

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 September 2023

Public Authority: University Hospitals of Derby and Burton NHS Foundation Trust

Address: Royal Derby Hospital
Uttoxeter Road
Derby
DE22 3NE

Decision (including any steps ordered)

1. The complainant has requested details of reviews carried out into maternity incidents. The above public authority (“the public authority”) relied on section 21 of FOIA (reasonably accessible) to withhold most of the information and section 40(2) of FOIA (third party personal data) to withhold the remainder.
2. The Commissioner’s decision is that the public authority has:
 - failed to comply with its duty under section 1(1) of FOIA in respect of part [1] of the request as it failed to identify all the information in scope or communicate it to the complainant; and
 - correctly relied on section 21 of FOIA to withhold the information within the scope of parts [2] and [4] of the request and holds no further information within the scope of these parts; and
 - correctly relied on section 40(2) of FOIA to withhold most of the information within the scope of part [3] of the request; and
 - did not rely on section 41(1) of FOIA to withhold information relating to individuals who are deceased. The Commissioner has applied this exemption himself proactively.

- Failed to recognise that some of the information would not fall within the scope of either section 40(2) or 41(1) of FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
- Either provide the complainant with the number of individual investigations carried out during the period stated in the request, or issue a refusal notice citing a valid exemption from the duty to disclose this information.
 - For each report falling within the scope of part [3], disclose the sub-section titled "6.2 – safety recommendations."
 - Disclose one copy of the standard text contained in sections 1 and 2 of the investigation reports.
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

5. On 11 April 2023, the complainant wrote to the public authority and requested information in the following terms:
- "Under the Freedom of Information Act 2000, I request the following information:
1. The number of the individual HSIB maternity investigations or reviews carried out at Royal Derby Hospital in the past three calendar years, broken down by year (2020, 2021 and 2022), and this year's cases to date (April 11, 2023)
 2. The number of thematic HSIB maternity investigations or reviews carried out at Royal Derby Hospital in the past three calendar years, broken down by year (2020, 2021 and 2022), and this year's cases to date (April 11, 2023)
 3. Copies of the individual HSIB maternity investigations or reviews carried out at Royal Derby Hospital in the past three calendar years, (2020, 2021 and 2022), and this year's cases to date (April 11, 2023)

4. Copies of the thematic HSIB maternity investigations or reviews carried out at Royal Derby Hospital in the past three calendar years, (2020, 2021 and 2022), and this year's cases to date (April 11, 2023)."
6. The public authority responded on 11 May 2023. It stated that:

"The information for questions 1,2 & 4 can be found on the publicly accessible HSIB meta-review that is available on the website -

<https://www.uhdb.nhs.uk/download.cfm?doc=docm93jijm4n22473.pdf&ver=58188>

"We are unable to provide the information for question 3 due to the data we have being for individual patient specific incidents investigation reports. This is in accordance of Section 40 of FOIA, which provides an exemption from the right to information if it is personal data as defined in the DPA."
7. The complainant contacted the public authority again on 19 May 2023. He argued that the report the public authority had directed him to did not contain the information he was seeking. The public authority acknowledged this and provided several holding responses when the complainant chased the matter, but had failed to provide a further substantive response when the Commissioner began his investigation.

Scope of the case

8. The complainant contacted the Commissioner on 25 July 2023 to complain about the way his request for information had been handled. Although he had only challenged the public authority about the extent to which the published information satisfied his request, he subsequently confirmed that he also wished to challenge the public authority's reliance on section 40(2) of FOIA to withhold the information within the scope of element 3.
9. As the Commissioner understands it, the complainant does not challenge that the report to which the public authority has referred is reasonably accessible to him, only that it does not provide (or does not provide all of) the information within the scope of elements 1, 2 and 4 of the request. The Commissioner therefore considers that the scope of his investigation is to determine whether section 40(2) of FOIA has been correctly applied and whether the public authority holds further information beyond that already in the public domain.

