

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

**Date:** 24 October 2018

**Public Authority:** North Lincolnshire and Goole NHS Trust  
**Address:** Diana, Princess of Wales Hospital  
Scartho Road  
Grimsby  
DN33 2BA

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

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1. The complainant has requested information relating to a review of waiting list times at the Trust.
2. The Commissioner's decision is that North Lincolnshire and Goole NHS Trust (the Trust) has correctly applied section 36(2)(c) - prejudice to the effective conduct of public affairs, but that the public interest favours disclosure. She also finds that section 31(1)(g) - law enforcement, is not engaged.
3. The Commissioner further finds that the Trust has incorrectly applied section 40(2) to the majority of the information in the main body of the report but did apply it correctly to pages 14 to 44.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose pages 1 - 13 of the requested information aside from names and job titles.
5. The public authority must take these steps 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

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6. On 18 December 2017, the complainant wrote to the Trust and requested information in the following terms:  
  
*"Under the Freedom of Information Act, please send me a copy of the independent fact find outcome report into the review of waiting lists at the Trust"*
7. The Trust responded on 20 January 2018 and refused to provide the requested information. It cited section 31(1)(g) in conjunction with section 31(2)(a)-(d) and (j), and section 40(2) as its reason for doing so.
8. The complainant accepted that section 40(2) could apply to personal information of patients and staff below board level.
9. Following an internal review the Trust wrote to the complainant on 22 February 2018. It stated that in addition to section 31 it was also relying on section 36(2)(c) of the FOIA to withhold the information.

## Scope of the case

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10. The complainant contacted the Commissioner on 27 March 2018 to complain about the way his request for information had been handled.
11. The complainant explained that his request concerned a fact find outcome report into a review of waiting lists at the Trust. He stated that this follows the discovery many thousands of patients at the Trust have not had timely treatment in accordance with national NHS standards due to administrative errors with waiting lists.
12. Furthermore, the complainant stated that it remains unclear how this happened, how many patients have been affected and the degree of harm they have suffered as a result. It is, therefore, an extremely serious issue.
13. The complainant went on to explain other concerns relating to the Trust's performance and explain why, in his view, section 36 does not apply. For brevity the Commissioner has not repeated them all here. He further stated that:

*As noted above, the Trust's chief executive has decided to use section 36(2)(c) as a further exemption at the appeal stage.*

*The report has been finalised, the issue is not ongoing, and the time for a free and frank exchange of view or provision of advice is now over.*

*I would suggest any risk of prejudice to the effective conduct of public affairs is very slight. It does not even meet the "would be likely to" threshold although I'm not clear which threshold the Trust is claiming.*

*The "safe space" argument made by the Trust to "consider and learn from alleged wrongdoing" would, if accepted, mean that no details of future reports into alleged wrongdoing would be made public.*

*Publishing the information would, far from discouraging whistleblowers, encourage them to come forward and given them confidence that action would be taken into problems they raise.*

*I am content for details in the report identifying small teams, ie fewer than five people, to be redacted. However, in general I should point out that details about the performance of all hospital departments are regularly reported upon and subject to public scrutiny - some of these necessarily have very small numbers of staff - and yet I am not aware the Trust has sought to withhold details of their activities.*

*As far as section 40 is concerned, I am content that personal information of staff below those at board level is withheld along with identifiable details of patients.*

*This would not, for instance, apply to the vast majority of recommendations from the report, an executive summary, nor of lessons learned*

14. The Commissioner considers the scope of this case to be to determine if the Trust has correctly applied any of the exemptions it has cited to the withheld information.

## **Background**

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15. By way of background, the Trust explained the nature of the information and the circumstances in which it was created. The NHS has various targets for waiting list management and 'referral to treatment' (RTT) times, and the Trust's compliance with these affects its financial position and regulatory oversight, as these figures are reported externally to the Trust's commissioners and regulators. There are circumstances in which it may be possible to legitimately 'stop the clock' on the timing of a patient's referral to treatment progression. In October 2016, the Trust commissioned its Internal Auditors to conduct various independent reviews into the management of its waiting lists following anecdotal evidence of possible mismanagement involving alleged inappropriate "clock stops".

