

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 13 July 2023

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

### Decision (including any steps ordered)

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1. The complainant has requested information from NHS England in relation to the Data Security & Protection toolkit submitted for 2021/2022. NHS England refused to provide the information, citing section 44(1)(a) of FOIA – prohibitions on disclosure.
2. The Commissioner's decision is that NHS England was entitled to rely on section 44(1)(a) of FOIA.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

### Request and response

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4. On 28 February 2023, the complainant wrote to NHS England and requested information in the following terms:

"Please can I request copies of information held relating to evidence for the Data Security & Protection toolkit submitted for 2021/2022 by Circle Health, NV30F, 1 Islington Street, Swindon, England, SN1 2DQ.

Specifically those around IG training and compliance. I.e. evidence items around sections 2, 3 and 5.

Additionally if it has already been submitted the information for 2022/2023 and 2023/2024."

5. NHS England responded on 27 March 2023. It refused to confirm or deny that the requested information was held.
6. The Commissioner accepted the complaint on 2 June 2023, at which point NHS England had still failed to provide an internal review response within 40 working days.
7. Following on from the Commissioner accepting the complaint, he had advised NHS England to revisit the request and provide explanations for the exemptions cited. Additionally, he explained that it may amend its decision. NHS England took the opportunity to revise its position.
8. In the revised position, NHS England explained that it was relying on section 44(1)(a) of FOIA.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 26 May 2023, to complain about the way their request for information had been handled.
10. The Commissioner considers that the scope of this complaint is to determine if NHS England is entitled to rely on section 44(1)(a) of FOIA to withhold the requested information.

### **Reasons for decision**

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#### **Section 44 – prohibitions on disclosure**

11. Section 44 of FOIA states that:

“(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.”

#### **Is disclosure of the requested information prohibited by or under any enactment**

12. Information is exempt under section 44(1)(a) if its disclosure would breach any of the following:
  - primary legislation (an Act of Parliament); or
  - secondary legislation (a Statutory Instrument).

13. The relevant legislation in this case is the Health and Social Care Act 2012.

14. Section 254 of the Health and Social Care Act 2012 states:

“(1) The Secretary of State may direct NHS England to establish and operate a system for the collection or analysis of information of a description specified in the direction.

(2) A direction may be given under subsection (1) by the Secretary of State only if –

- (a) The Secretary of State considers that the information which could be obtained by complying with the direction is information which it is necessary or expedient for the Secretary of State to have in relation to the exercise by the Secretary of State of the Secretary of State’s functions in connection with the provision of health services or of adult social care in England, or
- (b) The Secretary of State otherwise considers it to be in the interests of the health service in England or of the recipients or providers of adult social care in England for the direction to be given.”

15. Section 260 of the Health and Social Care Act states:

“(1) NHS England must publish all information which it obtains by complying with a direction under section 254 or a request under 255 unless the information falls within subsection (2); and, subject to subsection (3), if the information falls within that subsection, NHS England must not publish it.

(2) Information falls within this subsection if-

(d) the information is of a description specified in a direction given to NHS England by the Secretary of State.”

16. In relation to the Data Security and Protection Toolkit, the Secretary of State considers that the information is necessary or expedient to have in relation to his functions in connection with the provision of health services or of adult social care in England. This is set out within the Direction<sup>1</sup>.

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[Data+security+and+protection+toolkit+data+collections+service+Direction+2018+letter.pdf](#)

## **NHS England's position**

17. NHS England has explained that it does hold the information requested. It has also explained that the Data Security and Protection Toolkit is an online self-assessment tool that allows organisations to measure their performance against the National Data Guardian's 10 data security standards. NHS England further explained that all organisations that have access to NHS patient data and systems must use this toolkit to provide assurance that they are practising good data security and that personal information is handled correctly.
18. NHS England has advised both the complainant and the Commissioner that for the organisation named within the request, it has published on its website that it has gained 'Standards Met' status for 2021/22 and 2022/23<sup>2</sup>.
19. NHS England has explained that publication of any specific evidence obtained by complying with the section 254 Direction, is prohibited, as per the Direction given by the Secretary of State for Health. As such, it is withholding the requested information under section 44(1)(a) of FOIA.

## **The Commissioner's view**

20. The Commissioner considers that NHS England's internal review response adequately explains the interactions between the Health and Social Care Act 2012, the Direction and FOIA. It is clear that NHS England cannot, under FOIA, disclose any information that has been provided as evidence to comply with the 254 Direction.
21. The Commissioner notes that NHS England does provide updates on its website, advising if standards have been met by each of the organisations.
22. Whilst the Commissioner has not seen the withheld information, he is satisfied that it would likely contain personal information, which could lead to individuals being identified. The Commissioner also acknowledges why the complainant would want such information. However, he is satisfied by publishing the outcome of each of the organisations, it demonstrates that the organisation has complied with the requirements.
23. Section 44(1)(a) of FOIA is an absolute exemption so there is no requirement to conduct a public interest test as set out in section 2 of FOIA.

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<sup>2</sup> [Organisation Details \(dsptoolkit.nhs.uk\)](https://www.nhs.uk/its/standards/organisation-details)

24. In conclusion, the Commissioner's decision is that NHS England has correctly applied section 44(1)(a) to withhold all the requested information in this case.

## Right of appeal

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25. 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](mailto:grc@justice.gov.uk)

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

26. 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.
27. 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 .....**

**Michael Lea**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**