

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 March 2023

Public Authority: NHS England
Address: PO Box 16738
Redditch
B97 9PT

Decision (including any steps ordered)

1. The complainant has requested the number of maternity incidents meeting the threshold for a HSIB (Healthcare Safety Investigation Branch) investigation. NHS England relied on section 40(2) (third party personal data) and section 41 (breach of confidence) to withhold some information where the number of individuals is equal to or fewer than five.
2. The Commissioner's decision is that NHS England is entitled to rely on section 40(2) and section 41 to withhold the redacted information. However, the Commissioner has recorded a procedural breach of section 10(1) (time for compliance) of FOIA.
3. The Commissioner does not require NHS England to take any steps as a result of this decision notice.

Request and response

4. On 16 July 2022, the complainant made the following request for information:

"Please treat this as a freedom of information request.

Please could you tell me how many maternity incidents there have been meeting the threshold for a HSIB investigation per hospital, per month (or per calendar year

if per month is not possible) since HSIB was established and to date, per each of the four criteria for a HSIB maternity investigation.

Please can you also tell me how many of these went on to be investigated.

I am happy to receive this information via email, perhaps in a spreadsheet."

5. NHS England responded on 26 August 2022 confirming that it held the requested information. It provided the information requested but redacted some information under section 40(2) where the number of incidents was equal to or fewer than 10.
6. On 29 August 2022, the complainant requested an internal review of NHS England's decision to withhold some of the requested information.
7. NHS England provided the outcome of its internal review on 14 September 2022, maintaining its original position.

Scope of the case

8. The complainant contacted the Commissioner on 23 September 2022 to complain about the way their request for information had been handled.
9. During the Commissioner's investigation, NHS England issued the complainant with a revised response on 30 January 2023. In the revised response, NHS England reduced the threshold for withholding information from 10 or less incidents to five, therefore disclosing some further information that had not been disclosed in its original response. It maintained that the information it continued to withhold was correctly withheld under section 40(2) of FOIA. It also considered that some of the withheld information should also be withheld under section 41(1) of FOIA.
10. The Commissioner considers the scope of his investigation is to consider whether NHS England can withhold the remaining redacted information under sections 40(2) and 41(1) of FOIA.

Reasons for decision

Section 40(2) – third party personal data

11. Section 40(2) of FOIA says that information is exempt information if it is the personal data of another individual and disclosure would contravene a data protection principle. “Personal data” means any information relating to an identified or identifiable living individual¹
12. In this case, the withheld information is numbers of maternity incidents at hospitals, which on the face of it would not be personal data unless it was possible to identify individuals from that information or link the information to an identified individual. Not every small number identifies an individual, nor is there a specific figure at which the information automatically becomes personal data. However, in general terms, the lower the number, the more likely it is that it will be possible to link the information to a particular individual and therefore that it will be personal data.
13. Whether individuals can be identified will depend on the particular facts, such as the size of the overall dataset, the number of data points that have been requested and the information already in the public domain that could potentially be cross-referenced with the disclosed information. It is not sufficient for there to be only a hypothetical risk of identification. If there is no realistic route to identification, the information is not personal data, regardless of its sensitivity.
14. When considering the possibility of identification, the Commissioner applies the “Motivated Intruder Test.” This test starts with a hypothesis that there exists a person who wishes to identify the individuals covered by the disputed information. The person is willing to devote a considerable amount of time and resources to the process of identification. They may have some inside knowledge (i.e., information not already in the public domain) but will not resort to illegality – they are determined but not reckless. The Commissioner looks to see how such a person would go about identifying the individuals involved.
15. In this case, the information held is broken down by gender, specific hospital, type of maternity incident and date. In addition, NHS England

¹ “Personal data” is defined under Section 3(2) of the Data Protection Act 2018

has responded to a previous request for information (from the same complainant as this complaint) disclosing information relating to the maternity incident data broken down by category.

