

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 January 2023

Public Authority: University College London Hospitals NHS
Foundation Trust
250 Euston Road
London
NW1 2PG

Decision

1. The Commissioner's decision is that University College London Hospitals NHS Foundation Trust is entitled to rely on section 40(2) of FOIA to withhold the requested information about job applicants as it is the special category personal data of third parties and disclosure would be unlawful.

Request and response

2. On 23 June 2022 the complainant submitted a request to University College London Hospitals NHS Foundation Trust ('the Trust'), which is reproduced in the annex to this notice.
3. The Trust disclosed the majority of the information requested and advised it does not hold some of the information. Its final position was to withhold the remaining information – numbers under five - under section 40(2) of FOIA.

Reasons for decision

4. This reasoning covers the Trust's reliance on section 40(2) of FOIA.

5. 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.

Is the information personal data?

6. Information can be categorised as personal data if it relates to a living person and that person must be identifiable, with relative certainty.
7. In this case, the Trust has not provided some of the information in part 1 of the request, where the number is less than five. Part 1 of the request is for information on the number of job applicants, the number of applicants shortlisted for interview and the number of applicants offered a position after interview by different applicant ethnicity groups.
8. The Commissioner asked the Trust to explain how a specific person/persons could be identified if the actual numbers were disclosed.
9. The Trust said that its Director of Workforce decided that releasing low numbers could lead to identification. This is because the data was broken down into a time period, ethnicity, job role and stage of recruitment. The Trust said that, given that ethnicity is a special category of data and that "members of staff involved in the recruitment process" could identify the individuals concerned, the Trust deemed it necessary to anonymise the low numbers.
10. The Trust clarified that the recruitment staff referred to were "internal staff" (not, for example, from an external recruitment agency). It told the Commissioner that those staff members could potentially learn something new about an applicant from the withheld information; namely the reported ethnicity of applicants. This is because ethnicity data is not made available to staff in order to comply with equalities legislation.
11. The Trust has acknowledged that members of the public outside the Trust would not be able to identify any individual applicant from the low numbers. Its concern is that its own staff with access to the Trust's recruitment systems and related would be able to identify specific individuals from the low numbers and would glean new information about them; their ethnicity.
12. When the Commissioner asked it for further explanation, the Trust gave the following example of a member of staff recruited to a more senior position. There was only one such position advertised in the timeframe of the request. The recruiting manager would not be informed of the ethnicity of the applicant before or after appointment. If the withheld information were disclosed it would allow the recruiting manager to positively identify the person recruited to the more senior position and

their ethnicity. This would also apply to the candidates interviewed. The recruiting manager would not need access to any other records or systems to link the individuals with their ethnicity.

13. The Trust gave a second example. Someone working in recruitment could use their access to the Trust's recruitment software to match the ethnicity data to interviewed candidates and those appointed. They could do this by searching for the roles recruited for in the time period in question. They would not have access to the ethnicity data in the recruitment system as this is restricted.
14. The Trust noted that all its staff are bound by confidentiality clauses in their contract and Trust policies on data protection and information governance. It acknowledged that the likelihood of Trust staff actively seeking to determine applicants' ethnicity was extremely low. However, the Trust considered it remained a theoretical possibility.
15. On the basis of the Trust's explanations, the Commissioner will accept that the withheld information can be categorised as personal data under section 40(2) of FOIA. This is because it would be theoretically possible for other staff members to use the information to glean new information about specific individuals who could be identified. While the likelihood of this happening is low, because, as will be discussed below, the information is special category personal data, the Commissioner is satisfied the information should be treated with more caution. This is in line with his 'Anonymisation' code of practice (page 25)¹.

Is the data special category data?

16. Information relating to special category data is given special status in the UK General Data Protection Regulation (GDPR).
17. Article 9 of the UK GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
18. Having considered the request, the Commissioner finds that the requested information is special category data. He has reached this

¹ <https://ico.org.uk/media/for-organisations/documents/1061/anonymisation-code.pdf>

conclusion on the basis that it concerns the ethnicity of the individuals concerned.

19. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
20. The Commissioner considers that the only conditions that could be relevant to a disclosure under FOIA are conditions (a) (explicit consent from the data subjects) or (e) (data made manifestly public by the data subjects) in Article 9.
21. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to a FOIA request or that they have deliberately made this data public.
22. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of FOIA.

Right of appeal

23. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

24. 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.
25. 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

ANNEX

Part One

Numbers of Job Applicants, Applicants Shortlisted for Interview, and Applicants Offered a position after interview, by ethnicity and for the following groups of staff, for the period 1 April 2021 to 31 March 2022 (or, if not available, the most recent 12-month period – in which case please state which period the data is for):

1. All AfC Roles at bands 1 – 8b
2. All AfC Roles at 8c and above
3. All Registered Nursing Roles at Band 5
4. All Registered Nursing Roles at Band 8c and above
5. All Registered Midwives at Band 5
6. All Registered Midwives at Band 6
7. All Allied Health Professionals
8. All Occupational Therapists
9. All Physiotherapists
10. All Dieticians
11. All Radiographers
12. All SAS Roles
13. All Medical Consultant Roles
14. All Band 5 Bank Registered Nurse recruitment

Please supply the numbers of candidates (not the %) for the following Ethnicity Descriptors:

Asian (including Chinese)

Black

Mixed (including Arab)

Other

White

Unknown (including do not wish to say)

The above categories mirror the 2021 Census categories, please refer to the attached document setting out these category descriptors if further guidance is needed. If you use Trac please ensure that the Vietnamese, Japanese, Filipino, and Malaysian descriptors are included in the Asian category. Please note in particular that Chinese is listed as Other on Trac & should be re-classified as Asian in line with the 2021 census categories.

This request is part of a larger research project. In order to avoid transcription errors the format of the data should be sent as an Excel file in the following format:

[Format provided]

Part 2

Please provide the level of expenditure in the 2021-22 financial year on the recruitment of overseas nurses. To minimise transcription errors, please use the following format and attach as an Excel file:

[Format provided]