Reasons for decision

Part [1] – held/not held

10. When a person makes a request for information, unless exemptions apply, section 1(1) of FOIA requires the public authority to inform that person of whether it holds that information and, if it does, to provide copies
11. As the way that the public authority had responded to part [1] (as well as parts [2] and [4] – which he will deal with separately) was ambiguous, the Commissioner asked the public authority to explain why the information it had highlighted as being in the public domain was the only information it held.
12. The public authority responded to say that:

“The Thematic review of the seven cases has been published on the UHDB website and the requestor was referred to this in response to their question 2. This report detailed seven maternal collapses or deaths – two of which occurred in 2021 and the remainder in 2022. Maternity investigations that took place outside of these dates are in individual reports and are not currently in the public domain.”
13. The Commissioner considered this answer to be no clearer than the first. He asked the public authority to confirm explicitly whether other individual maternity investigations had been carried out besides those referred to in the published report or whether the published report detailed **all** the individual investigations carried out during the period covered by the request.
14. The public authority responded to say that other investigations had been carried out during this period, but that not all the reports had been completed and the reports that had been completed were confidential.
15. The Commissioner will go on to consider the actual contents of the reports below. However, he notes that part [1] of the request did not seek the reports themselves – it merely asked for the number of investigations carried out.
16. As far as the Commissioner is aware, the public authority has not informed the complainant of the number of investigations carried out during the time period covered by the request, nor has it cited a valid exemption from its duty to disclose.

17. The Commissioner therefore considers that the public authority failed to comply with its duty under section 1(1) of FOIA in respect of part [1] of the request.

Parts [2] and [4] – reasonably accessible

18. Section 21 of FOIA allows a public authority to withhold information if that information is already reasonably accessible to the requester.
19. To be “reasonably accessible” the information does not need to be more easily accessible to the requester than to the public authority, but the public authority is entitled to take into account the identity of the requester and whether their particular circumstances mean that the information is more or less accessible than it would be to someone else.
20. The public authority has directed the complainant to a report it has published on its website. The complainant has clearly been able to access this report and therefore the Commissioner considers that this information is reasonably accessible to the complainant and therefore exempt under section 21.
21. The complainant also challenged whether this was the only information that the public authority held.
22. The public authority’s response to the Commissioner’s first enquiry is set out in paragraph 12. When the Commissioner asked the public authority to clarify its stance, it confirmed that the report it had withheld under section 21 was the only thematic report that had been created. No other thematic reviews had been carried out during the timeframe specified by the request.
23. Whilst the Commissioner considers that the public authority could have been much clearer in its initial response, he accepts that the report was already reasonably accessible to the complainant. The report was the only information the public authority held within the scope of part [4] and, by directing the complainant’s attention to it, the public authority, by implication, also dealt with part [2] of the request. He is therefore satisfied that the public authority complied with its duty under section 1(1) of FOIA in respect of parts [2] and [4], to the extent it was required to do so.

Part [3] – personal or confidential information

24. The public authority provided the Commissioner with samples of the individual reports. Each report follows a standard template. There is a section setting out the investigation methodology, followed by a detailed description of the events under investigation, the findings of the investigation and then recommendations.

