

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 22 July 2020

**Public Authority:** Human Tissue Authority  
**Address:** 151 Buckingham Palace Road  
Victoria  
London  
SW1W 9SZ

### Decision (including any steps ordered)

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1. The complainant has requested information from the Human Tissue Authority (HTA) on incidents reported to it in 2018 under the category of 'release of wrong body'. The HTA release information on numbers but withheld two incident reports on the basis of section 31(1)(g) leading to 31(2)(c) of the FOIA.
2. The Commissioner's decision is that the HTA has correctly engaged the section 31 exemption and the balance of the public interest favours maintaining the exemption.

### Request and response

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3. On 6 August 2019 the complainant made a request to the HTA in the following terms:

*"Under the freedom of information act, please supply the following information, working through 1, 2 and then 3. Please advise if there is likely to be a cost overrun, or provide any necessary assistance as to how the request may be reformulated to cover information that you hold. Should there be the risk of a cost overrun, please provide necessary assistance as outlined in FOI guidance/legislation, such that the request may be reformulated."*

- 1) *The numbers of HTA Reportable incidents (HTARIS) reported by London post mortem establishments in 2018 under the category of "release of the wrong body" in 2018*
- 2) *The number of HTA Reportable incidents reported by London post mortem establishments under the category "release of the wrong body" in 2019 to date*
- 3) *Copies of the relevant HTARI reports that were submitted pertaining to (1) and (2) (I note that in the past you have not previously released reports in full and would therefore expect as much information as is possible to be released about the incidents referenced in (1) and (2))."*
4. The HTA responded on 22 August 2019 and provided information with regard to parts (1) and (2). However, the HTA refused to provide the information requested at part (3) citing section 31(1)(g) of the FOIA.
5. The complainant requested an internal review on 4 September 2019 and the HTA conducted a review and responded with the outcome on 2 October 2019. The HTA explained there were two incident reports within the scope of part (3) of the request and maintained its position these should be withheld under section 31(1)(g) of the FOIA.

## **Scope of the case**

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6. The complainant contacted the Commissioner following the internal review to complain about the way his request for information had been handled. The complaint was accepted for investigation on 6 December 2019.
7. The Commissioner considers the scope of her investigation to be to determine if the HTA has correctly withheld information within the scope of part (3) of the request on the basis of section 31 of the FOIA.

## **Reasons for decision**

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### **Section 31 – law enforcement**

8. The HTA has argued the withheld information is exempt on the basis of section 31(1)(g) which provides that information is exempt if its disclosure would or would be likely to prejudice the exercise by any public authority of the functions set out in section 31(2) of the FOIA.
9. The purpose the HTA has argued would be likely to be prejudiced if the information was disclosed is within section 31(2)(c):

“(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist, or may arise.”

10. To engage the exemption a public authority must:
  - Demonstrate that it has been entrusted with a function to fulfil this regulatory purpose;
  - Confirm that the function has been specifically designed to fulfil that purpose; and
  - Explain how the disclosure would or would be likely to prejudice that function.
11. As a qualified exemption, section 31 is subject to the public interest test.
12. In its submissions to the Commissioner the HTA explained it is the regulator for human organs, tissues and cells and was established by the Human Tissue Act 2004 (HT Act) in 2005, following the discovery of establishments removing and retaining human organs and tissues without consent. The HT Act addressed this issue and brought together other existing laws that related to human tissue and organs.
13. The HT Act applies to the removal, storage and use of human organs and tissue for certain specified ‘scheduled’ purposes. In England, Wales and Northern Ireland, mortuaries where post-mortem examinations take place are licensed and inspected by the HTA.
14. The HTA’s functions are set out in general terms at section 15 of the HT Act. These include superintending compliance with requirements under Part 1 of the HT Act and with Codes of Practice made under the HT Act.
15. The information request referred to HTARIs which are adverse events in mortuaries that are potentially detrimental to the dignity of deceased individuals. In line with the HTAs role in superintending compliance with the HT Act, HTARIs are reported by establishments, investigated and corrective action taken to avoid repeated incidents.
16. The Commissioner is satisfied the HT Act provides the HTA with a range of functions in respect of superintending compliance with the HT Act and ensuring mortuaries are operating within the requirements of the HT Act. As such the first of the conditions at paragraph 10 has been met.
17. The information to which the HTA considers section 31(2)(c) applies comprises two incident reports. The Commissioner has reviewed these reports and is satisfied they contain detailed accounts of the incidents to allow the HTA to consider if any action is necessary.

