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PROCESS FOR RESPONDING TO PREVENT / EXTREMISM Freedom of Information Act REQUESTS

Introduction

1. This document provides guidance for responding to Freedom of Information Act 2000 (“FOIA”) requests which may be received by NHS Organisations where they relate to matters concerning Prevent and Extremism.
2. Prompt action is required to ensure legal deadlines are not breached and that requests are completed & issued to ensure compliance with the FOIA (reply within 20 working days of receipt in the relevant Public Authority).
3. The DH request that Prevent FOI submissions are shared with the DH where possible prior to submission. Where this is not possible a copy is shared from the submitting agency.
4. Annex A provides some suggested text for the FOIA exemptions, which are most commonly engaged in Prevent and Channel related to FOI requests, and the latest Home Office (HO) advice.

Background

5. Given the sensitive nature of responding to counter terrorism enquires, all FOIA requests are in the spotlight of public interest. To support health agencies the DH request that all FOI submissions are supported with a review from the DH. It is expected that public interest will continue following the Prevent and Channel Duties (“Prevent” and “Channel”) becoming statutory duties from 1 July 2015, when the Counter Terrorism and Security Act 2015 came into force, and the publication of the Counter Extremism strategy in October 2015.
6. Recent publication of Channel statistics in the media has highlighted the need for high level agreement on what can safely be released into the public domain.
7. Whilst all health organisations must decide what information is or is not to be released, you should consider the following sections of the Freedom of Information Act (FOIA):- Section 24(1) – National Security; and Section 31(1)(a) - the prevention or detection of crime. Annex A attached provides information on the exemptions that could be used and the HO advice that may be used and adapted in relation to what impact the release of the information would be likely to have, and what the specific arguments are.

Process – NHS England FOI Request

8. On receipt of an FOIA request, that could be regarded as falling within the Prevent or Channel categories, the NHS England Prevent strategic lead should be notified and s/he should inform the DH Prevent/Extremism policy team.

9. DH Prevent/Extremism policy team will inform the HO FOI team that a relevant request has been received.
10. Each organisation must decide what exemptions apply, though the HO FOI team can assist as necessary by advising which further exemptions under the law may be applied.
11. DH Prevent/Extremism policy team to inform the NHS England Prevent strategic lead of the HO advice.

NHS England Prevent strategic lead will liaise with the health organisation to support drafting the response.

Process – DH FOI Request

1. On receipt of an FOIA request by the DH FOI team regarding Prevent and Extremism, the DH Prevent/Extremism policy team should be informed/commissioned to provide a contribution.
2. HO FOI team to confirm that relevant exemptions under the FOIA should be applied.
3. DH Prevent/Extremism policy team to draft reply in consultation with the DH FOI team to ensure the correct exemptions are used and the appeals process is included and for clearance at Branch Head /SCS level.
4. DH Prevent/Extremism policy team to send cleared SCS reply to DH FOI team

NHS England advice

Section 24(1) FOIA – National Security

Section 24(1) provides that information is exempt from disclosure if it is required for the purpose of safeguarding national security. The use of section 24(1) signifies that the information being withheld does not relate to a security body.

National security is not limited to the security of the UK, its military defence and its systems of government. The term is taken to mean that it includes co-operation with other states in combating international terrorism and guarding against actions targeted at other states which may impact on the UK and its citizens. Although there has to be a real possibility that the disclosure would undermine national security, the impact does not need to be direct or immediate.

Guidance issued by the Information Commissioner's Office (ICO) provides that the term "required for the purposes of safeguarding national security" means that the withholding of the information must be reasonably necessary for those purposes. Case law has established that this means there must be a clear basis for arguing that disclosure would have an adverse effect on national security before the exemption is engaged. The ICO guidance further provides that, while the impact on our partners may be relevant to the question of whether the exemption is engaged, a public authority can only look at the importance to the UK in withholding the information (although any impact on co-operation with the UK by other countries may be relevant).

The protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence. Action against a foreign state may be capable indirectly of affecting the security of the UK and reciprocal co-operation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom's national security.

