

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 28 May 2021

**Public Authority:** University Hospitals of Leicester NHS Trust  
**Address:** Leicester Royal Infirmary  
Infirmary Square  
Leicester  
LE1 5WW

#### Decision (including any steps ordered)

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1. The complainant has requested information from the University Hospitals Leicester NHS Trust ("the Trust") regarding various procedures within the Trust, but with a specific focus on staff inappropriately accessing patient records, within three specified timeframes.
2. The Commissioner's decision is that the Trust was entitled to withhold the requested information under section 40(2) of the FOIA.
3. 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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4. On 29 March 2020, the complainant wrote to the Trust and requested information in the following terms:

*"I write to request the information set out as points 1-14 below under the Freedom of Information (FOI) Act 2000*

*(<http://www.legislation.gov.uk/ukpga/2000/36/contents>)*

*For all 14 points please breakdown the answer into the following three timeframes;*

- **Financial year 2017 - 2018**
- **Financial year 2018 - 2019**

- ***From start of Financial year 2019 to 29 February 2020***

**Information requested under FOI act**

- 1. Please confirm that the trust has Standard Operating Procedures (SOP's) for your Accident and Emergency department at the Leicester Royal Infirmary site. This should include the admissions, treatment and discharge procedures (including electronic and paper management of patient records procedures).*
- 2. If you do have these then please send me copies of all current Standard Operating Procedures (SOP's) for your Accident and Emergency department at the Leicester Royal Infirmary site. This should include the admissions, treatment and discharge procedures (including electronic and paper management of patient records procedures). If these SOP's have changed then please include any previous versions since 2018.*
- 3. If you do not have these SOP's, then please send me all documentation for procedures for your Accident and Emergency department at the Leicester Royal Infirmary site. This should include the admissions, treatment and discharge procedures (including electronic and paper management of patient records procedures).*
- 4. Please confirm the total number of patient records accessed by staff without authorisation or business justification to do so by staff employed by the trust at the Leicester Royal Infirmary site for the three requested timeframes.*
- 5. Please breakdown the total number of patient records accessed by staff without authorisation or business justification to do so by staff employed by the trust at the Leicester Royal Infirmary site by department where the incident/breach occurred, for the following timeframes (i.e. Accident and Emergency department, Musculoskeletal department, Women's and Children's department, etc.) for the three requested timeframes.*
- 6. Please provide the number of referrals made to professional bodies i.e. the GMC and NMC by UHL trust for staff working at the Leicester Royal Infirmary Site for the three requested timeframes.*
- 7. Please breakdown the number of these referrals by department at the Leicester Royal Infirmary Site (i.e. Accident and Emergency department, Musculoskeletal department, Women's and Children's department, etc.) for the three requested timeframes.*

8. *Please provide the overarching reasons for these referrals where available (i.e. Professional conduct, clinical safety, unauthorised access of patient records etc.) for the three requested timeframes.*
9. *Please breakdown these reasons by department at the Leicester Royal Infirmary Site (i.e. Accident and Emergency department, Musculoskeletal department, Women's and Children's department, etc.). For the three requested timeframes.*
10. *Please provide the total number of disciplinary sanctions issued for by the trust for staff employed at the Leicester Royal Infirmary site for unauthorised access of patient records for the three requested timeframes.*
11. *Please provide the level of sanctions issued in accordance with the trusts disciplinary policies (i.e. no further action, first written warning, final written warning, dismissal etc.) for staff employed at the Leicester Royal Infirmary site for unauthorised access of patient records for the three requested timeframes.*
12. *Please breakdown these levels of sanction for staff employed at the Leicester Royal Infirmary site by department (i.e. Accident and Emergency department, Musculoskeletal department, Women's and Children's department, etc.) for the three requested timeframes.*
13. *Please provide the total number of referrals made to the Information Commissioners Office (ICO) by the trust for unauthorised access of patient records (confidentiality, integrity breaches) for staff employed at the Leicester Royal Infirmary site for the three requested timeframes.*
14. *Please provide the total number of reports to the police for crimes committed under GDPR for unauthorised access of patient records, for staff employed at the Leicester Royal Infirmary site for the three requested timeframes."*
5. The Trust responded on 29 June 2020. It stated that due to the Covid-19 pandemic, it had temporarily paused responding to FOIA requests from March 2020. It advised that it was now processing requests again and was able to provide a partial response to the request.
6. The Trust responded to parts 1, 2 and 3 of the request, and explained it would respond to the rest once it was in a position to do so.
7. On 2 July 2020, the Trust provided a response to the remainder of the complainant's request. However, it applied section 40(2) of the FOIA to parts 4,5,8,9,10,11 and 12.

