

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 November 2011

Public Authority: The Department of Health
Address: Richmond House
79 Whitehall
London
SW1A 2NS

Decision (including any steps ordered)

1. The complainant has requested from the Department of Health ('the DoH) information about the public authority's procedures around Summary Care Records. The DoH provided some information, applied section 21(1) to other information and explained that it did not hold any more information. The complainant referred this matter to the Information Commissioner ('the Commissioner').
2. During the course of the Commissioner's investigation, the DoH provided the complainant with some more information and explained that it now believed that the costs limit [section 12(1)] applied because it would require work beyond the costs limit to be certain to find all the information requested.
3. The complainant then asked the Commissioner to issue a Decision Notice on specific problems with the DoH's handling of his request. For those issues, the Commissioner has determined:
 1. The DoH's response was delayed and it breached section 17(5) in not telling the complainant that it was relying on section 12(1) in 20 working days;
 2. The DoH also breached sections 1(1)(a) and 10(1) in wrongly declaring that it did not hold further relevant recorded information when it did;
 3. The advice and assistance provided by the DoH was not reasonable and it breached section 16(1); and

4. The DoH wrongly argued that section 21(1) applied to the information behind links that didn't work and so also breached sections 1(1)(b) and 10(1).
4. He does not require any remedial steps to be taken because the DoH provided the readily available information on the Commissioner's instruction and the complainant has submitted a narrowed request to the DoH after discussing this matter with the Commissioner which would have constituted the advice and assistance that he would have ordered the DoH to provide.

Request and response

5. The complainant originally made a wider request for information and the procedural compliance with that request was considered in **FS50381511**.
6. He submitted a refined request on 7 March 2011 and asked for:
'all available information relating to what happens if I decided not to authorise changes/access/storage [in relation to the Summary Care Records]'
7. On 4 April 2011 the DoH issued its response. It explained that all the information it held had already been provided to the complainant or was on its website. It applied section 21(1). It also explained that in the event that the patient chose not to have a Summary Care Record, it would still endeavour to provide the best care possible.
8. On the same day the complainant asked for an internal review. He didn't state what he wasn't happy with.
9. After the Commissioner's intervention, the DoH communicated the results of its internal review on 28 July 2011. It explained that it held no further recorded information that was relevant to the request, although when an individual does opt out of the Summary Care Records process, they can opt back in at any time.

Scope of the case

10. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He originally had not had an internal review and the Commissioner ensured that he received one.

11. Once the internal review was complete, the complainant explained that he considered that there was information missing and that the DoH's response was incomplete. The Commissioner agreed to consider whether this was the case.
12. During his investigation, the DoH provided the complainant with further information and the complainant remained unhappy. For the reasons outlined in the reasons for decision section, the DoH confirmed that the only way it could be sure that it had no further relevant recorded information would be to undertake work beyond the cost limit and that it was therefore able to apply section 12(1).
13. On 27 October 2011 the complainant and the Commissioner discussed this case to determine what the complainant considered were the outstanding issues that would need to be addressed in a Decision Notice. On the following day the complainant agreed that the Commissioner would issue a Decision Notice focussing on the following four things:
 1. *the delays,*
 2. *the DoH's failure to tell him that it was relying on the costs limit*
 3. *its failure to provide reasonable advice and assistance; and*
 4. *its provision of bad links.*
14. The Commissioner has addressed these specific issues below.

Reasons for decision

Section 21(1)

15. Section 21(1) can be applied when all the relevant recorded information is reasonably accessible to the applicant. It is an absolute exemption and so has no public interest component.
16. The DoH applied section 21(1) to the information that was on its website about Summary Care Records and the information that it had provided to the complainant already.
17. The complainant stated that some of the links supplied did not work and argued that the information that was connected to those links was not reasonably accessible to him.
18. The Commissioner considers that section 21(1) can be applied to all the information that the DoH has applied it to, save the information that was connected to the broken links.

19. In relation to the broken links, the Commissioner ensured that the DoH (and for the later disclosure himself) provided working links to replace them and that they are now reasonably accessible to him and section 21(1) now applies.
20. Section 1(1)(b) requires that a public authority provides the complainant with the relevant recorded information that he was entitled to under the Act. The failure to provide the information behind the broken links was a breach of section 1(1)(b).
21. Section 10(1) also requires a public authority to comply with section 1(1)(b) in 20 working days. The DoH's failure to comply with 1(1)(b) in relation to the information behind the broken links was also a breach of section 10(1).

Section 1(1)(a)

22. During the course of the investigation, it became apparent that the DoH had a considerably narrower view about what had been requested than the Commissioner did. The Commissioner considers that the request '*provide all available information relating to what happens if I decided not to authorise changes/access/storage [in relation to the Summary Care Records]*' requires the DoH to find all relevant recorded information that it held about what happens to Summary Care Records in the event that an individual does not consent to changes/access/storage of them. It would therefore involve consideration of what would happen to the records in the event that there was notification from the individual at any time in their lifecycle.
23. The Commissioner considers that the DoH is obliged to consider the request that was made objectively and for it to answer the request completely. The DoH explained that it had originally taken a pragmatic view of the request and ensured that staff from the relevant departments provided information they believed would be of interest to the complainant. It ensured that numerous individuals from its policy department provided their input to enable the complainant to receive as much relevant information as possible. On the Commissioner's understanding of the request, the DoH was able to provide further relevant recorded information to the complainant and did so.
24. However, the DoH also explained that to be certain that it could find all the recorded information it held, it would be required to do more than 24 hours work doing only the relevant activities. It would therefore exceed the costs limit. It decided therefore to apply section 12(1) at this late stage.

25. Section 1(1)(a) requires that a public authority on receipt of a request for information must confirm or deny whether it holds relevant recorded information. The Commissioner considers that the DoH breached section 1(1)(a) because it wrongly denied that it held further information [outside the information that it had provided and that on its website] when this was not correct.
26. Section 10(1) requires that a public authority complies with section 1(1) in 20 working days. The DoH failed to comply with section 1(1)(a) in this time and therefore also breached section 10(1) again.

Section 17(5)

27. The complainant argued that the DoH relied on section 12(1) late and it therefore breached the Act.
28. The Commissioner agrees with the complainant that the DoH did not rely on section 12(1) until his involvement in the case. Section 17(5) requires a public authority when it is relying on section 12(1) to say so in 20 working days. The DoH's failure to do so was also a breach of section 17(5).

Section 16(1)

29. Section 16(1) imposes an obligation for a public authority to provide advice and assistance to a person making a request, so far as it would be reasonable to do so. Section 16(2) states that a public authority is to be taken to have complied with its section 16 duty in any particular case if it has conformed with the provisions in the Section 45 Code of Practice in relation to the provision of advice and assistance in that case.
30. Whenever the cost limit has been applied, the Commissioner must consider whether it would be possible for the DoH to provide advice and assistance to enable the complainant to obtain information without attracting the costs limit in accordance with paragraph 14 of the Code. In this case the Commissioner has considered whether it would have been reasonable for the DoH to have advised the complainant to reduce the scope of his request.
31. Firstly, it must be noted that the Commissioner considers that the DoH was not clear about its position in the refusal notice or its internal review and this prevented the complainant from being able to consider narrowing down his request.
32. The Commissioner considers that the DoH did not offer reasonable advice and assistance because it never offered the complainant the opportunity to narrow down his request further (before the

Commissioner's involvement). The failure to provide reasonable advice and assistance was a breach of section 16(1).

33. The DoH also held more publicly available material that was of the description that the complainant asked for that was easily identifiable and the Commissioner considers that this information should also have been offered as reasonable advice and assistance. This information was then provided to the complainant during the course of the Commissioner's investigation.
34. After discussing the case with the Commissioner, the complainant did make a narrowed request specifying the relevant recorded information that he was seeking. The Commissioner considers that this would have been the step he would have recommended the DOH to take to remedy the breach of section 16(1) in this case and as it has been done, he requires no remedial steps to be taken in this case.
35. While the Commissioner has found a considerable number of breaches of the Act, he does not consider that any remedial steps are possible in this case for the reasons outlined above.

Other matters

36. The Commissioner appreciates that this case has been characterised by confusion and he considers that the complainant could have helped himself by making it clear exactly what relevant recorded information he sought. While a complainant cannot be expected to know exactly what is held by a public authority in relation to any specific request, he does know what sort of information it is that he is interested in receiving. The Commissioner considers that the DoH could have reasonably have asked for the complainant to clarify what he wanted in accordance with section 1(3) of FOIA in this case. This would have helped it to have found the information that the complainant sought, some of which has now been provided.
37. Finally, the Commissioner also wants to note that he has some concerns regarding the DoH's handling of this case particularly in relation to its interpretation of the request, its engagement with the Commissioner and the effect this has had on the Commissioner's ability to investigate the complaint. He will be monitoring the DoH and looking for improvements in how it deals with other cases that are referred to him in the future.

Right of appeal

38. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

39. 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.
40. 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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