Section 24 can be engaged to prevent a disclosure that would have adverse consequences for a partner even if disclosure would not result in a direct or immediate risk of attack on the UK or its citizens. This also includes protecting potential targets even if there is no evidence that an attack is imminent.

Section 24 is a qualified exemption and, as such, you are required to assess the public interest in withholding this information against that of its release. We understand that the Prevent and Channel programme is high profile and there is a public interest in understanding how it is operated and to be assured that the programme is achieving its objectives.

However, we also take into account the fact that the specific information being requested in this instance may undermine the UK's national security. Disclosure may open up/reveal detailed information about individuals who have received or are receiving support through Prevent and/or Channel on a regional level. Furthermore, there is a serious terrorist threat to the United Kingdom and disclosing this information into the public domain could put national security at risk by jeopardising or negating the Government's efforts to prevent acts of terrorism and terrorist related crime.

Therefore, if following a full review of the specific information requested you consider that releasing this information would not be in the public interest; as this could possibly put those organisations and individuals at risk. Release of the information requested may divulge information which could be used against the counter-terrorism strategies in the UK, therefore possibly breaching national security: Any sensitive information can be declined under the principles set out in s24 of the FOIA.

Section 31(1)(a) FOIA - the prevention or detection of crime

Section 31(1)(a) covers all aspects of the prevention and detection of crime. It covers information held by public authorities without any specific law enforcement responsibilities, such as NHS England, and can be used as an exemption to withhold the disclosure of copies of information the authority had provided to a law enforcement agency as part of an investigation. It could also be used to withhold information that would make anyone, including the public authority itself, more vulnerable to crime for example, by disclosing its own security procedures, such as alarm codes.

NHS England may consider that section 31(1)(a) applies to the information that has been requested, in that releasing specific information would increase fears around the identification of individuals and partners involved in the process – irrespective of whether identification actually takes place.

Section 31(1)(a) is a qualified exemption and as such, organisations are required to consider the public interest in withholding this information. There is a very strong public interest in protecting the ability of public authorities to enforce the law. Furthermore, as outlined above, consideration must be given as to whether disclosing this information would be likely to reduce the effectiveness of Prevent and Channel and as such result in an increased risk of crime and increased risk to the public.

The public interest favouring disclosure assumes that referral locations are in fact in the areas of greatest risk and threat. This assumption may lead to unwarranted wider assumptions being made about the level of radicalisation and terrorist activity taking place in a particular location. This could raise alarm and lead to an increased risk of community tensions and public order issues. In the event that the criteria specified in the section are satisfied, NHS England could decline to disclose.

Section 41 FOIA – information provided in confidence

Section 41 of the FOIA provides for the protection of information provided in confidence. Section 41 prohibits a public body from disclosing information obtained from any other person if the disclosure of this information to the public would constitute a breach of confidence actionable by that or any other person.

When deciding whether the exemption under s41 applies to a request for information, consideration must be given as to whether organisations, partner agencies, and community members have been given reassurances that information submitted will be treated in the strictest of confidence thus forming a duty and obligation of confidence, and capable of success in any breach of confidence action. Releasing specific information could increase fears around the identification of individuals and partners involved in the process – irrespective of whether identification actually takes place. In the event that disclosure of this information could erode trust in the Prevent and Channel process from partners and

communities it would be possible to consider that section 41 applies to the information.

Whilst the section 41 exemption is absolute, there is still a need to consider the public interest as a defence lies to an action for breach of confidence on grounds of significant public interest. Some of the issues that are relevant to the public interest are referred to above. Also, where section 41 is sought to be relied upon in respect of non-personal data, there is a need to show that some risk of detriment would be caused by disclosure and that risk of detriment must be evidence based and not based on speculation.

HO advice

First consideration - is information held that would answer all of the questions, if not, specify which questions no information is held for. Sections 24, 31 and 41 of the FOIA are engaged (40 could also be engaged when numbers are low).