16. Internal Audit's work was unable to provide definitive evidence of intentional manipulation of waiting list data but concluded that there was the potential for this to have been the case given the scale and nature of the inappropriate clock stops. Internal Audit recommended that the Trust should consider its findings, and in light of their seriousness, consider instigating a further formal investigation into this matter in accordance with the Trust's disciplinary policy.
17. This approach was endorsed by the Trust Board at its meeting on 28 February 2017.
18. The disputed information here was the product of that subsequent investigation. The conclusion of that investigation was that there was no evidence that there had been any deliberate mismanagement of waiting lists from any of the staff members involved. In all cases, the staff interviewed had acted in good faith believing that they had recorded accurately based on their understanding of RTT rules and in some cases following advice, including clinical advice. The conclusions (that there was no deliberate misreporting and no patient harm) have been conveyed to the complainant already. The final report was dated 20 September 2017.

## **Reasons for decision**

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### **Section 36 – prejudice to the effective conduct of public affairs**

19. The Commissioner has first considered section 36 as this has not been subject to internal review by the Trust.

20. Section 36 of the FOIA provides that:

*"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-*

*(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."*

21. The Trust has applied section 36(2)(c) FOIA to all the withheld information. In the event that the Commissioner finds this exemption is not applicable she will go on to consider the application of section 31.
22. Section 36(2)(c) says that information is exempt information if, in the reasonable opinion of a qualified person, disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

23. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised, qualified person for that public authority. The qualified person's opinion must also be a "reasonable" opinion, and the Commissioner may decide that the section 36 exemption has not been properly applied if she finds that the opinion given is not reasonable.

### **The Trust's position**

24. The Trust argued that the aspect of the conduct of public affairs which is engaged is the Trust's delivery of clinical and support services as part of the NHS, investigation and assessment into allegations of wrong-doing, and taking action as appropriate in light of the findings.
25. The report is a confidential internal investigation into the alleged manipulation of waiting time information via the inappropriate application of 'clock stops'. The conclusion of the report was that no such deliberate manipulation took place.
26. However, the investigation of any such issues relies on the voluntary participation of staff, and in future cases staff may not participate if they believe the Trust would lightly disclose information they provide 'to the world' under FOIA. In turn, this would be likely to detract from the quality and completeness of any equivalent investigations the Trust undertakes, the Trust needs a safe space, and candour on the part of staff to undertake such investigations and applying the exemption helps to preserve that safe space for future cases.
27. The report concludes that there was no deliberate manipulation of waiting list data, and that no patients came to harm.
28. As large elements of the report are also the personal data of Trust staff, those parts would also be exempt under section 40(2) of the FOIA. The Trust believes the report is also exempt under section 31 of the FOIA.
29. The Trust will inevitably be required to carry out internal investigations in the future, initiated by any number of scenarios. Such investigations will inevitably involve a number of staff, who will be asked to provide comment/evidence on allegations or actions of their colleagues. This can clearly be a difficult process for all involved. It is therefore essential that there continues to be a safe space for these investigations to take place, in order to ensure that staff remain open and willing to participate in investigations of this nature.

### **The prejudice**

30. The Trust explained that the nature of the investigation undertaken was into a relatively small team (ultimately focussing on four members of staff) within the Trust, and the manner in which the investigation was

undertaken in a large part depended on the voluntary and candid cooperation of staff, regardless of whether or not there is any (implied) contractual obligation on the staff involved to co-operate.

31. It further stated that the matters raised in the report are a detailed and at times personalised analysis and critique of issues relating to those individuals and departments concerned. If this report were to be disclosed, the likelihood and concern is that the involvement of other staff in future investigations would not be so open, and they may be defensive. The effectiveness of any investigation of this kind relies in large part on the candour and frankness of staff. Future similar investigations would run the real risk of being compromised because of guarded or incomplete disclosure, or less than complete and enthusiastic co-operation by staff members.
32. If staff did not provide accurate, detailed or candid accounts of their involvement in matters under investigation, then the whole purpose of an investigation of this kind would be undermined. In turn, the scope for learning lessons and implementing recommendations would likely be undermined. This would be likely to have serious impacts on staff, future and current patients and members of the general public. The Tribunals recognise the "precedent value" of the disclosure of information 'to the world' under FOIA on certain issues and its implications for future cases: see *Hemsley v IC (EA/2005/0025)*, and it is in this way that there is a causal relationship between the disclosure of the information that has been requested and prejudice that may occur. In short, a lack of staff cooperation would also leave the Trust vulnerable to a failure to demonstrate due diligence/compliance with broader statutory obligations of the kind set out above.
33. The Trust is of the view that the disclosure of this report would be likely to undermine any similar future investigations and that there is a causal link between disclosure of this report and that prejudice.