25. The Commissioner accepts that the sections of each report that describe the events that occurred will identify each mother and, by inference, their baby.
26. The Commissioner has considered carefully, with reference to the samples he has reviewed, whether this information could be redacted sufficiently to anonymise it without rendering the information meaningless. In his view it cannot.
27. These sections of the report (3, 4 and 5) provide an exceptionally detailed account of the care each mother received. Certain sections contain an almost minute-by-minute description.
28. Even if obviously identifiable information, such as the mother's age or the date of her admission to hospital, was removed, the Commissioner is not satisfied that the information would not be identifiable.
29. Each of the mothers in the sample had had some form of pregnancy complication. Whilst they may not have shared the precise details of their treatment, the Commissioner considers it reasonable to assume that each mother may have shared some basic details of issues she was having with her close friends or family.
30. After the event, the mother or her family may have also shared some very basic information about her treatment with her close friends and other family members.
31. The Commissioner considers that individuals who were already aware of this basic information, when combined with other clues in the public domain (such as the year of publication) could identify the mother who is the subject of the report. If they are able to do so, they will learn a considerable amount about the clinical care provided to that mother that will go far beyond what they already know.
32. Without knowing exactly what information each mother might or might not have shared, the Commissioner considers that a very considerable amount of redaction would have to take place to these sections of each report to ensure that no clues about the mother's identity are left in. In the Commissioner's view, once this level of redaction has taken place, the residual information in these sections will be rendered meaningless as it will lack a factual context.
33. The Commissioner is therefore of the view that the information contained in sections 3, 4 and 5 of each report is information that relates to and identifies the mother.
34. The Commissioner also considers that, because of the nature of pregnancy, information that relates to the medical treatment the mother

received whilst pregnant is also information about the medical treatment the baby received.

35. Information about the medical treatment a person has received is their special category personal data. Special category data receives special protection under data protection law and can only be disclosed if one of a relatively narrow set of conditions are met. In the context of a FOIA request, disclosure would only be lawful if the data subject had given consent for their information to be published or if they had manifestly made the information public themselves.
36. Babies are incapable of giving consent or of manifestly making information public. Nor is there any indication that the families of the babies have provided consent for the information to be made public, or placed the information in the public domain.
37. None of the mothers have given their consent for publication or made the information public themselves, as far as the Commissioner is aware, therefore there is no lawful basis for publishing this information.
38. As there is no lawful basis for processing, to the extent that the information is personal data, the Commissioner considers that the public authority was entitled to rely on section 40(2) of FOIA to withhold it. This exemption will apply to information that is the personal data of someone other than the requester and where publication would not be lawful under data protection law.
39. There is some information in these sections that relates to mothers that sadly died. Because personal data must relate to an individual that is still alive, not all the information will qualify as personal data.
40. Some of the information will still be covered by section 40(2) if it relates to the baby, even if the mother has passed away. However, in such a situation, to the extent that any of the information relates only to the mother, or where the baby has also died,¹ the Commissioner has gone on to consider whether section 41 might apply. The public authority does not appear to have considered this scenario.
41. Section 41 allows a public authority to withhold information whose unauthorised disclosure, outside of FOIA, would represent an actionable breach of confidence.

¹ None of the babies in any of the sample reports provided had died, but given the nature of such reports, the Commissioner has erred on the side of caution.

42. It is well established in case law that a duty of confidence – such as that between a doctor and their patient – does not end because the patient has passed away.
43. The Commissioner has a longstanding position that detailed records relating to an identifiable person's medical or social care will be exempt under section 41(1) of FOIA – regardless of whether the individual is still alive. The reasons for this are set out in decision notice IC-227096-L5V5.²
44. In this case, the Commissioner has already established that each mother is identifiable from the information in sections 3, 4 and 5. As disclosure of this detailed information would be unauthorised, the Commissioner is satisfied that a disclosure would be an actionable breach of confidence – for the same reasons as in decision notice IC-227096-L5V5.
45. Given the sensitive nature of the information involved, his well-established position that the exemption would apply and the fact that the public authority does not appear to have considered the situation thoroughly enough, the Commissioner considers it appropriate for him to apply section 41 himself, proactively, in these circumstances to prevent a disclosure.
46. To the extent that any of the information in sections 3, 4 or 5 is not covered by section 40(2), the Commissioner considers it would be exempt under section 41(1) of FOIA.
47. That leaves sections 1, 2 and 6 of each report.
48. Sections 1 and 2 are generic and, as far as the Commissioner can see from the samples he has seen, identical for each report. This information, whilst contained in a report about each mother, does not relate to the mother in any meaningful way. It is therefore not their personal data and disclosure would not lead to any loss of privacy.
49. The Commissioner therefore considers that this information is not subject to an exemption and consequently requires it to be disclosed. However, given that the information does not change from report to report, he considers that it is only proportionate to require one copy of this information to be disclosed.