The information in monthly reports submitted by regional co-ordinators would reveal a month by month picture over the period requested of the number of referrals by region. The reports do not just provide a number of referrals, other information is included. This information, put together with other information already in the public domain would allow a detailed picture of Prevent and Channel engagement to be drawn across the country. This reveals a pattern across the country which may then be used to undermine the Prevent and Channel programmes.

While it can be argued that it is in the public interest to understand what action the government is taking across the UK to protect communities revealing such a detailed breakdown would undermine the national security of the UK. There are a number of concerns:

- It would undermine our ability to identify and protect those vulnerable people
- It also reveals information about communities which can be misinterpreted and this can be presented in a way which is not conducive to serving the public interest in fostering safe and cohesive communities

Section 24

Revealing the detailed information requested may increase interest in areas which could ultimately lead to the identity of individuals, which may assist others intending to counter such work. Identification of those working locally to deliver the aims and objectives of the Channel and Prevent programme could enable those wishing to counter such work to disrupt delivery of ongoing work. The Government's counter terrorism strategy could be undermined and this would lead to the public being at increased risk from terrorism.

This information may also lead to detection of a range of criminal activity, not just direct threats to National Security. Disclosure of the information would enable those intent on engaging in terrorist activities to determine on a National level which areas within the UK may be a vulnerable area to target.

Section 31

Disclosure of the information would hinder the prevention and detection of crime. A fear of crime would be realised because if the terrorists identified more vulnerable areas, they would target and exploit these areas and the public would be in fear of more criminal/terrorist activity occurring. There would be an impact on police and other official resources because if the measures used to detect terrorist activities and safeguard children are disclosed, and some areas are deemed to be a 'softer' target, those intent on criminal activity may move to these areas in order to continue their

operations and target vulnerable individuals. There could be local implications with wrongful identification of children and families which in turn could lead to further offences being committed in the community.

Section 41

An actionable breach of confidence may not arise if an individual cannot be identified from the information that has been disclosed. However, if those engaging are told that their information, either their own personal data or the personal data of third parties that they are providing, is given in absolute confidence and will not be disclosed, then we must be sure that there is no risk that anyone could be identified from the information that is released. This is probably the case with top level national statistics on referrals but we believe there is a risk in disclosure at regional level.

Every attempt should be made to abide by the required 20 days, where this is not possible, due to the nature of the request or the significant impact to National security, NHS England, HO and DH should be sighted to the delay and the reasons, the DH can offer support to the agency in reviewing the new timescale confirmed and the relevant information to share. The requestor should be informed of the delay and where possible given a revised deadline for receipt of a response.

Further consideration

Section 38 may be engaged if there is any risk that health officials involved could be identified in response to the question about the number of Prevent referrals where NHS have provided an input and that the disclosure of information about such individuals would or would be likely to endanger their safety.

Section 38(1)(b) FOIA (Health and Safety)

The exemption:

s.38 (Health and Safety)

(1) Information is exempt if its disclosure under the Act would, or would be likely to

(b) Endanger the safety of any individual

Considerations in favour of disclosing the information

As above.

Considerations in favour of withholding the information

Disclosure of information could lead to organisations and individuals who are engaged in the delivery of Prevent and Channel being identified. This work is undertaken to protect individuals who are vulnerable to recruitment, or have already been recruited by extremists and it is often sensitive. Those engaged may be concerned about any risk that their engagement would become public knowledge.

Disclosing this information could put individuals at considerable risk of serious injury or harm from those who support terrorism and seek to damage the United Kingdom's interests and harm individuals within its communities. We must take care not to release information that may jeopardise the health & safety of any individual.

We have determined that the safety of any individual is of paramount importance and that in all circumstances of the case it is our opinion that the public interest clearly favours the non-disclosure of information covered by section 38(1)(b).

Section 17 (Declining disclosure Notification)

It is always necessary to notify applicants when a request is going to be declined. It is also generally necessary to confirm or deny the existence of information, and where information is being withheld, state which exemption(s) has been relied upon and why. It is recommended that when drafting declining disclosure notices, careful consideration should be given to the provisions contained within section 17 and if the authority does not wish to confirm or deny that information is held that must be communicated to the requestor.