8. Following an internal review the Trust wrote to the complainant on 20 August 2020. It stated that it maintained its original position.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 25 September 2020, to complain about the way their request for information had been handled.
10. The Commissioner considers that the scope of her investigation is to establish whether the public authority is entitled to withhold the requested information under section 40(2) of the FOIA.

### **Reasons for decision**

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

11. 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.
12. 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').
13. 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.
14. 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?***

15. Section 3(2) of the DPA defines personal data as:
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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA

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

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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.
18. 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.
19. In the circumstances of this case, the Trust has explained that the requested information relates to a small number of individuals. It explained to the complainant that it had already provided some "high-level information", however, in light of information provided to another request from the complainant, due to the small numbers involved, individuals could potentially be identified and as such, section 40(2) had been applied.
20. The Trust has provided the information it holds to the Commissioner for consideration. A key factor in this case is to determine whether or not individuals are identifiable from the withheld information.
21. The Commissioner notes that the complainant's request did not require any further identifying information, such as names of the individuals. The complainant evidently considers that the information requested is sufficiently anonymous not to comprise personal data.
22. However, the Trust has argued that as previous information has been provided, due to the small figures relating to this request, an individual could be identified.
23. As is explored in her guidance on determining what is personal data<sup>2</sup>, the Commissioner considers that it is necessary to consider whether individuals would be identifiable "by a determined person with a particular reason to want to identify individuals". This is because a disclosure which is ordered under the FOIA is a disclosure to the world at large, and not only to the person making the request.

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

24. The Trust has explained to both the Commissioner and the complainant, that as previous information has been provided under other FOIA requests, if the specific figures were to be released, individuals could potentially be identified.
25. In her guidance on anonymisation<sup>3</sup>, from page 31 onwards, the Commissioner explains that "removing numbers relating to five or 10 individuals or fewer may be a reasonable rule of thumb for minimising the risk of identification".
26. The Commissioner has examined the withheld information in this case and is satisfied that the Trust holds information relating to a small number of individuals: fewer than five.
27. The Commissioner considers that the individuals involved in any of the instances, could potentially be identified by "a determined person" from the requested information, owing to the very small numbers involved.
28. She is satisfied that the risk of identification is sufficient that the information falls within the definition of "personal data" in section 3(2) of the DPA.
29. 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.
30. The most relevant DP principle in this case is principle (a).

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

31. 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".*

32. 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.
33. 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***

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<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/1061/anonymisation-code.pdf>

34. 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>4</sup>.*

35. 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.

36. 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*

37. In considering any legitimate interest(s) in the disclosure of the requested information under the 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.

38. Further, 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. They may be

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<sup>4</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".*

compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

39. The Commissioner considers that there is some legitimate interest in information about the number of incidents of inappropriate access to medical records by staff members and how the Trust responds to these incidents.

*Is disclosure necessary?*

40. '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.
41. The Commissioner is not aware that the information requested by the complainant has otherwise been published or can otherwise be accessed by the requester. She is therefore satisfied that disclosure under the FOIA would be necessary to meet the legitimate interests of the requester.
42. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.
43. As the Commissioner has decided in this case that disclosure is necessary to meet the legitimate interest in disclosure, she has gone on to conduct the balancing test.

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

44. It is necessary to 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.
45. 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.
46. 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.
  47. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
  48. In this case, the Trust has explained that it has considered the information requested, along with previous requests for information/information that has already been released under the FOIA.
  49. The Trust has advised that to provide more detailed information, would risk identification of any staff members, due to the low numbers involved.
  50. It explained that to release the information would be like to lead to a "*diminution in the trust and confidence employees of the Trust have in its employer*". It advised that it is seeking to promote a culture where there is freedom to speak up and to release such information, which is personal to staff members, it would undermine this culture.
  51. The Trust considers that the rights and freedoms of the data subjects, outweigh the legitimate interest of the public in the circumstances of this request for information.
  52. The Commissioner agrees that the relevant individuals would have no expectation that their personal circumstances would be released. She considers that disclosure of the information is likely to result in unwarranted damage and distress, especially if the individuals were indentified.
  53. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
  54. 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.

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

## **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**  
**SK9 5AF**