

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 15 September 2022

**Public Authority:** United Lincolnshire Hospitals NHS Trust

**Address:** Trust Headquarters  
Lincoln County Hospital  
Greetwell Road  
Lincoln  
LN2 5QY

#### **Decision (including any steps ordered)**

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1. The complainant has made a three part request for information relating to babies that were born at the Pilgrim Hospital in Boston with Erb's Palsy (otherwise known as brachial plexus injury). United Lincolnshire Hospitals NHS Trust (the Trust) withheld the requested information under section 40(2) of FOIA on the basis that it is third party personal data, and its disclosure would breach data protection law.
2. The Commissioner's decision is that the Trust is not entitled to rely on section 40(2) to withhold the information requested under part one of the request for information, and therefore breached section 1 of FOIA by failing to provide it. However, the Commissioner has decided that the Trust is entitled to rely on section 40(2) of FOIA to withhold the information requested under parts two and three of the request. The Commissioner has also recorded a procedural breach of section 17 of FOIA, as the Trust failed to issue the complainant with a refusal notice in respect of parts two and three of the request within the statutory time limits.
3. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
  - Disclose the information requested in part one of the complainant's request for information.

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 FOIA and may be dealt with as a contempt of court.

## **Request and response**

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5. On 22 December 2020, the complainant made the following request for information under FOIA:
  - 1) "How many babies were born at the Pilgrim Hospital in Boston Erb's palsy (otherwise known as brachial plexus) injury from January 2013-December 2014?
  - 2) Following on from the above, please indicate the month and year of each of those births, eg August 2003;
  - 3) Whilst preserving patient confidentiality, what were the broad circumstances of the above births including specifically head to body delivery intervals and how many fully-qualified medical staff were present at those births once shoulder dystocia was diagnosed?"
6. The Trust responded on 21 January 2021 and refused to provide the requested information, stating:

"...that the Trust did not have electronic systems in place at this time. As such, any injury would have been recorded within the maternity hand held records and baby notes.

Whilst the Trust holds the records from this time period it would not be possible to retrieve the birth records from these two records and review each set of notes within the appropriate limit of a freedom of information request. As such, we are therefore applying section 12(1) of the Act, exemption where cost of compliance exceeds appropriate limit.

In order to provide a full response to you a search of the Trust's incident management system (Datix) has also been undertaken to identify any such injuries. I can confirm that, since incident recording commenced using Datix in November 2003, there were no incidents of Erb's palsy or brachial plexus reported during the period requested."

7. The complainant wrote to the Trust on 25 January 2021, asking it to revisit their request. The complainant stated that they understood the implications of section 12(1) of FOIA but had anticipated that the Trust would have used the Datix system to respond to the request, and that it therefore would have fallen within the appropriate limit.
8. The complainant noted that the Trust had not identified any injuries on the Datix system and stated that this was incorrect. The complainant explained that its client was born with the shoulder injury in question during the period covered by their request, and that they were aware that there was a Datix report in respect of that incident. They were also aware of two other individuals who were similarly injured during the same time period.
9. The Trust responded to the complainant on 23 March 2021, advising that it had expanded the search of the Datix system and searched for the term "*shoulder dystocia*" for the time period of January 2003 to December 2004. The Trust confirmed that it recorded fewer than five incidents within the Datix system that occurred at Pilgrim Hospital, Boston and referred to shoulder dystocia.
10. The complainant responded to the Trust on 25 March 2021, raising concerns that the response did not specifically address their request for information. In particular, the complainant raised concerns that the Trust had not provided the exact number of incidences of injury. The complainant also raised concerns that the Trust had not responded to parts two and three of their request.
11. The Trust responded on 8 April 2021, stating that it was withholding the requested information under section 40(2) of FOIA, on the basis that disclosure would contravene the UK data protection principles, specifically the first principle (which requires personal data to be processed lawfully, fairly and transparently).
12. The complainant requested an internal review of the Trust's decision on 19 April 2021.
13. The Trust provided the outcome of its internal review on 17 May 2021, maintaining its position that it was withholding the information requested under section 40(2) of FOIA.

### **Scope of the case**

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14. The complainant contacted the Commissioner on 21 May 2021 to complain about the way their request for information had been handled.

15. The Commissioner considers that the scope of his investigation is to consider whether the Trust is entitled to withhold the requested information under section 40(2) of FOIA.

