

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

### **Decision notice**

**Date:** 19 July 2024

**Public Authority:** Lancashire Teaching Hospitals NHS  
Foundation Trust

**Address:** Sharoe Green Lane  
Fulwood  
Preston  
PR2 9HT

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

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1. The complainant has requested information about an incident that had occurred on the premises of the Lancashire Teaching Hospitals NHS Foundation Trust (the Trust). The Trust refused to provide this information exempting it under sections 40(2) and 40(1) of FOIA.
2. The Commissioner's decision is that the Trust is entitled to rely on section 40(1) of FOIA as the information is substantially the complainant's own personal information and cannot be disclosed under FOIA. The Commissioner has also decided that the Trust has correctly relied on section 40(2) to withhold third party personal data. The Trust has breached sections 1(1)(a), 10(1) and 17(1) of FOIA by not confirming that it held information or issuing a refusal notice within the statutory timeframe.
3. The Commissioner does not require further steps.

#### **Request and response**

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4. Having recently received a letter from the Trust, the complainant made a request for information under the FOIA on 4 November 2023 in the following terms:

“As a freedom of information request please state the trading name of your security company including companies house registration number.

Please also supply any other documentation you or the Trust holds in relation to this incident, including all electronically held data including telephone calls or data held in any form.”

5. On 31 January 2024 the Trust responded late to the complainant. Regarding the first part of the request, the Trust explained that it did not hold the requested information as security was “in-house”.
6. Regarding the second part of the request, the Trust refused to provide the requested information, citing section 40(2) - personal information - of FOIA.
7. On 8 February 2024 the complainant asked for an internal review as they required the requested data.
8. On 5 March 2024 the Trust provided its internal review. It maintained its citing of section 40(2) of FOIA and advised the complainant to make a subject access request.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 11 January 2024 to complain about the way their request for information had been handled.
10. During the course of correspondence with the Commissioner, the complainant was advised on 16 May 2024 that their own personal data was not accessible under FOIA and should be requested via a subject access request.
11. On 12 June 2024 the Trust responded to the Commissioner and outlined its reasons why it believed that sections 40(1) and 40(2) of FOIA applied to the requested information.
12. The Commissioner considers that the scope of his investigation is to determine the extent to which the requested information is third party personal information and whether it has been withheld appropriately. He will also consider to what extent it is the complainant’s own personal data.

## **Reasons for decision**

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### **Section 40 personal information**

13. Section 40(1) of FOIA says that any information to which a request for information relates is exempt information if it constitutes personal data of which the requester is the data subject.
14. 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?**

15. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual".
16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of the individual.
18. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
19. In this case the complainant has requested information relating to an incident that occurred involving themselves and about which they required all information the Trust held. The Trust explained to the Commissioner that the requested information it had provided to him "contained personal data of more than one person" which it did not consider could be separated. This consisted of an incident report, email communications surrounding this incident and bodycam footage.
20. Therefore, the Commissioner considers that every part of the request in some way or another links back to the complainant. As such, any information the Trust holds within the scope of the request, has only been created in relation to the incident involving the complainant.
21. The Commissioner is therefore satisfied that most of the requested information is the complainant's personal data – they can be identified as they are named in the request and the information relates to them.

22. The Commissioner appreciates that, for personal reasons, the complainant has a legitimate interest in this information that would be met by disclosing the information. Some of the information has already been received by the complainant from the Trust as part of correspondence concerning this incident under its own processes when such an incident occurs. It cannot be provided under the FOIA as it is not the appropriate regime under which it can be released.
23. As there is no route to a requester's own personal data under FOIA, if the complainant is unhappy with the information received, they should challenge any exemption from disclosure under data protection legislation.
24. The Commissioner therefore finds that section 40(1) of FOIA is engaged in respect of the withheld personal information that is the complainant's own.
25. Section 40(1) is an absolute exemption and there is no requirement for the Commissioner to consider the balance of public interest. Nor is he required to consider whether or not the complainant would be happy to have their personal data published to the world at large. If the exemption applies, the information is not available via FOIA.
26. He has gone on to look at the remaining information which the Trust has exempted as third party personal data. Having seen this information, the Commissioner considers it to be closely linked with the complainant's own personal data for the reasons provided earlier. The personal information is the names, contact details and opinions of the other individuals that were involved in the actual incident or those who looked into this matter subsequently. There is also the special category data of one individual as health information is included.

### **Section 40(2) – third party personal information**

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

27. 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".
28. In the case of an FOIA request, the personal data is processed when it is 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.
29. 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.

#### **Is the information special category data?**

30. Information relating to special category data is given special status in the UK GDPR.
31. 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.
32. Having seen the written withheld information (the Commissioner did not find it necessary to view bodycam footage), he finds that some of the requested information does include special category data. He has reached this conclusion on the basis that disclosure of the requested information refers to an individual's medical information. It therefore falls within the definition of health data.
33. 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.
34. The Commissioner considers that the only conditions that could be relevant to a disclosure under FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
35. The Commissioner has seen no evidence or indication that the individual concerned has specifically consented to this data being disclosed to the world in response to an FOIA request or that they have deliberately made this data public.
36. 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).
37. The Commissioner has gone on to consider the remaining personal information that does not fall under special category data.

### **Lawful processing: Article 6(1)(f) of the UK GDPR**

38. 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"<sup>1</sup> .

39. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
40. 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**

41. In considering any legitimate interest(s) in the disclosure of the requested information under the 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.
42. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and 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.

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<sup>1</sup> Article 6(1) goes on to state that:- "Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks". However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted"

43. As stated earlier, the Commissioner understands that the complainant has reasons for wanting the information they requested disclosed which represent a legitimate interest. However he has already given his view that the third party personal information is bound up with the incident involving the complainant.

### **Is disclosure necessary?**

44. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

45. As previously indicated, the Commissioner considers that the personal information of third parties is closely linked to the complainant. However, he acknowledges that the complainant considers it necessary that this information is disclosed, possibly because they were sent correspondence about it that they wished to challenge.

### **Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms**

46. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not 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.

47. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure would cause;
- the extent to which the information is already in the public domain;
- the extent to which the information is already known to some people;
- whether the individual has expressed concern or objected to the disclosure; and
- the data subject's reasonable expectations of privacy.

48. In the Commissioner's view, a key issue is whether the individuals concerned 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.
49. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
50. The Trust contends that "disclosure would not be necessary to achieve the legitimate interests" of the complainant and suggests that "disclosure would have an adverse effect on the rights and legitimate interests of the individuals whose personal data would be disclosed as part of this request". More specifically, the Trust referred to the "adverse consequences" on the individual whose health details would be disclosed and "members of staff identified on the CCTV footage and on the incident report".
51. The Commissioner agrees with the Trust that the disclosure of this information would be beyond the reasonable expectations of the individuals involved and is likely to cause them distress.
52. As previously explained, although the Commissioner understands why the complainant has asked for this information, he does not accept that it should be provided under FOIA as it is closely linked with the incident itself and was only created as a result of that incident. The incident contains a great deal of personal data that the Commissioner considers to be the complainant's own and could lead to their identification which it has already been established, cannot be disclosed under FOIA.
53. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
54. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

## **Procedural matters**

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55. The Trust breached section 1(1)(a) and 10(1) of FOIA because it failed to confirm that it held some of the requested information within 20 working days.



56. The Trust also breached section 17(1) of FOIA by failing to issue a refusal notice within the statutory timeframe.

## Right of appeal

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57. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

58. 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.
59. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Janine Gregory**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**