

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 June 2018

Public Authority: NHS Commissioning Board (NHS England)

Address: 4N22 Quarry House
Quarry Hill
Leeds
LS2 7UE

Decision (including any steps ordered)

1. The complainant has made a two part request for information relating to a complaint he submitted to NHS England, and information relating to its decision not to accept his reason for not attending any of the medical practices offered to him. NHS England withheld all the information, citing the exemption under section 40(1) (personal information) of the FOIA as its basis for doing so. The complainant considers NHS England's reasons for withholding the requested information are neither valid nor fair
2. The complainant is also concerned that NHS England has not complied with its obligations under section 1(1), section 10(1) and section 17(1) of the FOIA.
3. The Commissioner's decision is that NHS England has complied with its obligations under section 1(1), section 10(1) and section 17(1) of the FOIA.
4. The Commissioner also finds that the requested information was exempt from disclosure under section 40(1) of the FOIA but NHS England should have cited section 40(5)(a) to neither confirm nor deny whether it holds the requested information.
5. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Background

6. The complainant contacted NHS England on 2 March 2016 to complaint about the Dicconson Group Practice stating that "We feel we have no choice but to remove this patient but are mindful we need to ensure he has access to primary care services and would value your help and support in this matter." NHS England responded to this complaint on 2 June 2016 in which it stated that "this issue has been dealt with previously under the NHS complaints regulations." The first part of the request relates to all recorded information that NHS England hold on how it came to the decision that the complaint had been previously dealt with.
7. As a result of Dicconson Group Practice removing the complainant from their services, NHS England offered him alternative medical practices. The complainant explained the reason why he could not attend the medical practices offered to him. NHS England responded on 2 June 2016 and explained that it could not accept the reasons he had given. The second part of the request relates to all recorded information that NHS England hold on how it came to the decision that it could not accept the complainant's reasons for not attending these alternative medical practices.

Request and response

8. On 9 January 2017, the complainant wrote to NHS England and requested information in the following terms:

"This is a Freedom of Information Request.

Please inform me whether or not you hold the information specified below.

If you do hold the requested information please send me a copy.

REQUEST No. 1.

Copy of all recorded information you hold in respect of the following complaint issue (number 5) of the 2016 formal complaint you received about Dicconson Group Practice (DGP), Wigan. In particular I wish to receive a copy of all recorded information on which you based your decision that the; ' issue has been dealt with previously under the NHS complaints regulations.,' this comment was made in your 02 June 2016 dated letter your Complaint Reference; C-062141.

To assist you;

** Issue number 5 of the 2016 formal complaint about DGP began with the following;*

' 5) DGP (page number 295) state that; 'We feel we have no choice but to remove this patient but are mindful we need to ensure he has access to primary care services and would value your help and support in this matter.'

** The 2016 formal complaint about DGP was first emailed to you on the 6 March 2016 and your complaint response was in your 02 June 2016 dated letter your Complaint Reference; C-062141*

REQUEST No. 2.

Copy of all recorded information you hold on which you based your decision that; ' NHS England cannot accept your reasons for not attending medical practices offered to you as reasonable.,' this comment was made in your 02 June 2016 dated letter your Complaint Reference; C-062141"

9. NHS England responded on 23 January 2017. It stated that it did hold information relevant to the complainant's request for information. However, it refused to provide the requested information citing section 40(1) of the FOIA as its basis for doing so. NHS England explained to the complainant that the FOIA gives the public the right to access recorded information held by an authority subject to the Act. It went on to explain that the FOIA cannot be used to provide personal information relating to an individual as it would contravene the data protection principles as set out in the Data Protection Act 1998 (the DPA). This is because information provided under the FOIA is considered a disclosure to the public. To disclose information to the public which would identify an individual is unlikely to be fair and would breach that person's data protection rights, (even if that person is the applicant).
10. On 13 February 2017, the complainant requested an internal review of his FOIA request, stating that NHS England had failed to provide him with the following within 20 working days –
 - a copy of the recorded information NHS England held fitting the criteria of his request
 - a valid/accurate refusal notice.
11. Following an internal review NHS England wrote to the complainant on 13 March 2017. It stated that that the response to his request was provided within the 20 working days. It also upheld its original position.