² <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4025330/ic-227096-l5v5.pdf>

50. Section 6 of each report is divided into two subsections: findings and recommendations.
51. The sub-section on findings also contains details about the mother and her treatment. It is therefore exempt under either section 40(2) or 41(1) of FOIA for the same reasons as set out in respect of sections 3, 4 and 5.
52. However the sub-section on safety recommendations (6.2), whilst differing from report to report, does not contain information that would identify the mother.
53. Although the recommendations arise out of the precise facts of each case³, they are expressed in general terms and without reference to anything that would identify the mother.
54. The information does not relate to the mother in any meaningful way – it relates to policies, processes and procedures the public authority has in place.
55. The Commissioner considers that this information can be easily separated from the identifiable information and it is comprehensible in its own right. He also notes that there is a public interest in understanding the recommendations that have been made so that the public can hold the public authority to account for acting on those recommendations.
56. The Commissioner therefore considers that this information is not covered by an exemption and must be disclosed.

³ Each individual recommendation actually appears for the first time next to the relevant finding of fact in section 5 of the report. However, the recommendations are then collated to from the second part of section 6

Other matters

Interpreting and clarifying requests

57. In the Commissioner's view, this complaint was complicated unnecessarily by the ambiguity of the public authority's response – which he has highlighted above. This appears to have arisen from a failure, by the public authority, to interpret the request correctly.
58. It is important that public authorities read any request they receive carefully. If a requester has asked for one thing, but the public authority reasonably believes that they are really seeking something else, it can ask the requester to clarify what it is that they wish to receive, but a public authority should not simply assume that it knows what the requester wanted to ask for, when such an interpretation appears to conflict with the actual wording of the request.
59. The Commissioner would draw the public authority's attention to his published guidance on interpreting and clarifying requests.⁴

Internal reviews

60. The Commissioner also notes that the public authority's failure to interpret the request correctly was compounded by its failure to carry out a proper internal review.
61. When the Commissioner pointed out to the public authority that it had not carried out an internal review, the public authority responded to say that:
- “The Trust would like to clarify that no request for an Internal Review was made by the complainant. On 19 May they requested clarification on the FOI response that they had received, however, due to the need to obtain clarity from the relevant department there was a delay in responding to this query. This was communicated to the requestor via email on 23 August and the Trust apologies for the delay.”
62. The complainant had emailed the public authority on 19 May 2023 to say that:
- “The response says: "The information for questions 1,2 & 4 can be found on the publicly accessible HSIB meta-review that is available on

⁴ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/interpreting-and-clarifying-requests/>

the website" followed by a link to a specific review. The answers to my questions do not appear to be in that review. Please could the trust detail the information as requested."

63. The Section 45 FOIA Code of Practice defines a request for an internal review as correspondence which "seeks to challenge either the outcome or the process of the handling of the initial response."⁵
64. The Commissioner considers that the wording of the correspondence should have triggered the public authority's internal review process. The complainant clearly felt that the public authority held more information than had been provided to him.
65. Even if the Commissioner were to accept that the public authority was entitled to deal with the correspondence under Business As Usual rules, he considers that taking three months to provide a further response was extremely poor practice. Dealing with correspondence as Business As Usual is supposed to provide a quicker response than going through the formal process. A formal internal review should not have taken more than 40 working days.
66. The Commissioner notes that, had a thorough, prompt, internal review been carried out, it is likely that the scope of this complaint would have been considerably reduced.

Right of appeal

67. 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

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

68. 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.
69. 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

Roger Cawthorne
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