### **The Commissioner's position**

34. In determining whether the exemption was correctly engaged by the Trust, the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
  - Establish that an opinion was given;
  - Ascertain who was the qualified person or persons;
  - Ascertain when the opinion was given; and
  - Consider whether the opinion was reasonable.

35. The Trust explained that the qualified person is the Chief Executive, Dr Peter Reading, and that he was shown the requested information. The submissions provided to the qualified person were also provided to the Commissioner. Dr Reading's opinion was provided on 20 February 2018 and that opinion was that section 36(2)(c) was applicable in this case as disclosure would otherwise be likely to prejudice the effective conduct of public affairs.
36. The Commissioner is satisfied that the opinion was that of the appropriate qualified person for the Trust and provided at the appropriate time. She has gone on to consider whether that opinion is reasonable. It is important to note that this is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold. This only requires that it is a reasonable opinion, and not necessarily the most reasonable opinion. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, she must find that the exemption is engaged.
37. With regard to section 36(2)(c), the qualified person's opinion in this case seems to be that prejudice *would be likely to* occur if the withheld information was to be disclosed, rather than would occur. 'Would be likely' imposes a less strong evidential burden than the higher threshold of 'would occur'.

### *Reasonableness*

38. In determining whether the exemption is correctly engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner will consider all of the relevant factors. These may include, but are not limited to:
  - whether the prejudice or inhibition relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable;
  - the nature of the information and the timing of the request; and
  - the qualified person's knowledge of, or involvement in, the issue.
39. With regard to whether the prejudice related to the specific subsection of section 36(2) that is being claimed, the submission to the qualified person reasoned that disclosure would be likely to prejudice *"the Trust's delivery of clinical and support services as part of the NHS, investigation*

*and assessment into allegations of wrong-doing, and in taking action as appropriate in light of the findings”.*

40. The Commissioner accepts that the prejudice envisaged is other than to the prejudice or inhibition specified in sections 36(2)(a) and (b).
41. The Commissioner’s guidance on section 36<sup>1</sup> of the FOIA states:  
*“It is important to remember that the qualified person’s opinion is about whether the prejudice or inhibition would or would be likely to occur”.*
42. In this case, the Commissioner is satisfied that the submission to the qualified person clearly related to the request that was made by the complainant. She is also satisfied that it explained why an opinion was being sought and provided relevant background information together with a copy of the withheld information. The Commissioner is satisfied that qualified person provided his opinion and that the opinion was reasonable. Therefore she finds that the exemption is engaged and has gone on to consider the public interest arguments.

### **The public interest test**

#### *Public interest arguments in favour of disclosing the requested information*

43. The Trust has recognised that as a public body, it has a duty to be open and transparent. This duty is of particular importance where wrongdoing has been alleged. At this point the Trust clearly has a duty to establish accountability and ensure openness around the incident(s), and any system failures which may have contributed to the circumstances in question.
44. However, whilst there were some issues identified around training and the understanding of procedures (and consequently recommendations made), the allegations of wrongdoing were not substantiated.
45. The Trust has confirmed that no patients suffered any harm as a result of the ‘clock stops’.
46. The Trust recognised the public interest in assuring the public that the conclusions of the investigation (i.e. that there was no deliberate misreporting and no patient harm), set out above, are verified.

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[https://ico.org.uk/media/fororganisations/documents/1175/section\\_36\\_prejudice\\_to\\_effective\\_conduct\\_of\\_public\\_affairs.pdf](https://ico.org.uk/media/fororganisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf)



47. It also acknowledged that disclosure could inform public debate about the quality of support services delivered by the Trust (and, indeed, investigations concerning them), which ultimately involve the spending of public money.
48. The Trust accepts the applicant's view that disclosure of information could help to *"generate public confidence that changes have been made to patient administration systems so that waiting lists are accurate and properly operated by the Trust, that patients receive timely treatment and that it is provided on an equitable basis to those at other Trusts. It would also reassure patients that no harm has resulted from problems uncovered."*

