

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 12 July 2049

**Public Authority:** Betsi Cadwaladr University Health Board

**Address:** [bcu.foi@wales.nhs.uk](mailto:bcu.foi@wales.nhs.uk)

### Decision (including any steps ordered)

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1. The complainant has requested various email correspondence of five named individuals in respect of his late mother and his complaint to Betsi Cadwaladr University Health Board. The Health Board provided some information but refused other elements citing section 42(1) of the FOIA on the basis that it was protected by Legal Professional Privilege (LPP). The Commissioner's decision is that Betsi Cadwaladr University Health Board has complied with its obligations under section 1(1). However, the information withheld under section 42(1) constitutes the personal information of the complainant and is therefore exempt under section 40(1).
2. However, in light of the fact that no exemptions are actually being applied to some elements of the information held, the Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information categorised as enclosures 11, 12 and 13.
3. 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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4. On 13 May 2018, the complainant wrote to the Health Board and requested the following information in respect of his late mother:

*"...can you please forward myself ...copies of all correspondence from the Board and its members relating to [named individual] and my case."*

5. On 12 June 2018, the complainant sent a further email to the Health Board repeating the request and stating that it was now 4 weeks since his original request.
6. The complainant sent a further reminder on 1 August 2018 stating that it had now been 11 weeks since his original request.
7. The Health Board acknowledged the request on 3 August 2018 apologising for its failure to progress the request and stating that that his request would not be progressed at pace.
8. On 9 August 2018, the Health Board sought clarification regarding whether the request related to all Board members or whether there was specific Health Board individuals.
9. On the same date the complainant confirmed that he was seeking all correspondence relating to his mother's case generated and received by employees of the Health Board and its Board members. However, he added that he needed the following information more urgently:
  - *"Any emails to/from [named individual A] re my Mum and family 21 since 1 January 2018*
  - *Any emails to or from [named individual B] re my Mum or family 21 since 1 Jan 2018*
  - *Any emails to or from [named individual C] re my Mum or family 21 since January 2018."*
10. The following day during a telephone conversation with the Health Board, the complainant added two more names to the list and it was agreed that the Health Board could focus on just the emails of the specific individuals and if that met his needs, he would not need the full correspondence requested.
11. On 29 August 2018, the complainant queried the continued delay with the response.
12. The Health Board responded on 31 August 2018. It provided copies of some emails, and informed the complainant that some information will be shared with him as part of the final investigation report once completed. It further informed the complainant that it was withholding some information under section 42(1) of the Freedom of Information Act 2000 ('The FOIA') on the basis of Legal Professional Privilege (LPP).

13. The complainant expressed dissatisfaction with this response on 1 and 4 September 2018 on the following grounds:
- Batches 3,4 and 5 are duplicates and most of the other batches were copies of email strings to which he was already privy. There were no emails between Directors, nor Directors and third parties.
  - The public interest favours disclosure of information withheld on the basis of section 42.
  - The delay in providing a response.
14. Following an internal review the Health Board wrote to the complainant on 7 September 2018. It stated that all emails that he was entitled to under the FOIA as per the complainant's request, were provided to him and upheld its reliance on section 42(1) FOIA.

### **Scope of the case**

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15. The complainant contacted the Commissioner on 4 September 2018 to complain about the way his request for information had been handled. He was not satisfied with the Health Board's reliance on section 42(1) stating that this information relates to his late Mother's case as one of 80 cases in the Ockenden review into the Tawel Fan ward of the Hergest Unit in North Wales for the Elderly Mentally Infirm (EMI) and as such, considers the balance of public interest is weighted in favour of disclosure.
16. The complainant is also concerned that not all of the information falling within the scope of his request has been identified/provided and considers that there are emails missing which do not constitute legal advice.
17. The complainant is also not satisfied that the Health Board has not considered his original request, having opted to refine it in August 2018. The Commissioner would point out that the focus of this notice is solely in relation to the refined request and not any previous or subsequent requests.
18. On a number of occasions throughout the Commissioner's investigation, the complainant has raised concerns regarding an internal email he has received from the Health Board which he considers proof that an individual within the Health Board considered his appeal to the Commissioner as correct ideologically as opposed to procedurally. This has been discussed in more detail in the 'Other matters' section of this notice in paragraph 42 to 44 of this notice.

19. The Complainant has also raised a number of concerns outside of the remit of the Commissioner and whilst she acknowledges the very distressing circumstances surrounding the request and subsequent complaint, she cannot comment on matters outside of her remit. She also notes that this matter has been on-going for a number of years and that an Inquiry into the Tawel Fan ward and Mental Health care across North Wales was announced in December 2018 which she anticipates would be a more appropriate avenue for addressing these concerns.
20. The scope of the Commissioner's investigation therefore, is to consider whether the Health Board has complied with its obligations under section 1(1) of the FOIA, the Health Board's reliance on section 42(1), whether the withheld information constitutes the personal data of the complainant (section 40(1)) and its procedural handling of this request for information.

## **Reasons for decision**

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### **Section 1 – General right of access to information held**

21. Under section 1(1) of the FOIA, in response to a request for information a public authority is only required to provide recorded information it holds and is not therefore required to create new information in order to respond to a request.
22. In her consideration of this case, the Commissioner is mindful of the former Information Tribunal's ruling in EA/2006/0072 (Bromley) that there can seldom be absolute certainty that additional information relevant to the request does not remain undiscovered somewhere within the public authority's records. When considering whether a public authority does hold any additional information therefore, the normal standard of proof to apply is the civil standard of the balance of probabilities.
23. The Commissioner's judgement in such cases is based on the complainant's arguments and the public authority's submissions and where relevant, details of any searches undertaken. The Commissioner expects the public authority to conduct a reasonable and proportionate search in all cases.
24. In this particular case the scope of the Commissioner's investigation is the refined request of 9 and 10 August 2018 and she notes that it is for emails to and from five named individuals in relation to the complainant's late mother and family 21 (the identifier used to describe the family group).

25. The complainant does not accept that no relevant emails were exchanged between third parties and Directors, nor between Directors themselves.
26. The Commissioner notes that in its internal review, the Health Board informed the complainant that all emails found by the search were assessed to ensure they were appropriate for disclosure under the FOI and confirmed:

*“My investigation has concluded that all emails that you are entitled to under the Freedom of Information Act as per your request have been provided to you.”*

27. The complainant was further informed that the search was carried out by the Information Governance Manager (IGM) who submitted a request directly to its Information Communication & Technology (ICT) Department who ran the search on the mailboxes specified and using the key words provided in paragraph 26 of this notice. The IGM reviewed the information generated by the search to ensure they related to the request and assessed whether any exemptions under the FOIA may apply.
28. The Health Board has informed the Commissioner that it does not consider that there are any further emails besides the ones provided to the complainant and those withheld under section 42.
29. The Commissioner has considered the details of the search conducted by the Health Board and considers that it was reasonable and proportionate based on the refined request. She has therefore concluded that the Health Board has complied with its obligations under section 1 of the FOIA.

## **Section 42 – Legal professional privilege**

30. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege.
31. The Commissioner notes that whilst it appeared that the withheld information consisted of Enclosures 10 -13, the Health Board has subsequently confirmed that it is only withholding Enclosure 10 on the basis of section 42 of the FOIA. Having had sight of the withheld information, the Commissioner considers that it constitutes the personal information of the complainant, and as such should be considered not under section 42 but section 40(1) of the FOIA.
32. In respect of enclosures 11 to 13 the Health Board has subsequently confirmed that it is not relying on section 42(1) in respect of these, therefore it will need to disclose them to the complaint.

## **Section 40(1) – personal data of which the applicant is the data subject**

33. Section 40(1) of the FOIA states that:

*"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."*

34. Section 3(2) of the DPA 2018 defines personal data as:-

*"any information relating to an identified or identifiable living individual"*.

35. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

36. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

37. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

38. In this particular case, the withheld information is an email chain to and from one of the named individuals in the request with the complainant directly identified in its content. The Commissioner is therefore satisfied that the information constitutes the complainant's own personal data.

39. Section 40(1) is an absolute exemption and there is no requirement for the Commissioner to consider the balance of public interest.

## **Other matters**

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### **Procedural handling of the request**

40. The Commissioner notes that whilst the Health Board's original response fell within the timescales (20 working days) stipulated under section 10 of the FOIA, and its internal review was within the Commissioner's guidelines in respect of timescales for responding, that this request was submitted as a refinement to a request originally sent to the Health Board on 13 May 2018, again on 12 June 2018, to which he had not received a response.

41. The Commissioner would point out that had the complainant not refined his request and the original was the subject of this notice, she would be recording a breach of both section 10 and section 17 of the FOIA. The Commissioner makes a note of all procedural matters which come to her attention during the course of an investigation, and should a trend of non-compliance become evident may consider taking enforcement action against the public authority in this regard.

**Betsi Cadwaladr University Health Board internal email**

42. The complainant has voiced concern on a number of occasions to the Commissioner regarding an internal email from the Health Board which states:

*"I've got a call in with the ICO to discuss the situation because as far as I am aware the individual has quite rightly complained to them following due process and so for us to now engage with him directly could impact on the investigation."*

43. The complainant considers that this is proof that the author believes he was justified in appealing the Health Board's decision to the ICO on the basis that it says quite *"rightly"* as opposed to *"correctly"*.
44. The Commissioner has explained to the complainant that she cannot comment definitively on what is written as only the author would know exactly what was meant. However, she considers that it is likely that as the complainant had recently exhausted the Health Board's internal complaints process that it was merely expressing the view that he was following procedure since his next step if he remained dissatisfied was to appeal to the ICO. The Commissioner's views in relation to this have not changed.

## Right of appeal

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45. 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)

46. 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.
47. 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 .....**

**Catherine Dickenson  
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