

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 October 2021

Public Authority: West London NHS Trust

Address: Trust Headquarters
1 Armstrong Way
Southall
UB2 4SD

Decision (including any steps ordered)

1. The complainant has requested information about a review of an investigation. West London NHS Trust ('the Trust') has applied section 30(3) (investigations and proceedings), section 40(2) (personal data) and section 42 (legal professional privilege) to the request.
2. The Commissioner's decision is as follows:
 - If the Trust holds any information within scope of the request it would be the complainant's own personal data which would be exempt information under section 40(1) of the FOIA. The Commissioner has therefore applied section 40(5A) of the FOIA herself proactively to prevent the disclosure of personal data that would result from confirming or denying that information was held.
 - The Trust breached section 17(1) of the FOIA as its refusal notice was inadequate.
3. The Commissioner does not require the Trust to take any remedial steps.

Request and response

4. On 1 February 2021 the complainant wrote to the Trust and requested information in the following terms:

“I would like to make an FOI. I have been informed that the Trust have arranged an external independent review of my case. I would like to know who is conducting this.”

5. The Trust responded on 2 March 2021. The Trust applied section 30(3) of the FOIA and said it was applying this exemption as it would not disclose any information about investigations nor would it confirm or deny their existence.
6. The Trust advised that it was also applying “section 40” and explained that under this exemption any requested information that constitutes the applicant’s own personal data is exempt information.
7. The Trust provided an internal review on 21 July 2021. It confirmed its reliance on section 30(3). The Trust advised that it considered the exemption under “section 42” of the FOIA was also engaged. Finally, the Trust now confirmed that that it continued to rely on “section 40(2)” and that the public interest favoured maintaining the exemptions, where relevant.

Scope of the case

8. The complainant first contacted the Commissioner on 6 March 2021 to complain about the way their request for information had been handled.
9. Having considered the request and the Trust’s submission, the Commissioner will explain why she considers that the Trust should have neither confirmed nor denied holding information within the scope of the request. She has also considered the Trust’s refusal of the request.

Reasons for decision

Section 40 personal information

10. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b) to have the information communicated to them if it is held and is not exempt information – ‘the duty to confirm or deny’.

11. Section 40(1) of the FOIA provides that information is exempt from disclosure if it is the personal data of the applicant.
12. However, under section 40(5A) the duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).
13. Section 2(2) of the Data Protection Act 2018 defines personal data as:

"any information relating to an identified or identifiable living individual."
14. The Trust provided the complainant with a confused refusal of the request and a confused internal review. It both neither confirmed nor denied it held the requested information under section 30(3) of the FOIA (as confirming or denying would indicate whether a person was or was not subject to an investigation or proceedings) but also suggested it *did* hold relevant information and was withholding it under section 40(1) in its response, which became section 40(2) in its internal review. The Trust also appeared to withhold information under "section 42" [ie the Trust did not refer to a specific subsection of section 42, such as 42(2)].
15. The request is for the name of the individual who would carry out a review of the complainant's own [complaint] case.
16. The Commissioner considers that any information that the Trust held within the scope of the request would be the complainant's own personal data.
17. The request is ostensibly about a member of the Trust's staff that will carry out a review. However, the complainant has not asked about a member of staff at random. The wording of the request makes clear that the information relates to an individual who (the complainant believes) will review the circumstances of a dispute they themselves had with the Trust, and the resulting investigation.
18. The request the complainant has made is based on the premise that they had been in dispute with the Trust. If they had not been in dispute, the Trust would be unable to identify which individual's name the complainant was seeking.
19. Therefore, if the Trust were to confirm or deny that it held information within the scope of the request, it would be revealing whether or not the complainant had been in dispute with the Trust. Whether or not the complainant had been in dispute with the Trust would be the complainant's personal data as it relates to them and they could be identified from it (since they submitted the request).

20. The Commissioner notes that the First Tier Tribunal in *Kenneth Heywood v Information Commissioner (EA/2021/0031P)* recently upheld a decision notice in which she had proactively applied section 40(5A) of the FOIA in respect of a personal data premise-based request¹.
21. The complainant obviously knows whether or not they are in dispute with the Trust, and the Trust will also know. However, the world at large does not know, and responses provided under the FOIA are considered to be provided to the world at large, not just to the individual who made the request.
22. In this particular case, the complainant and the Trust communicated by private email, so the likelihood of harm is extremely low – however, the correct response under the FOIA is not determined by the likelihood of harm, or the complainant's wishes to obtain the information.
23. The Commissioner therefore considers that the Trust could not confirm or deny holding information within the scope of this request without disclosing personal information relating to the complainant. It should therefore have relied on section 40(5A) for the FOIA to neither confirm nor deny holding information. The Trust should then have considered the request under the data protection legislation if it had not already done so.

As section 40(5A) is an absolute exemption, there is no requirement for the Commissioner to consider the balance of the public interest.

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[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2822/Decision%20Haywood,%20Kenneth%20Michael%20\(EA-2021-0031\)%20Dismissed.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2822/Decision%20Haywood,%20Kenneth%20Michael%20(EA-2021-0031)%20Dismissed.pdf)

Procedural matters

24. Section 17(1) of the FOIA requires a public authority to inform a complainant of any exemptions it wishes to apply either to withhold information, or to neither confirm nor deny holding information. This should include the section, subsection and wording of the exemption concerned.
25. In this case, whilst noting they were the incorrect exemptions in any case, the Trust's refusal did not consistently include the subsection of those exemptions it was relying on. The Commissioner therefore considers that the Trust's refusal breached section 17(1) of the FOIA.

Right of appeal

26. 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

27. 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.
28. 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

Cressida Woodall
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF