

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 2 August 2021

**Public Authority:** Health and Social Care Board  
**Address:** Linenhall Street  
Belfast  
BT2 8BS

#### Decision (including any steps ordered)

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1. The complainant requested information relating to an investigation into a named doctor. The Health and Social Care Board in Northern Ireland (the 'HSCB') provided some of the requested information but refused to provide the remainder, citing section 40(2) (personal information) of FOIA. During the course of the Commissioner's investigation, the HSCB revised its position and said it should have neither confirmed nor denied ('NCND') whether it held the requested information in response to the initial request. It now cited section 40(5B), the 'neither confirm nor deny' provision for personal information on the basis that, if held, the information would constitute the personal data of a third party.
2. The Commissioner's decision is that the HSCB was correct to rely on section 40(5B) of FOIA.
3. She does not require the HSCB to take any steps as a result of this notice.

#### Background

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4. The HSCB has explained that the complainant is representing her client who is a former employee who worked at the same location as the named doctor, and that the request was submitted by the complainant on behalf of her client ('the client'). Although the Commissioner has not been party to the earlier correspondence, it is evident that there have been previous written exchanges between the HSCB and the complainant leading to the FOIA request.

## Request and response

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5. On 18 November 2019, the complainant wrote to the HSCB and requested information in the following terms:

*"...Unfortunately the reply is inadequate and further information is requested.*

*I would therefore like to make a request under GDPR/DPA/FOIA for the specifics of the investigation and sight of the documentation reviewed, in particular the responses made by [named doctor] to each of the concerns raised by my client as well as the proposed actions in each case..."*

6. The HSCB responded on 17 December 2019 and provided some information within the scope of the request. It refused to provide the remainder citing section 40(2) of FOIA – the exemption for personal information.
7. The complainant requested an internal review on 14 February 2020 in which she suggested redacted versions of the requested information should be released. The HSCB provided its internal review, late, (see 'Other matters' section of this notice) on 4 September 2020 (apologising for the Covid-19 related delay) in which it maintained its original position.

## Scope of the case

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8. The complainant contacted the Commissioner on 18 September 2020 to complain about the way her request for information had been handled. She asked the Commissioner to determine whether the requested information should be released in a redacted form.
9. During the course of the Commissioner's investigation, the HSCB revised its position. It now said that it would neither confirm nor deny ('NCND') whether it held the requested information by virtue of section 40(5B)(a)(i) because the information, if held, would constitute the personal data of a third party.
10. On 13 July 2021, the Commissioner sought the complainant's view of HSCB's revised position. She replied on 22 July 2021 as follows:

*"I do not think this is a valid reason for withholding the information that we have requested on behalf of my client. We do not wish to see any patient details, only the information relating to [Doctor's name redacted] and the investigation carried out as a result of our client's complaints."*

11. The Commissioner has considered whether the HSCB has properly relied on section 40(5) of the FOIA, to refuse to either confirm or deny it holds the requested information.

## **Reasons for decision**

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### **Neither confirm nor deny – ('NCND')**

12. Section 1(1)(a) of FOIA provides that where a public authority receives a request for information, it is obliged to tell the applicant whether it holds that information. This is commonly known as the duty to confirm or deny.
13. The decision to use an NCND response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point, and main focus for NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.
14. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.
15. The HSCB has taken the position of neither confirming nor denying whether it holds any of the requested information in its entirety, citing section 40(5) of FOIA. The issue that the Commissioner has to consider is not one of the disclosure of any requested information that may be held, it is solely the issue of whether or not the HSCB is entitled to NCND whether it holds any information of the type requested by the complainant.
16. Put simply, in this case the Commissioner must consider whether or not the HSCB is entitled to NCND whether it holds any information about an alleged investigation into a named doctor. The HSCB has said that the information described in the request, if it was held, would be fully exempt from disclosure by virtue of section 40(5) of FOIA.

### **Section 40 – personal information**

17. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.

18. Therefore, for the HSCB to be entitled to rely on section 40(5B) of FOIA to NCND whether it holds information falling within the scope of the request, the following two criteria must be met:

- confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
- providing this confirmation or denial would contravene one of the data protection principles.

***Would confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?***

19. Section 3(2) of the Data Protection Act 2018 ('the DPA') defines personal data as:

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

20. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
21. 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.
22. Clearly the request concerns a named, living individual and therefore confirmation or denial as to whether or not the requested information is held would reveal something about that person (ie whether a complaint had been made about them and whether they had been the subject of an investigation as a result of that complaint).
23. For these reasons, the Commissioner is satisfied that if the HSCB confirmed whether or not it held the requested information, this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.
24. The request clearly relates to an alleged investigation into a named party. Given that the complainant is representing her client, (a former employee who worked at the same location as the named doctor), the client would know the named doctor by sight, as well as by their place of work and employer.
25. The requested information would require a confirmation or denial that an investigation took place. Were the HSCB to confirm or deny that the information is held, this would place into the public domain personal information as to whether or not an investigation had taken place. The

HSCB said making the information available, if held, "*would be to release the personal data of the named doctor*" and:

*"...therefore contravene Article 5 (1) (a) – Principle (a) of the UK GDPR requiring that personal data will be processed lawfully, fairly and in a transparent manner in relation to individuals".*

26. The fact that confirming or denying whether the requested information is held would reveal the personal data of the named doctor does not automatically prevent the HSCB from refusing to confirm whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.
27. The Commissioner agrees that the most relevant data protection principle is principal (a).

***Would confirming whether or not the requested information is held contravene one of the data protection principles?***

28. Article 5(1)(a) 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 – or as in this case, the public authority can only confirm whether or not they hold the requested information – if to do so would be lawful (ie it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR, be fair, and be transparent).

*Lawful processing: Article 6(1)(f) 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*" conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
31. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:

*"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."*

32. In considering the application of Article 6(1)(f) 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 confirmation as to whether the requested information is held (or not) 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.
33. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

*(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. 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.
35. In submissions to the Commissioner, the HSCB recognised that there is a legitimate interest in transparency around medical professionals and a legitimate interest in public access to information relating to "*founded concerns*". The Commissioner agrees with this assessment and therefore considers this limb of the test to be met.

*(ii) Is confirming whether or not the requested information is held necessary?*

36. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested

information is held must therefore be the least intrusive means of achieving the legitimate aim in question.

37. The HSCB explained to the Commissioner that complaints about medical professionals can be made to its 'Responsible Officer' who has a duty under the Responsible Officer Regulations to investigate.
38. HSCB said it also has a formal complaints procedure, details of which can be found on its website.<sup>1</sup>
39. HSCB told the Commissioner it is the responsibility of the Responsible Officer to have mechanisms in place to initially investigate and where possible resolve complaints/concerns locally. Where complaints/concerns are investigated and disproved/resolved to the satisfaction of the Responsible Officer it is not usual practice to place that information into the public domain.
40. Additionally, HSCB explained that there are instances where the General Medical Council ('GMC') become involved and conduct investigations and, as a result, might potentially issue an undertaking or make a sanction against a medical professional. In these circumstances this information is usually made public on the GMC website.<sup>2</sup>
41. Given the existence of the mechanism for confirmation of more serious misconduct by medical professionals, the Commissioner is satisfied that those complaints which result in further action being warranted are usually publicly available. She, therefore, does not consider it 'necessary' for details of **all** complaints against medical professionals to be publicly confirmed, particularly when they have resulted in no further action, or the allegations prove to be unfounded. The Commissioner is therefore satisfied that the HSCB was correct to NCND whether the requested information is held in this case.

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<sup>1</sup> How to Make a Complaint:

<http://www.hscboard.hscni.net/download/PUBLICATIONS/COMPLAINTS/How-to-make-a-complaint-2016.pdf>

Complaints

Policy: <http://www.hscboard.hscni.net/download/PUBLICATIONS/COMPLAINTS/HSCB-Policy-for-the-management-of-complaints-November-2020-FINAL.pdf>

<sup>2</sup> <https://www.gmc-uk.org/concerns/hearings-and-decisions/gmc-decisions>



42. The Commissioner, whilst accepting the legitimate interests in transparency around medical professionals and in public access to information relating to the existence of complaints and ensuing investigations, finds that the 'necessity' test is met by the publication of findings for those medical professionals whose conduct has resulted in action being taken, particularly where complaints result in doctors' fitness to practice being revoked. Therefore, she does not consider that there is a lawful basis for the processing of this personal data and, accordingly, confirmation or denial under the FOIA would be unlawful.

*The Commissioner's view*

43. The Commissioner has therefore decided that HSCB was entitled to refuse to confirm whether or not it held the requested information on the basis of section 40(5B)(a)(i) of FOIA.

**Other matters**

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44. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA.
45. Part VI of the section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.
46. In this case, HSCB has apologised to the complainant for the Covid-19 related delay in completing the internal review. Additionally, the complainant did not complain about the delay. Given the unprecedented impact of the pandemic, the Commissioner has not recorded the delay in this instance.



## **Right of appeal**

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47. 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: 0203 936 8963

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)

48. 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.
49. 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 .....**

**Carolyn Howes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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**SK9 5AF**