

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 24 November 2011

**Public Authority:** NHS Litigation Authority  
**Address:** 2nd Floor  
151 Buckingham Palace Road  
London  
SW1W 9SZ

### Decision (including any steps ordered)

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1. The complainant has requested the names of the parties to each medical contract dispute resolution in 2010/11. The NHS Litigation Authority (the "NHSLA") refused to disclose the information relying on section 40(2). During the course of the Commissioner's investigation the NHSLA changed its policy regarding the publication of medical dispute decisions. It opted to publish the names of the parties to each dispute and redact personal sensitive information from the body of the text. Previously it had redacted the names of the parties to the dispute but retained the anonymised personal sensitive information in the body of the text. The NHSLA refused to apply this change retrospectively to previous decisions.
2. The Commissioner's decision is that the NHSLA was correct to refuse the request by relying on section 40(2).
3. The Commissioner requires no remedial steps to be taken in this case.

### Request and response

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4. On 19 March 2011 the complainant requested information from the NHSLA in the following terms:

*"Please provide, for each medical contract dispute resolution case in 2010/11 for which a decision has been published on your website [...]"*

*(1) the name and address of the GP Practice which was party to the dispute.*

*(2) the name of the Primary Care Trust which was party to the*

*dispute.*

*Please also provide, for each application for medical contract dispute resolution which has been received in 2010/11, but for which a decision has not yet been published on that webpage:*

*(3) the name and address of the GP Practice which is/was party to the dispute.*

*(4) the name of the Primary Care Trust which is/was party to the dispute.*

*(5) a brief summary of the nature of the dispute."*

5. On 20 March 2011 the complainant asked for the following information to be included in the request:

*"For each application for medical contract dispute resolution which has been received in 2010/11, but for which a decision has not yet been published:*

*(6) your reference number for the case."*

6. The NHSLA responded to the request on 06 April 2011:

- It withheld information concerning requests (1) and (3) on the basis of the exemptions contained in section 40(2)(a) of the Act.
- It disclosed the information it held in relation to request (2).
- It withheld the information it holds in relation to requests (4), (5) and (6) on the basis of the exemptions contained in section 22(1)(a).

7. The complainant contacted the NHSLA and requested an internal review to its responses to requests (1), and (3) to (6).

8. The NHSLA responded to this request on 28 April 2011. It upheld its decision to withhold the outstanding information for requests (1) and (3) under section 40(2)(a) and stated that disclosure would breach the first data protection principle.

9. In relation to requests (4) to (6) the NHSLA found it had incorrectly relied on the exemption at section 22(1)(a), and disclosed the information it held in relation to requests (4) and (6). However, in relation to request (5) it claimed the information was not held.

## Scope of the case

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10. On 16 May 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
11. During the course of the investigation the Commissioner clarified the scope of the request with the complainant. At item (5) – a request for summaries – the complainant said he was merely looking for a “brief indication of the subject area” relating to each dispute decision.
12. The NHSLA, upon clarification, said it did hold this information and released this information to the complainant.
13. During the course of the investigation the NHSLA, as alluded to earlier, also changed its policy regarding the publication of medical contract dispute decisions. The NHSLA refused to apply its policy change retrospectively to previous decisions.
14. Therefore, the scope of this case is to consider the NHSLA’s use of section 40(2) to withhold the outstanding information, namely, the names of the parties to the disputes in published decisions in 2010/11 reports.

## Reasons for decision

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15. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in sections 40(3) or 40(4) is satisfied.
16. In this case the relevant condition is contained in section 40(3)(a)(i), which applies where the disclosure of the information to any member of the public would contravene any of the data protection principles. This is an absolute exemption, and is therefore not subject to a public interest test.
17. The full text of section 40 can be found at <http://www.legislation.gov.uk/ukpga/2000/36/content>
18. In this case the NHSLA has sought to rely upon this exemption to withhold the outstanding withheld information, on the grounds that the disclosure of this information under the FOIA would be unfair and would therefore be in breach of the first principle of the Data Protection Act 1998 (the “DPA”).
19. In order to establish whether this exemption has been correctly applied the Commissioner has first considered whether the withheld information is the personal data of a third party.

20. Section 1 of the DPA defines personal data as data which relate to a living individual, who can be identified:
  - from that data, or
  - from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
21. In this case the outstanding information is the names of the doctors and GP practices involved in medical contract disputes with Primary Care Trusts. The names remain redacted in the published NHSLA dispute resolution decisions for 2010/11. The Commissioner is satisfied that the outstanding withheld information would by its very nature identify individuals and so is the personal data of third parties.
22. The Commissioner has gone on to consider whether the disclosure of the outstanding withheld information would be in breach of the first principle of the DPA.
23. The first principle requires that personal data is:
  - processed fairly and lawfully, and
  - that one of the conditions in schedule 2 is met.
24. The Commissioner has first considered whether the disclosure of the withheld information would be fair.
25. In considering whether disclosure of this information would be fair the Commissioner has taken the following factors into account:
  - whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned;
  - the individual's reasonable expectations of what would happen to their information; and
  - are the legitimate interests of the public sufficient to justify any negative impact to the rights and freedoms of the data subject.
26. In relation to sensitive personal data, the Commissioner's approach is that where information constitutes sensitive personal data disclosure of that information will in most circumstances be unfair. By its very nature, sensitive personal data has been deemed to be information that individuals regard as the most private information about themselves. Further, the Commissioner considers that disclosure of this type of information is likely to have a detrimental or distressing effect on the subjects of this information (i.e. the named individuals).

27. In relation to information that relates to non-sensitive personal data, whilst the Commissioner acknowledges that it does not fall under the categories of information discussed above, he notes that it still relates to matters of financial or employment dispute between contract holders and third parties. Given the nature of these disputes, the Commissioner considers that this information would still be of some sensitivity to the individuals concerned, and that publishing their names in association with the details of the disputes already published, may have a detrimental or distressing effect on those individuals.
28. The NHSLA confirmed that it does not expressly offer to keep the identity of those taking part in dispute resolution confidential. However, it described a longstanding practise of not publishing the names of applicants in these cases – be these the names of GPs or the names of their practice. This has given rise to an expectation on the part of those individuals, that their names will not be published. However, it has added that these individuals expect a detailed yet anonymised body of text regarding the dispute to be placed in the public domain.
29. The Commissioner also considers that an expectation of confidentiality would exist in light of the nature of dispute resolution services offered by the NHSLA. Dispute resolution is akin to arbitration. GPs would not expect their names in 2010/11 reports, alongside their personal and/or sensitive personal data contained in the body of the NHSLA decision, to be released.
30. Notwithstanding the third party's reasonable expectations, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
31. The Commissioner notes that in all cases of dispute resolution the information within the decisions could relate to a wide variety of issues about the GPs public and private life. However, the disputes in question do relate to NHS contracts and therefore ultimately to the spending of public money. Therefore there is a public interest in transparency and accountability, especially so in times of limited resources and funding issues within the NHS.
32. The Commissioner considers that there is a public interest in openness and accountability. In the circumstances of this case he considers that there is a public interest in ensuring that contractual agreements between the NHS and GP practices are sound. The complainant argued that as the role of the GP has shifted, in light of Government reforms, to one of more autonomy and greater decision making powers, so should the level of public scrutiny. However, the Commissioner notes that the level of detail provided in the dispute decisions already published by the NHSLA somewhat satisfies this public interest.

33. The NHSLA is now publishing the names of individuals involved in contract disputes – but the Commissioner notes that it is instead withholding details of the disputed contracts. He is satisfied that the revised publication policy cannot be applied retrospectively, as the information previously disclosed by the NHSLA, together with the information in question in this case, would directly identify doctors with detailed information on disputes, including in some instances information on the health or criminality of GPs.
34. Bearing these factors in mind, the Commissioner finds that it would be unfair to disclose the withheld information.
35. Therefore, after considering all the information in this case, the Commissioner finds that the disclosure of the withheld information in this case would breach the first data protection principle. Therefore the NHSLA dealt with the request in accordance with the requirements of the FOIA in that it correctly relied upon sections 40(2) and 40(3)(a)(i) to withhold this information.

## Right of appeal

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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: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

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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**Water Lane**  
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