## Reasons for decision

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### Section 40 personal information

16. Section 40(2) of 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.
17. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup> of FOIA. 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"). The DP principles are set out in Article 5 of the UK General Data Protection Regulation ("UK GDPR"). However, at the time of the request, the UK was still within the EU-UK transition period as it left the European Union. During the transition period, the EU GDPR was the applicable data protection law in the UK. As this request was received before the end of that transition period, the application of section 40(2) has been decided by reference to the EU GDPR.
18. 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 2018"). If it is not personal data, then section 40 of FOIA cannot apply.
19. Secondly, if the Commissioner is satisfied that the requested information is personal data, he must then establish whether disclosure of that data would breach any of the DP principles.

### Is the information personal data?

20. Section 3(2) of the DPA 2018 defines personal data as:

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

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

21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
22. An individual is "identifiable" if they 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.
23. 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.

#### Part one of the request for information

24. The Trust has confirmed in response to part one of the request that because the requester narrowed the location of the search to Pilgrim Hospital, Boston, this reduced the potential number of results and increased the chance of individuals being identifiable. Also, due to the physical disabilities suffered as a result of shoulder dystocia and subsequent diagnosis of Erb's Palsy, the Trust withheld the information due to the possibility of individuals being identifiable due to physical factors.
25. The Commissioner noted that the request spans a two year period during which the total number of babies born at the hospital in question was presumably several thousand and was not convinced that releasing the figure would allow for them to be identified. He therefore asked the Trust to again explain definitively how any particular individual could be identified from the withheld figure.
26. In reply, the Trust's stated that given that the request, whilst looking at a two year period, specifically sought information for a single hospital, covering a particular region of the county and the characteristics and physical attributes for those with a diagnosis of Erb's Palsy, the identification of a month and year of birth heavily reduces the figures, in respect of the number of births at that time and in that area of the county. The Trust has argued that if all the requested information was provided to the requester, it would not only breach the EU GDPR but would also go against the Trust's legal duty to protect the anonymity of the patient from the general public, as well as the complainant, as per Section 40(2) and (3) of FOIA.
27. The Trust also referred to the fact that the complainant had identified a further two cases to the Trust without advising of consent to share. The Trust took the decision, in order to protect the rights of the individuals, not to release the information.

28. In the circumstances of this case, having considered the explanations put forward by the Trust, the Commissioner does not consider that the information requested under part one of the request (i.e. the number of babies born with Erb's Palsy within the two year period at Pilgrim Hospital, Boston) could be used to identify any specific individuals, given the total number of babies born within that period.
29. In conclusion the Commissioner has decided that the information requested in part one of the request does not fall within the definition of 'personal data' in section 3(2) of the DPA 2018 and so it cannot engage the exemption under section 40(2) of FOIA.

Parts two and three of the request for information

30. The information requested under parts two and three of the request is:

- the month and year of any babies born with Erb's Palsy during the specified period, and
- the broad circumstances of those births.

31. The Commissioner's guidance on what is personal data<sup>2</sup> states that if information 'relates to' an 'identifiable individual' it is 'personal data' regulated by the DPA.

32. The information in this case does not directly identify individuals. However, just because the name of an individual is not known, it does not mean that an individual cannot be identified.

33. A question faced by many organisations, particularly those responding to Freedom of Information requests, is whether, in disclosing information that does not directly identify individuals, they are nevertheless disclosing personal data if there is a reasonable chance that those who may receive the data will be able to identify particular individuals to whom the information in question relates.

34. The aforementioned guidance states:

"Your starting point might be to look at what means are available to identify an individual and the extent to which these are readily available. For example, if searching a public register or reverse directory would enable you to identify an individual from an

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<sup>2</sup> <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/what-is-personal-data/>

address or telephone number, and you are likely to use this resource for this purpose, you should consider that the address or telephone number data is capable of identifying an individual.

