

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 22 December 2020

**Public Authority:** South Tees Hospitals NHS Foundation Trust

**Address:** The James Cook University Hospital

Marton Road

Middlesbrough

TS4 3BW

### Decision (including any steps ordered)

---

1. The complainant has requested information within the contract for the former CEO of South Tees Hospitals NHS Foundation Trust (“the Trust”). The Trust provided some information but withheld the former CEO’s annual leave entitlement, citing section 40(2) of the FOIA for doing so.
2. The Commissioner’s decision is that the Trust is not entitled to rely on section 40(2) due to the balance between the legitimate interests and the data subject’s interests or fundamental rights and freedoms favouring the disclosure of the former CEO’s annual leave entitlement.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the former CEO’s annual leave entitlement.
4. 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

---

5. On 29 October 2019 the complainant wrote to the public authority and requested information in the following terms:

*"I would like to request the following information under FOI laws.*

- 1. Under the contract for the trust's former CEO Siobhan McArdle, please state how many days of paid annual leave it entitled her to.*
- 2. The full text within the section of the contract that relates to overtime payments.*
- 3. If possible, a copy of the full contract."*

6. The public authority responded on 19 November 2019. It provided some information within the scope of the request, such as a redacted copy of the former CEO's contract, but refused to provide the complainant with Ms McArdle's annual leave entitlement and daily overtime rates, citing section 40 of the FOIA as its basis for doing so.

7. The complainant contacted the Trust to request an internal review as he disagreed with its argument that the annual leave entitlement was part of Ms McArdle's negotiated benefit package, which would consist of her personal data and thus not disclosable whilst providing him with other negotiated contractual details such as the amount of working days per week.

8. Following an internal review the public authority wrote to the complainant on 23 December 2019. It upheld its original decision of withholding the information.

## Scope of the case

---

9. The complainant contacted the Commissioner on 27 December 2019 to complain about the way his request for information had been handled.

10. Within his contact to the Commissioner, the complainant stated the following:

*"I would contend that details about annual leave entitlement sit in the same bracket as the contracted weekly hours/days, which the trust has provided. Along with the annual salary, which is already published, these are both key bits of information through which the annual salary can be understood and contextualised."*

11. The Commissioner considers the scope of her investigation to be to establish whether the public authority is entitled to withhold the former chief's annual leave entitlement under section 40(2) of the FOIA.

## Reasons for decision

---

### Section 40 personal information

12. 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.
13. 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').
14. 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.
15. 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?***

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

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

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

---

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

more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

19. 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.
20. In the circumstances of this case, having considered the withheld information regarding the former chief's annual leave entitlement, the Commissioner is satisfied that the information relates to the data subject. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
21. In this case, the information requested is for the annual leave entitlement for a named person in a singular role, where the Trust has informed the complainant that it was part of the individual's negotiated benefits package. The individual (Ms McArdle) is clearly identifiable from the request and the information will relate to her because it forms part of her conditions of employment.
22. 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.
23. The most relevant DP principle in this case is principle (a).

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

24. 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".*

25. 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.
26. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

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

27. 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>.

28. 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 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 interest(s) or fundamental rights and freedoms of the data subject.
29. 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*

30. 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. 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.

---

<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".*

31. The Trust recognised that there was a legitimate interest in transparency in public life, particularly in relation to the accountability and transparency in the spending of public funds. This in turn may assist members of the public in understanding decisions taken by public authorities and perhaps even to participate more in decision-making processes.
32. The complainant noted that, by publishing the former CEO's annual leave, the Trust would allow the public to contextualise her earnings.
33. The Commissioner considers that both the complaint and the Trust have made broadly the same point. There is a legitimate interest in understanding the terms of the remuneration packages offered to senior employees so that the public can be reassured that value for money is being achieved. The higher the overall size of the remuneration package and the more senior the role, the stronger that interest will be.

*Is disclosure necessary?*

34. '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 the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
35. The Commissioner notes the Trust has advised that it does accept that the release of the information is necessary to achieve the legitimate interests identified above. She is satisfied in this case that there are no less intrusive means of achieving this.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

36. Having determined that disclosure is necessary, the Commissioner must still balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
37. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that disclosure may cause;

- whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
38. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data. Whilst it is clearly helpful if the individual's actual expectations are known, the Commissioner must still consider whether those expectations are reasonable in the circumstances.
39. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
40. In the circumstances of this request, the Commissioner has noted that some of the negotiated benefits comprising the overall package, such as the working days, overtime payments and salary, of the former Chief Executive have already been disclosed to the complainant. Information has also been published by the Trust – although the Commissioner notes that some of this information had not been published at the point at which the request was responded to.
41. The complainant argued the following:
- "The ICO makes clear there are different expectations for very senior officials in terms of releasing this type of information. Hence why trusts are expected to publish chief executive salaries. I would suggest that contracted hours (now disclosed by the trust) and annual leave entitlements should be treated in the same way, as they enable the public to fully assess the annual salary. Without that information, the public is unable to satisfactorily benchmark one chief executives salary against another, as they may have different annual leave entitlements."*
42. The Commissioner has therefore reviewed the information withheld under section 40(2). It is evident to the Commissioner that the leave entitlement forms part of the negotiated benefit package. The Commissioner recognises that such information is likely to be held by the Trust with an expectation of confidence on the part of the individual, who would expect a certain degree of privacy.



43. In its submissions to the Commissioner, the Trust said:

*"The Trust conducted a balancing test to consider whether the disclosure outweighed the interests or fundamental rights and freedoms of the data subject which required the protection of personal data. We note in this respect that Ms Ardle expressly informed the Trust that any disclosure of her employment contract was contrary to her fundamental rights and freedoms.*

*The Trust considered the nature of the information, namely an employment benefit specifically awarded to Ms McArdle and no other employee, which was not routinely published. The Trust also considered Ms McArdle's seniority, especially the fact that (as Chief Executive) Ms McArdle held a very public-facing position. We note in this regard that Ms McArdle's pay scale was published by the Trust in its annual report.*

*The Trust had regard to the guidance published by the Information Commissioner which states that when such information is not routinely published, the disclosure of more detailed information or exact salaries is more intrusive than giving a salary band or the pay scale. Ms McArdle's annual leave entitlement formed part of her negotiated package.*

*The Trust also considered the reasonable expectations of Ms McArdle and considered that she would not expect this information to be published or otherwise disclosed. As noted above, Ms Ardle in fact subsequently complained about the limited disclosure that was made.*

*The Trust did not consider there were any "exceptional circumstances" to justify the disclosure of Ms McArdle's exact annual leave entitlement. Further, the Trust was of the view that it had already disclosed enough of the contract to meet the legitimate interests identified above. The information requested in the internal review went beyond that and its disclosure would constitute a disproportionate interference with Ms McArdle's rights. Accordingly, the Trust concluded that disclosure would be in breach of the GDPR and was therefore exempt under s.40(2) of the Act.*

*Finally, we note that whilst Ms McArdle initially complained to the Trust that the information disclosed was a breach of her rights under the General Data Protection Regulation, she did not pursue this complaint once it was explained to her that the Trust had undertaken the careful balancing exercise discussed above. We consider that this further illustrates that the Trust struck the right balance in the circumstance of this case.*



44. The Commissioner notes the Trust's comments about exceptional circumstances. Her guidance<sup>3</sup> explains that:

*"Exceptional circumstances are needed to justify the disclosure of exact salaries when you don't routinely publish them. In such cases there may be additional public interest factors that outweigh any detriment to the employees concerned. These exceptional circumstances could include situations where:*

- *there are current controversies or credible allegations;*
- *there is a lack of safeguards against corruption;*
- *normal procedures have not been followed;*
- *the individual in question is paid significantly more than the usual salary for their post; or*
- *the individual or individuals concerned have significant control over setting their own or others' salaries."*

45. The Commissioner has had regard to the actual information that is being withheld. In this case she notes that the number of the annual leave days granted is considerably larger than what might normally be expected in a public sector role – even a very senior one. This would suggest that the annual leave entitlement was a key part of the overall remuneration package that was negotiated.

46. The Commissioner recognises that the strength of the legitimate interest will be highest when the individual is in office and will gradually diminish once they leave office. The Commissioner notes that that this request was made after the former CEO of the Trust had left, so as she was not a senior member of staff at the time of the request, her expectations of the Trust withholding her personal information are more reasonable. However, very little time had elapsed between the former CEO leaving and the request being made so the issue was very much alive at that time.

47. In the First-tier Tribunal case of Gibson v Information Commissioner and Craven District Council (EA/2010/0095), the Tribunal found that it *"would not regard it as reasonable for the ex-CEO (or the council) to*

---

<sup>3</sup> [https://ico.org.uk/media/for-organisations/documents/1187/section\\_40\\_requests\\_for\\_personal\\_data\\_about\\_employees.pdf](https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf)

*expect that certain information relating to the use of public funds, to be hidden from public gaze by virtue of a confidentiality clause agreed between them. This is because of the context described below and the fact that the ex-CEO was the most senior officer of the council."*

48. In the circumstances of this case the public cost of the former Chief Executive's departure from the Trust has now been published<sup>4</sup> and shows the actual cost including agreed the contractually obliged payments which would include the cost of any unused annual leave. Although this report does not appear to have been published at the time of the request.
49. In the Trust's same report, it shows the Care Quality Commission's (CQC's) rating as "Requires Improvement" and brings attention to the Trust's use of resources in particular. The Commissioner considers that the fact that the independent regulator has had cause to criticise the Trust, again raises the question of whether the Trust achieved value for money when it employed its former CEO – who is of course ultimately responsible for how the Trust uses its resources.
50. According to reports<sup>5</sup> about her resignation, Ms McArdle *"warned the trust was 'financially unsustainable' without a long-term recovery plan to deal with its debts"*. This is despite the fact that, as CEO, she would have had ultimate responsibility for the Trust's long-term financial planning and the structuring of its debts. The Commissioner would accept that the former Chief sending a resignation such as this, would lead to information requests for details regarding her own salary and non-financial benefits and given Ms McArdle's seniority, the Commissioner would expect such details to be released.
51. The Commissioner notes that this additional leave is, in effect, a non-financial benefit which would not fall under the usual disclosure rules. Whilst the data subject clearly expects the information to be withheld, the Commissioner does not consider it is reasonable to expect a value, that is so out of line with what would normally be expected for a public sector role, to be exempt from disclosure.
52. The Commissioner is aware of the fact that, as CEO, Ms McArdle will have had considerable influence over the salaries and negotiated benefit packages of other staff in the Trust. Also, her leave entitlement comes

---

<sup>4</sup> <https://www.southtees.nhs.uk/content/uploads/Annual-Report-and-Accounts-2019-20.pdf>

<sup>5</sup> <https://www.bbc.co.uk/news/uk-england-tees-49640293>

on top of a healthy (and already published) salary, overtime and working week. The larger the size of the remuneration package, the greater the emphasis on the Trust to show that it is achieving value for money. The Commissioner also notes that very few of the people employed by the Trust would have had the opportunity to negotiate their own remuneration package.

53. It appears clear from the Trust's submission that the data subject in this case does have an expectation that the information in question would not be disclosed – although the Commissioner notes that the Trust has already concluded that this should not be a determining factor in respect of the information it has previously disclosed.
54. So although the former CEO had expressed her concern to the disclosure of information previously, the fact that she was a very senior employee and responsible for the expenditure of public money means her expectation for the release of personal information should be higher and her expectation of scrutiny greater than a more junior official.
55. Based on the above factors, the Commissioner has determined that there is sufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of the information would be lawful.

### **Fairness and transparency**

56. Even though it has been demonstrated that disclosure of the requested information under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).
57. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.
58. The requirement for transparency is met because as a public authority, the Trust is subject to the FOIA.

### **The Commissioner's view**

59. In this instance, the Commissioner has decided that the Trust has failed to demonstrate that the exemption at section 40(2) is engaged.

## Right of appeal

---

60. 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)

61. 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.
62. 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**  
**SK9 5AF**