

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

### **Decision notice**

**Date:** 14 January 2014

**Public Authority:** NHS Litigation Authority  
**Address:** 2<sup>nd</sup> Floor  
151 Buckingham Palace Road  
London  
SW1W 9SZ

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

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1. The complainant has requested information from the National Clinical Assessment Service ("NCAS") which is an operating division of the NHS Litigation Authority ("NHS LA") which, if held, would have included details as to the length of time an individual had been known to NCAS. NCAS refused to confirm or deny whether or not the requested information was held under section 40(5) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the NCAS was correct to neither confirm nor deny whether the requested information was held under section 40(5) of the FOIA. He therefore requires no steps to be taken.

#### **Background**

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3. NCAS is an operating division of the NHS LA. Its statutory functions include supporting NHS bodies where there are concerns about the performance of an individual practitioner and to provide advice and support in relation to practitioners who have been referred.
4. When NCAS receives a complaint about an individual practitioner its practice is to log a referral as a case on a database and then to allocate a case number to the referral. NCAS has advised that thereafter the convention is to refer to the matter by that case number alone and not by personal identifiers such as name.

## **Request and Response**

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5. On 27 June 2013 the complainant requested information of the following description:

*"Under the FOI Act I would like to know from what date NCAS first became aware of Dr [number redacted]"*.

6. On 1 July 2013 NCAS responded and advised that it neither confirmed nor denied it held the information requested relying on the exemption under section 40(5)(b)(i) of the FOIA.
7. On the same date the complainant advised NCAS that he had documentation in his possession that identified the individual to whom his request related and wished NCAS to reconsider its response. He maintained that as the identity of the individual concerned was anonymised by code the refusal to provide the information he sought was not valid as he already knew the identity of the individual practitioner.
8. NCAS provided a further response to the complainant maintaining its original position.
9. On 4 July 2013 the complainant asked NCAS to conduct an internal review of its response to his request dated 27 June 2013.
10. On 29 July 2013 NCAS provided its internal review upholding its original response to the request. It stated that it would be relying upon section 40(5)(b)(i) of the FOIA in that it neither confirmed nor denied it held the requested information.

## **Scope of the case**

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11. The complainant contacted the Commissioner on 12 August 2013 to complain about the way the request for information had been handled. Therefore the scope of this case has been to consider whether NCAS was correct in relying upon section 40(5)(b)(i) of the FOIA to refuse to confirm or deny whether the requested information is held.

## **Reasons for decision**

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12. Sections 40(5) of the FOIA provides, amongst other things, that a public authority is not obliged to confirm or deny whether information is held if

to do so would constitute a disclosure of personal data and this disclosure would breach any of the principles of the DPA.

13. In this case the request is for information which, if held, would have included details as to the length of time an individual had been known to NCAS.
14. Personal data is defined under section 1(1) of the DPA as data which relate to a living individual who can be identified
  - (a) from those data, or
  - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
15. In this matter the Commissioner is satisfied that the requested information, being the length of time an individual had been known to NCAS, would be personal data if it were held. Even though the complainant has indicated that the individual who is the subject of the request is known to him, details as to how long a person may or may not have been the subject of review by NCAS is the personal data of that individual.
16. Further, the Commissioner considers that even confirming or denying whether information is held or not would reveal whether or not a referral had been made about an individual and in this case would confirm the anonymised code being used in relation to that specific individual. The Commissioner considers that whether or not a referral has been made in respect of a named individual acting in their professional capacity is information which constitutes the personal data of that individual.
17. Having considered the nature of this request, and the circumstances of the case, the Commissioner has concluded that if the requested information were held, it would be the personal data of the individual in question.
18. Having identified that the requested information is personal data consideration has to be given as to whether confirming or denying whether the requested information is held would breach a data protection principle. In reaching this view the Commissioner has to consider the consequences of confirming or denying whether the information is held and not the consequences of disclosing the content of the information itself.
19. In cases such as this the most likely data protection principle is the first principle which requires that personal data is processed fairly and lawfully. The Commissioner has first considered whether it would be fair to confirm or deny whether the requested information is held.

20. In considering whether confirming or denying would be fair the Commissioner has taken the following factors into account:
- the consequences to the data subject;
  - the data subject's reasonable expectations of what would happen to their personal data and;
  - the balance between the rights and freedoms of the data subject and the legitimate interests of the public.
21. In this instance confirming or denying whether the information was held would communicate whether or not a referral had been made about the performance of an individual practitioner. NCAS has argued that this would be unfair to the data subject as the reasonable expectation of an individual, if a complaint had been made, would be that information would not be published in respect of any referral as this would suggest that that individual had been the focus of a NCAS case.
22. Given NCAS's procedures the Commissioner is satisfied that the reasonable expectation of an individual would be that if a referral had been made any information in respect of that referral, if held, would remain confidential. He recognises that to confirm or to deny the existence of a referral could cause damage to the professional reputation of an individual and personal distress.
23. The Commissioner is aware that there is a legitimate public interest in knowing that health professionals are fit to practice and that issues of competency and performance are investigated if concerns are raised. However, in circumstances where there is a concern the Commissioner is satisfied that review procedures exist and information concerning issues of competency come into the public domain if and when a case to answer is satisfactorily established.
24. Having considered the issue of legitimate public interest the Commissioner is satisfied that, in these circumstances, the rights of the data subject would not be outweighed by the legitimate public interest in this case.
25. From the information submitted the Commissioner concludes that, in these circumstances, the reasonable expectations of the individual would be for this information, if held, to remain confidential. He considers that to confirm or deny that information is held would be unfair and a breach of the first principle.
26. In reaching a view on this the Commissioner has had to bear in mind that the FOIA is applicant blind, except in a few limited scenarios none of which are applicable in this case. In other words, the potential

disclosure of information under the FOIA has to be considered as a potential disclosure to the world at large. Consideration cannot be given to the fact that the identity of the practitioner who is the subject of the request is already known to the applicant.

27. In this instance the Commissioner accepts that, in line with previous decisions it would be unfair in the circumstances for NCAS to confirm or deny whether it holds the information within the scope of the request.<sup>1</sup>
28. The Commissioner therefore considers that NCAS has acted appropriately in refusing to confirm or deny that information is held and is entitled to rely upon section 40(5)(b)(i) of the FOIA.

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<sup>1</sup> ICO decision notices FS50276047, FS50169734, FS50474386

## Right of appeal

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29. 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: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

30. 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.
31. 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**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**