

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 December 2016

**Public Authority:** Derbyshire Healthcare NHS Foundation Trust  
**Address:** Trust Headquarters  
Kingsway Hospital  
Kingsway  
Derby  
DE22 3LZ

### Decision (including any steps ordered)

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1. The complainant made a freedom of information request to Derbyshire Healthcare NHS Foundation Trust ("the Trust") for reports into events that led to the Employment Tribunal of a former employee of the Trust. The Trust refused to disclose some of the requested information under the exemptions in section 31(1)(g) (law enforcement), 40(2) (personal information), section 41 (information provided in confidence), section 42 (legal professional privilege).
2. The Commissioner has found that the requested information is exempt from disclosure under section 40(2) and she requires no steps to be taken.

### Request and response

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3. On 7 April 2016 the complainant made a request for information to the Trust for a copy of the report into events surrounding the Employment Tribunal of a former employee of the Council. The request read as follows:

*"I request to see the report undertaken by [a named individual], [a named individual] and [a named individual] into the Trust, and the events surrounding the [a named individual] employment tribunal, in full. I request that this includes the individual reports into individuals.*

*How much did it cost the trust to commission the report?"*

4. The Trust responded to the request on 6 May when it explained that the independent report had been published and so this element of the request was exempt under the section 21 exemption (information accessible by other means). It also said that the reports into individuals (the Individual reports) were being withheld under the exemptions in section 40(2) (personal information), section 41 (information provided in confidence) and section 42 (legal professional privilege).
5. The Trust disclosed the information in the final element of the request which asked for the cost of the reports.
6. On 23 June the complainant asked the Trust to carry out an internal review of its handling of the request and it presented its findings on 16 August 2016. The Trust upheld the decision to withhold the "Individual reports" under the exemptions in section 40(2) and section 41. It also said that section 31(1)(g) (law enforcement) was being applied in addition to the other exemptions. Section 42 was not mentioned although the Trust later confirmed to the Commissioner that it was still relying on this exemption in respect of certain sections of the reports but that it was satisfied that the reports were exempt in their entirety under the other exemptions it had cited.

## **Scope of the case**

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7. Following completion of the internal review the complainant contacted the Commissioner to complain about the Trust's decision to refuse his request. The Commissioner agreed with the complainant that the scope of her investigation would be to consider whether the Trust was correct to withhold the individual reports under any of the section 40(2), section 41, section 42 or section 31 exemptions.

## Reasons for decision

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### Section 40(2) – personal information

8. The withheld information in this case comprises a number of reports into the conduct of officers of the Trust in relation to events surrounding the dismissal of a former employee of the Trust and issues raised in a subsequent Employment Tribunal. The Commissioner has first considered whether the section 40(2) exemption applies to this information.
9. So far as is relevant in this case, section 40(2) provides that information is exempt if it is the personal data of someone other than the applicant and disclosure would contravene one of the data protection principles.
10. In deciding whether section 40 is engaged the first thing to consider is whether the requested information is personal data. Personal data is defined in the Data Protection Act 1998 as:

*“personal data” means data which relate to a living individual who can be identified—*

*(a) from those data, or*

*(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

*and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;*

11. The Trust explained that the reports requested by the complainant were commissioned to consider the actions of the Trust's officers and whether action should be taken in relation to their conduct. Therefore, it said that each report constitutes the personal data of the individual who is the subject of that report but that they also contain the personal data of other individuals who were part of the events being investigated.
12. The Trust referred to the Commissioner's guidance on “What is personal data a quick reference guide” which sets out the following factors which might indicate that information is personal data.
  - ‘relates to’ the data subject;
  - Is ‘obviously about’ the data subject;
  - Is ‘linked to’ the data subject;

- Is used to inform or influence actions or decisions affecting the data subject;
  - Focuses upon the data subject as its central theme;
  - Has the potential to impact upon the data subject, whether in a personal, family, business or professional capacity.
13. The Commissioner would agree that the withheld information meets each of these criteria. Clearly information about an investigation into an employee's conduct would identify that individual and is linked to them in a significant way. Therefore, the Commissioner is satisfied that all of the information amounts to personal data.
14. The next thing to consider is whether disclosure would contravene any of the data protection principles. In this case the Trust has said that disclosure would contravene the first principle which requires that personal data be processed fairly and lawfully and in particular, that it shall not be processed unless one of the conditions in schedule 2 of the DPA is satisfied. The Commissioner's approach when considering the first principle is to start by looking at whether the disclosure would be fair. Only if the Commissioner finds that disclosure would be fair will she go on to look at lawfulness or whether a Schedule 2 condition can be satisfied.
15. In assessing whether disclosure would be unfair, and thus constitute a breach of the first data protection principle, the ICO takes into account a number of factors, including the following:
- 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)?
  - What reasonable expectations does the individual have about what will happen to their personal data?
  - What are the consequences of disclosure?
  - Has the individual named been asked whether they are willing to consent to the disclosure of their personal data?
  - Are there any legitimate interests in disclosure which would outweigh the rights and freedoms of the data subject?
16. As regards the expectations of the individuals the Trust said that it had confirmed with the data subjects that they understood that the information which they shared with the investigation panel would be kept confidential as would the report and its conclusions. They have also confirmed that they do not consent to the reports being disclosed and would be distressed if they were made publicly available.

