

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

### **Decision notice**

**Date:** 4 September 2018

**Public Authority:** Berkshire Healthcare NHS Foundation Trust  
**Address:** Fitzwilliam House  
2/3 Floor  
Skimped Hill Lane  
Bracknell  
Berkshire  
RG12 1BQ

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

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1. The complainant has requested information relating to complaints made about nurses and also all their places of work within Berkshire Healthcare NHS Foundation Trust (the Trust).
2. The Commissioner considers that the Trust incorrectly applied section 40(2) of the FOIA to the portion of the request concerning complaint data. The Commissioner has decided that under section 40(5)(b)(i) of the FOIA, the Trust is not obliged to confirm or deny that it holds the requested information as to do so would release the personal data of third parties. In regard to the portion of the request concerning the nurses places of work, the Trust has reconsidered its position and has disclosed the information to the complainant outside of the FOIA.
3. The Commissioner does not require the public authority to take any steps.

## Request and response

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4. On 26 February 2018 the complainant wrote to the Trust and requested information in the following terms:

*"Have there been any written or verbal complaints about or against [redacted] and [redacted] both of whom are currently nurses at [redacted] I would like the FOI to include their current place of work and anywhere else in the Trust  
I would also like to know if the Trust knows of any complaints written or verbal against them at any previous place of employment"*

5. On 28 February 2018 the Trust responded. It refused to provide all the information that was requested citing section 40(2) of the FOIA (personal information) as its basis for doing so. The complainant replied to the Trust requesting a review of its handling of the request.
6. The complainant subsequently wrote to the Trust on 17 March 2018 saying *"another local Health Trust has revealed the number of complaints against a health professional in their employ, so there is precedence for such a request."*
7. On 19 March 2018 the Trust carried out a review and wrote to the complainant maintaining its original decision.

## Scope of the case

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8. The complainant contacted the Commissioner to complain about the way her request for information had been handled.
  9. During the course of the Commissioner's investigation the Trust decided to release information about the nurses places of work to the complainant outside the FOIA. The Commissioner has therefore focused her investigation on whether the remainder of the request [information about complainants] is for third party personal data and whether section 40(2) or section 40(5) of the FOIA applies to this portion of the request.
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## Reasons for decision

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### Section 40 – personal data

10. Section 1 of FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities:
  - a) *the duty to inform the applicant whether or not requested information is held and, if so*
  - b) *the duty to communicate the information to the applicant.*
11. It is important to note that the rights of access provided by section 1 are both subject to the application of exemptions.
12. Section 40(2) of the FOIA says that information is exempt from release if it is the personal data of a third party, e.g., someone other than the applicant, and if one of the conditions for processing under section 40(3) or section 40(4) of the FOIA are met. By applying section 40(2) of the FOIA to the request the Trust appears to indicate that it holds information relating to complaints about third parties. In the Commissioner's view, the Trust should have applied section 40(5)(b)(i) of the FOIA to the request.
13. Section 40(5)(b)(i) says that a public authority is not obliged to confirm or deny under section 1(1)(a) of FOIA whether third party personal data is held if, or to the extent that:

*"the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded"*
14. This subsection is about the consequences of confirming or denying whether information is held, and not about the content of the information. The criterion for engaging it is not whether disclosing the information would contravene the data protection principles, but whether the simple action of confirming or denying that it is held would do so. Therefore this notice only considers whether the Trust is entitled, on the basis of this exemption, to refuse to confirm or deny whether it holds the requested information and the Commissioner has not gone on to consider whether the requested information – if held – should be disclosed.

15. The Commissioner's guidance on section 40(5)1 of the FOIA explains that there may be circumstances, for example for information about criminal investigations or disciplinary records, in which simply to confirm whether or not a public authority holds the requested information can itself reveal something about an individual. To either confirm or deny that information is held could indicate that a person is or is not the subject of a criminal investigation or disciplinary process. In this case, implying that the requested information is held indicates that complaints have been made about the named individuals during their employment with the Trust and/or other organisations.
16. For section 40(5)(b)(i) of the FOIA to apply to a request the following conditions must be met:
  - confirming or denying whether information is held would reveal the personal data of a third party; and
  - confirming or denying whether information is held would contravene one of the data protection principles.

*Is the information personal data?*

17. The Commissioner has first considered whether confirming or denying relevant information is held would reveal the personal data of a third person as defined by the Data Protection Act ("DPA").
18. The DPA says that for information to constitute personal data, it must relate to a living individual and that individual must be identifiable from it.
19. The requested information, in this case confirming or denying that information about complaints about the nurses is held, is information that relates to living individuals and they could clearly be identified from it. The Commissioner is satisfied that, if held, the requested information would be third party personal data. She has gone on to consider section 40(3) of the FOIA in the first instance, which concerns release of personal data and the DPA.

*Would confirming or denying the information is held contravene any of the data protection principles?*

20. Section 40(3)(a) of the FOIA says that personal data is exempt from release if disclosing it would contravene any of the data protection principles, or would cause damage or distress and so breach section 10 of the DPA.

21. The Commissioner has considered whether confirming or denying the requested information is held would breach the first data protection principle which states:
  - Personal data must be processed fairly and lawfully; and
  - Personal data shall not be processed unless at least one of the conditions in the Data Protection Act (DPA) schedule 2 is met.
22. When assessing whether confirming or denying information is held would be unfair, and so constitute a breach of the first data protection principle, the Commissioner takes into account factors such as whether the information relates to an individual's private or public life, whether the individual has consented to the authority confirming or denying the information is held, the reasonable expectations of the individual(s) concerned [about what will happen to their personal data] and any potential damage and/or distress to the individual(s).
23. In this case, if held, the information relates to living individuals public lives [as nurses], and confirming or denying whether the information is held would communicate that a complaint or complaints have been made about them.
24. Releasing information under the FOIA is effectively releasing it to the world at large. The Commissioner recognises that individuals have a reasonable expectation that a public authority, in its role as a responsible data controller, will respect confidentiality. The Trust has confirmed that, if held, any relevant information would have been treated confidentially.
25. The Commissioner notes here that there may be situations in which it could be argued that giving the confirmation or denial to a requester would not necessarily contravene the data protection principles.
26. The FOIA is motive and applicant 'blind', and the test is whether the information can be disclosed to the public at large, not just to the requester. Therefore, an authority can only disclose or confirm or deny it holds the information, to any member of the public who requested it.
27. The Commissioner therefore considers that confirming or denying the requested information is held would be unfair to third parties. The third parties would reasonably expect that their personal data – whether or not complaints were made about them - would not be released to the world at large.

*Balancing the individual's rights and freedoms against the legitimate*

*interest in confirming or denying information is held*

28. Despite the factors above, a public authority may confirm or deny information is held if there is compelling public interest in doing so that would outweigh the legitimate interests of the third party in this case.
29. Given the background to the request, and the complainant's concerns, the Commissioner recognises that the information in question is of interest to the complainant, e.g., that she wishes to use the information concerning a grievance about the care received by a family member. However, the complainant has not provided evidence for confirmation or denial that the information is held that is so compelling that it overrides the third party's legitimate rights and freedoms.
30. The Commissioner has noted that, by applying section 40(2) of the FOIA to the request, the Trust appeared to confirm that it holds related information. The Commissioner is satisfied that, under section 40(5)(b)(i) of the FOIA, the Trust was not obliged to confirm or deny that it holds the information the complainant has requested. Doing so would release the personal data of third parties, which would be unfair and a breach of the first data protection principle.

## Right of appeal

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31. 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)

32. 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.
33. 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 .....**

**[Name of signatory]**

**[Job title of signatory]**

**Information Commissioner's Office**

**Wycliffe House**

**Water Lane**

**Wilmslow**

**Cheshire**

**SK9 5AF**