You should assume that you are not looking just at the means reasonably likely to be used by an ordinary person, but also by a determined person with a particular reason to want to identify individuals. For example, investigative journalists, estranged partners, stalkers, or industrial spies.”<sup>3</sup>

35. Further to the arguments provided by the Trust in paragraph 26 of this decision notice, the Trust is also of the view that there would be additional information available to the public which, when combined with the withheld information, would enable identification.
36. In particular, the Trust argued that the physical characteristics of a person who suffered with shoulder dystocia at birth and subsequently received a diagnosis of Erb’s Palsy could allow identification. The Trust explained that whilst it recognised that some babies who suffered with shoulder dystocia go on to recover from this, those who do not continue to exhibit physical characteristics for the remainder of their life.
37. The Trust argued that the ability to obtain information about medical conditions in today’s society make it likely that those wishing to gain an understanding of a condition can easily do so through an internet search. The Trust stated that this would not only offer a written explanation but also images that would clearly show the physical attributes of a sufferer.
38. The Trust argued that by having an understanding of the physical attributes of the condition of Erb’s Palsy and knowing the date and month of birth of the individual, this would narrow the ability of a member of the public to identify a person with the condition.
39. In the circumstances of this case, having considered the information withheld in relation to part two and three of the request, the Commissioner is satisfied that the information relates to living individuals. He is also satisfied that those individuals are identifiable from the information itself, or in combination with other information

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<sup>3</sup> <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/what-is-personal-data/can-we-identify-an-individual-indirectly/>

available to the public. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

**Would disclosure of the information contravene any of the DP principles?**

40. The fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
41. The most relevant DP principle in this case is the one contained within Article 5(1)(a) of the EU GDPR, which states:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
42. 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 doing so would be lawful, fair and transparent.
43. In order to be lawful, one of the lawful bases for processing listed in Article 6(1) of the EU GDPR must apply to the processing. It must also be generally lawful (i.e. not in contravention of any other laws).
44. In addition, if the requested information is "special category" personal data, the public authority must be able to satisfy one of the conditions listed in Article 9 of the EU GDPR in order for disclosure to be lawful and compliant with the principle.

**Is any of the requested information special category personal data?**

45. Information relating to "special categories" of personal data is given special status in the EU GDPR.
46. Under Article 9 of the EU GDPR, "special category" personal data is data which:
  - a. reveals racial or ethnic origin,
  - b. reveals political opinion,
  - c. reveal religious or philosophical beliefs,
  - d. reveals trade union membership,
  - e. genetic data,



- f. biometric data for the purpose of uniquely identifying a natural person,
  - g. data concerning health, or
  - h. data concerning a natural person's sex life or sexual orientation.
47. In its initial submission to the Commissioner, the Trust confirmed that it did not consider the requested data to be special category data.
48. However, having seen the withheld information falling within the scope of part three of the request, the Commissioner was of the view that the data concerned a person's health and therefore would be considered to be special category data.
49. Following further consideration of the withheld information, the Trust confirmed that the information, considered personal data, obtained from its incident reporting system (Datix) would be recorded within the health record of the mother and baby, once a health record was established post birth. The Trust stated that, given that this information does not solely reside within the incident record but should also be contained within the health record, it did consider it to be Special Category Data as per the rules of Article 9(2)(g) of the EU GDPR.
50. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the information withheld in response to part three of the request does consist of special category data. He has reached this conclusion on the basis that the broad circumstance of a birth falls into one of the categories listed in paragraph 46 of this decision notice (specifically category g (data concerning health)).
51. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it cannot be processed (including disclosure under FOIA), unless one of the stringent conditions listed of Article 9 can be met.
52. The Commissioner considers that the only conditions in Article 9 that could potentially allow the disclosure of special category personal data under FOIA are:
- (a) the data subject has given explicit consent to the disclosure; or
  - (e) the personal data in question has been manifestly made public by the data subject).
53. The Commissioner has seen no evidence or indication that the individuals concerned have explicitly consented to this data being

disclosed to the world in response to the FOIA request, nor has he seen evidence to suggest that they have deliberately made this data public at the time of the request.

54. As none of the conditions required for processing special category data are satisfied, disclosing special category data relating to the broad circumstances of a birth would not be lawful and would therefore breach the fairness, lawfulness and transparency principle under Article 5(1)(a) of the EU GDPR. This information is therefore exempt under section 40(2) of FOIA.

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

55. Having dealt with the elements of the withheld information that constitute special category personal data, there remains the information requested under part two of the request, relating to the month and year of any babies born with Erb's Palsy. This information does not fall within any of the special categories but is nevertheless personal data.
56. "Lawful" processing is defined by Article 6(1) of the EU GDPR, which states that "processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in Article 6 applies. In other words, for processing to be lawful, it must satisfy one of the lawful bases for processing listed in Article 6(1).
57. The Commissioner considers that the lawful basis most applicable to disclosure under FOIA is that provided by Article 6(1)(f), which states that processing will be lawful if:

"(the) 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>.

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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:-

58. In considering the application of Article 6(1)(f) of the EU GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:
- i) **Legitimate interests:** Whether a legitimate interest is being pursued in the request for information.
  - ii) **Necessity:** Whether disclosure of the information is necessary to meet the legitimate interest in question.
  - iii) **Balancing:** Whether the above interests override the legitimate interests or fundamental rights and freedoms of the data subject.
59. 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

60. In considering any legitimate interests in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be considered “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 interests can include broad general principles of accountability and transparency for its 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. Both compelling and trivial interests can be legitimate interests, but trivial interests may be more easily overridden in the balancing test.
61. The complainant has explained that Erb’s Palsy, or brachial plexus injury, occurs at the time of birth and is a life-long injury to the nerves in the shoulder, causing significant functional disability. The complainant has argued that as this injury is extremely rare, it raises a public interest of a possible unsafe system of managing labour. The

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*“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”.*

complainant stated that, at the time of their complaint, there was no indication that the Trust had acknowledged and/or investigated a cluster of extremely rare but serious injuries to babies and mothers.

62. The Trust has stated that it has not identified any legitimate interests in the disclosure of the requested information.
63. However, the Commissioner accepts that the complainant is pursuing a legitimate interest in requesting the information and has therefore gone on to consider whether the disclosure of the information is necessary to meet that legitimate interest.

#### Necessity test

64. Where a legitimate interest is being pursued in a request for information that includes third party personal data, it must then be considered whether the disclosure of that information is "necessary" for the purposes of that legitimate interest.
65. "Necessary" means more than desirable but less than indispensable or an 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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
66. The Commissioner has considered whether disclosure of the month and year of birth is necessary to meet the requester's specific legitimate interests and the wider legitimate interest in openness and transparency by public authorities.
67. It is important to make clear at this point that disclosure under FOIA is disclosure into the public domain, not just specifically to the requester. The Commissioner has therefore considered whether disclosure of the third-party individuals' personal data to the world at large is necessary to meet the legitimate interests identified above.
68. The Commissioner notes that in this decision notice, he has instructed the Trust to release the total number of babies born with Erb's Palsy/brachial plexus injury within the specified two year period, which will contribute to satisfying the legitimate interest being pursued by the requestor. The Commissioner acknowledges that releasing the date and year of birth would go some way towards informing the public about the Trust's accountability in terms of the allegedly unsafe system of managing labour during the requested time period.

69. However, the Commissioner does not consider that the release of the month and year of any babies born with Erb's Palsy injury to be *necessary* to satisfy the legitimate interests pursued by the complainant.
70. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, he has not gone on to conduct the balancing test. As disclosure is not necessary, Article 6(1)(f) of the EU GDPR cannot apply and the disclosure would therefore be unlawful. As a result, disclosure does not meet the requirements of the lawfulness, fairness, and transparency principle under Article(5)(1)(a) of the EU GDPR. The information is therefore exempt under section 40(2) of FOIA.

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

71. In view of the above, the Commissioner has decided that the Trust was entitled to withhold the information that constitutes personal data in parts two and three of the request under section 40(2), by way of section 40(3A)(a).
72. However, the Commissioner has decided that the Trust has failed to demonstrate that the exemption at section 40(2) is engaged in respect of part one of the request.
73. The Commissioner therefore requires the Trust to disclose the information requested under part one of the request (i.e. the number of babies born at Pilgrims Hospital, Boston from January 2013 to December 2014 with Erb's Palsy/brachial plexus injury).
74. As explained in paragraph 17 of this decision notice, this request was received before the end of the EU-UK transition period as the UK left the EU. The application of section 40(2) has therefore been decided by reference to the EU GDPR. However, as the relevant parts of the EU GDPR remain the same within the UK GDPR, the Commissioner is satisfied that he would come to the same decision in this case had the UK GDPR been the applicable data protection law at the time of the request.

### **Procedural matters**

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75. Section 17(1) of FOIA states that where a public authority intends to refuse a request for information on the grounds that it is subject to an exemption in Part II of FOIA, it must issue the requester with a refusal notice explaining the exemptions relied upon and why they apply (if not apparent), no later than 20 working days after the date on which the request was received.

76. In this case, the Trust failed to issue the requester with a valid refusal notice with respect to parts two and three of the request within 20 working days. The Commissioner therefore finds that the Trust breached section 17 of FOIA with regards to these two parts of the request.

## Right of appeal

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77. 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)

78. 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.
79. 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**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**