

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

### **Decision notice**

**Date:** 12 June 2019

**Public Authority:** Health and Social Care Board

**Address:** Linenhall Street  
Belfast BT2 8BS

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

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1. The complainant has requested information from the Health and Social Care Board (HSCB) in relation to patients who had travelled to Cambridge to receive medical treatment within a specified time period. The HSCB disclosed some information, stated that it did not hold some of the information, and refused to disclose the remainder, citing sections 40(2) and 41 of the FOIA as a basis for non-disclosure. Two separate requests for information were made and the Commissioner has considered these separately.
2. The Commissioner's decision is that, in relation to the complainant's first request, the HSCB has incorrectly applied the exemptions at sections 40(2) and 41. In relation to the second request, question 1 is dealt with in the first request. Regarding questions 2 and 3, the Commissioner is satisfied that on the balance of probabilities HSCB does not hold the requested information. In relation to question 4 the Commissioner is satisfied that the information is exempt from disclosure under section 40(2) of the FOIA.
3. The Commissioner has also decided that the HSCB breached section 10(1) of the FOIA by failing to disclose part of the information which was held and was not covered by an exemption within the statutory time for compliance.
4. The Commissioner requires the HSCB to take the following step to ensure compliance with the legislation:

- In relation to the first request, disclose how many men travelled out the night before their pre-operational consultation at Addenbrookes during 1 March 2016 and 1 March 2018.
5. The HSCB must take this step 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**

6. The complainant on 2 March 2018 made the following request for information to the HSCB:-

"Under the Freedom of Information Act 2000, I wish to be furnished with the following information concerning travel arrangements for men attending pre-operation consultations for robotic prostatectomy at Addenbrookes hospital in Cambridge:-

1. During the last two years, i.e. 1<sup>st</sup> March 2016 to 1<sup>st</sup> March 2018, how many men travelled out the night before their pre-operational consultation at Addenbrookes?
  2. How many men travelled out on the same day as their pre-operation consultation at Addenbrookes?"
7. The HSCB responded to the complainant on 9 April 2018, providing some information within the scope of the complainant's request, but refusing to disclose the remaining requested information and citing the exemptions under sections 40(2) (personal data of a third party) and 41 (information provided in confidence).
8. The complainant sought an internal review of that decision on 27 March 2018 as he was dissatisfied with the HSCB's response. The HSCB provided a response to this on 9 April 2018, upholding the original decision.
9. On 20 April the complainant again wrote to the HSCB, requesting information in the following terms:-
- "Your initial response identified that between 2016 and 2018, 76 men attended Addenbrookes in Cambridge for a pre-operational consultation and that 36 of them stayed over on 1 night, whether the night before or the night after. I cannot accept that you do not record whether they stayed the night before or the night of their consultation or whether they paid personally for the stay.

Question 1: How many men travelled over the night before the pre-operation consultation 2016 until 2018?

Question 2: What are their perceived community backgrounds (religions)/political affiliations?

Question 3: What are the perceived community backgrounds/political affiliations of those whom the Board paid to travel and stay the night before the pre-operation consultation 2016 until 2018?

Question 4: What are the perceived community backgrounds/political affiliations of the members of the Board's Patient Travel Unit?"

10. The HSCB responded to that request on 21 May 2018. It stated that information relating to the community backgrounds/political affiliations of the relevant patients was not held by the HSCB, and that information relating to the community backgrounds/political affiliations of the Board's Patient Travel Unit constituted personal data and could not be disclosed under section 40(2) of the FOIA.
11. On 2 July 2018, following further correspondence between the complainant and the HSCB, the HSCB wrote to the complainant providing a full review of how it had handled both information requests. In relation to his initial request of 2 March 2018, it stated that information within the scope of this, other than what had already been provided, was not held by the HSCB as it would be contained within the patients' medical records at Addenbrookes Hospital. Therefore the HSCB's initial application of sections 40(2) and 41 of the FOIA to the information in that request was inappropriate.
12. In relation to the complainant's follow-up request of 20 April 2018, the HSCB concluded that the patient information requested was not held by it, and that the information relating to the religious/political affiliations of its staff was exempt from disclosure under section 40(2) of the FOIA.
13. The Commissioner wrote to the HSCB seeking its detailed submissions on 17 January 2019. The HSCB responded to the Commissioner on 11 March 2019, providing its submissions as to its application of the above exemptions. The Commissioner has considered the HSCB's handling of the complainant's request.

