

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 July 2019

**Public Authority:** Airedale NHS Foundation Trust

**Address:** Airedale General Hospital

Skipton Road

Steeton

Keighley

West Yorkshire

BD20 6TD

### Decision (including any steps ordered)

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1. The complainant has requested information relating to numbers of Downs Syndrome births. The Airedale NHS Foundation Trust (the Trust) refused to provide the requested information citing the exemption under section 40(2) of the FOIA (third party personal data) as its basis for doing so.
2. The Commissioner's decision is that the Trust has correctly applied section 40(2) of FOIA to the withheld information. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

### Request and response

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3. On 12 February 2019 the complainant made the following request for information:

*'Please could you tell me the total number of live births, the number of prenatal diagnoses of Down Syndrome and the number of live births with Down syndrome in your Trust in the past 8 years?'*

*If you collect data in financial years please fill in table A, if you collect data in calendar years please fill in table B [from 2010-2017].'*

4. On 28 February 2019 the Trust disclosed some information (the total number of live births per year in the Trust) but suppressed the actual numbers of live births with Down syndrome under five as <5 and cited the exemption section 40(2) (Personal Information) of the FOIA.
5. On 18 March 2019, the complainant requested an internal review.
6. On 17 April 2019 the Trust provided the outcome of the internal review. It upheld the decision to refuse the suppressed numbers citing section 40(2) of the FOIA.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 18 April 2019 to complain about the way the request for information had been handled.
8. During the investigation the Trust disclosed the data for the years 2011 and 2013 as the values were zero in those years. The Trust also offered to provide the total number of live births with Down syndrome over the whole of the remaining years: *'this would provide the requester with a more accurate figure than the potential 24 births using <5 over the 6 years'*. The complainant responded that she still required the actual withheld figures per year.
9. Therefore, the Commissioner considers the scope of this case to be to determine if the Trust has correctly applied section 40(2) FOIA to the withheld information - the suppressed numbers of live births with Down syndrome.

### **Reasons for decision**

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#### **Section 40 Personal information**

10. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

11. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation (GDPR) ('the DP principles').
12. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (DPA). If it is not personal data then section 40 of FOIA cannot apply.
13. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

***Is the information personal data?***

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

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

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
17. 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.
18. In this case, the Trust has withheld information about the annual number of live births with Down syndrome.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) of the Data Protection Act 2018

19. The Commissioner's guidance on what is personal data<sup>2</sup> states that if information 'relates to' an 'identifiable individual' it is 'personal data' regulated by the DPA.
20. The information in this case doesn't directly identify individuals. However, because the name of an individual is not known, it does not mean that an individual cannot be identified. The aforementioned guidance states the following:

'A question faced by many organisations, particularly those responding to Freedom of Information requests, is whether, in disclosing information that does not directly identify individuals, they are nevertheless disclosing personal data if there is a reasonable chance that those who may receive the data will be able to identify particular individuals.'

It also states:

'The starting point might be to look at what means are available to identify an individual and the extent to which such means are readily available. For example, if searching a public register or reverse directory would enable the individual to be identified from an address or telephone number, and this resource is likely to be used for this purpose, the address or telephone number data should be considered to be capable of identifying an individual.

When considering identifiability it should be assumed that you are not looking just at the means reasonably likely to be used by the ordinary man in the street, but also the means that are likely to be used by a determined person with a particular reason to want to identify individuals. Examples would include investigative journalists, estranged partners, stalkers, or industrial spies."

21. The Trust stated that it is a small Trust in a rural area and the number of relevant patients is very small. *'Small numbers in small geographical areas present increased risk although we accept this does not mean small numbers must always be suppressed. When information is published under the FOI Act, we are very aware that it is in effect published to the world and can be re-printed or circulated in any format including via the World Wide Web, in broadcast media, or in the national*

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<sup>2</sup><https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf> & [https://ico.org.uk/media/for-organisations/documents/1549/determining\\_what\\_is\\_personal\\_data\\_quick\\_reference\\_guide.pdf](https://ico.org.uk/media/for-organisations/documents/1549/determining_what_is_personal_data_quick_reference_guide.pdf)

*or local press. We believe that the relevant patient(s) themselves, or their family, friends, colleagues or neighbours, may be able to identify an individual to whom our figures refer if we were to disclose them as requested. This information is personal and neither the child nor the mother would have any expectation that information about their pregnancy, or outcome, could be published or examined in public in the future.'*