Scope of the case

12. The complainant contacted the Commissioner on 15 May 2017 to complain about the way his request for information had been handled, and in particular that NHS England failed, within 20 working days to –
 - Provide a copy of the information he requested
 - Provide a proper/valid refusal notice
13. The Commissioner has considered whether NHS England has complied with its obligations under section 1(1), section 10(1), and section 17(1) of the FOIA. Having considered the request and the information provided by NHS England, the Commissioner has also considered whether the complainant requested his own personal data and therefore whether NHS England should have cited section 40(5)(a) to neither confirm nor deny whether it held the information.

Reasons for decision

Section 1 – general right of access

14. Section 1(1) of the FOIA says that an individual who asks for information from a public authority is entitled to (a) be informed whether the authority holds the information and (b) if the information is held, to have that information communicated to them.
15. If a public authority is refusing to meet either of these duties it will usually need to issue a refusal notice to the requester explaining why.
16. NHS England provided a response to the request on the 23 January 2017, in which it confirmed that it did hold the requested information but refused to provide it.
17. The Commissioner is therefore satisfied that NHS England has complied with its obligations under section 1(1) of the FOIA.

Section 10 – time for compliance

18. Section 10(1) of the FOIA says that a public authority should comply with section 1(1) promptly and no later than the twentieth working day following the date of receipt.
19. The request in question was made on 9 January 2017, therefore NHS England should have provided its response to the request in compliance with section 1(1) of the FOIA by no later than the 6 February 2017.

20. NHS England provided a response to the request on the 23 January 2017, in which it confirmed that it did hold the requested information but refused to provide the information. NHS England's response was provided 10 working days following receipt of the request.
21. The Commissioner is therefore satisfied that NHS England has complied with its obligations under section 10(1) of the FOIA.

Section 17 – refusal of request

22. Section 17(1) of the FOIA states that where a public authority refuses a request for information it must provide the applicant with a refusal notice explaining the exemption(s) relied upon within the time for compliance provided in section 1(1).
23. In NHS England's response to the request on the 23 January 2017, it stated to the complainant that it was withholding the requested information. It specified that it was relying on section 40(1) – the personal information exemption and explained the reason why it was relying on this exemption.
24. The Commissioner is therefore satisfied that NHS England has complied with its obligations under section 17(1) of the FOIA.

Section 40(1) – applicant's own personal data

25. Section 40(1) of the FOIA says that information that is the applicant's own personal data is exempt information.
26. Section 40(5)(a) of the FOIA excludes a public authority from complying with the duty to confirm or deny in relation to information which, if held, would be exempt information by virtue of section 40(1) of the FOIA.
27. It is important to note that sections 40(1) and 40(5)(a) of the FOIA are class based exemptions. This means there is no need to demonstrate that disclosure (or confirmation/denial) under the FOIA would breach an individual's rights under the DPA when engaging these exemptions.
28. The DPA defines personal data 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, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."

29. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
30. Having considered the request in this case, and the information provided by NHS England, the Commissioner is satisfied that the complainant is the data subject of all of the requested information. This is because the information he has requested relates to the basis of a decision NHS England made about a complaint he submitted to it, and a decision NHS England made to not accept his reason for not attending any of the medical practices offered to him. The information the complainant has requested is therefore linked to him and meets the criteria for personal data, set out in paragraphs 25 and 26, above.
31. In this case, the Commissioner is therefore satisfied that the requested information is the complainant's personal data. It follows that the Commissioner considers that the complainant is the data subject within the meaning of the exemption at section 40(1) of the FOIA.
32. In relation to such information, the provision of section 40(5)(a) means that NHS England was not required to comply with the duty to confirm or deny whether it held the information, as the duty to confirm or deny does not arise in relation to information which is (or, if it were held by NHS England, would be) exempt information by virtue of section 40(1) of the FOIA.
33. For the reasons set out above, the Commissioner is satisfied that under section 40(5)(a), NHS England was under no duty to confirm or deny whether it held the requested information.
34. How NHS England might approach this particular information under the DPA is not a matter that falls within the scope of this investigation, which concerns the FOIA only. However, the Commissioner notes that NHS England has advised the complainant of his rights under the DPA in its initial response to the request and in the outcome of the internal review.

Right of appeal

35. 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

36. 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.
37. 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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF