

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

### **Decision notice**

**Date:** 21 July 2023

**Public Authority:** Gateshead Health NHS Foundation Trust  
**Address:** Queen Elizabeth Hospital  
Sheriff Hill  
Gateshead  
Tyne and Wear  
NE9 6SX

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

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1. The complainant has requested information on complaints about a named surgeon. Gateshead Health NHS Foundation Trust ('the Trust') withheld the information under section 40(2) of FOIA as it considers it to be someone else's personal information.
2. The Commissioner's decision is that the Trust correctly applied section 40(2) of FOIA to the requested information.
3. It's not necessary for the Trust to take any corrective steps.

### **Request and response**

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5. The complainant made the following information request to the Trust on 2 February 2022:

"I am requesting information on a [redacted] surgeon named [name redacted] who was a surgeon at the QUEEN ELIZABETH HOSPITAL IN SHERIFF HILL GATESHEAD.

- 1/ How many complaints were made in total about this surgeon.
- 2/ The nature of the complaints.
- 3/ When the first complaint was made.
- 4/ Was there any deaths due to this surgeon's incompetence.
- 5/ How many complaints made on hip operations only.

6/ How long was this surgeon allowed to perform operations after last complaint.

7/ Were there any complaints made by other Surgeons or staff and what did they consist of.

8/ Was there any compensation awarded due to the complaints and if so how much on each separate incident.

9/ Did the surgeon or hospital ever go to court due to complaints by this surgeon if so how many times.

10/ If the hospital/surgeon did go to court can you give me details of court case ie when it was and case number.

11/ Was this surgeon ever struck off."

6. Following the Commissioner's decision in IC-218871-N6B8<sup>1</sup>, on 24 April 2023, the Trust provided a fresh response to the request. It refused parts 1-10 of the request under section 40(2) of FOIA. The Trust advised it doesn't hold information within scope of part 11 and directed the complainant to the General Medical Council (GMC). The Trust maintained this position following its internal review.

## Reasons for decision

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11. This reasoning focusses on whether the Trust is entitled to withhold information the complainant has requested under section 40(2) of FOIA.
12. Under section 40(2), information is exempt from disclosure if it's the personal information of someone other than the requester and a condition under section 40(3A) is satisfied.
13. In this case the relevant condition is contained in section 40(3A)(a). This applies where disclosing the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation (GDPR).
14. First, the Commissioner must determine whether the withheld information is personal information as defined by the Data Protection Act 2018. If it's not personal information, then section 40(2) of FOIA can't apply.
15. The Commissioner is satisfied that the information to which the Trust has applied section 40(2) is personal information. A specific surgeon is

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4024747/ic-218871-n6b8.pdf>

named in the request and the 10 parts of the request concern complaints about that surgeon. As such, the surgeon can be identified from the requested information and the information relates to them.

16. Second, the Commissioner must establish whether disclosing the information would breach any of the DP principles.
17. The most relevant principle is that under Article 5(1)(a) of the UK GDPR. This states that:

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

**Would disclosure contravene principle (a)?**

18. 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.”

19. In the case of a FOIA request, the personal information is processed when it's 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.
20. 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**

21. Article 6(1) of the UK GDPR sets out the requirements for lawful processing. It says 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.
22. 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.”
23. When he considers the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, the Commissioner has to consider the following three-part test:

**Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information

**Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question

**Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the surgeon named in the request ('the data subject').

24. 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**

25. In considering any legitimate interest(s) in disclosing the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
26. A wide range of interests may also be legitimate interests. They can be the requester's own interests, the interests of third parties, commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
27. The surgeon who is the subject of the request has been subject to media articles and has sanctions against their GMC registration. It appears that the complainant has an interest in the detail about complaints about the surgeon in question. The Commissioner considers that is a legitimate interest for the complainant to have. There's also a general interest in public authorities being open and transparent.

### **Necessity test**

28. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves considering 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.
29. The Commissioner accepts that disclosing the requested information would be necessary to meet the complainant's legitimate interest and the more general interest of transparency.

### **Balancing test**

30. In balancing the complainant's and data subject's legitimate interests it's necessary to consider the impact of disclosure. For example, if the data subject wouldn't reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
31. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that disclosure may cause
  - whether the information is already in the public domain
  - whether the information is already known to some individuals
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
32. In the Commissioner's view, a key issue is whether the data subject would have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
33. It's also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
34. The Commissioner appreciates that some information about the surgeon is already in the public domain and that the requested information relates to them in their professional capacity. However, the Commissioner is satisfied that the surgeon in question would still have the reasonable expectation that details of complaints about them would not be disclosed to the world at large as the result of an information request. As far as the Commissioner is aware from the GMC's website, the surgeon remains registered with a licence to practice. The Commissioner considers that disclosing that information would therefore be likely to cause that individual harm or distress.
35. The Commissioner considers that the interest in a surgeon's fitness to practice and transparency about that matter is adequately met through the Trust's complaints process and the GMC's processes. He is satisfied that the complainant's interest, while legitimate, is not sufficient to outweigh the interests of the data subject and their fundamental rights and freedoms.

36. The Commissioner therefore finds that there's no Article 6 basis for processing and so disclosing the information in question wouldn't be lawful. Given the above conclusion that disclosure would be unlawful, the Commissioner doesn't need to go on to consider separately whether disclosure would be fair or transparent.
37. The Commissioner's decision is that the Trust is entitled to withhold the requested information under section 40(2) of FOIA, by way of section 40(3A)(a).

## Right of appeal

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51. 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)

52. 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.
53. 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**