

Data Protection, Re-use of Public Sector Information Regulations, Environmental Information Regulations and Freedom of Information

Internal review procedure

Issue sheet

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Title	Data protection, re-use of public sector information regulations, environmental information regulations and freedom of information internal review procedure
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Revision details

Version	Date	Amended by	Approved by	Details of amendments
Initial release	30.05.2007	-	IGSG	-
a	28.02.2014	C Gooday	A&PF	Change of role to Head of Internal Governance, change of name for Ministry of Justice and reflect centralised process
b	24.03.2015	C Gooday	A&PF	Change to location of templates and High Court replaced with Upper Tribunal
c	21.03.2016	C Gooday	A&PF	Annual Review
c	8.06.2018	C Gooday	GDPR	Remove NHS Protect, add GDPR impact

1. The overarching principle governing the NHS Business Services Authority (NHSBSA) procedure is:

This internal review procedure should provide a fair and thorough review of handling issues and of decisions taken ... including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue. This procedure should be as clear and simple as possible. It should encourage a prompt determination of the review request.

(Extracted from the Code of Practice)

Only written requests (including emails) will initiate a review of the way a request for information, a re-use request or a data subject rights request was handled or a complaint about the NHSBSA's publication scheme. Verbal requests cannot be accepted.

The review must be handled by any of the Information Governance Manager, the Head of Information Governance or the Corporate Secretary (subsequently referred to in this procedure as the Reviewer). The person selected as the Reviewer must not have had any material dealings with the way the original request was handled. They must also have the following:

- A sufficient understanding of the NHSBSA, its work, its background or general history and the wider social context in which it operates. This will enable them to be able to assess those areas which may call for judgement of wider issues, such as public interest in keeping particular material secret or opening it to public scrutiny.
- Sufficient maturity and judgement to take a balanced, open-minded and thoughtful approach.
- Sufficient skills and / or appropriate support to ensure that the review is conducted methodically, in proper sequence and properly recorded and notified to the applicant.
- Sufficient independence of mind to be able to ensure that the right questions are asked about the cases allocated to them and an independent decision is reached.
- Sufficient understanding of the access and rights regimes to be able to consider whether the rules have been applied as they should.
- Sufficient time allocated in order to carry out the review.

2. On the day that the request is received, send an acknowledgement letter to the requester. Use *NHSBSAIGM003 - Letter Template 1 – Acknowledgement* which can be found at *S:\BSA\GMMng IG\Administering IG Section\Templates and Forms\IR Templates working*.

Please note: You only have 20 working days to complete the review.

3. The Reviewer needs to have access to the following:
- A copy of the entire correspondence with the applicant relevant to the original request and review request.
 - A copy of all the material extracted on the original search carried out to isolate the information requested and where appropriate a note of the methodology used in the original search.
 - A copy of the refusal response sent to the applicant.
 - The relevant legislation.
 - The relevant Codes of Practice.
 - Any of the guidance produced by the Information Commissioner, the Ministry of Justice, the Department for the Environment Food and Rural Affairs which relates to the decision; for example how particular exemptions are considered to apply.
 - A copy of any relevant case decisions - these might be cases which have been to the Commissioner or tribunal decisions.
 - A copy of any relevant advice (for example, legal advice) which has been taken into account.
 - A copy of any report or material which was compiled and used at the time of the original decision.
 - The name and contact details of the person who made the original decision (if not already obvious from the papers).
 - A copy of the basis of the calculations and any supporting materials (if the refusal was made because the cost of meeting the request would be above the appropriate limit).
 - A reference to any published materials which are being cited as the basis for a FOI section 21 application.

It is important that the Reviewer makes sure that the material is up-to-date.

Please note: Cases which have been decided by the Commissioner or tribunal are not binding legal precedents unless the Upper Tribunal has ruled on them. Even if there has been a previous similar case, there might be something different on the facts of this one or social policy may have moved in the area, or material may have been published or reached the public domain in other ways. Each request for review must be considered individually.

4. In carrying out a review of the original decision, it is important that full records are kept on the progress of the review and any outcomes that result from the review. This will assist in any further investigations by the Information Commissioner. Use *NHSBSAIGM003 - Template – Record of Actions which can be found at S:\BSA\IGMMng IG\Administering IG Section\Templates and Forms\IR Templates working*

The Reviewer may discuss the case with the original decision-maker as long as it is quite clear to both parties that the decision-maker is only acting as a 'witness'; that his / her role is to explain what he / she took into account and why he / she made the decision; and not to argue for it or try to influence the Reviewer. The discussions or meeting should be fairly formal and a record must be kept document the roles of the individuals and the subjects of discussion.

A checklist of useful points for the Reviewer is shown below:

- If you do not deal with reviews regularly, set aside some time to re-read the basic rules on the access and Data Subject rights.
- Check that you have the original request(s) and the date(s) on which the request(s) were made.
- Check that the response(s) sent dealt adequately with all the elements of the request.
- Where there has been continuing correspondence with the applicant or about the applicant's request, make sure that you have separated out material generated after the request was made. The applicant is only entitled to material which existed as at the time that the request was made.
- Check that you have all the relevant materials (see step 3).
- Once you are sure that you have all the materials needed, check the timescales which have been applied. If the request has not been dealt with within the required timescales, you should send an apology to the applicant even if you do not consider that any other action is required.
- Look at each 'set' or 'block' of information separately, bearing in mind that the NHSBSA is only allowed to withhold material that is exempt and should redact if possible. It can be useful to work on a matrix for every separate set of information.
- Check that the correct legislation has been applied to the request. Sometimes it is easy to miss the fact that there was personal data about an applicant in a set of papers and sometimes information should have been considered under the Environmental Information Regulations rather than the Freedom of Information Act.
- For requests for information, check that the duty to confirm or deny has been considered and applied in relation to every set of information.
- Check that all the relevant exemptions which may apply have been considered. There is no rule that only one or two exemptions can apply. In many cases the exemptions are overlapping and several may apply at the same time.
- Each potential exemption should be considered separately even if they are based on the same facts.
- Check whether third parties have been consulted and whether you have copies of all the relevant correspondence and papers. If you decide that further consultations are necessary remember to set timescales on everything, for example, telling consultees that they must respond within a set time frame if they want their views to be taken into account.

- For requests for information, deal with the public interest considerations in respect of each separate exemption. You may find it simpler when drafting the decision notice to deal with all the public interest issues together, but when reviewing them you should note them separately for each exemption.

FOI Section 36 exemption

This only applies where the qualified person (the Chief Executive) decides that, in his / her opinion, disclosure of the information would prejudice one of the interests listed in Section 36. The Reviewer is not a qualified person and therefore cannot substitute his / her view for the view which has been taken by that person. There is no case law on how an authority should conduct a review of the application of this exemption. In considering the application of the exemption, the Reviewer should apply the test that would be applied on a judicial review of a decision; that is, whether the decision was one which would have been made by a reasonable person faced with the facts.

The Reviewer should then make a recommendation to the qualified person. This may be that the decision should stand or that the qualified person should reconsider the application of the exemption. The exemption is subject to the public interest test and the public interest balance can be carried out in the usual way.

5. The applicant must be fully informed of the outcome of the internal review, using template *NHSBSAIGM003 - Letter Template 2 – Result*, which can be found at S:\BSA\IGM\Mng IG\Administering IG Section\Templates and Forms\IR Templates working.
6. After concluding the internal review, the Reviewer should discuss their conclusions with the Information Governance Manager/assistant concerned to ensure that any internal processes which may need to be altered are fully reviewed.