

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 October 2023

Public Authority: University Hospitals Sussex NHS Foundation Trust

Address: Worthington Hospital
Lyndhurst Road
Worthington
BN11 2DH

Decision (including any steps ordered)

1. The complainant has requested cost information relating to legal cases. University Hospitals Sussex NHS Foundation Trust (‘the public authority’) refused to confirm or deny whether information was held, citing 40(5A) (personal information) of FOIA.
2. The Commissioner’s decision is the public authority was entitled to neither confirm or deny whether it holds the requested information.
3. The Commissioner does not require further steps.

Request and response

4. On 16 March 2023 the complainant wrote to the public authority requested cost information. To avoid potentially identifying the complainant in this decision notice, the Commissioner has chosen not to replicate the request in full.
5. The public authority responded on 13 July 2023. It refused to confirm or deny whether information was held in response to the request, citing section 40(5A) and section 40(5B)(a). It also applied section 42(2) (legal professional privilege).
6. The complainant requested an internal review on 9 August 2023, stating 'the invoice figures I am requesting are not personal information'.
7. The public authority provided the outcome to its internal review on 23 August 2023. It upheld its previous position.

Reasons for decision

Section 40 (personal information)

8. Section 1(1)(a) of FOIA outlines a public authority's obligation to confirm or deny whether it holds information being requested. This is commonly known as 'the duty to confirm or deny'. There are, however, exemptions.
9. Section 40(1) of FOIA states that information which is the personal data of the requester is exempt from disclosure under FOIA. This is because there is a separate legislation under which individuals can request their own personal data, the Data Protection Act 2018 ('the DPA'); this is what is known as a subject access request ('SAR').
10. Section 40(5A) of FOIA states that a public authority doesn't have to confirm or deny that information is held, if by just complying with the duty to confirm or deny, would disclose the requester's personal data.
11. So, if information is the requestor's own personal data it will be exempt, either from disclosure under FOIA or the duty to confirm or deny. According to section 2(2) of the Data Protection Act 2018, personal data is:

"any information relating to an identified or identifiable living individual."

12. The complainant is correct, on the surface the invoice totals don't represent personal data. However, the Commissioner must consider the information being requested in the context of the request as a whole.
13. If the public authority confirms that it holds the requested information (if indeed it is held) it is essentially confirming that the complainant's involvement in the circumstances outlined in the request.
14. If the public authority denies that it holds the requested information, it denies the complainant's involvement in such circumstances.
15. Both scenarios (whether or not the information is indeed held) would disclose, to the world at large, the personal data of the complainant, as they are the subject of the request and they could be identified from this information.
16. The complainant has provided the Commissioner with several arguments as to why they consider the application of section 40(5A) appropriate. Firstly, they have pointed to information in the public domain relating to a separate unfair dismissal case. The complainant is concerned:

"The article demonstrates that the reason the ('the public authority') gives, for not disclosing the legal costs information I have requested by way of my FOI request, is not valid. To state the obvious according to the ('the public authority') the reason for denying my FOI request the (redacted) would be in breach of the FOI Act for disclosing to the HSJ (who then made the information public) that it spent (redacted) on legal fees in defending the case brought against it and in disclosing that it had to pay (redacted) after it lost."
17. FOIA is entirely separate to journalism and doesn't obstruct such reporting. Like FOIA, good journalism fosters a culture of accountability and transparency and like journalism, disclosure under FOIA must be seen as disclosure to the world at large, rather than solely the requestor.
18. The complainant has also pointed to information in the public domain which involves both themselves and the public authority, but relates to an earlier dispute between the parties. There is clearly a link between this previous matter, for which there is official confirmation of the requestor's personal data in the public domain and this request. The Commissioner doesn't deem it appropriate to replicate that link in this decision notice.
19. However, just because official confirmation is in the public domain in relation to a previous matter, doesn't mean that official confirmation or denial relating to a later, albeit linked matter is also in the public domain.

20. Furthermore, the complainant is requesting the **total** invoice information in relation to a long running legal dispute and potential appeal. The way the request has been framed, the Commissioner doesn't believe the public authority can extrapolate information that might be exempt under section 40(1), if held, from information that it should neither confirm nor deny it holds under section 40(5A).
21. Both section 40(1) and section 40(5A) are absolute; there is no access to the requestor's own personal data through FOIA because there is a separate piece of legislation for this purpose – the DPA.
22. In this case, as any information that is held (if indeed it is held) would be the complainant's own personal data, the Commissioner's decision is that the public authority was correct to neither confirm nor deny holding any relevant information, and could rely upon section 40(5A) of the FOIA to do so.
23. The Commissioner doesn't need to go onto consider any of the other exemptions the public authority cited.

Other matters

24. The Commissioner's guidance¹ says:

"Although you will comply with FOIA ... if you neither confirm nor deny that you hold the requester's personal data, you should also go on to deal with the request as a subject access request".

25. The section 45 Code of Practice² says:

"... a request for a person's own personal data should be dealt with under the subject access provisions of the Data Protection Act 2018. Sometimes it may be necessary to consider a request under more than one access regime."

26. It's not clear whether the public authority has already dealt with this request as a SAR but it should have. The Commissioner cannot require a public authority, in a FOIA decision notice, to deal with requests as a SAR, but he would strongly recommend that the public authority reconsider the request as a SAR and respond accordingly (if it hasn't already done so), including confirming to the requestor what is or isn't held.

¹ [s40 Personal data of both the requester and others v2.0 \(ico.org.uk\)](https://ico.org.uk/for-organisations/our-approach-to-transparency/subject-access-requests/s40-personal-data-of-both-the-requester-and-others-v2.0)

² [CoP FOI Code of Practice - Minor Amendments 20180926 .pdf \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/684826/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926.pdf)

27. The Commissioner recognises that many requestors are unaware of the nuanced differences between the various information access regimes. When a requestor makes an information request, they simply want the information (or confirmation it exists) and are usually unconcerned about the method by which it reaches them. It's for the public authority to determine, in the first instance, which information access regime(s) is likely to be most generous to the requestor and deal with the request via that route.

Right of appeal

28. 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

29. 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.

30. 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

Alice Gradwell
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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Wilmslow
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