

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 25 October 2023

**Public Authority:** Devon Partnership NHS Trust  
**Address:** Wonford House Hospital  
Dryden Road  
Exeter  
Devon EX2 5AF

### Decision (including any steps ordered)

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1. The complainant has requested information on complaints about senior staff and the number of staff employed by Devon Partnership NHS Trust ('the Trust'). The Trust withheld the information under section 40(2) of FOIA as it considers it to be someone else's personal data.
2. The Commissioner's decision is that the Trust incorrectly applied section 40(2) of FOIA to part 2 of the request. However the Trust correctly applied this exemption to the information requested in part 1.
3. The Trust must take the following step to ensure compliance with the legislation:
  - Provide a response, that complies with FOIA, to the request for the number of staff at the organisation.
4. The Trust 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 the Trust on 16 August 2023:

"[1] Please provide information regarding complaints received by your organisation's HR department between January 2021 and August 2023 that concern senior members of staff, with suitable redactions.

For the purposes of this request, by "senior", I mean consultant-level doctors, board members, and any other staff at agenda for change grades 8a or above.

Please specify the date of the complaint, the relationship of the complainant to the person making the report, the nature of that complaint, the complaint route and the outcome (as you can see in the example below).

<b>Date of Complaint</b>	<b>Relationship of Complainant</b>	<b>Complaint/Issue</b>	<b>Complaint Route</b>	<b>Outcome</b>
June 2018	Staff member against supervisor	Alleged disclosure of personal information	Written	Investigated – partially upheld

[2] Please also provide the total number of staff at your organisation (e.g. 5,000). "

6. The Trust refused the entire request under section 40(2) of FOIA and maintained this position at internal review.
7. In wider correspondence with the complainant the Trust explained it would be able to provide the total number of such complaints raised in the period and whether or not they were upheld without disclosing personal data. However, the complainant confirmed they're seeking the specific information they requested.

### **Reasons for decision**

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8. This reasoning focusses on whether the Trust is entitled to withhold information the complainant has requested under section 40(2) of FOIA.
9. 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.
10. 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).

11. First, the Commissioner must determine whether the withheld information can be categorised as 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.
12. In the second part of their request the complainant has asked for the total number of staff at the Trust. The Commissioner assumes the Trust overlooked this element. The total number of staff can't be categorised as the personal data of any individual and so the Trust can't rely on section 40(2) to withhold this particular information and it must disclose it. The Commissioner has next considered the information requested in the remaining element of the request.
13. The first and substantive part of the request is for details about complaints about senior staff over a 19-month period: date, relationship between the parties, subject, how the complaint was submitted and the complaint outcome.
14. In its submission, the Trust has said that staff at pay grade 8A and above, which is what the complainant has requested, are senior decision makers, board members and consultants. To varying degrees, these staff are likely to be known because of their roles. They may be known through "a social media campaign," a Trust internet publication or part of a public register for example as Data Protection Officer or Caldicott guardian ie it may be in the public domain that certain named staff have certain roles.
15. Noting the different details the complainant has requested, the Trust goes on to say that because individuals' roles and names are in the public domain, the Trust needs to balance the individuals' public and private lives.
16. The Trust considers that providing the requested details may lead to individuals being identified, by combining that information with other known information. For example, a senior manager's name and role will be in the public domain as they carry out that role. With the requested details it would be possible to link a complaint to a named individual which would disclose that a complaint had been made about them, what the complaint was about and the outcome of the complaint.
17. Part of the request is for the "relationship" between the person submitting the complainant and the person the complaint is about. As an example, if the relationship is given as "personal assistant to medical director," together with the date of the complaint this could lead to private information about the medical director being made public. The Commissioner notes that it could also potentially disclose the identity of,

and information about, the person submitting the complaint; the personal assistant in the hypothetical example above.

18. In answer to a further question from the Commissioner, the Trust gave him the number of complaints over the period of the request and explained how these were spread out over the months. The figure for the number of complaints is relatively low and given how the complaints are spread out, the Commissioner considers that it would be possible for someone who already has some knowledge about certain events, for example because they work at the Trust, to put what they know together with the details that have been requested and identify a specific individual or individuals. This makes those individuals the 'data subjects'.
19. The Commissioner is therefore satisfied that the requested information can be categorised as personal data, even though the complainant didn't request the names of any individuals.
20. Second, the Commissioner must establish whether disclosing the information would breach any of the DP principles.
21. 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)?**

22. 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."
23. 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.
24. 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**

25. 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.

26. 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.”

27. 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 those who made complaints and those who had made complaints made against them ('the data subjects').

28. 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**

29. 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.
30. 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.
31. The complainant has an interest in this information. They haven't explained what that interest is but nonetheless it's a legitimate interest for them to have. However, other than the general public interest in transparency, any significant, wider public interest the requested information has isn't obvious to the Commissioner.

### **Necessity test**

32. '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.
33. The Commissioner accepts that disclosing the details the complainant has requested about complaints against Trust staff would be necessary to meet the complainant's legitimate interest and, to a lesser degree, the more general interest of transparency.

### **Balancing test**

34. In balancing the complainant's legitimate interests and the data subjects' rights and freedoms, it's necessary to consider the impact of disclosure. For example, if the data subjects 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.
35. 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.
36. In the Commissioner's view, a key issue is whether the data subjects 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.
37. It's also important to consider whether disclosure would be likely to result in unwarranted damage or distress to those individuals.
38. The Commissioner has found that the requested information is other people's personal data. The information relates to individuals in a professional capacity. However, he's satisfied that those individuals would reasonably expect that information about them – such as whether a complaint was raised about them and whether that complaint was

upheld – wouldn't be disclosed to the wider world. As such, disclosing that information under FOIA would cause them harm or distress.

39. There's some public interest in how the Trust's senior staff behave and carry out their roles which the requested information may shed a little light on. However, the matter of complaints raised against senior staff could be addressed to an adequate degree through alternative information, an example of which the Trust suggested to the complainant.
40. The Commissioner is therefore satisfied that the complainant's interest and the general interest in transparency, while legitimate, aren't sufficient to outweigh the data subjects' fundamental rights and freedoms.
41. 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.
42. The Commissioner's decision is that the Trust is entitled to withhold the information requested in part 1 of the request 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**  
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**SK9 5AF**