16. Given the information that is already in the public domain, the granularity of the information that has been requested, and the low number of incidents that have occurred in the examples that have been redacted, the Commissioner is satisfied that it is highly likely that data subjects could be indirectly identified by a motivated intruder and that the information in question would reveal previously unknown information about those individuals.
17. In the circumstances of this case, the Commissioner is therefore satisfied that the risk of being able to identify an individual in cases where the number of incidents is five or lower is high enough that the withheld information should be treated as personal data. Furthermore, the withheld information can be categorised as special category personal data as it is data concerning health.
18. Special category data is particularly sensitive and therefore warrants special protection. It can only be processed (including disclosure in response to an information request) if one of the stringent conditions under Article 9 of the UK General Data Protection Regulation (UK GDPR) can be met.
19. In this case the relevant conditions (the data subject's explicit consent, or that the data has been manifestly made public by the data subject) has not been met. The Commissioner has seen no evidence or indication that the data subjects have consented to the disclosure of the information or that the information has been manifestly made public by the data subjects.
20. As none of the conditions required for processing special category data are satisfied, there is no legal basis for its disclosure. Processing this data would therefore contravene the data protection principle set out under Article 5(1)(a) of the UK GDPR². The information is therefore exempt under section 40(2) of FOIA.

Section 41 – information provided in confidence

21. Some of the withheld information relates to individuals who are deceased. This information is therefore not personal data and cannot be

² Article 5(1)(a) of the UK GDPR states that "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

withheld under section 40(2). However, information relating to deceased individuals can still be subject to a duty of confidence and could therefore be exempt from disclosure under section 41 of FOIA.

22. Information is exempt from disclosure under section 41 if it was obtained by the public authority from any other person and the disclosure of the information to the public would constitute a breach of confidence actionable by that or any other person.
23. The withheld information is information about maternity incidents relating to deceased individuals. The information was obtained by NHS England from provider organisations (i.e., NHS Foundation Trusts and NHS Trusts) and the families who provided consent for the investigations to be conducted.
24. The Commissioner is satisfied that the withheld information is therefore information obtained from another person and this element of the exemption is met.
25. When determining whether disclosure would constitute an actionable breach of confidence it is necessary to consider whether the information has the necessary quality of confidence and whether it was imparted in circumstances importing an obligation of confidence. Then, whether disclosure would be an unauthorised use of the information to the detriment of the confider.
26. The Commissioner is satisfied that withheld information is information that has the necessary quality of confidence. It is not trivial or otherwise accessible to the general public.
27. The withheld information would have been imparted in circumstances giving rise to an obligation of confidence. The Commissioner is satisfied that there is an implicit obligation of confidence where information is provided in the context of the relationship between patient and doctor and other medical professionals. Information of this nature is treated with the strictest of confidence.
28. In terms of disclosure causing detriment to the confider, the Commissioner is satisfied that where the information relates to a personal or private matter, it should be protected by the law of confidence, even if disclosure would not result in any tangible loss to the confider. He considers a loss of privacy is itself detrimental. It is therefore not necessary for there to be any tangible loss to the original confider for private healthcare information to be protected by the law of confidence.
29. It is also accepted that the duty of confidence continues to apply after the death of the person concerned. This is in accordance with the

Information Tribunal hearing of Pauline Bluck v Information Commissioner and Epsom & St Helier University Hospitals NHS Trust (EA/2006/0090).

30. Although section 41 is an absolute exemption (and there is therefore no requirement to conduct the public interest test), it is accepted that if there is an overriding public interest in disclosure it can be a defence to an action of breach of confidentiality.
31. The Commissioner notes that the complainant is of the view that there is a strong public interest in releasing the redacted figures to understand the scale of the problems in maternity care, but the Commissioner does not consider this would be enough to constitute a public interest defence. There is weighty public interest in maintaining the confidentiality of this type of information and protecting the integrity of the patient/carer and medical professional relationship. Furthermore, NHS England has disclosed (via FOIA requests) specific recommendations it has suggested to NHS Trusts and NHS Foundation Trusts, thus demonstrating its transparency in the work it does regarding maternity incidents.
32. For the above reasons, the Commissioner is satisfied that section 41 of FOIA applies.

Procedural matters

Section 10 – time for compliance

33. Section 10(1) of FOIA says that a public authority should comply with section 1(1) promptly and by no later than the twentieth working day following the date of receipt of a request for information.
34. The request was made on 16 July 2022. NHS England provided the response detailed in paragraph 5 to the complainant on 26 August 2022, and the response detailed in paragraph 9 was provided to the complainant on 30 January 2023. This is clearly outside the required 20 working days stipulated in section 10 of FOIA.
35. In this case, the total time taken by NHS England to provide the complainant with the information exceeded 20 working days. The Commissioner therefore considers NHS England to have breached section 10(1) of FOIA in this case.

Right of appeal

36. 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

37. 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.
38. 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
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