

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 June 2013

Public Authority: NHS Commissioning Board
Address: Southside
105 Victoria Street
London, SW1E 6QT

Decision (including any steps ordered)

1. The complainant has requested information relating to a review of the paediatric cardiac surgery unit at Leeds General Infirmary (LGI).
2. The Commissioner finds that the requested information is exempt under section 40(2). As such the Commissioner has not gone on to consider the application of sections 38 and 41 to the requested information
3. The Commissioner does not require NHS Commissioning Board to take any steps as a result of this decision notice.

Background

4. On 5 July 2012, the complainant wrote to NHS London and requested information relating to the review which led to the decision to close the paediatric cardiac surgery unit at LGI.
5. NHS London did not regard this as a request under the FOIA. However, it did disclose some of the information requested.
6. Following subsequent correspondence between the two parties an FOI request was made on 29 October 2012.
7. The complainant approached the Commissioner before NHS London had provided a response or provided an internal review.
8. The complainant was advised that an internal review should be carried out before making a complaint to the Commissioner.

9. NHS London provided the complainant and the Commissioner with further background information relating to the Independent Expert Panel Methodology and the individual Kennedy panel member scores. This is contained in Annex 1 at the end of this decision notice.
10. During the Commissioner's investigation the NHS went through a period a major reorganisation. On 1 April 2013, NHS England inherited responsibility for the Safe and Sustainable Review from the Joint Committee of Primary Care Trusts (JCPCT) which included responsibility for the information held by NHS London.
11. The legal name for NHS England remains as the NHS Commissioning Board and therefore for the purposes of this Decision Notice, the public authority will therefore be referred to as both NHS London and the NHS Commissioning Board.

Request and response

12. On 29 October 2012 the complainant requested information in the following terms:

a) "I would like to reiterate my request for a full set of JCPCT reports, for all of the 14 meetings which took place in private. I do not believe any of these reports are confidential, and they should all be made available to the public under the Freedom of Information Act. If you are not prepared to make them available, please could you tell me which exemption you rely on under the Freedom of Information Act?"

b) It also appears to me that your publication of the proceedings of the NCS Expert Panel is woefully inadequate. The Consultation Document published in July 2011 contains some scores at Appendix 2, but there is no justification for any of these figures, which appear to have been plucked from the air to support the Panel's stated view that these nationally commissioned services should remain at their present locations. Please could we see a detailed breakdown showing exactly how these scores were determined, for each of the competing institutions?"

c) I have also previously requested a full set of minutes for the National Specialised Commissioning Group (NCG) and the Advisory Group for National Specialised Services (AGNSS). In each case partial sets of minutes have been published on the Safe & Sustainable website, but these are clearly incomplete...These minutes are therefore plainly relevant, and we know that the reorganisation was discussed in these fora. Please can we also see copies of any relevant reports? Please can

you in any event provide a full list of NSCG, NCG and AGNSS meeting dates?

d) Please can we see the individual scores prepared by each of the Kennedy Panel Assessors under each of the assessment criteria for each of the institutions that they assessed? Please can we see these detailed scores, or at least a valid reason for your refusal that would meet the requirements of the Freedom of Information Act? Please will you confirm or deny whether you actually hold this requested information as provided in the Freedom of Information Act."

13. NHS London responded on 21 December 2012. This was its primary response, as well as a result of its internal review. It provided an estimated 3,600 pages of information, in addition to other information the complainant had previously received outside of the FOIA, or which was already in the public domain.
14. In its response to the complainant dated 21 December 2012 NHS London explained that it was in the process of finalising its response to point d). It went on to explain that there are hundreds of individual sub-scores which fall within the request. It also advised the complainant that at that stage it considered some aspects of the information were considered to be exempt under sections 40 and 41.
15. NHS London provided further information on 18 January 2013, including the Independent Expert ("Kennedy") Panel anonymised individual panel member scores.

Scope of the case

16. The complainant contacted the Commissioner on 5 November 2012 to complain about the way his request for information had been handled.
17. As explained above the complainant was advised of the appropriate steps in the complaint process.
18. The complainant contacted the Commissioner again on 4 January 2013, following the response from NHS London.
19. The Commissioner contacted NHS London on 10 January 2013 to advise that the complaint had been received. Following a number of communications NHS London disclosed further information to the complainant in relation to parts a) – c) above. It stated that it had also disclosed information relating to part d) above in an anonymised form. It cited section 40(2) and section 41 as its basis for doing so.

20. During the Commissioner's investigation the NHS Commissioning Board included a late reliance on section 38 of the FOIA.
21. The Commissioner considers the scope of this case to be to determine if NHS London correctly applied section 38, 40(2) and section 41 of the FOIA to the withheld information.

Reasons for decision

Section 40(2) – third party personal data

22. Section 40(2) provides an exemption for information which is the personal information of an individual other than the applicant, and where one of the conditions listed in sections 40(3) or 40(4) is satisfied.
23. In this case the relevant condition is contained in section 40(3)(a)(i). This applies where the disclosure of information to any member of the public would contravene any of the principles of the DPA. This is an absolute exemption, and is therefore not subject to a public interest test.
24. NHS London has sought to rely on this exemption to withhold the names linked to the scores provided by the 'Kennedy panel'. The scores themselves have been disclosed and the names of the panel members are also in the public domain. This is the extent of the remaining withheld information falling within the scope of the request.
25. NHS London has argued that the disclosure of the panel members names linked to the scores they provided would be a breach of the DPA principles.
26. In order to establish whether this exemption has been correctly applied the Commissioner has first considered whether the withheld information is the personal data of third parties, namely the members of the panel who provided the scores.
27. Personal data is defined in the DPA as information about a living individual who can be identified from that information, or from that information and other information in the possession of, or likely to come into the possession of, the data controller.
28. In this case, the withheld information in question clearly relates to identifiable individuals and would be linked to their individual scores.

Therefore, the Commissioner is satisfied that this information is the personal data of third parties.

Would the disclosure be fair?

29. The Commissioner has gone on to consider whether the disclosure of this information would be in breach of the first principle of the DPA.
30. The first principle requires, amongst other things, that personal data is processed fairly and lawfully. The Commissioner has first considered whether the disclosure of the withheld information would be fair.
31. In considering whether disclosure of this information would be fair the Commissioner has taken the following factors into account:
 - whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned;
 - the individual's reasonable expectations of what would happen to their information; and
 - are the legitimate interests of the public sufficient to justify any negative impact to the rights and freedoms of the individuals concerned.
32. NHS London has argued that whilst the individual panel members were nominated by professional associations to provide services to the Review, they largely are not public facing figures, but are independent experts in their particular fields.
33. Furthermore, NHS London argued that the panel had a 'collective' identity and it was only public facing through its chairman. All of the formal scoring undertaken by the panel and which was used by the JCPCT was understood to be by consensus – that is, the panel members coming together and discussing their views before collectively agreeing a score for the panel as a whole.
34. NHS London stated that when making their individual scores, the individual panel members never had any expectation that their individual scores would be used by the JCPCT, or released more widely. The individual panel member's scores were a 'snapshot' of their thinking early on in the process, before the issues were discussed among the panel members and before the panel as a whole reached consensus. The panel members' expectation was that only the collective consensus scores would be used by the JCPCT and publicly disseminated. The panel members had no expectation that their individual scores would be used. They were only an aide memoire to individuals.

35. NHS London further stated that it had considered the wider circumstances in which the personal data was provided to the NSC Team. It referred to its terms of reference for the independent panel.
36. NHS London has provided the Commissioner with an extract from the Terms of Reference for the Kennedy Panel which states:

"Confidentiality

All information received by the panel will be regarded as confidential and will not be disclosed to other parties unless with the express agreement of the Director of the National Specialised Commissioning.

At the conclusion of this work the panel will return all paperwork to the NSC Team.

Public Announcements

The panel will not make any public announcement unless with the express agreement of the Director of National Specialised Commissioning.

