

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 07 October 2019

Public Authority: NHS Business Services Authority

Address: Stella House
Goldcrest Way
Newburn Riverside
Newcastle Upon Tyne
NE15 8NY

Decision (including any steps ordered)

1. The complainant has requested information about the dispensing of Stiripentol. The NHS Business Services Authority (the NHSBSA) refused to provide some of the requested information citing the exemptions under section 40(2) (third party personal data) and section 41(1) (information provided in confidence) of the FOIA as its basis for doing so.
2. The Commissioner's decision is that the NHSBSA has incorrectly applied section 40(2) and section 41(1) of FOIA to the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose columns B and C - the dispenser details where the total number of items fell below 5.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 16 January 2019 the complainant made the following request for information:

'Please can we have a re-run of request number 7568 (relating to the dispensing of Stiripentol (Diacomit) for the period February 2018 to the latest available.'

6. On 13 February 2019 the NHSBSA refused the data for the month of February 2018 as it was a repeated request and the information had already been provided. It provided the data from March to November 2018 but withheld the dispenser details where the total number of items fell below 5 as patients could be identified. It cited section 40(2) (Personal Information) of the FOIA.
7. On 13 February 2019, the complainant requested an internal review. He stated that he was confused as to why the information was withheld for the reason given as it had been previously provided.
8. On 12 March 2019 the NHSBSA provided the outcome of the internal review. It upheld the decision to refuse the dispenser data where the total number of items fell below 5 as patients could be identified. *'New information has come to light about the risks to patient identification due to the amount of patient prescribing information that is available now and will be made available in the future.'* It cited section 40(2) and section 41(1) (information provided in confidence) of the FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 25 March 2019 to complain about the way the request for information had been handled and after providing further information, the case was accepted on 24 April 2019.
10. The Commissioner considers the scope of this case to be to determine if the NHSBSA has correctly applied section 40(2) and/or section 41(1) of FOIA to the withheld information (the dispenser details where the total number of items fell below 5). The Commissioner will first consider section 40.

Reasons for decision

Section 40 Personal information

11. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
12. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation (GDPR) ('the DP principles').
13. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (DPA). If it is not personal data then section 40 of FOIA cannot apply.
14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

Is the information personal data?

15. Section 3(2) of the DPA defines personal data as:-

"any information relating to an identified or identifiable living individual".

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

¹ As amended by Schedule 19 Paragraph 58(3) of the Data Protection Act 2018

18. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
19. In this case, the NHSBSA has withheld the columns (B and C) for the dispenser code and name where less than 5 items of Stripentol (a medicine for Epilepsy) had been dispensed in the month.
20. The Commissioner's guidance on what is personal data² states that if information 'relates to' an 'identifiable individual' it is 'personal data' regulated by the DPA.
21. The information in this case doesn't directly identify individuals. However, just because the name of an individual is not known, it does not mean that an individual cannot be identified. The aforementioned guidance states the following:

'A question faced by many organisations, particularly those responding to Freedom of Information requests, is whether, in disclosing information that does not directly identify individuals, they are nevertheless disclosing personal data if there is a reasonable chance that those who may receive the data will be able to identify particular individuals.'

It also states:

'The starting point might be to look at what means are available to identify an individual and the extent to which such means are readily available. For example, if searching a public register or reverse directory would enable the individual to be identified from an address or telephone number, and this resource is likely to be used for this purpose, the address or telephone number data should be considered to be capable of identifying an individual.'

When considering identifiability it should be assumed that you are not looking just at the means reasonably likely to be used by the ordinary man in the street, but also the means that are likely to be used by a determined person with a particular reason to want to identify individuals. Examples would include investigative journalists, estranged partners, stalkers, or industrial spies."

²<https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf> & https://ico.org.uk/media/for-organisations/documents/1549/determining_what_is_personal_data_quick_reference_guide.pdf

22. The NHSBSA explained that the information is sourced from NHS patient prescription forms. It is the personal data of the patient detailed on the prescription form issued by the prescriber and dispensed by the dispenser. The dispenser codes can be used to identify the exact location of the dispenser as that information is in the public domain. (See the file edispensary at <https://digital.nhs.uk/services/organisation-data-service/data-downloads/gp-and-gp-practice-related-data>)
23. This can be linked to further prescription information in the public domain that shows where the medicines were prescribed (by GP practice): <https://digital.nhs.uk/data-and-information/areas-of-interest/prescribing/practice-level-prescribing-in-england-a-summary/practice-level-prescribing-data-more-information> and https://digital.nhs.uk/binaries/content/assets/legacy/excel/e/p/gp_prescribing_sample_data_file_presentation_level.csv
24. The NHSBSA also publishes prescription sourced data on its FOIA disclosure log. It believes that from that data and other data available the patients are likely to be identified.
25. The NHSBSA identified a new process that will result in the wider use of patient data sourced from prescription forms. On 13 June 2019 the Department of Health and Social Care directed NHS Digital to issue a Data Provision notice to the NHSBSA (under section 259 of the Health and Social Care Act 2012) to provide on a monthly basis all the patient identifiable prescription data derived from a prescription form. This would then be made available to organisations who apply to NHS Digital through their Data Access Request Service (DARS) process. (See <https://digital.nhs.uk/services/data-access-request-service-dars>) The Commissioner notes that the application process includes a payment and organisations/individuals will need to show that they meet strict data governance standards.
26. The Commissioner notes that this new process was not in place at the time of the FOIA request.
27. The NHSBSA also explained that currently there is considerable motivation to identify epileptic patients as demonstrated by the media and public interest in the new use of Cannabis based medicine for the treatment of epilepsy. The NHSBSA provided the Commissioner with a number of links to health and media websites on the cannabis treatment for Epilepsy. The NHSBSA has refused a number of FOIA requests for this information from media organisations as nationally the number of patients receiving this medication outside of hospitals is very low (1 or 2 a month in England) and could be identified by researching the news stories on this subject.
28. The NHSBSA stated that a motivated intruder could use:

- The NHS Digital published prescribing information to find out where epileptic medicine was prescribed AND
- This requested information and previously released FOIA requests to determine from which pharmacy the medication was dispensed.

'The lower the numbers of items shown in the information then the greater the likelihood that would allow the motivated intruder to then pin point the place that epileptic drugs were both prescribed and dispensed, making identification of a patient reasonably likely... Existence of other information mentioned above will provide other information to assist with patient identification through a mosaic effect both now and in the near future. This in turn increases the likelihood of patient identification.'

29. The Commissioner notes that these numbers and addresses relate to a number of identifiers (location and medical health) and that there is currently a strong motivation to identify patients prescribed with epileptic drugs. She accepts that the withheld data may link with other information or knowledge, such as information from the links above or from the media or social media.
30. However, although the withheld information clearly relates to prescription information, she is not convinced that the combined addresses of the prescriber and dispenser of epileptic medicine would lead to the identification of the patient collecting the prescription.
31. In conclusion, she is not satisfied that this information both relates to and identifies the patients. Therefore the information does not fall within the definition of 'personal data' in section 3(2) of the DPA and the NHSBSA was incorrect to cite section 40. The Commissioner has gone on to consider section 41.

Section 41 – information provided in confidence

32. Section 41(1) of the FOIA states that:

"Information is exempt information if –

- a) it was obtained by the public authority from any other person (including another public authority), and*
- b) the disclosure of the information to the public (otherwise that under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*

Was the information obtained from another person?

33. It is clear that the information as a whole was sourced from NHS patient prescription forms issued by the prescriber on behalf of a patient and the medicine was collected by the patient from a dispenser they had chosen. *'The dispenser provided the confidential patient data to the NHSBSA as part of their NHS Contract obligations detailed in NHS Pharmacy regulations.'*
34. The Commissioner is satisfied that the information was obtained from another person.

Would disclosure constitute an actionable breach of confidence?

35. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
- whether the information has the necessary quality of confidence;
 - whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.

Does the information have the necessary quality of confidence?

36. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
37. The NHSBSA stated that *'this is information concerning the health of the patient and how their condition can be managed with appropriate medication.'*
38. Having regard to the above, the Commissioner would accept that the information cannot be said to be publicly available and as such it cannot be considered to be otherwise accessible. The information as a whole cannot be said to be trivial as it constitutes sensitive medical information about a patient's treatment for epilepsy. However, the withheld information is a list of codes and names of the dispensers of the epileptic medicine where the total number of items is less than 5.
39. Therefore the Commissioner is not satisfied that the withheld information has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

40. The NHSBSA stated that a patient consults a medical professional about their health with the expectation that the information will be kept confidential. The resulting prescription for medicine is covered by that same expectation. The patient expectation is that the confidentiality will be maintained by the dispenser and anyone else processing that prescription or the information sourced from it. The NHSBSA only discloses patient identifiable data to those:

- directly involved in the patient's NHS care
- reviewing the patient's NHS care
- having a legal right to it
- where the patient consents to disclosure
- where there is a sufficiently strong public interest justifying the disclosure of confidential patient data e.g. patient safety concerns or vital interests

41. The Commissioner refers to the test set out in *Coco v AN Clark (Engineers) Ltd [1969] RPC 41*, specifically:

"...if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being provided to him in confidence, then this should suffice to impose upon him an equitable obligation of confidence".

42. The Commissioner considers that in the circumstances, nature of and way in which the prescription information was supplied to the NHSBSA there is both an implied and explicit obligation of confidence on the part of the NHSBSA that the prescription information as a whole retains a confidential quality.

43. However, the withheld information identifies the dispenser and not the patient.

44. Having viewed the withheld information, the Commissioner is clear that, in itself, the withheld information is a list of dispensers (by name and code) and is not the complete and personal information that was originally written on the prescription form (including name, address and age of the patient).

45. The Commissioner is therefore not convinced that the withheld information was imparted in circumstances importing an obligation of confidence.

Would disclosure be of detriment to the confider?

46. The NHSBSA stated that *'the consequence of disclosure would mean that an individual's medical condition could be inferred (either correctly or incorrectly) from the data and other data available to a motivated intruder. Aside from the expectation that medical data is confidential and therefore would not be made publically available, the release of the data could potentially lead to unfair discrimination for individuals (whether correctly identified or not). Any breakdown in trust between a patient and the NHS is going to have a detrimental impact on the patient's ability to receive effective treatment.*

Other impacts could be that a child or vulnerable adult are located by someone who means to harm them or narrow down the possibilities in locating them generally thereby increasing the risks of harm to them and those caring for them.'

47. The Commissioner accepts that if medical information was disclosed then there would be a detriment to the patient. However, as discussed above the withheld information consists of information concerning the addresses of the dispensers dispensing Stiripentol medication, which, even with information from other sources of the addresses of prescribers prescribing Stiripentol medication, it is difficult to see how the motivated intruder would locate the patient and provide detrimental impact in the way that the NHSBSA suggests.
48. In conclusion, the Commissioner has decided that the NHSBSA has failed to demonstrate that the exemption at section 41 is engaged.

Right of appeal

49. 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@justice.gov.uk

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

50. 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.

51. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF