

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 19 March 2013

**Public Authority:** NHS Bristol  
**Address:** South Plaza  
Marlborough Street  
Bristol  
BS1 3NX

#### **Decision (including any steps ordered)**

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1. The complainant made a request to NHS Bristol for information regarding a report into allegations made concerning breaches of the Code of Conduct for NHS Managers. NHS Bristol refused the request under the exemptions in section 31(1)(g) (law enforcement), section 40(2) (personal information) and section 41 (information provided in confidence). The Commissioner has investigated the complaint and found that the information is exempt from disclosure under section 40(2) as it is the personal data of a third party.
2. The Commissioner requires no steps to be taken.

#### **Request and response**

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3. On 17 September 2012, the complainant wrote to NHS Bristol and requested the report on the investigation into the alleged breaches of the code of conduct for NHS managers.
4. NHS Bristol responded on 2 October 2012. It stated that disclosing the report to the complainant would breach the Data Protection Act 1998 (DPA). Following this response the complainant requested an internal review on 22 October stating that the public interest in disclosure overrode any other considerations in this case.
5. Following an internal review NHS Bristol wrote to the complainant on 20 November 2012. It stated that it upheld its original decision to withhold

the report but clarified it was being withheld on the basis of section 31(1)(g) leading to 31(2)(b), section 41 and section 40(2).

## **Scope of the case**

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6. The complainant contacted the Commissioner on 27 November 2012 to complain about the way her request for information had been handled. In particular the complainant stated that there was a strong public interest in being able to see the report to understand the decision that no breach of the Code of Conduct has occurred.
7. The Commissioner considers the scope of his investigation to be to determine if any of the exemptions cited by NHS Bristol provide a valid basis for refusing the request.

## **Reasons for decision**

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8. The Commissioner has recently also considered a request for a copy of this report in another case<sup>1</sup> in which he considered the majority of the report to be the complainant's personal data and, where it was the personal data of third parties, he accepted the information was exempt under section 40(2).
9. The Commissioner has therefore taken the same approach when considering this request and throughout this Notice has been mindful of his earlier decision.

### *Section 40 – Personal information*

10. In its submission to the Commissioner NHS Bristol concentrated on the fact that the report constituted the personal data of the individuals who were the subject of the complaint and therefore had applied the section 40(2) exemption which applies where the information is the personal data of someone other than the applicant. The Commissioner also, in line with his earlier decision, considers much of the information in the report to also be the personal data of the individual who made the allegations referred to in the report.

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<sup>1</sup> ICO decision notice FS50474256

11. He has had to carefully consider whether any of the information will also be the complainant's own personal data, particularly any sections of the report the complainant contributed to. This is particularly important as where requested information constitutes the personal data of more than one individual, then both individuals are data subjects for the purposes of section 40. In situations such as this, where a request is made by one of the data subjects the Commissioner's approach is to consider the information under the section 40(1) exemption. This provides that information is exempt if it is the personal data of the applicant.
12. When the Commissioner made his earlier decision on whether the report should be disclosed he acknowledged that the report was likely to be, in its entirety, the personal data of the requester as it outlined her allegations and the evidence provided to support them and the report detailed the history of her interactions with NHS Bristol. As such the Commissioner found that the information was the requester's personal data as she was clearly identifiable from the report.
13. At the same time the Commissioner did recognise that sections of the report involved interviews with witnesses and if this information could be isolated from the rest of the report so that it was not the personal data of the applicant then section 40(2) would apply. In this case, having had sight of the report the Commissioner does not consider that it would be possible to isolate the sections of the report which may be the personal data of the applicant as they are linked with other information in the report. Often there are references to witnesses and comments are grouped together and referred to collectively. For this reason the Commissioner does not consider the information is sufficient to identify individual witnesses and is therefore not the personal data of the applicant.
14. The Commissioner has therefore considered the majority of the report on the basis of section 40(2) as the whole report is the personal data of third parties (the person who made the allegations and the staff who are referenced in the report and are the subject of the allegations).
15. Section 40(2) provides that information is exempt if it is the personal data of someone other than the applicant and disclosure would meet one of two conditions. In this case it is the first condition which is relevant which is that disclosure would contravene one of the data protection principles.
16. In order for the exemption to be engaged the Commissioner has first considered whether the information is personal data. NHS Bristol consider the report to be covered by the section 40(2) exemption on the basis that the report constitutes the personal data of the individuals who were the subject of the allegations and the investigation that was

undertaken in response. NHS Bristol has also stated that the investigation involved interviews with several members of staff and lay representatives who gave evidence in relation to the allegations. As well as this the Commissioner has previously determined the report is also the personal data of the person who made the allegations.

17. The Commissioner is clear that the information clearly relates to those individuals involved in the investigation, either in the context of making the allegations or defending them. The individuals can be identified from that information and the Commissioner is therefore satisfied it is their personal data.
18. Having satisfied himself that the information is personal data the Commissioner has gone on to consider whether disclosure would contravene any of the data protection principles listed in schedule 1 of the DPA 1998. In this case the Trust argues that disclosure would contravene the first principle which requires that data be processed fairly and lawfully.
19. When considering whether a disclosure under FOIA would be fair the Commissioner's approach is to reach a balanced view after considering the following factors:
  - Does the information relate to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life)?
  - Has the individual named been asked whether they are willing to consent to the disclosure of their personal data?
  - The possible consequences of disclosure.
  - The reasonable expectations of the individual(s) about what will happen to their personal data.
20. As regards the expectations of the individuals concerned, the Trust has said that the information in the report was provided confidentially on the understanding that it would be used for the purposes of the investigation but would not be made public. The investigation was carried out in line with NHS Bristol's "Guidance on Investigating Complaints and Allegations Related to Employment" which makes it clear that this is confidential. The framework agreement for this specific investigation also makes it clear that it is confidential. The Commissioner also understands that the individuals who are the subject of the investigation have not consented to disclosure and have made it clear that they do not want the report to be made public. In light of this the Commissioner is of the view that the individuals named in the report would have a high expectation that their personal data would not be disclosed.

21. The Commissioner has taken into account the fact that the report relates to allegations about the activities of the employees during their working lives, as opposed to their personal lives. However the Commissioner has also been made aware that individuals named in the report have felt harassed and that their private lives have been impinged upon due to their involvement in the work to which the allegations relates. The Commissioner considers that disclosure would be likely to be distressing to these individuals and he is also mindful of the fact that the allegations considered in the report were ultimately found to be unproven.
22. However, the Commissioner's approach to cases like this is that, notwithstanding the data subjects' reasonable expectations or any damage or distress caused to him or her by disclosure, it may still be fair to disclose requested information if it can be argued that there is a more compelling public interest in releasing the information. Therefore the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in disclosure.
23. The Commissioner would stress that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protecting an individual's personal data the Commissioner's 'default position' is in favour of protecting the privacy of the individual. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure; that is to say any public interest in disclosure must outweigh the public interest in protecting the rights and freedoms of the data subject.
24. In this case the complainant has argued that there is a public interest in a code of conduct investigation being seen to be reasonable, fair and impartial and that this overrides any privacy concerns. Whilst the Commissioner would accept that there is a public interest in knowing that complaints made to NHS bodies are dealt with properly, he notes that the conclusions of the investigations have been made public. The Commissioner's view is that given the strong expectations of privacy and the likely alarm and distress that disclosure would cause, the disclosure of the requested information would be disproportionate. Consequently, the Commissioner is satisfied that the section 40(2) exemption is engaged in this instance.

## Right of appeal

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25. 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)

26. 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.
27. 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, Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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