18. The Commissioner is satisfied that the second condition set out in paragraph 10 is met. The purpose of reporting HTARIs is to allow the HTA to be informed, assess the incident and determine if any action is needed in line with the HTA's role as a superintendent of the HT Act. As such the information in the incident reports is designed to allow the HTA to fulfil its role under the HT Act. She will now go on to consider whether the disclosure would prejudice the HTA's regulatory functions.
19. Section 31(2)(c) can be engaged on the basis that disclosing the information either 'would' prejudice the HTA's functions, or that disclosure would only be 'likely' to prejudice those functions. From its submissions to the Commissioner it is understood the HTA applied the exemption on the basis of the lower threshold of prejudice i.e. that disclosure would be likely to prejudice its regulatory functions.
20. Nevertheless this still means that the HTA is of the opinion there is a real and significant risk that the prejudice would occur if the requested information was released. The HTA has stressed that when reporting incidents it needs information to be provided in an appropriate level of detail to adequately investigate the incident and take corrective action. The provision of frank and detailed reports is an essential part of this process.
21. The HTA has genuine concerns that this disclosure would make regulated institutions less likely to provide full and frank reports of incidents for fear that details will end up in the public domain. Less detailed reports of incidents would inhibit the HTA's ability to make decisions based on full possession of the facts.
22. The HTA publishes detail of individual HTARIs, including the name of the establishment at which it occurred and a high-level description of the issue and its case. However, the HTA has previously surveyed mortuaries that it licences about the publication of HTARI information and the majority did not agree that the HTA should routinely publish more detailed information about incidents.
23. The HTA therefore considers disclosure of the full incident reports will not only single out the institutions in this case, opening them up to scrutiny and negative attention that other institutions have not been put under, but also impact on the candour of the reporting establishment as a whole and the quality of the HTAs investigation.
24. The Commissioner notes that the HTA's arguments are focussed more on the extent that disclosing the information will have on future regulatory activity but there is also a specific argument that it would be unfair on the mortuaries involved in these reports to have a level of detail disclosed in the public domain that is not normally disclosed. The

Commissioner also accepts that effective investigations often rely on a safe space where information can be shared in confidence to allow for full and frank exchanges and efficient and effective action.

25. Even if the HTA had powers to compel institutions to provide it with information, it is likely to obtain higher quality information, and to obtain that information more quickly, where there is cooperation between the parties. However, the extent to which disclosing the detailed incident reports would have on institutions' willingness to be candid in the future with the HTA will depend on how sensitive the information was at the time of the request.
26. In this case the information in these reports is more often than not likely to be sensitive, concerning adverse events in mortuaries that could be distressing to the deceased's family. The request specifically asked for incidents relating to 'release of the wrong body' so it is reasonable to assume that incidents of this nature will have caused some distress.
27. The Commissioner agrees with the HTA that disclosing the reports from the mortuaries would be likely to inhibit future communications and reporting; there is enough evidence to suggest that there is opposition from mortuaries and regulated institutions to the HTA publishing any more detail than it already does and that disclosing the reports could create adversarial relationships. This may then impact on the HTA's ability to conduct its investigations efficiently and effectively. The Commissioner is therefore satisfied the third of the conditions at paragraph 10 is met.
28. Since all the conditions are met, the Commissioner finds that the requested information engages the exemption under subsection 31(1)(g) leading to 31(2)(c). She has gone on to consider the public interest test.

*Public interest in disclosing the information*

29. The HTA acknowledges there is a public interest in transparency around incidents of this nature but it considers it has met this with the information it routinely discloses about HTARIs.
30. The complainant argues that the release of a wrong body to a family is of high public concern and the public have a right to understand details of the incidents and not just the generalities as these hospitals are funded by public taxation and may serve the areas of interested members of the public.
31. The complainant has stressed that he does not consider that all HTARI reports should necessarily be disclosed but that these two specific reports carry a specific weight of public interest in their disclosure. The

complainant points to the fact that at the hospital referred to in the report, a report was submitted one year and seemingly the same incident happened again the next year, adding to the weight of public interest in knowing the full details of the incident.

32. The complainant argues that it is tenuous of the HTA to argue that by releasing the reports the ability of the HTA to investigate future incidents would be impaired and that it might prevent disclosure from others in the future as hospitals are obliged to disclose these details, under the law.

*Public interest in maintaining the exemption*

33. The HTA states it reviewed each of the incidents reported and considered that in both cases the establishments provided a full report of the incidents, neither of which demonstrated any systemic failures. The HTA therefore considers the public interest is better served by not jeopardising full and frank reporting of incidents across the system when weighed against the public interest in revealing the full detail of two specific cases where disclosure would not shed significant further light on the issue.

*Balance of the public interest*

34. There is a strong public interest in ensuring that the HTA can perform its functions and undertake appropriate investigations into HTARIs. The Commissioner appreciates that the complainant has raised concerns about the specific hospital involved in these reports having a repeated incident but the HTA is of the view that there is no systemic issue involved following its investigations.
35. The Commissioner notes that the HTA does publish details of HTARIs following its investigation – the published information includes the month, name of the institution, a brief description of the incident and the type of incident. From reviewing some of this published information on the HTA's website it seems that 'release of the wrong body' is reported by a number of establishments throughout a calendar year and more often than not this is concluded as being down to human error. This amount of detail in the public domain would appear to be sufficient to satisfy the public interest in knowing what incidents occur and the reasons for this. To disclose the reports in full would add additional detail but not anything meaningful beyond adding some additional timings and logs of movements and the Commissioner is not minded to accept the public interest in this would outweigh the public interest in preserving the safe space needed to continue the voluntary flow of free and frank information between regulated institutions and the HTA.

36. The Commissioner is therefore satisfied that, in this case, the public interest favours maintaining the section 31(1)(g) exemption.

## Right of appeal

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37. 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)

38. 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.
39. 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 .....**

**Jill Hulley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
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**Water Lane**  
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**SK9 5AF**