Impartiality and probity

The panel will not discuss any aspect of the review process or the outcomes of the review process with officers or representatives of any centre or other parties except as part of the process set out in these terms of reference.

Members of the panel will immediately inform the Chair if a conflict of interest or potential conflict of interest becomes apparent.

Transparency

Details of the panel will be made publically available."

37. NHS London stated that as set out above, the panel members had the expectation that any information apart from the consensus scores was to be treated as confidential, and that the papers would not be shared after they were returned to the NSC Team as secretariat. The panel members had a clear expectation that their personal data (i.e. their individual sub-scores) would not otherwise be processed.
38. NHS London further explained that the JCPCT, as decision maker, did not receive the panel members' individual scores – it was not shared with them (in line with the panel's terms of reference). This personal

data is not in the public domain. It stated that it is unclear why the complainant should have the data, where no one else has.

39. Given the above terms of reference the Commissioner is satisfied that it is unlikely that the panel members would have had any reasonable expectation that the withheld information would be disclosed under the FOIA.

Consequences of disclosure

40. NHS London stated that the process by which the scores were determined is complex, and deals with an emotive subject. The climate into which the data would be released is heated. Release of an individual panel member's scores without a full understanding of where that data fits in to the Review process could lead to a skewed interpretation or selective use, and incorrect aspersions being made about a particular individual panel member (for instance, that they were biased towards or against a particular centre).
41. The Commissioner rarely accepts the argument that information could be taken out of context and would expect a public authority to provide that context to aid understanding. However, given the further argument that the review and scoring has been a highly complex and lengthy process, he considers this argument has some merit on this occasion.
42. NHS London further stated that given the emotive nature of the assessment, the panel members may receive unsolicited correspondence, innuendo or other smears. Personal attacks have already been made against the Programme Director for the Review on social media, including plans announced on Facebook to make phone calls to his home in the middle of the night.
43. NHS London stated that other distressing comments have been made about other NHS staff involved in the Review on social media. It considered similar attacks on panel members would be likely if the scores were released without anonymity and that the disclosure therefore could cause damage or distress to the panel members/data subjects.
44. NHS London further argued that it felt that if, for instance, a panel member's professional judgement meant that they gave a low score to one particular centre on one particular issue, they could be unfairly vilified for exercising that judgement.
45. It was therefore of the view that similar personal attacks on the specific panel members would be likely if the scores were released without anonymity and that disclosure would (1) not be fair to the data subjects,

and in breach of the first data protection principle in particular; and (2) also may cause damage and distress to panel members/data subjects.

46. In relation to the legitimate interests in disclosure of this information, the complainant has argued that there is a legitimate interest in the public knowing what each panel member scored as he considered that at least one panel member may have had a bias towards a particular centre.
47. NHS London stated that it is unclear what legitimate interests would be served by disclosure of this information or why the disclosure must be necessary for a legitimate interest of the public. The complainant has referred to statistical analysis. NHS London stated that it cannot see that proper statistical analysis can be done with reference to people's names. However, it did consider that it would be prejudicial to the rights, freedoms and legitimate interests of the data subjects if the information were released for the reasons identified above, and therefore the processing is unwarranted, particularly as the other information that has been published.
48. The Commissioner accepts that there is a general public interest in terms of the transparency and accountability of public sector organisations and specifically in accessing information about the way a public authority has reached decisions. However, the Commissioner does not consider that any legitimate interest extends to disclosure of the names linked to the individual panel scores.
49. The Commissioner is unable to conclude that disclosure of the withheld information is necessary to meet a legitimate public interest.
50. Based on the above, the Commissioner is satisfied that the withheld information is personal data and that disclosure would breach the first data protection principle as it would be unfair to the individuals concerned.
51. As the Commissioner has determined that it would be unfair to disclose the requested information, it has not been necessary to go on to consider whether disclosure is lawful or whether one of the conditions in Schedule 2 of the DPA is met.
52. The Commissioner therefore upholds the public authority's application of the exemption provided at section 40(2) of the FOIA. Consequently, he has not gone on to consider the application of section 38 or 41 of the FOIA.

Right of appeal

53. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

54. 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.
55. 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
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Appendix 1

Independent Expert Panel Methodology

56. The Independent Expert Panel was responsible for assess the eleven centres carrying out paediatric cardiac surgery in England against the proposed standards developed by the *Safe and Sustainable* Steering Group. The purpose of the assessment process was to produce a composite consensus panel score for each centre independently (that is, without comparison between the centres), on the basis of the Independent Expert Panels' assessment of the evidence that was provided by each centre to it. Within the "Report of the Independent Expert Panel – December 2010" it states that,

"The panel was asked to assess compliance with the standards now and in the future and to consider how the centres could expand facilities and workforce if necessary...The panel approached this task by assessing each centre separately."

57. The assessment process involved two phases. In the first instance panel members separately assessed and score the criteria in the self-assessment template having considered the submissions and evidence supplied by each centre. The panel members did not disclose these individual scores to each other. The template is available via the *Safe and Sustainable* website.

58. There are a few instances where a panel member did not score particular criteria prior to the visit, and this was noted on the individual panel members scoring. Furthermore, the Independent Expert Panel did not assess the assessment category of deliverability and achievability.

59. The second phase of the Independent Expert Panel assessment involved visits to each centre for a full day in May and June 2010. During this time the Independent Expert Panel met staff and patient representatives. At the conclusion of each visit the Independent Expert Panel undertook a scoring session, where the panel members scored the criteria for a second time, taking into account the discussions and their observations during the day.

60. The second phase scores were shared amongst the panel members in order to facilitate discussion. Following detailed discussions the Independent Expert Panel reached a consensus score for each criterion. It is important to note that the panel did not seek to compare the centres as it made its deliberations or apply any weightings itself, and the consensus scores were not developed as an average of the individual scores.

61. The scores generated relate to the extent to which the centres provided evidence on the issues assessed on the following basis:

Score	Definition
1	Inadequate – no evidence to assure panel members
2	Poor – limited evidence supplied
3	Acceptable – evidence supplied is adequate, but some questions remain unanswered or incomplete
4	Good – evidence supplied is good, and the panel are assured that the centre has a good grasp of the issues
5	Excellent – evidence is of the highest standard

62. A score of “4” therefore did not mean 4/5 or 80%, but rather that the panel member considered the evidence supplied by the centre met that definition. The panel members discussed and deliberated the evidence in order to then reach a single consensus score, which was then weighted by the NSC Team (and not the Independent Panel) using a weighting that had previously been given to the centres and then this weighted consensus score was used by the JCPCT.
63. In order to maintain fairness and consistency, the same panel members attended each visit where possible. At the start of each consensus scoring session the panel were asked to declare any conflicts of interest. Dr Mabin, due to his practice in the South West congenital hear network and referrals to Bristol paediatric cardiac surgery service, withdrew from the scoring assessment of Bristol but Dr Mabin did offer his clinical opinion where necessary. Due to illness Dr Godman was unable to attend the visits to Birmingham and Oxford and in his absence Dr Mabin provided appropriate cardiology advice, a solution with which the panel members were content. This information is already in the public domain. As a result, it has not been appropriate to use a numerical cypher that refers to the same panel members in every assessment, as from this it would be possible for a ‘motivated intruder’ to identify Dr Mabin and Dr Godman.
64. The JCPCT received summary feedback and the individual score for each centre in July 2010. The report of the Independent Expert Panel was shared with the JCPCT in December 2010 and was publically available on the *Safe and Sustainable* website, in January 2011 before the public consultation.

65. In summary, the Independent Expert Panel was established to provide a consensus view on each centre's compliance with the *Safe and Sustainable* standards, rather than to set out in its advice to the JCPCT the specific views of the panel members on a particular issue. The consensus scores were one aspect of the Independent Panel's work, the other key piece being the Independent Panel's substantive report on their findings from the appraisal of each centre.
66. The detailed consensus and weighted scores produced by the NSC Team have previously been published.