

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

### **Decision notice**

**Date:** 10 November 2015

**Public Authority:** Surrey and Sussex Healthcare NHS Trust  
**Address:** East Surrey Hospital  
Canada Avenue  
Redhill  
RH1 5RH

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

---

1. The complainant has requested information on the decision of Surrey and Sussex Healthcare NHS Trust ("the Trust") to refer patient files to the Royal College of Surgeons and any instructions given to staff on the whereabouts of Mr Miller at this time. He also requested details of the procedure which was the subject of the Trust's investigation. The Trust stated no information was held for the first two points of the request and withheld two letters related to the third part of the request on the basis of section 40(2) and 41 of the FOIA.
2. The Commissioner's decision is that the Trust has correctly stated that no information is held and has applied section 40(2) correctly to withhold the two letters. He requires no steps to be taken.

#### **Request and response**

---

3. On 16 February 2015, the complainant wrote to Surrey and Sussex Healthcare NHS Trust ("the Trust") and requested information in the following terms:

*1) "Copies of all correspondence, emails, minutes of meetings and contemporaneous notes of phone calls relating to the decision to hold an investigation into Mr P Miller and the Trusts instructions to its staff on how to address the matter. But in particular the decision that the Trust should not seek permission from its patients to release their personal files to third parties outside of*

*the Trust. I wish to see a trail of events and decision making within the Trust in this matter.*

*2) Details of the precise procedure or treatment carried out by Mr P Miller that the Trust objected to and held an investigation into."*

4. Following intervention by the Commissioner, the Trust responded to the complainant's request on 9 April 2015. The Trust explained it held information on the decision to hold an investigation into Paul Miller but considered it exempt on the basis of sections 40, 41, 42 and 36 of the FOIA. For the more general request for information on how staff were instructed to act the Trust stated no information was held. Regarding the decision making process by the Trust to release patient files to third parties; the Trust provided an explanation to the complainant of its obligations towards patient confidentiality and its basis for making disclosures. Finally, for the final part of the request the Trust identified two letters written by clinical staff which were within the scope of the request and withheld these on the basis of section 40 and 41.
5. The complainant responded to the Trust on 16 April 2015 to clarify his request and ask for an internal review of the Trust's decision. In this letter the complainant stressed that he did not intend his request to be for any personal information of any patient and he did not want correspondence relating directly to the Mr Miller investigation and this had only been referred to as this investigation acted as a conduit for patient files to be released to the Royal College of Surgeons ("RCS"). As a result of this the complainant set out his request to avoid any reference to personal data and it was set in the following terms:
  - 1) *"All correspondence, emails, minutes of meetings and contemporaneous notes of phone calls relating to the release of Patients files to the RCS without the patients knowledge, agreement or permission. I wish to see a documentary trail of evidence as to how this decision was arrived at by the Trust internally.*
  - 2) *What instructions were given to the staff about Mr Miller's whereabouts during the investigation as the truth was withheld from patients?*
  - 3) *What was the procedure carried out by Mr Miller that the Trust investigated."*
6. The Trust responded again on 3 June 2015 and explained it considered the clarification from the complainant changed the scope of the request. It now considered the complainant was no longer requesting the

information from the initial request on the decision to investigate Paul Miller and had changed the focus of the remainder of the request.

7. On the basis of this re-scoped request the Trust responded and stated that it held no information specifically documenting the decision to disclose patient information to the RCS. The Trust again reiterated that no specific instructions were given to staff on how to handle the investigation. For the final part of the request the Trust maintained its position that the two letters identified as within the scope of the request were exempt on the basis of section 40 and 41 of the FOIA.

### **Scope of the case**

---

8. The complainant contacted the Commissioner following the internal review on 8 June 2015 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of his investigation to be to determine if any information was held by the Trust in response to parts 1 and 2 of the request as set out by the complainant on 16 April 2015. The Commissioner will also look to determine if the Trust has correctly withheld the two letters within the scope of part 3 of the request under section 40 and 41 of the FOIA.

