

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 10 November 2022

**Public Authority:** Great Ormond Street Hospital for Children NHS Foundation Trust (GOSH)

**Address:** Great Ormond Street  
London  
WC1N 3JH

### Decision (including any steps ordered)

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1. The complainant made a request for information regarding the employment of a doctor at GOSH. GOSH refused to confirm or deny whether it holds the requested information under section 40(5B)(a)(i) FOIA.
2. The Commissioner considers that GOSH incorrectly applied section 40(5B)(a)(i) FOIA in this case.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
  - GOSH must confirm or deny whether it holds information within the scope of the request. If GOSH holds information it must either disclose it, or issue a refusal notice that complies with section 17 of the FOIA.
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 the Act and may be dealt with as a contempt of court.

### Request and response

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5. The complainant made the following information request to GOSH on 20 March 2022:

1. Confirmation of employment started for [NAMED DOCTOR].
  2. Confirmation of employment ended for [NAMED DOCTOR].
  3. Confirmation that [NAMED DOCTOR] a Principal Clinical Psychologist at the Great Ormond Street Hospital NHS Trust.
  4. Confirmation [NAMED DOCTOR] was Attached to the Department of Infectious Diseases with emphasis on children and adolescents infected with HIV.
  5. Confirmation that [NAMED DOCTOR] was Responsible for psychological services including assessment, long and short-term therapeutic work, reports for court regarding child protection issues, management of in-patient and research.
  6. Copies of all correspondence and e-mails between Great Ormond Street Hospital Clinic and [NAMED DOCTOR].
  7. Qualifications held on record of [NAMED DOCTOR].
  8. Confirmation that [NAMED DOCTOR] was a member of Great Ormond Street Hospital Clinic CAMHS Team.
  9. Confirmation that [NAMED DOCTOR] at Locum Position in the Great Ormond Street Hospital Gender Identity Development Unit.
  10. Under what capacity was [NAMED DOCTOR] at the Great Ormond Street Hospital.
  11. [NAMED DOCTOR] was apart of the Group for Trainee Clinical Psychologists, Great Ormond Street Hospital for Children, Facilitator.
  12. [NAMED DOCTOR] was the Group for Assistant Psychologists, Great Ormond Street for Hospital for Children, Facilitator.
6. On 31 March 2022 GOSH responded, it explained that:
- “To confirm or deny whether personal information exists could publicly reveal information about an identifiable individual or individuals thereby breaching the right to privacy afforded to persons under the Data Protection Act (DPA) and the General Data Protection Regulation (GDPR) 2018.”
7. On 21 April 2022 the complainant asked GOSH to carry out an internal review. On 4 May 2022 GOSH provided the internal review outcome:

"The Trust informed the requestor that the Trust could 'neither confirm nor deny' that it held the information. This was appropriate as:

1. If the Trust informed the requestor that the information was held, this would inform the requestor that the individual had worked at the Trust.
2. If the Trust informed the requestor the information was not held, this would inform the requestor that the individual had not worked at the Trust.

In both examples, this would breach the right to privacy afforded to persons under the Data Protection Act (DPA) and the General Data Protection Regulation (GDPR) 2018."

### **Scope of the case**

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8. The complainant contacted the Commissioner on 4 May 2022 to complain about the way their request for information had been handled.
9. The Commissioner therefore considered the scope of his investigation to be to determine if GOSH was correct to refuse to confirm or deny whether the requested information was held under section 40(5B)(a)(i) FOIA.

### **Reasons for decision**

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

10. 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 UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.
11. Therefore, for GOSH to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny 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 the confirmation or denial that the requested information is**

**held constitute the disclosure of a third party's personal data?**

12. Section 3(2) of the DPA 2018 defines personal data as: - "any information relating to an identified or identifiable living individual". The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable. 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.
13. By confirming or denying whether the requested information is held, this would confirm or deny whether the individual named in the request worked for GOSH.
14. The Commissioner is satisfied that confirming or denying whether the requested information is held would disclose information about an identifiable living individual. This information therefore does fall within the definition of 'personal data' in section 3(2) of the DPA.
15. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent GOSH 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.
16. The Commissioner considers 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?**

17. Article 5(1)(a) of the UK GDPR states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

18. 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.
19. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

20. Article 6(1) of the UK 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*” lawful bases for processing listed in the Article applies.

21. 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>1</sup>.*

22. In considering the application of Article 6(1)(f) of the UK 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.

23. The Commissioner considers that the test of ‘necessity’ under stage must be met before the balancing test under stage (iii) is applied

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<sup>1</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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

*“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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”.*

*(i) Legitimate interests*

24. 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.
25. In this case the Commissioner considers that there is a legitimate interest in transparency as to the medical staff GOSH employs who by the nature of their job occupy public facing roles.

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

26. '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 must therefore be the least intrusive means of achieving the legitimate aim in question.
27. The Commissioner does consider it would be necessary to confirm or deny whether the requested information is held to meet the legitimate interests in this case.

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

28. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject(s)' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For

example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.

29. In this case, as outlined above, given the nature of a doctor's role is public facing, the Commissioner considers that there would be some reasonable expectation that GOSH may confirm or deny if a particular doctor was or had been employed. Furthermore in this case the Commissioner has located material within the public domain which would confirm or deny whether the named doctor was employed by GOSH.
30. Based on the above factors, the Commissioner has determined that there is sufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and that confirming whether or not the requested information is held would be lawful.
31. Given that the Commissioner is satisfied that issuing a confirmation or a denial would be lawful, he can see no reason why it would not also be fair. The requirement for transparency is satisfied because all employees should be aware that they are employed by a public authority subject to FOIA."
32. In this instance, the Commissioner has decided that GOSH has failed to demonstrate that section 40(5B)(a)(i) is engaged.

## Right of appeal

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33. 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)

34. 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.
35. 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.....**

**Gemma Garvey**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**