## **Scope of the case**

14. The complainant contacted the Commissioner on 5 July 2018 to complain about the way his requests for information had been handled.
15. The Commissioner has considered the HSCB's handling of the complainant's requests.

## **Reasons for decision**

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### **First request**

16. The HSCB's initial response to the complainant's first request, after providing some information within the scope of that request, stated that the exemptions as set out in sections 40(2) and 41 of the FOIA applied as the information relating to the number of patients who stayed the night before their operation and the number who travelled out and back on the same day constituted personal data.
17. The HSCB's internal review of that response disagreed with the initial findings of sections 40(2) and 41 applying to the withheld information. The reviewer provided the complainant with a table showing a breakdown of the 77 patients who travelled for operations within the requested time period. That table showed that 41 patients travelled over and back on the same day, while 36 patients had an overnight stay. However the HSCB confirmed that it was unable to distinguish between who stayed the night prior to the operation and who stayed the night of the operation. The reviewer felt that the information was not held because HSCB would have been required to search individual patient records to obtain this information.
18. The HSCB's final submissions to the Commissioner then stated that the internal review response was not wholly accurate. It confirmed that it does in fact hold the information regarding which specific night the patients stayed within its patient level data. The HSCB therefore advised the Commissioner that it wished to revert back to its initial decision and rely on sections 40(2) and 41 for the non-disclosure of this information.
19. The Commissioner will now consider the application of these exemptions.

## **Section 40 (2) – personal data of third parties**

20. The HSCB advised that the complainant has requested information contained within patients' medical records, which is sensitive personal data under the Data Protection Act 1998 (DPA). The DPA 1998 was still in force at the time of the HSCB's response to the complainant so the Commissioner will consider the application of section 40 in accordance with the 1998 legislation. The HSCB said that releasing the information would involve processing the personal data of the individual patients for purposes other than those for which it was held. The Commissioner has taken this to mean that:

the HSCB considers that disclosure would breach Principle 6 of the DPA: *"...personal data shall be processed in accordance with the rights of data subjects under this Act."*

### **Is the withheld information personal data?**

21. The DPA provides that, for data to constitute personal data, it must relate to a living individual and that individual must be identifiable. The Commissioner accepts that the information is that of living individuals, as they were patients who travelled for an operation within a certain time period. However, the Commissioner has examined the withheld information and does not consider that individuals would be identifiable from it. There is always the possibility of self-identification, however the Commissioner does not consider that recognising themselves and their travel arrangements regarding a specific operation would be likely to cause them damage or distress. The Commissioner considers that disclosure of patient numbers held by the HSCB would not be likely to lead to identification of those patients, as numerical data, even coupled with information regarding the operations and travel arrangements of these individuals, would not render those individuals identifiable to the public.
22. The Commissioner considers that the withheld information is sufficiently anonymised so as not to lead to the identification of individuals and therefore does not constitute personal data, so section 40(2) of the FOIA would not be applicable to that information.
23. The Commissioner has gone on to consider the HSCB's application of section 41 of the FOIA to the withheld information.

## **Section 41 – information provided in confidence**

24. Section 41(1) of the FOIA states that information is exempt if it was obtained by the public authority from any other person and if disclosure of the information would constitute a breach of confidence actionable by that or any other person. The exemption is absolute and therefore not subject to the public interest test.
25. The HSCB has argued that the withheld information is exempt from disclosure on the basis of section 41 because it was provided to it in confidence by third parties, possesses the necessary quality of confidence, was imparted in circumstances giving rise to an obligation of confidence and disclosure of the withheld information would be actionable. The Commissioner has considered the application of this exemption to the withheld information.
26. In order for section 41 to apply it is necessary for all of the relevant elements of the test of confidence to be satisfied. Therefore if one or more of the elements is not satisfied, then section 41 will not apply. The Commissioner has first considered whether the information was obtained by the HSCB from another person.
27. The information is statistical information relating to the number of men who travelled over to Addenbrookes Hospital between 1 March 2016 and 1 March 2018 for a pre-operation consultation and the number of those who stayed the night before or the night of the consultation. and expenses information for these. That information is generated by the HSCB itself from the patient records. The information was not obtained by the HSCB from another person, therefore, section 41 cannot apply to the information held by the HSCB as to the number of men who travelled over to Addenbrookes for the consultation and the further breakdown of how many travelled the same day and how many travelled the night before. The Commissioner has concluded that the HSCB has incorrectly applied section 41 of the FOIA to that information.