### **Reasons for decision**

---

#### **Section 1 – information held**

10. Section 1(1) of the FOIA states that:

*"Any person making a request for information to a public authority is entitled –*

*a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

*b) if that is the case, to have that information communicated to him."*

11. The Commissioner has considered whether the Trust has complied with this section of the FOIA when it stated that no information was held in relation to parts 1 and 2 of the request.
12. The Trust had informed the complainant that it did not hold any information specifically documenting the decision to disclose patient information to the RCS and no specific instructions were given to staff

on how to handle the investigation. The Commissioner therefore wrote further to the Trust and in determining whether it held any information within the scope of parts 1 and 2 of the request he considered the standard of proof to apply was the civil standard of the balance of probabilities. In deciding where the balance lies in cases such as this one the Commissioner may look at:

- Explanations offered as to why the information is not held; and
  - The scope, quality, thoroughness and results of any searches undertaken by the public authority.
13. The Commissioner wrote to the Trust to ascertain what searches it had carried out to determine that no relevant information was held, why it considered these searches would have returned information if it were held, and to provide further explanations for its position.
  14. The Trust explained that it contacted relevant executive directors who were involved in the investigation into Paul Miller and, in particular, the RCS review. In response the Trust's Medical Director explained he had been on leave at the time the RCS were appointed and commenced their investigation. The individual who was acting in the Medical Director's absence was approached and asked to provide any information he held.
  15. All individuals approached were asked to search their personal computer systems and within their email accounts. The Trust did explain that it held paper files in relation to Mr Miller but there was no specific manual or electronic record that held all information in relation to each aspect of the various investigations into Mr Miller. The Trust considered the information asked for in this case – information on the decision to release patient files to the RCS and information given to staff on Mr Miller's whereabouts – would have been held as electronic records if it were held.
  16. The acting Medical Director stated he no longer held any information relating to the events during the time period in question and any information he might have held had been deleted.
  17. The Commissioner asked the Trust for further detail on this point to ascertain what information had been held and whether it could be recovered. When responding the Trust explained that items deleted from an email mailbox are kept for 28 days within the 'recover deleted items' folder. To recover information after this time, as is the case here, would require the Trust to identify the relevant back-up tape and then restore it to an additional exchange server before the actual emails in question could be identified and recovered.

18. The Trust considers this process would require a dedicated resource of at least one member of the Trust's IT department working full-time for approximately three days to identify and recover the back-up tapes.
19. The Commissioner wrote further to the Trust about this issue to establish if the information was in fact held but could not be recovered without exceeding the appropriate cost limit set out in section 12 of the FOIA, therefore changing the position of the Trust.
20. The Trust responded and clarified that any emails held on this issue would have been most likely to have been emails from the acting Medical Director to Mr Miller and his lawyers. The emails were intended to clarify the Terms of Reference for the review and other related matters. The Trust has explained and evidenced its policy on the use and management of email communications which makes it clear that emails that record business transactions should be retained in line with the retention policy of the Trust.
21. In this case, the Trust has acknowledged that any emails that may have been held were not retained in line with the retention of emails policy and it is taking steps to ensure this does not occur again. However, the Commissioner has to then consider whether as the emails have not been retained and have been deleted if they are unable to be recovered so are not held or can be recovered and engage the section 12 exemption.
22. The Trust conducted further investigations with its IT department and informed the Commissioner that any information could not be recovered. In explaining this further the Trust has provided the Commissioner with details of its back-up strategy for electronic information. It stated that it has three levels of electronic back-up: daily, monthly and yearly. In each of these a number of back-up tapes is used and the oldest is overwritten the next time a back-up is done. For the yearly back-up the back-up is not a full back-up of the preceding 12 months.
23. The Trust has explained that these back-ups are done to enable business continuity in the event of a system malfunction to allow the Trust the ability to recover some data but once the data is overwritten it cannot be retrieved. The Trust has stated that due to the time that had passed since the information was deleted any information could now not be recovered as it would have been overwritten with this year's electronic data back-up.
24. In reaching a decision about whether information is held by the Trust, or was held at the time of the request, the Commissioner has considered the arguments presented by the Trust and the searches it has carried out. He accepts that different public authorities will have different ways of storing information and will have different policies governing the

storage and retention of electronic information and the Trust have explained their systems and policies adequately for the Commissioner to reach a conclusion.

25. The Commissioner accepts that it is now not possible to recover any emails which may have been deleted due to the passage of time and whilst it is regrettable that the Trust did not follow its own policies on the retention of emails in this case, he understands that the yearly back-up is run on 31 December each year and as such the emails that were deleted cannot now be recovered as they date from March to April 2014. The Commissioner notes that the Trust is taking steps to ensure that emails are retained as appropriate and in line with its policies in the future but he must make a decision on the circumstances in this case and he is satisfied with the explanations provided by the Trust that the information cannot now be recovered and is therefore not held.
26. The Commissioner has also considered the searches carried out by the Trust to identify any other relevant information which may have been held by other members of staff than the Acting Medical Director. He is satisfied that the searches conducted by the Trust were wide enough to have resulted in information relevant to the request being found if it were held. The Trust focused on searching with those members of staff involved in the investigation and the RCS review which, due to the issue being investigated, would appear to be proportional as the information requested in parts 1 and 2 of the request related to the decision to release files to the RCS and instructions to staff. This information would have been likely to have been held by more senior staff due to its nature and as such the Commissioner accepts that searches for information would focus on those staff involved in the investigation and the decision-making process.
27. The Commissioner has to make a decision on balance and in doing so he has looked at the searches carried out by staff and considers them to have been robust enough – staff were asked to search their personal computers and email accounts for information on Mr Miller – to have identified any relevant information and then to have allowed further interrogation to find information relevant to parts 1 and 2 of the request. The Commissioner, taking this into account and the explanation of the Trust as to why deleted emails cannot be recovered, has therefore concluded that the Trust has complied with section 1 of the FOIA and on balance of probabilities it does not hold information within the scope of parts 1 and 2 of the request.

## **Section 40(2)**

28. Section 40(2) states that a public authority is not obliged to disclose information if to do so would constitute a disclosure of personal data and

if this disclosure would breach any of the data protection principles or section 10 of the Data Protection Act 1998 (DPA).

29. The Commissioner has gone on to consider whether or not the Trust has correctly applied section 40(2) to withhold the two letters containing information relating to the third part of the request.
30. The DPA defines personal data as:

*"...data which relate to a living individual who can be identified*

*a) from those data, or*

*b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the data controller or any person in respect of the individual."*

*Is the withheld information personal data?*

31. The Commissioner has reviewed the withheld information in this case. The letters have been written by clinical staff and contain details of a particular case that was used to demonstrate the more widely held concerns about Mr Miller's clinical practice.
32. In the first of these letters the information details a telephone call with the patient's wife about his treatment and the Commissioner is therefore satisfied the contents of this letter constitute the personal data of both the patient's wife and the member of clinical staff providing the statement. Both of these individuals could be identified from the information as the case was used as part of the wider investigation to demonstrate the issues with Mr Miller. It is reasonable to therefore conclude that anyone with knowledge of this patient and his treatment would be able to identify the patient's wife and members of staff involved in his treatment from this information. The nature of the telephone discussion detailed in the statement gives some indication of the relationship between the patient and the clinician who provided the statement and could lead to identification of the individuals referred to.
33. The second letter also contains a statement about the concerns of a clinical member of staff about the same patient and, whilst more factual in nature, does contain references to the patient's wife and is referred to as an "Expression of concern over the management of Mr [name redacted]". This information forms the view of the clinician about the treatment of the patient and recommendations that were made and at times not followed. The Commissioner considers this information could

be used to identify the clinician, the patient and, by association, the patient's wife.

34. For the same reasons as with the first letter, the Commissioner finds that as the information contains details of the treatment of a patient whose case was used as an example as part of the investigation into Mr Miller it is reasonable to conclude that this information could be linked to a specific individual, at the very least by any other individuals involved in the treatment or investigation. Due to the information in both of the letters and the media interest there has been in the investigation<sup>1</sup> the Commissioner considers it would be possible for the individuals concerned to be identified from the content of the letters.
35. For these reasons the Commissioner is satisfied the information constitutes personal data, as defined by the DPA. The Commissioner has now gone on to consider whether disclosure of this information would be unfair and/or unlawful.

*Would disclosure be unfair and/or unlawful?*

36. The Trust has stated that individuals providing information to it as part of an investigation into wider concerns would reasonably expect the contents of such information to remain confidential. In addition to this the next of kin of patients would not expect details about the treatment of their family members to be made publicly available.
37. In considering whether disclosure would be fair the Commissioner takes into account the following factors:
  - Whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned;
  - The individual's reasonable expectations of what would happen to their information; and
  - Balancing the rights and freedoms of the data subject with legitimate interests.
38. The Commissioner has considered the information withheld under section 40(2) and the fact that individuals providing information as

---

<sup>1</sup> <http://www.itv.com/news/story/2014-10-16/treatment-fear-for-cancer-patients/>

<http://www.surreymirror.co.uk/Cancer-doctor-sacked-East-Surrey-Hospital/story-23181880-detail/story.html>



evidence of concerns and as part of an investigation would have no reasonable expectation that this information would be made publicly available. He has also taken into account the fact that the letters refer to a patient who has since died and refer to his next of kin who would have had no expectations that details of discussions with her would be disclosed and may not even be aware that this information is included in the letters.

39. The Commissioner's view is that when considering what information individuals should expect to have disclosed about them a distinction should be drawn as to whether the information relates to the individual's public or private life.
40. In the case of the first letter the information details the telephone conversation between the patient's wife and a clinician and whilst the majority of the information would be that of the wife and relate to her private life, the information is also the personal data of the clinician and is the account of the clinician's experience at work. The second letter is the account of a clinician and is not therefore related to the individual's private life but is not strictly about their public life as it relates to their account of the treatment history of a patient and the decisions that were made as well as the reactions of the patient's wife. As such, in both cases the expectation of privacy is increased and the Commissioner fails to see how individuals raising their concerns about the clinical practice of a doctor would expect that information of this type would be placed in the public domain.
41. The Commissioner has next gone on to consider whether the release of the information would cause unnecessary or unjustified harm to the individuals involved.
42. The Trust has argued that the treatment of the patient referred to in the letters and the details of this treatment and the telephone call would be distressing to the wife of the patient and it would not be justified to disclose information which will bring these issues up again and cause further distress and harm to the individuals involved.
43. The Commissioner accepts the Trust's position in this regard. He also notes that the information in the withheld information was used as part of the Trust's investigation into the wider concerns about the practice of Mr Miller and is not in the public domain. As such disclosure of the information which could lead to identification of the individuals involved both those who provided evidence and the family of the deceased. The issue involved was clearly emotive to those involved and the Commissioner is satisfied that disclosure of this information into the public domain would be unnecessarily distressing.

44. In relation to the final factor, the legitimate interest in the public knowing this information, the Commissioner has considered whether disclosure of the information would lead to a greater infringement of the individual's right to privacy than is outweighed by the legitimate interest in disclosure.
45. In his submissions to the Trust, the complainant stated he was not interested in receiving other patient's personal data but did raise the issue of the importance of NHS Trust's having proper records management and being accountable for decisions. The Trust does not consider there are any public interest arguments that would justify disclosure in this case.
46. The Commissioner recognises that the issues around Mr Miller have drawn attention in the media and there is a need for NHS Trust's to proactively provide information to the public to demonstrate they are operating effectively and taking steps when things go wrong.
47. The Commissioner has to consider whether disclosure of the specific information in this case into the public domain would be in the wider public interest. He has not been convinced there is any legitimate public interest in disclosure of the information in the two statements from the clinicians about the treatment of a patient beyond simply increasing transparency within the public authority. He does not consider that disclosure of the information in the two letters would increase the public's understanding of the issues around Mr Miller to an extent that it overrides the unwarranted or unjustified damage or distress that may be caused to the individuals involved if the information were to be disclosed.
48. The Commissioner therefore considers that disclosure of this information would be unfair and in breach of the first data protection principle. As such, section 40(2) is engaged and the information is therefore exempt from disclosure.

## Right of appeal

---

49. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

50. 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.
51. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**