

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 September 2022

Public Authority: Department of Health and Social Care
Address: 39 Victoria Street
London
SW1H 0EU

Decision (including any steps ordered)

1. The complainant has requested information about the handling of patient data. The Department of Health and Social Care ("the DHSC") denied that it held the specific information requested.
2. The Commissioner's decision is that, on the balance of probabilities, the DHSC does not hold the requested information.
3. The Commissioner does not require further steps.

Request and response

4. On 28 October 2021, the complainant wrote to the DHSC and requested information in the following terms:

"When a doctor is working outside their NHS employment, providing patients' NHS records to any third party, how is the safety of this data and third party comprehension of the medical information monitored."
5. The DHSC responded on 19 November 2021. It denied holding any information, but did point the complainant towards guidance on patient data safety produced by NHS Digital.
6. The complainant sought an internal review on 9 December 2021, but did not set out why they were dissatisfied with the DHSC's response. Nor did they say why they believed that the DHSC held relevant information.

7. The DHSC completed its internal review on 11 January 2022. It upheld its original position.

Scope of the case

8. The complainant first contacted the Commissioner on 9 December 2022 to complain about the way their request for information had been handled. They explained the personal circumstances that had led them to seek this information, but did not explain why they believed that the information was held by the DHSC. An explanation was subsequently provided and this is dealt with below.
9. The Commissioner considers that the scope of his investigation is to determine whether the requested information is held by the DHSC.

Reasons for decision

10. Section 1(1) of the FOIA states 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.
11. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, he will consider any reason why it is inherently likely or unlikely that information is not held.
 12. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
 13. It is also not the Commissioner's role to identify which of a group of organisations is most likely to hold particular information – only whether

the particular public authority, to which the request has been made, does or does not hold the information that has been requested.

14. In the complainant's view, "someone" should be responsible for overseeing this particular policy area and, whilst they had approached both the DHSC, NHS Digital and the National Data Guardian, none of those organisations held information and all of them had indicated that one of the others might. The complainant pointed to the DHSC's functions (in particular its role in overseeing healthcare providers both inside and outside the NHS) and argued that the DHSC (being the most senior) was the most likely of the three to hold the information.
15. The Commissioner has considered the complainant's arguments carefully but, in his view, they do not provide compelling evidence that the DHSC holds the information in question.
16. The fact that Public Authority A may be theoretically more likely than Public Authority B to hold a particular piece of information does not make it more likely than not that Public Authority A holds that information (or that Public Authority B does not). Given the extremely complex network of healthcare providers and regulators the DHSC oversees, the Commissioner is in any case unconvinced that the DHSC is significantly more likely to hold the information than any other body.
17. The Commissioner recognises that the complainant has a personal issue and has had difficulty in identifying the correct body with whom to raise a grievance. The Commissioner is sympathetic to the complainant's situation, but the evidence provided is not so compelling that the DHSC holds the information – which is all the Commissioner is obliged to consider under FOIA.
18. The responses the complainant has received to date point towards the possible existence of a regulatory blind-spot. If that is the case, it would make it even less likely that the DHSC would hold the requested information.
19. Whilst the DHSC's responses could have provided a more detailed rationale as to why it did not hold the information, the Commissioner notes that it has stated categorically on two occasions that it does not hold the requested information. The complainant has not provided and nor has the Commissioner been otherwise made aware, of any evidence that contradicts the DHSC's stance.
20. The Commissioner therefore takes the view that, on the balance of probabilities, this information is not held by the DHSC.

Right of appeal

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF