

27 September 2017

Our ref: NIC-136626-R7V9M

Dear Lara Ten Caten,

Re: Information Request – Freedom of Information Act (FOIA) 2000

Following our initial response to your information request (our letter dated 19 September 2017), this is a supplementary response to your request dated 21 August 2017.

We first wish to apologise that we sent a draft response. We also should have made the application of exemptions to question 2 clear in our first response.

Under question 2 where we have claimed qualified exemptions and to consider the public interest test fully we need to extend the 20 working day response period. We now aim to provide you with a full response on or before 20th October 2017.

We have here provided further information under question 1 and question 3 that relate to the questions raised.

"I refer to the memorandum of understanding between NHS Digital, the Department for Health and the Home Office (the MOU), effective from 1 January 2017 and published here (<https://www.gov.uk/government/publications/information-requests-from-the-home-office-to-nhs-digital>).

"1. Please provide copies of any risk assessments and equality impact assessments that were carried out before NHS Digital entered into the MOU."

We do not hold risk assessments and equality impact assessments carried out before NHS Digital entered into the MOU.

The MOU formalises a service which has existed for some years, and predates the creation of the Health and Social Care Information Centre. Patient registration and demographic data has been provided from the NHS Central Register system (now superseded by the Personal Demographics Service) since the NHS Central Register was established to support the operations of the National Health Service in 1948.

NHS Digital's review of the National Back Office functions considered with great care the legitimacy and risks associated with its disclosures, alongside NHS Digital's statutory and legal obligations to protect the confidentiality, rights and interests of individuals; its obligations on matters of public interest; and enabling the legitimate functions of government.

This review is planned for future publication and for this reason we believe section 22 of the FOIA is engaged.

Section 22 is a qualified exemption and requires a public interest test where we must consider the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest considerations favouring disclosure

- Releasing all drafts of the review report would increase transparency into the workings of public authorities and government. The drafts of the review report would also make public authorities and government more accountable to the electorate.
- It can be argued that releasing all the drafts of the review report would increase the public's trust and increase their confidence in the perceived ability of public authorities to carry out their functions.
- We also recognise that there is a general public interest in the subject matter of this report.

Public interest considerations favouring withholding the information

- The public interest in permitting public authorities to publish information in a manner and form and at a time of their own choosing is important. It is part of the effective conduct of public affairs that the general publication of information is a conveniently planned and managed activity within the reasonable control of public authorities. Where they have taken the decision in principle to publish, public authorities do have a reasonable entitlement to make their own arrangements to do so.
- The review report is currently in a draft un-finalised state and is still subject to internal review and as such may require amendment. Premature publication, including of any drafts, would not allow the effective management of the information. If further amendments have to be made, there could be out of date versions in circulation that could lead to confusion. It is in the public interest that the assurance and review process is able to conclude before making information to the public to ensure confidence and accuracy in the information disclosed.
- As the subject matter is of public interest, we feel that it is important that the public can access the report simultaneously rather than piecemeal by disclosure to a small number of individuals under the FOIA. Therefore, the wider public interest is in the ability of the public to access this information by adhering to the publication schedule and to receive information that has been reviewed and finalised.
- Finally as the assurance and review process is currently ongoing, early release of the requested information could be misrepresentative of the report and could potentially impact upon policy and operational decisions.

On balance, we feel that it is reasonable to withhold the information from disclosure until the future publication date and that the public interest in favour of maintaining the exemption outweighs the public interest in disclosure.

"2. The board of NHS Digital was informed on 28 March 2017 by Sir Ian Andrews that "one key outcome of the review was the signing a tri-party memorandum of understanding (MOU) between the Department of Health, NHS Digital and the Home Office" (at paragraph 4.1(a)).

Please:

- a. Confirm who, and on the basis of what authority, approved the signing of the MOU by NHS Digital;*

- b. *Confirm whether the NHS Digital board considered the MOU before it was signed and provide copies of any minutes;*
- c. *Confirm whether any committee of the NHS Digital board considered the MOU before it was signed and provide copies of any minutes;*
- d. *Provide copies of any board papers, updates or other materials (including any correspondence between NHS Digital and the Home Office) that enabled the board, such committee, or any officer or employee to conclude that the terms of the MOU would be lawful and appropriately safeguard NHS patients' confidential data; and*
- e. *Provide a copy of the review mentioned by Sir Ian Andrews.*

This information pertains in part to legal advice received, and for this reason we believe section 42 of the FOIA is engaged.

This information pertains in part to information that would, or would be likely to, inhibit (i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation, and for this reason we also believe section 36 of the FOIA is engaged.

To the extent we do not believe sections 42 and 36 apply, we will redact the documents appropriately.

We have one note of clarification in relation to 2d – we have assumed by this question that you are asking for board papers and submission materials that were provided to the NHS Digital board to support the meetings relating to the tri-partite MOU. A review of all correspondence of all staff involved in the development of the MOU, and an assessment of each email regarding whether this was sent or cc'd to a board member directly or indirectly, and/or otherwise pertained to the board decision, would take us beyond the time available to respond.

“3. Please confirm whether there have been any previous data sharing agreements, memoranda of understanding or guidance on data sharing between NHS Digital / HSCIC and the Home Office. If so, please provide copies of any such agreements.”

We are not aware of any previous data sharing agreements, memoranda of understanding or guidance on data sharing between NHS Digital / HSCIC and the Home Office which relate to the National Back Office tracing service.

There is however an MOU dated 2015 that was signed prior to the NBO Tracing service MOU between the Department of Health, NHS Digital and the Home Office which relates to the Visitor & Migrant NHS Cost Recovery Programme. We believe this is unrelated to your query, but have referenced here with further detail below.

Introductory information regarding the Visitor & Migrant NHS Cost Recovery Programme is available here:

- <https://www.gov.uk/government/publications/recovering-costs-of-nhs-healthcare-from-visitors-and-migrants>
- See also the Health and Social Care Information Centre ([Immigration Health Charge](#)) Directions 2015.

In line with the Information Commissioner's directive on the disclosure of information under the Freedom of Information Act 2000 your request will form part of our disclosure log. Therefore, a version of our response which will protect your anonymity will be posted on the NHS Digital website.

I trust you are satisfied with our interim response to your request for information. We aim to provide you with a full response on or before 20th October 2017. However, if you are not satisfied, you may request a review from a suitably qualified member of staff not involved in the initial query, via the enquiries@nhsdigital.nhs.uk email address or by post at the above postal address.

Yours sincerely,

L Boden
Information Governance Advisor

Further information about your right to complain under the Freedom of Information Act is available from the Information Commissioner's Office, Wilmslow, Cheshire, and on The Information Commissioner's website www.ico.org.uk.

NHS Digital values customer feedback and would appreciate a moment of your time to respond to our Freedom of Information (FOI) Survey to let us know about your experience. Please access the survey through this link [here](#)