

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 May 2016

Public Authority: Human Fertilisation & Embryology Authority (HFEA)

Address: Finsbury Tower
103-105 Bunhill Row
London
EC1Y 8HF

Decision (including any steps ordered)

1. The complainant has requested information relating to egg donation. The HFEA provided some information but withheld some information under section 44(1)(a) of the FOIA.
2. The Commissioner's decision is that the HFEA has correctly applied section 44 (1)(a) FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 4 July 2015 the complainant requested information of the following description:
 1. How many egg donors have had eggs taken from them that have resulted in five or more babies being born to mothers who had the eggs implanted into them since 30 September 2008?
 2. For each individual in Q.1 please state (a) how many treatments have involved the use of the donor's gametes (b) the number of babies born from donated eggs in these cycles and (c) The total number of eggs provided by the donor (d) the number of egg collection cycles undertaken by the donor.

5. On 31 July 2015 HFEA responded. It provided the complainant with aggregated data, and cited section 44(1)(a) of the FOIA as the reason why it would not release un-aggregated data.
6. The complainant requested an internal review. The HFEA sent the outcome of its internal review on 23 October 2015. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 7 December 2015 to complain about the way the request for information had been handled.
8. The Commissioner has considered whether the HFEA has correctly applied section 44(1)(a) FOIA to refuse to provide the un-aggregated data requested.

Reasons for decision

Section 44(1)(a)

9. Information is exempt under section 44(1)(a) if disclosure is prohibited by other legislation. The exemption is not subject to a public interest test.
10. The HFEA explained that the enactment which prohibits disclosure in this case is the Human Fertilisation and Embryology Act 1990 (the Act), specifically section 33A. It said that the Act places tight restrictions on who can see the information held by the HFEA.

11. Section 33A of the Act states that:

“No person shall disclose any information falling within section 31(2) which the person obtained (whether before or after the coming into force of section 24 of the Human Fertilisation and Embryology Act 2008) in the person’s capacity as -

(a) a member or employee of the Authority,

(b) any person exercising functions of the Authority by virtue of section 8B or 8C of this Act (including a person exercising such functions by virtue of either of those sections as a member of staff or as an employee),

- (c) any person engaged by the Authority to provide services to the Authority,
- (d) any person employed by, or engaged to provide services to, a person mentioned in paragraph (c),
- (e) a person to whom a licence applies,
- (f) a person to whom a third party agreement applies, or
- (g) a person to whom Directions have been given."

Section 31(2) states that "Subject to subsection (3), information falls within this subsection if it relates to—

- (a) the provision for any identifiable individual of treatment services other than basic partner treatment services,
 - (b) the procurement or distribution of any sperm, other than sperm which is partner-donated sperm and has not been stored, in the course of providing non-medical fertility services for any identifiable individual,
 - (c) the keeping of the gametes of any identifiable individual or of an embryo taken from any identifiable woman,
 - (d) the use of the gametes of any identifiable individual other than their use for the purpose of basic partner treatment services, or
 - (e) the use of an embryo taken from any identifiable woman, or if it shows that any identifiable individual is a relevant individual.
12. It explained that the HFEA is the regulator of fertility treatment and human embryo research in the UK and holds a large amount of information about fertility treatments in the UK on the HFEA Register. It said that this information is classified as sensitive personal data as defined by the Data Protection Act (DPA). It said that the confidentiality of the information held on the Register is very strictly protected by the Act.
13. The Commissioner considers that the information requested would fall under section 31(2) of the Act because it relates to the use of donor gametes and un-aggregated information would relate to identifiable individuals due to the small numbers involved.

14. This is because the information which was aggregated relates to small numbers (<5) and therefore following guidance in the Commissioner's Anonymisation: managing data protection risk Code of Practice¹, which acknowledges that small numbers can present a greater risk of identification, the HFEA aggregated this data for the purpose of anonymising it. If the information were to be disclosed in an un-aggregated format, because of the small numbers involved, there is a much greater risk of identification.
15. The HFEA confirmed that it did, back in 2010 provide the complainant with un-aggregated information. However it has said that its approach as to whether or not data subjects could be identified from small numbers (<5) was amended following the publication of the Commissioner's Anonymisation Code of Practice in November 2012. As section 31(2) of the Act refers to information relating to identifiable individuals, because the HFEA's position as to what type of information would identify data subjects has changed since 2010, this explains why the statutory bar was not applied at that time.
16. The HFEA has confirmed in this case that because of the small numbers, a reasonably competent person could make use of a variety of sources and other data published to identify an individual from un-aggregated information.
17. Section 33A of the Act states that 'No person shall disclose any information falling within section 31(2)... in the person's capacity as - (a) a member or employee of the Authority'.
18. Section 33A of the Act therefore prevents employees from disclosing information falling within section 31(2) of the Act. This therefore operates as a statutory bar preventing the disclosure of the requested information and section 44(1)(a) FOIA was correctly applied by the HFEA.

¹ <https://ico.org.uk/media/for-organisations/documents/1061/anonymisation-code.pdf>

Right of appeal

19. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

20. 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.
21. 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

Gemma Garvey
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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Wilmslow
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