

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

### **Decision notice**

**Date:** 14 March 2023

**Public Authority:** Swansea Bay University Health Board

**Address:** 1 Talbot Gateway  
Baglan Energy Park  
Baglan  
Port Talbot  
SA12 7BR

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

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1. The complainant requested information from Swansea Bay University Health Board ('the public authority') regarding staff subject to disciplinary action. The Commissioner's decision is that the public authority was entitled to rely on section 40(2) of FOIA to withhold some, but not all, of the requested information.
2. The Commissioner requires the public authority to take the following step:
  - disclose the information requested at part [1] of the request to the complainant, that is, the number of staff at Morriston Hospital subject to disciplinary process between 25 January and 20 March 2022.
3. The public authority must take this step 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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4. On 21 March 2022, the complainant made the following request for information to the public authority:

“Between the dates of 25th January 2022 to 20th March 2022 can you please confirm [1] how many NHS staff based at Morriston hospital have been through a disciplinary process, [2] what were the reasons and [3] the outcome of that disciplinary action.”

5. The public authority refused to provide all of the requested information citing section 40(2) (personal information) of FOIA as its basis for doing so.

## Reasons for decision

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### Section 40 - personal information

6. This reasoning covers whether the public authority was correct to apply section 40(2) of FOIA to the request.<sup>1</sup>
7. Section 40(2) says that information is exempt information if it is the personal data of another individual and disclosure would contravene one of the data protection principles. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable (directly or indirectly).
8. In this case, the public authority withheld information due to the small numbers involved. It believed that disclosing this information would make it possible for individuals to be identified.
9. The Commissioner recognises that small numbers carry a greater risk of identification than larger ones – but that does not mean that every small number identifies any individual. Whether individuals can be identified will depend on the particular facts, such as the size of the overall dataset, the number of data points that have been requested and the information, already in the public domain, that could potentially be cross-referenced with the disclosed information. It is not sufficient for there to be only a hypothetical risk of identification. If there is no

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<sup>1</sup> <https://www.legislation.gov.uk/ukpga/2000/36/section/40>

realistic route to identification, the information is not personal data, regardless of its sensitivity.

10. The Commissioner considers that the public authority's evidence relied mainly on the nature of the information and its sensitivity, rather than demonstrating how individuals could be identified. When asked to explain how a person would identify any of the individuals within the dataset, the public authority argued that colleagues of the individuals concerned could identify them based on certain details in the withheld information.
11. As mentioned above, one of the considerations when determining whether or not a small number would identify individuals is the size of the overall dataset. It is much easier, for instance, to identify one person from a group of three than it is to identify one from a group of 300. The public authority confirmed that the total number of staff it employed at the site in question during the time period covered by the request was approximately 5000.
12. When considering the possibility of identification, the Commissioner applies the "Motivated Intruder Test". This test starts with a hypothesis that there exists a person who wishes to identify the individuals covered by the disputed information. The person is willing to devote a considerable amount of time and resources to the process of identification. They may have some inside knowledge (i.e. information not already in the public domain) but will not resort to illegality – they are determined but not reckless. The Commissioner looks to see how such a person would go about identifying the individuals involved.

*Part [1] of the request*

13. With regard to the first part of the request (the number of staff subject to disciplinary action), the Commissioner does not consider that the public authority explained how individuals could be identified from this information. The Commissioner finds that the overall dataset is sufficiently large that it would not be possible to identify individuals from the disclosure of the number of staff subject to disciplinary action alone, irrespective of the fact it is a small number. As individuals cannot be identified, the Commissioner has determined that this particular information is not personal data and the exemption at section 40(2) does not apply. The public authority should therefore disclose this information.

*Parts [2] and [3] of the request*

14. With regard to the remainder of the withheld information (the reasons for and outcomes of disciplinary action), the Commissioner considers

that it would be possible to indirectly identify individuals from this information. This is due to the short time frame set out in the request and the specific details of the information requested. In the Commissioner's view, there are likely to be other staff employed by the public authority who, if sufficiently motivated to do so, would be able to piece together the specific information requested with other information already known to them or in the public domain in order to identify the individuals concerned. The Commissioner is therefore satisfied that this information is personal data and will now consider whether disclosure would contravene one of the data protection principles.

15. In the case of a 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.
16. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary and whether these interests override the rights and freedoms of the individuals whose personal information it is.
17. The Commissioner considers that the complainant is pursuing a legitimate interest and that disclosure of the requested information is necessary to meet that legitimate interest.
18. It is necessary to balance the legitimate interests in disclosure against the fundamental rights and freedoms of the data subjects. In doing so, it is necessary to consider the impact of disclosure.
19. In the Commissioner's view, a key issue when considering the balancing test is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to the individuals, taking into account whether or not they have consented to its disclosure.
20. The Commissioner considers that employees would have a very firm and reasonable expectation that information relating to disciplinary matters would remain private between themselves and their employer. They would have no expectation that such information would be disclosed to the wider public. This approach was recognised by Tribunal in the case of *Rob Waugh v Information Commissioner and Doncaster College* (EA/2008/0038, 29 December 2008), which found:

"there is a recognised expectation that the internal disciplinary matters of an individual will be private."

21. Based on the above factors, the Commissioner has determined that the fundamental rights and freedoms of the individuals outweigh the legitimate interest identified above. The Commissioner therefore considers that disclosing the reasons for and outcomes of disciplinary action would be unlawful as it would contravene a data protection principle; that set out under Article 5(1)(a) of the UK General Data Protection Regulation. The public authority was therefore correct to apply section 40(2) of FOIA to this part of the request.

**Right of appeal**

22. 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)

23. 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.
24. 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 .....**

**Michael Lea**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**