

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 22 June 2021

Public Authority: Worcestershire Acute Hospitals NHS Trust
Address: Charles Hastings Way
Worcester
WR5 1DD

Decision (including any steps ordered)

1. The complainant requested data about pacemaker appointments. Worcestershire Acute Hospitals NHS Trust ("the Trust") initially withheld some of the information before later disclosing it.
2. The Commissioner's decision is that the Trust did not discharge its duty under section 1(1) of the FOIA within 20 working days and has therefore breached section 10 of the FOIA.
3. The Commissioner does not require any further steps to be taken.

Request and response

4. On 30 July 2020, the complainant requested information of the following description:

"Information as to the number of the Pacemaker Check appointments as offered by the Trust, refused by a prospective patient, cancelled by the Trust, or as performed on he envisaged date by the Trust, between the dates in identified weeks in the months of November 2019 to July 2020." [sic]
5. On 1 September 2020, the Trust responded. It provided some data, but withheld all numbers between 1 and 5 "due to our confidentiality policy."

6. The complainant requested an internal review on 5 September 2020. The Trust sent the outcome of its internal review on 23 September 2020. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 26 September 2020 to complain about the way that the Trust had responded to the request.
8. Whilst it had not explicitly cited an exemption from disclosure, based on the nature of the information that had been withheld and the wording of the Trust's refusal notice, the Commissioner commenced her investigation on the basis that the Trust had relied on section 40(2) of the FOIA (personal data) to disclose the requested information. In line with her usual practice, the Commissioner asked the Trust to reconsider its stance and, if it did wish to rely on section 40(2) of the FOIA, to set out why it considered that individuals would be identifiable from the withheld information.
9. Having reconsidered its stance, the Trust reversed its position and decided to disclose the information on 24 May 2021.
10. The Commissioner wrote to the complainant on 25 May 2021, noting that the complainant had now received all the information he originally asked for, she invited him to withdraw his complaint. Alternatively, she invited him to set out what further matters, relating to the request, she needed to address.
11. The complainant informed the Commissioner that he did not wish to withdraw his complaint. His fresh grounds of complaint ran to some three pages – most of which did not relate to statutory breaches of the legislation. The Commissioner has covered some of these issues under "Other Matters."
12. However, the Commissioner did note two themes from the complainant's letter. Firstly, that he was dissatisfied with the delay in receiving all the information he had requested and secondly that he considered that the Trust had withheld information improperly.
13. The Commissioner does not consider it to be a worthwhile use of her valuable resources to investigate whether a public authority ought to have relied originally on an exemption to withhold information that has now been disclosed – although she has made some general comments on the use of section 40(2) to withhold small numbers under "Other Matters." However, as a general rule, the Commissioner encourages public authorities to take a practical approach during the course of

investigations and to disclose information – where it is safe to do so – even where there may have been valid grounds for withholding it at the point the request was responded to.

14. However, the Commissioner does recognise that the complainant has had to wait around nine months to receive all the information he originally sought. She has therefore decided to issue a decision notice focusing on the procedural handling of the request.
15. The scope of this notice and the following analysis is to consider whether the Trust has complied with section 10 of the FOIA.

Reasons for decision

16. 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.*

17. Section 8(1) of the FOIA states:

In this Act any reference to a "request for information" is a reference to such a request which –

- (a) is in writing,*
- (b) states the name of the applicant and an address for correspondence, and*
- (c) describes the information requested.*

18. The Commissioner considers that the request in question fulfilled these criteria and therefore constituted a valid request for recorded information under the FOIA.
19. Section 10 of the FOIA states that a public authority must comply with its duty under section 1(1) of the FOIA "*promptly and in any event not later than the twentieth working day following the date of receipt.*"
20. The Trust's refusal notice was not valid because it failed to communicate information and failed to cite an exemption that permitted it to do so. The Trust therefore did not comply with its section 1(1) duty until 24 May 2021 – which was well in excess of 20 working days.

21. The Commissioner therefore finds that the Trust breached section 10 of the FOIA in respect of this request.

Other matters

Small numbers and section 40(2) of the FOIA

22. Whilst the Commissioner makes no finding as to whether the Trust ought or ought not to have relied upon section 40(2) to withhold information, she considers that the following comments may be helpful.
23. Clearly, small numbers carry a greater risk of identification than large ones. However, the mere fact that a number is small does not automatically mean that it will identify an individual and hence be personal data.
24. When considering whether any number would reveal personal data, a public authority must consider a number of factors, including the overall size of the dataset from which the numbers are drawn, the manner in which the request requires the data to be analysed and any information that might be in the public domain that could be cross-referenced with the withheld information.
25. The binding decision of the Upper Tribunal in *Information Commissioner v Miller* [2018] UKUT 229 (AAC) demonstrates that public authorities must consider the individual circumstances and not apply section 40(2) in blanket fashion. Nor does the sensitivity of the information make an individual any more or any less identifiable.
26. When considering a complaint about such matters, the Commissioner would expect the public authority to be able to demonstrate how an individual could be identified from the withheld information.

Extraneous matters

27. The complainant, in his grounds of complaint dated 29 May 2021, was unhappy that the Trust's previous responses had not been signed off by a named individual and that its response of 24 May 2021 had not been sufficiently apologetic.
28. There is no requirement under FOIA for responses to information requests to be signed by a named (or even identifiable) individual. The obligation under FOIA falls on the public authority as a body corporate and not on any individual within it. The complainant did not put forward any evidence that would suggest that the responses did not represent the views of the Trust

29. Finally, there is no requirement, under the FOIA for a public authority to issue an apology in the event that it decides to revise its stance. Whilst the Commissioner would not seek to prevent a public authority from providing an apology – if it felt one were warranted – she would not require it to do so.

Right of appeal

30. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

31. 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.
32. 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

Pamela Clements
Group Manager
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Wycliffe House
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Wilmslow
Cheshire
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