

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 September 2020

**Public Authority:** Powys Teaching Health Board

**Address:** Glasbury House,  
Bronllys Hospital  
Brecon  
Powys LD3 0LU

### Decision (including any steps ordered)

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1. The complainant requested information from Powys Teaching Health Board ("the Board") about the training courses that had been attended by certain named members of staff. The Board withheld the information under section 40(2) of the FOIA: third party personal data.
2. The Commissioner's decision is that the Board correctly determined that the requested information was third party personal data and that there was no lawful basis for disclosing it. She is therefore satisfied that section 40(2) of the FOIA was correctly applied. However, since the Board did not provide its response to the request within the statutory time limit of twenty working days, it breached section 10(1) of the FOIA.
3. The Commissioner does not require the Board to take any steps.

### Request and response

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4. On 25 September 2019, the complainant wrote to the Board and requested information in the following terms:

*"Full details of the training courses attended in relation to Continuing Healthcare and the Assessment process by the clinical advisors involved in [name redacted]'s assessment, [three names redacted], including times, dates, places, course content and details of the*

*person(s) delivering the course(s)... I would be grateful if this information is provided as soon as possible."*

5. The Board responded on 20 December 2019. It stated that the information was exempt under section 40(2) of the FOIA – third party personal data.
6. To explain its staff training requirements regarding Continuing Health Care ("CHC") in general, it explained that *"all health boards in Wales have to provide relevant CHC training to staff, details of which are available by accessing the following link [link provided to the Complex Care and Information Support Site]... Staff attend the training and receive updates when there are changes to the All Wales CHC Policy."*
7. The complainant requested an internal review. He argued that the Wales NHS Guidelines for CHC placed an obligation on Local Health Boards to ensure that assessments are carried out by *"a competent person"*, and that providing details of the training for the three individuals would, therefore, be a fair and justifiable use of their data.
8. Following an internal review, the Board wrote to the complainant on 31 March 2020. It upheld its position that the information was exempt from disclosure under section 40(2) of the FOIA.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 14 April 2020 to complain about the way his request for information had been handled.
10. He explained that he considered that his wife, on whose behalf the request was made, may be entitled to access the information by way of a restricted disclosure, due to her personal connection to certain events which gave rise to the request. However, the Commissioner has explained that she does not have the power to order the restricted disclosure of third party personal data to specific individuals.
11. The complainant also questioned whether disclosure of the information to the wider public may in fact be lawful under the FOIA, in the specific circumstances of the case.
12. This notice covers whether the Board correctly determined that the information was exempt from disclosure under section 40(2) of the FOIA. It also covers the time taken by the Board to respond to the request.

## Reasons for decision

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

13. Section 40(2) of the 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.
14. 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 (“the DP principles”), as set out in Article 5 of the General Data Protection Regulation (“GDPR”).
15. 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 the FOIA cannot apply.
16. 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 DP principles.

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

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

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

18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
19. 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.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

20. 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.
21. In this case, the requested information comprises details of the training courses attended by three specified individuals. The complainant did not ask for a general list of training courses available to staff; he has specifically asked for details of courses attended by those three people, including times, dates, places and course content.
22. The framing of the request clearly relates the requested information to the three named individuals. They are the main focus of the request, and the information relates to them. They are identifiable from the wording of the request.
23. In addition, the complainant asked for "*details of the person(s) delivering the courses*". The Commissioner considers that this would be highly likely to identify other individuals, since by providing "*details*" of the training providers, the Board would be likely to render them identifiable.
24. In the circumstances of this case, the Commissioner is satisfied that the requested information relates to and identifies (a) the three clinical advisors, and (b) the training providers.
25. The requested information therefore falls within the definition of "personal data" in section 3(2) of the DPA.
26. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
27. The most relevant DP principle in this case is principle (a).

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

28. 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".*

29. In the case of an 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, fair and transparent.

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

30. 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.* It must also be generally lawful.
31. The Commissioner considers that the lawful basis most applicable is basis 6(1)(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>2</sup>.*
32. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is therefore 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;
  - iii) Balancing test: Whether the above interests override the legitimate interests or fundamental rights and freedoms of the data subjects.
33. The Commissioner considers that the test of “necessity” under stage ii) must be met before the balancing test under stage(iii) is applied.

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<sup>2</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”.

*i) Legitimate interests*

34. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
35. However, if the requester is pursuing a purely private concern, unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
36. In this case, the Commissioner is satisfied that a legitimate interest is being pursued. While, to some extent, the complainant is pursuing a private concern, since he appears to have a personal connection to certain matters that gave rise to the request, there is clearly a broader legitimate interest (both for the complainant and for the public) in ascertaining that appropriately trained and qualified staff are providing the relevant clinical advice and services within the NHS.
37. It is important in this case that the Commissioner considers that this legitimate interest extends to information about any specific individual working within the NHS, such as the named clinical advisors in this case. If a person is being treated by an individual, there is a legitimate interest in knowing whether that individual is appropriately trained and qualified.
38. She has therefore considered whether disclosure of the requested information is necessary to meet this legitimate interest.

*ii) Is disclosure necessary?*

39. "Necessary" means more than desirable, but less than indispensable or of 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 the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
40. In this case, while the Board provided the complainant with some general assurances and information about the type of training that individuals working in CHC normally undertake, including a link to information about course content, it did not provide any information about individual staff members. These general assurances, while they go

some way to reassuring the public that CHC staff are trained, do not wholly meet the legitimate interest in this case.

41. The Commissioner has therefore considered what information about individual staff is already in the public domain, and whether it is sufficient to meet the legitimate interest.
42. She notes that the clinical advisors are registered nurses, and as such, are regulated by the Nursing and Midwifery Council ("the NMC").
43. She further notes that the three named individuals in this case are, accordingly, searchable on the NMC's public register<sup>3</sup>, which provides information about their registered status, and would reveal if there were any restrictions on their fitness to practise.
44. While this public register does not provide details of every training course attended by each individual, the Commissioner does not consider that providing this information about every nurse is necessary to meet the legitimate interest in ascertaining that each individual is appropriately trained and qualified.
45. The fact that the individuals belong to a regulated profession ensures that their registered status is monitored. The role of the NMC is to ensure that the requirements for their ongoing registration as practising nurses are being met.
46. The Commissioner considers that, in this case, the disclosure of the requested information under the FOIA is not necessary to meet the legitimate interests in its disclosure. She is satisfied that the information about individuals which is already in the public domain is sufficient to provide the necessary assurances to the public. In her view, providing specific details to the public of every training course attended by every member of NHS staff, would be disproportionate.
47. As the Commissioner has decided in this case that disclosure under the FOIA is not necessary to meet the legitimate interest in disclosure, there is no lawful basis for this processing and it is unlawful.
48. Therefore, it would not meet the requirements of Article 5(1)(a) of the GDPR (Principle (a)), and the Commissioner has not gone on to conduct the balancing test.

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<sup>3</sup> <https://www.nmc.org.uk/registration/search-the-register/>



49. Given the above conclusion that disclosure would be unlawful, the Commissioner does not need to go on to consider separately whether disclosure would be fair or transparent.

### **The Commissioner's decision**

50. The Commissioner has therefore decided that the Board was entitled to withhold the requested information under section 40(2), by way of section 40(3A)(a).

### **Section 10(1) – time for compliance with a request**

51. Section 1(1) of the FOIA states that any person making a request for information to a public authority is entitled (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him or her.
52. Section 10(1) states that a public authority must comply with section 1(1) promptly, and in any event not later than the twentieth working day following the date of receipt.
53. In this case, the complainant made the request to the public authority on 25 September 2019, meaning that a response was due on or before 23 October 2019. The Board issued its response on 20 December 2019.
54. In doing so, it clearly failed to comply with the statutory requirement to respond within 20 working days.
55. Because a response was subsequently issued, the Commissioner does not require the Board to take any steps. However, she would remind the Board of the requirement to respond within the statutory time limit.



## Right of appeal

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56. 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)

57. 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.
58. 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** .....

**Phillip Angell**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
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