17. The Trust referred to the findings of the First Tier Tribunal in *Waugh v Information Commissioner and Doncaster College EA/2008/0038* where it found that:

*"...there is a recognised expectation that the internal disciplinary matters of an individual will be private. Even among senior members of staff there will be a high expectation of privacy between an employee and his employer in respect of disciplinary matters..."*

18. The Trust also said that in its view it was clear that the data subjects would be distressed if the reports were disclosed. In addition, it suggested that the individuals concerned would not have been willing to contribute to the investigation to the same extent, if at all, if they had known that their comments would be made public.
19. The Commissioner has reviewed the withheld information and considered the Trust's comments. Whilst she notes that the information relates to the individuals' professional rather than private lives she accepts that given the sensitivity of the information there would be a reasonable expectation that it would not be disclosed and furthermore, disclosure would likely be distressing to the individuals concerned. The Commissioner takes the view that information relating to an internal investigation or disciplinary hearing will carry a strong expectation of privacy. Employees, including senior employees, expect that details of their employment are treated confidentially by their employer, particularly information about their conduct and/or performance. The Commissioner is also mindful that the employment tribunal and the issues it raised have been covered in the media both locally and nationally and disclosure would be likely to lead to unwanted press attention. Therefore, the Commissioner finds that in all the circumstances, disclosure of the information would be unfair.
20. However, notwithstanding individuals' expectations of privacy or any harm that could be caused, there may be occasions when it is still fair to disclose information if there is a public interest in doing so or if the legitimate interests of the applicant outweigh the legitimate interests in protecting the rights and freedom of the data subject. In this case the complainant had sought to argue that there was a public interest in greater transparency and made the following points which are relevant to section 40(2):
- The complainant has argued that the reports cost more than £170,000 of taxpayers' money and that they should be released considering the cost and who paid for it.

- The main report into the actions of the Trust, rather than specific individuals, has been released and includes criticism of the Trust but also goes into detail about the how it feels it has handled the situation following the issues raised by the employment tribunal. The complainant has said that he believes it is only right that the public are given a full and clear picture of what happened, including the individual reports.
  - The complainant argues that the public should have trust in its local NHS body. In order for that to happen, it should be open, transparent and honest about its leadership team. He argues that the public has a right to know what a report, which was funded by the taxpayer, says about highly paid executives involved in a situation which he says has cost the taxpayer more than £1.4 million.
  - The complainant referred to the Nolan principles, the seven principles of public life. In particular the principles of Accountability; that holders of public office are accountable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this and Openness; holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing.
21. The Commissioner has considered the complainant's arguments and accepts that there is a public interest in disclosure insofar as this would promote greater transparency and accountability. Disclosure would provide a clearer picture of the Trust's officers' involvement in the dismissal of the former member of staff and the failings highlighted at the subsequent employment tribunal.
22. However, the Commissioner is also aware that a great deal of information has already been published about the concerns that were raised about the governance of the Trust in the employment tribunal. The Commissioner has already referred to the Independent Report which the Trust undertook to consider the issues raised. In addition, the Trust commissioned Deloitte, under the guidance of Monitor (now NHS Improvement), to prepare a report regarding the Trust's leadership and governance arrangements. The Care Quality Commission (CQC) also produced a report regarding the issues, with particular focus upon the governance concerns.
23. All three of the reports have been published and are publicly available. The Commissioner also understands that both the Independent Report and the (withheld) individual reports were subject to early scrutiny by

the relevant regulators (the CQC and Monitor (now NHS Improvement)) who found that no further action was required in relation to the data subjects in the individual reports. In the Commissioner's view this goes a long way to satisfy the public interest in greater transparency and accountability. Whilst she accepts that disclosure would provide a more complete picture this does weigh strongly in favour of withholding the information. The Commissioner also finds that since the concerns raised by the employment tribunal have been so thoroughly and independently examined this provides reassurance that the Trust had the appropriate procedures in place and was operating effectively.

24. In conclusion, the Commissioner would accept that there is some public interest in disclosure but this would be disproportionate and outweighed by the legitimate interest in protecting the rights and freedoms of the data subjects. Therefore, the Commissioner has found that disclosure would contravene the first data protection principle and that consequently the section 40(2) exemption is engaged.
25. The Commissioner has found that all of the withheld information is exempt on the basis of section 40(2) and so has not gone on to consider whether any of the other exemptions relied on by the Trust might also apply.

## Right of appeal

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26. 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: 0870 739 5836

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

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

27. 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.
28. 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** .....

**Paul Warbrick**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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