

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

### **Decision notice**

**Date:** 18 December 2017

**Public Authority:** North West Anglia NHS Foundation Trust  
(formerly Peterborough & Stamford NHS Trust)

**Address:** Peterborough City Hospital  
Bretton Gate  
Bretton  
Peterborough  
Cambs, PE3 9GZ

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

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1. The complainant has requested information relating to a serious incident investigation.
2. The Commissioner's decision is that North West Anglia NHS Foundation Trust (formerly Peterborough & Stamford NHS Trust) (the trust) has correctly applied section 40(2) personal data to part of the withheld information.
3. The Commissioner also finds that the trust has correctly applied section 42(1) (legal professional privilege) to the majority of the remaining withheld information.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
  - Disclose the information listed in the confidential annex schedule which was withheld under section 42
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

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6. On 9 August 2016, the complainant wrote to the trust and requested information in the following terms:
  - a) A full copy of [redacted] personnel file
  - b) All records of discussion between [redacted], [redacted], [redacted] and Mr [redacted] regarding the SI investigation and Report.
  - c) All records of communication Dr [redacted] has had with regard to the SI investigation and Report with anyone else
  - d) All records of communication [redacted] has had with others with regard to her investigations relating to [redacted] (MHPS investigation as well as investigation into [redacted] complaint of harassment etc)"
7. On 8 September 2016 the trust responded. It confirmed that the information requested at part a) had been provided previously. It further confirmed it held the information requested save for some of the information requested at part (d), which the Trust has requested from [redacted] in order to respond.
8. It provided some of the information requested at parts b) and c) but refused to provide the remainder. It cited section 42 and section 40 as its basis for doing so.
9. Following an internal review the trust wrote to the complainant on 17 February 2017 and maintained its original response. It stated that section 40(2) applied to a small number of documents in relation to part b) of the request; it held no further information in relation to part c) of the request and that section 42 applied to information withheld in relation to part d) of the request. However the trust also supplied some further information.

## **Scope of the case**

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10. The complainant contacted the Commissioner on 22 September 2017 to complain about the way this request for information had been handled.
11. The Commissioner considers the scope of this case to be to determine if the trust has correctly applied sections 40(2) and 42 to the withheld information.
12. As part of its submission to the Commissioner, the trust provided 11 'bundles' of information.

## Reasons for decision

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### Section 40(2) – third party personal data

13. This exemption provides that any third party personal data is exempt from disclosure, if that disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act 1998 (DPA).

#### Part b) of the request

*All records of discussion between [redacted], [redacted], [redacted] and Mr [redacted] regarding the SI investigation and Report.*

14. In its response to the Commissioner the trust stated:

*"Contrary to the information given in our letter of 17 February 2017, only one document within the scope of the request was withheld from production on section 40(2) grounds. Further, that document was not responsive to part (b) of the request, but was instead relevant to part (d). No documents responsive to part (b) were withheld has confirmed that all the information it held with regard to this part of the request has been provided to the complainant."*

15. The Commissioner has therefore not considered this part of the request any further.

#### Part d) of the request

*All records of communication [redacted] has had with others with regard to her investigations relating to [redacted] (MHPS investigation as well as investigation into [redacted] complaint of harassment etc)*

16. The trust stated that there was one email withheld in response to this part of the request which it considered was exempt by virtue of section 40(2) (third party personal data), referred to as *Category d – withheld personal data*
17. It explained that the document in question contains personal data of a consultant against whom various allegations had been made. Due to the structure and content of the email, it is not possible to redact the personal data.

### Is the withheld information personal data?

18. In order to rely on the exemption provided by section 40(2), the requested information must constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

*"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'.*

19. The information requested in this case is an email from a consultant. In the Commissioner's view it is clear that the withheld information 'relates' to a living individual, who is the focus of the request and it is therefore their 'personal data'.

### **Would disclosure breach the Data Protection Principles?**

20. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle, which is the most relevant, in this case, states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness.
21. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual, the potential consequences of disclosure and whether there is a legitimate public interest in the disclosure of the information in question.

#### *Reasonable expectations*

22. The trust argued that it would be unfair to the consultant if the email were to be disclosed. The email was created after the conclusion of the investigations and pertains to the impact of the allegations on the consultant. It is not a public document. While the information is not "sensitive personal data" within the statutory definition, it is clearly of a sensitive nature and related to allegations which could have had serious disciplinary consequences for the consultant.
23. The trust considered that the consultant would rightly expect his email to be held and treated in confidence. In addition, it considered that there is no legitimate interest in public disclosure of the email. As such, neither condition 1 nor condition 6 of Schedule 2 to the Data Protection Act 1998 is engaged.

### *Consequences of disclosure*

24. Disclosure of the information is unlikely to be fair if it would have unjustified adverse effects on the person concerned. Although employees may generally regard the disclosure of personal information about them as an intrusion into their privacy, this may often not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life.
25. The Commissioner acknowledges that the consultant would not have expected this information to be put into the public domain and that is likely to cause significant distress.

### **Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure**

26. The Commissioner accepts the legitimate interests in disclosure include the general public interest in transparency of public bodies, and in particular the expenditure of public money and performance of public bodies, (including in relation to alleged mismanagement by senior staff). An informed and involved public helps to promote good decision making by public bodies and ensures trust and confidence in the governance and processes within those bodies.
27. However, given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) has been cited 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 which would make it fair to do so.
28. The Commissioner acknowledges the reason why the complainant has requested this information. However, she is not convinced that its disclosure is of sufficient wider public interest to warrant overriding the rights and expectations of privacy of the individuals to whom that information relates.

### **Conclusion**

29. In view of the above, the Commissioner has concluded that to disclose the withheld information would be unfair and in breach of the first principle of the DPA. The Commissioner therefore finds that trust has correctly applied section 40(2) of the FOIA to the withheld information by virtue of section 40(3)(a)(i).

## **Section 42 – legal professional privilege**

30. In its submission to the Commissioner the trust stated that it had further reviewed the information withheld on the grounds of legal professional privilege (LPP) and intended to disclose a number of documents in full to the complainant. The trust confirmed to the Commissioner that it has provided the complainant with the information in the bundles labelled as Non-privileged materials part 1 and 2.
31. It also confirmed that it had provided copies of all the other information it held with redactions made to the information it considered was exempt by virtue of section 42. The Commissioner has therefore focussed her review on the information the trust has redacted from the documents provided to the complainant.
32. Section 42 of FOIA states that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.
33. In broad terms, legal professional privilege protects the confidentiality of communications between a client and their legal adviser. This allows the client to set out the issues on which they need advice as fully as possible and the legal adviser to provide full and frank advice which may, on occasions, include the weaknesses or criticism of their client's position.
34. For the information to be capable of attracting legal professional privilege the information must form part of a communication either from the client to their legal adviser, or the legal adviser to the client. In this case the information consists of communications between the trust and external solicitors which were engaged in relation to various matters, including the SI investigation and the consequent investigations into [redacted] probity and allegations against others.
35. There are two types of legal professional privilege. Litigation privilege will apply where litigation is in prospect or contemplated. Legal advice privilege will apply where no litigation is in prospect or contemplated.
36. The trust has not referred to any specific type of privilege when making its submission to the Commissioner. There is no actual litigation ongoing or in prospect that the Commissioner is aware of. In these circumstances the Commissioner considers the information could only attract advice privilege.
37. In order to attract legal professional privilege the communication must have been made for the dominant purpose of seeking or providing legal advice. The term 'dominant' is taken to mean the 'main' purpose for which the information was created as opposed to the sole purpose.

38. The Commissioner has reviewed the withheld redacted information and from the contents it is clear that its purpose was to provide the trust with legal advice on its handling of the case relating to the SI and subsequent matters.
39. In light of the above the Commissioner finds that the redacted withheld information does attract legal professional privilege and therefore the exemption provided by section 42 is engaged.
40. The Commissioner notes that there are a number of email chains where only part of the chain relates to LPP i.e. it is not communication made for the dominant purpose of seeking or providing legal advice. These emails are predominately communications between trust staff and although relate to the SI and subsequent issues, do not seek or contain legal advice. Therefore section 42(1) cannot apply. Details of this information can be found in the confidential annex provided to the trust. Since the trust has not sought to rely on any other exemptions the Commissioner requires this information to be disclosed to the complainant.
41. For the remainder of this decision notice, the Commissioner has referred to 'relevant' information to identify the information that falls under section 42(1).

### **Public interest test**

42. Section 42 is subject to the public interest test as set out in section 2 of the FOIA. This means that although the exemption is engaged the information can only be withheld if in all the circumstances of the case the public interest in favour of maintaining the exemption outweighs the public interest in disclosure.
43. There is a weighty public interest in preserving the principle that a client can consult with their legal adviser in a full and frank manner. This is necessary so that they can lay out all the issues relevant to the matter they require advice on and so that the lawyer can respond in full to those enquiries. This may include explaining any weaknesses in, or criticism of their client's position. Without being able to have such frank exchanges it would not be possible for clients to obtain the best legal advice possible and so defend their legal rights, or ensure they are acting in compliance with the law. This is why legal professional privilege is considered to be a cornerstone of the English legal system.
44. The Commissioner recognises there is an argument that additional weight should be given to protecting the confidentiality of advice where such advice is sought to ensure important functions, carried out to protect the public, are being performed correctly.

45. With regard to the relevant withheld information there is a strong weight built in favour of maintaining section 42 of the FOIA (*Bellamy v ICO (No 1)* [EA/2005/0023]), and this would require a significant public interest in the disclosure of the information in order to override that privilege. There must be some clear, compelling and specific public interest justification for disclosure which must outweigh the strong public interest in protecting communications which are intended to be confidential.
46. The Commissioner considers that there is a very strong public interest in the trust being able to obtain full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions without fear that this legal advice may be disclosed into the public domain. The Commissioner considers that disclosure may have a negative impact upon the trust's willingness to seek appropriate advice upon the quality of decisions made by the trust which would not be in the public interest.
47. On balance the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption. She therefore finds that the trust has correctly applied section 42 to the relevant withheld information.



## Right of appeal

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48. 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)

49. 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.

50. 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**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**