded form at the date of the request for it to be subject to the Act.

7. In *Linda Bromley & Others v Information Commissioner and Environment Agency*<sup>1</sup> the Information Tribunal confirmed that the test for establishing whether information was held by a public authority was not one of certainty, but rather the balance of probabilities. The standard of proof has been confirmed by the Tribunal decision of *Innes v Information Commissioner*<sup>2</sup>.
8. In this case, the NHS IC argued that it did not hold the relevant recorded information in this case. Its main argument was that, to produce the specific information requested would require new analyses to be carried out. Those analyses would have to be carried out by an external coding team in order to interpret the correct clinical codes needed to produce a bespoke report in response to the complainant's request. It explained that it believed that the process would amount to the creation of new recorded information and would therefore be outside of FOIA.
9. The complainant does not agree. He believes that the provision of the information that he has requested would be a simple extrapolation and updating of figures and believes that the information is held by the NHS IC.

### **The Commissioner's position**

10. The Commissioner's position has been informed by a particular Information Tribunal decision which has considered what is meant by information being held. This is the case of *Johnson v ICO and MOJ*<sup>3</sup>.
11. In the *Johnson* case the complainant had requested the number of cases struck out by specified judges. The public authority explained that it did not hold a central record of which Master struck out a case. Instead it was required to consider its electronic database and paper files in conjunction. In paragraph 45 the Tribunal explained that the MOJ regarded this exercise as creating new information as it did not

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<sup>1</sup> EA/2006/0072

<sup>2</sup> EA/2009/0046

<sup>3</sup> EA/2006/0085

believe that simply holding the “building blocks” meant it held the final product. The Tribunal dismissed this argument and agreed with the Commissioner that the MOJ held the information in this case. It then explained its view on when information was and was not held (at paragraph 46):

*‘The question for the Tribunal is this: if the MoJ has to do something with the building blocks, does this mean that they do not hold the information? We consider that the answer lies in the extent to which something needs to be done to the building blocks, in order to comply with the request. At the hearing Ms Grey gave the hypothetical example of a public body which forecasts future oil prices. If it holds forecasts for oil prices in respect of countries A and B, and it receives a request for a forecast for country C, she says, and we agree, that that would not be information that is “held” by that public body. To arrive at a forecast for country C, the raw data that the public body holds (or the “building blocks” to use the MoJ’s terminology), would likely have to be subjected to complex mathematical formulae, and also, a high level of skill and judgement would likely be required, in order to take account of political and other considerations.’*

12. It then went on to say that, in the hypothetical example above, the information was therefore not held. From this decision, the Commissioner acknowledges that the test for information not being held was that the information would require a high level of skill and judgment to be generated from the “building blocks”.
13. It is important therefore to establish what is meant by a high level of judgment. In the Commissioner’s view a high level of judgment would be characterised by some or all of the following four qualities:
  - the necessity for intellectual input to process the “building blocks”, and the presence of discretion;
  - the inability for a lay person to extract the relevant information from all the other information;
  - the need for specialist knowledge about the way the business area operates that would not be known by other individuals; and

- the application of that specialist knowledge and the need to construct the requested information from the “building blocks” using that specialist knowledge.
14. The NHS IC has stated that Hospital Episode Statistics (HES) data (the data required to be analysed in order to provide a response to the complainant’s request) is analysed using specialist software and queries are generated by skilled analysts to interrogate the complex patient record level data. This record level data is a series of codes, inputted by hospital staff, in accordance with the guidance set out in the NHS data dictionary.
  15. The complainant had requested that the NHS IC provide him with an updated version of its responses to previous parliamentary questions, i.e. updated to include additional data years. The NHS IC states that providing additional data years for a query is not a simple task. A saved query would have to be restored from the NHS’ data archive and would then have to be copied over to the new data year and checked by specialists to ensure this had been copied correctly. In addition to this, any query with extensive use of ICD10 or OPCS4 codes (the international classification systems for diagnoses and procedures respectively) would need to have additional checks to ensure the latest coding advice is being used.
  16. HES analysts at the NHS IC are statistically trained with no medical expertise. To ensure that the correct clinical codes are used in analyses advice is sought from specialist staff within the NHS Classifications Service which is external to the NHS IC. This, often complex, advice needs to be interpreted and applied to the NHS IC’s Business Objects queries. Clinical practice in areas such as bariatric surgery for the treatment of obesity is regularly changing so new coding advice needs to be commissioned for additional analyses.
  17. It is clear from the NHS IC’s arguments that extraction of the relevant information would not be a simple task and could not be done by a lay person. Whilst the ‘building blocks’ of the information, i.e. the clinical codes, are held by the NHS IC, it is clear that external specialist skill and knowledge is required in order to interpret and apply the codes so as to produce the specific information.
  18. Having considered these arguments, the Commissioner disagrees with the complainant’s assertion that the information requested would be easy to extrapolate and update from the codes held. Instead the specific information requested is not held by the NHS IC and would require a high level of skill and judgment to create. It would be necessary to apply specialist skill and knowledge in order to ensure

that the correct codes are used and that these are interpreted and applied correctly in order to produce accurate information.

19. Therefore, the Commissioner is of the view, on the balance of probabilities, that the public authority does not hold the relevant recorded information that has been requested. Accordingly, the public authority was correct to deny that it held this information in line with section 1(1)(a). Furthermore, FOIA imposes no obligation to provide the complainant with information that it does not hold.
20. Since the Commissioner is satisfied that the NHS IC does not hold the requested information, it follows that it has incorrectly applied the exemption under section 21 to that information as this exemption can only be applied to information held by a public authority.

## Right of appeal

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21. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

22. 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.
23. 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** .....

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
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