22. The Trust explained that the nature of the syndrome to which this data refers comprises specific physical characteristics. *'We also consider that some types of data are more attractive to a motivated intruder than others – and more consequential for individuals. We believe this is the case in relation to this data which may leave an individual if identified subject to distress plus given the relatively short passage of time from the year 2010 to date, the subjects would still be young children...'*
23. The Commissioner notes that these numbers relate to a number of identifiers - location, medical health, year of birth/age and physical characteristics of the individual(s). She accepts that the withheld data may link with other information or knowledge, such as information from the educational sector, media or social media, to make identification of the data subjects possible. Given the age of the children, it is likely that the families still live in the same area.
24. She is satisfied that this information both relates to and identifies the children. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
25. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the data protection principles.
26. The most relevant data protection principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

27. Article 5(1)(a) of the GDPR states that:-

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.
28. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful (i.e. it would meet one of the bases of lawful processing listed in Article 6(1) GDPR as well as being generally lawful), be fair, and be transparent.

29. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

***Is the information special category data?***

30. Information relating to special category data is given special status in the GDPR.
31. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
32. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include special category data. She has reached this conclusion on the basis that the data relates to a lifelong health condition and a specific genetic profile of the data subjects.
33. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
34. The Commissioner considers that the only conditions that could be relevant to a disclosure under FOIA are conditions (a) (consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
35. The Trust has stated that the data subjects are children under 9 years and has not sought consent from them. *'The Trust does not believe it is appropriate to seek consent from the parents or guardians of the children to whom this data relates. We believe it may be distressing for them to discover that their families are the subject of a Freedom of Information request and that there may be a risk of identification of the children by persons unknown.'*
36. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOI request or that they have deliberately made this data public.
37. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of FOIA.

38. As there have been a number of requests for this information, the Commissioner has gone on to consider if disclosure would more generally contravene any of the data protection principles.

### **Lawful processing: Article 6(1)(f) of the GDPR**

39. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that “*processing shall be lawful only if and to the extent that at least one of the*” lawful bases for processing listed in the Article applies.

40. The Commissioner considers that the lawful basis most applicable is basis (f) which states:-

*“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”<sup>3</sup>.*

41. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;

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<sup>3</sup> Article 6(1) goes on to state that:-

*“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.*

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

*“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.*



- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

42. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

#### *Legitimate interests*

43. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
44. Legitimate interests may range widely. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
45. In the circumstances of this case the Commissioner understands that the complainant is interested in actual numbers of live births with Down syndrome per year per Trust.
46. The Commissioner is inclined to accept that the complainant has a legitimate interest in making this request and has gone on to consider whether disclosure is necessary in order to meet the legitimate interest.

#### *Is disclosure necessary?*

47. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
48. The Trust considered this to be special category information and suppressed the small numbers of relevant live births as the least intrusive means of achieving the legitimate aim in question. It had offered aggregated data for the period but this had been rejected by the complainant.
49. The Trust stated that *'information may be published in the press or by broadcast media stating that only 1, 2, 3 or 4 children were born with Down syndrome born at this hospital in that year. The children and their families may not be aware of this information. Because Down syndrome has specific physical characteristics, a child of the right age could be linked to this data. This could bring unsought attention to the family or*



*child and may intrude on their private lives. Disclosure and publication could cause unnecessary and unjustified damage or distress to the individual(s) concerned for example, prejudice employment and/or educational prospects, unwelcome attention or bullying.'*

50. The Trust also informed the Commissioner that the legitimate interest could be met elsewhere:
- The National Down Syndrome Cytogenetic Register (NDSCR) for England and Wales has already disclosed some of the requested information with a view to satisfying the public interest in its annual reports e.g. the NDSCR anonymous data reports include Down's syndrome diagnosed since January 1989 until 2013 in England and Wales. NCARDRS congenital anomaly statistics provides annual data from 2014 onwards. We understand data collection in newly established regions started from 1 April 2017 and national coverage of congenital anomaly reporting including Down syndrome will be possible from 2019.
51. The Commissioner fully accepts that the Trust has considered at length what information it can lawfully provide to the complainant. She considers that further disclosure in the detail requested is not necessary to meet the complainant's legitimate interest in this case and could be intrusive to the data subjects.
52. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
53. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

*The Commissioner's view*

54. The Commissioner has therefore decided that the Trust was entitled to withhold the information under section 40(2).

## Right of appeal

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55. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

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

56. 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.
57. 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**