## **Second request**

28. The first part of the complainant's second request is a repeat of part 1 of the complainant's first request, which has already been dealt with in paragraphs 16-26 above.
29. The Commissioner will now consider the other parts of the complainant's second request, which read as follows:-

- What are their (those who travelled for the operations) perceived community backgrounds (religions)/political affiliations?
- What are the perceived community backgrounds/political affiliations of those whom the Board paid to travel and stay the night before the pre-operation consultation 2016 until 2018?
- What are the perceived community backgrounds/political affiliations of the members of the Board's Patient Travel Unit?

### **Section 1 – general right of access to information held by public authorities**

30. 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."*

31. In scenarios where there is some dispute between the public authority and the complainant about the amount of information that may be held, following the lead of a number of Information Tribunal decisions, the Commissioner applies the civil standard of the balance of probabilities.
32. For clarity, the Commissioner is not expected to prove categorically whether the information is held; she is only required to make a judgement whether on the balance of probabilities a public authority holds any information within the scope of the request.
33. In relation to the first and second bullet points of the request in paragraph 28 above, the HSCB in its submissions to the Commissioner stated that it does not hold the requested information. Any process operated by the HSCB to provide funding approval which requires the collection of personal data from data subjects is governed by the principles of the Data Protection Act 1998, which restricts data collection to that information necessary to allow HSCB to effectively carry out that role or function. As the ECR is a funding approval

process, the HSCB does not require nor does it record as a matter of course information regarding the religious or political affiliation of ECR patients. The Commissioner accepts that the HSCB therefore does not hold that information.

39. In relation to the third bullet point of the request in paragraph above, the HSCB stated that it does hold such information in relation to the staff members of the Patient Travel Unit, however it refused to disclose that information, citing sections 40(2) and 41 of the FOIA. The Commissioner has firstly considered the application of section 40(2) to the withheld information in that bullet point.

40. Section 40(2) of the FOIA states that:

*"Any information to which a request for information relates is also exempt if*

*a) It constitutes personal data which do not fall within subsection (1), and*

*b) either the first or second condition below is satisfied."*

### **Is the withheld information personal data?**

41. Personal data is defined by the Data Protection Act 1998 (the DPA) as any information which relates to a living individual who can be identified from that data or from that data along with any other information in the possession or is likely to come into the possession of the data controller. Sensitive personal data is defined by the DPA as, amongst other things, data revealing a living individual's political opinion and religious beliefs.

42. The information being withheld under section 40(2) in this case constitutes information regarding the religious/political affiliations of staff within the HSCB's Patient Travel Unit. The HSCB states that, due to the small number of staff within that unit, disclosure of that information would be likely to indirectly lead to the identification of specific staff members.

43. The Commissioner is satisfied that the information falls within the definition of personal data as set out in the DPA because it relates to identifiable living individuals. The information is also sensitive personal data, as it relates to religious beliefs and political opinion.



## **Would disclosure contravene any of the Data Protection Principles?**

44. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of disclosure against the legitimate public interest in disclosing information.

### **Reasonable expectations**

45. When a public authority discloses information under the FOIA, it is essentially disclosing information to the world and not just the person making the request.
46. The HSCB has informed the Commissioner that it is required to collect information for monitoring purposes regarding the perceived religious/political background of staff members of the Patient Travel Unit. As the information is collected only for such purposes, the staff would not have an expectation that this would be disclosed to the public.

### **Consequences of disclosure**

47. The Commissioner accepts that the staff members who provided such information in confidence would not have expected it to be disclosed to the public, and such disclosure would be likely to cause them distress.

### **Legitimate interests in disclosure balanced against the rights of the data subjects**

48. The Commissioner accepts that, although the complainant may have a strong personal interest in the withheld information, there is no wider legitimate public interest in disclosing it which would outweigh the likely distress caused to the data subjects.
49. Therefore the Commissioner's decision is that section 40(2) of the FOIA is engaged in this case and has therefore not gone on to consider the HSCB's application of section 41 of the FOIA.

## **Section 10 – time for compliance**

50. Section 10(1) of the FOIA states that a public authority must respond to a request promptly and *“not later than the twentieth working day following the date of receipt.”*
51. As the HSCB failed to disclose the in-scope information it held, to which the Commissioner considers that the specified exemptions do not apply, within the required timescale, it breached section 10(1) of the FOIA.

**Right of appeal**

52. 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)

53. 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.

54. 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 .....**

**Deirdre Collins**

**Senior Case Officer**

**Information Commissioner's Office**

**Wycliffe House**

**Water Lane**

**Wilmslow**

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**SK9 5AF**