*Public interest arguments in favour of maintaining the exemption*

49. The Trust stated that it had considered the following factors in this regard:
  - The strong public interest in undertaking robust investigations, by virtue of securing voluntary and candid participation in such investigations from staff.
  - In turn, the strong public interest in the safe and effective delivery of clinical services by the Trust, with staff feeling confident to engage with investigations and establishing a "learning not blaming" culture. This is a recognised national issue of interest in the NHS, as evidenced by the Freedom to Speak Up report authored by Robert Francis to the Secretary of State in 2015.
  - The public interest in ensuring that staff feel supported by their employer and avoiding unnecessary disputes or difficulties with staff, which waste the Trust's resources and undermine confidence in working relationships, leading to inefficient services. Again, this theme is captured in the Freedom to Speak Up report.
  - The public interest in shielding staff, where accusations of misconduct have been independently assessed as without foundation, from unwarranted further public scrutiny. This is reflected in the implied duty of mutual trust and confidence in the employment contract.
50. Having taken account of all the factors, including those set out above, the Trust concluded that the public interest favours non-disclosure. The Trust has reconsidered and maintains that position now.
51. The Trust further considers that the public interest in disclosure can be met through other channels, for instance consideration and scrutiny of the report and the changes being made to the systems and processes referred to in the report by the Trust's board (for instance non-executives) and internal and external auditors.

52. Finally, it is not necessary for the information in this case to be disclosed 'to the world' under FOIA, in order for other Trusts to take learning from this case (as the applicant suggested that this may be a way in which disclosure could help to service the public interest). It would be possible for learning to be shared in a mediated fashion through normal channels of communication and NHS learning mechanisms, rather than disclosure under FOIA.

### **Balance of the public interest arguments**

53. The Commissioner considers that there is a public interest in the Trust operating in an open and transparent manner, particularly in relation to investigations into allegations of misconduct. The Commissioner also notes that the investigation in question took place in 2016 and was complete at the time the request was made.
54. However as the Trust has highlighted the allegations were investigated and were unfounded which to some extent lessens the public interest in disclosure. The Commissioner also acknowledges that there is generally a strong public interest in not deterring the voluntary co-operation of staff with internal investigations.
55. The Commissioner also considers that there is a strong public interest in allowing such investigations to be carried out and considered without the fear that information will be disclosed into the public domain, particularly where allegations ultimately prove to be unfounded.
56. This is because disclosure may inhibit whistle-blowers from coming forward in the first place or could inhibit evidence gathering and the candour of staff contribution. This in turn would hinder the Trust's ability to conduct such investigations in the future. It would not be in the public interest to prejudice this culture of openness referred to by the Trust.
57. However, given that the investigation was carried out in 2016, the Commissioner considers that these arguments hold less weight. With regard to disclosure deterring whistle-blowers, as mentioned previously, it could be argued that the reverse is true.
58. Having carefully considered the arguments the Commissioner considers that the public interest is finely balanced in this case. However, in all the circumstances of this particular case, the Commissioner does not consider that the public interest in maintaining the exemption outweighs the public interest in disclosure of the requested information.
59. As the Commissioner finds that section 36(2)(c) does not apply, she has gone on to consider the application of section 31.

**Section 31(1)(g) – prejudice to the exercise of a public authority's functions**

60. Section 31 of the FOIA relates to a group of interests collectively known as "law enforcement" interests.

*(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—*

*(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),*

61. Specifically, section 31(1)(g) states that information is exempt from disclosure if its disclosure would, or would be likely to, prejudice the exercise by a public authority of its functions for any of the purposes specified in 31(2).

**Section 31(2)**

62. The relevant purposes claimed by the Trust in this case referred to in subsection (2)(a) to (d) and (j) are -

*(a) the purpose of ascertaining whether any person has failed to comply with the law,*

*(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,*

*(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,*

*(d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,*

*(j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.*

63. The Trust also stated that it could also, potentially claim subsection (e) *the purpose of ascertaining the cause of an accident* however, it did not provide any specific arguments in support of this.
64. The Commissioner has considered her own guidance<sup>2</sup> which states at paragraph 38:

### **Functions for a specified purpose**

*To engage the exemption a public authority must:*

- *identify the public authority that has been entrusted with a function to fulfil one of the purposes listed in subsection (2);*
- *confirm that the function has been specifically designed to fulfil that purpose, and*
- *explain how the disclosure would prejudice that function.*

65. The Trust stated that whilst it does not have a single explicit statutory function to undertake investigations of this kind, the investigation ties to many of the Trust's functions as well as the Trust's general powers and responsibilities as an employer to investigate potential misconduct.

66. The Trust's functions include:

- the proper delivery of healthcare services as part of the NHS (further to section 43 of the NHS Act 2006<sup>3</sup>);
- compliance with the NHS provider licence (under section 81 of the Health and Social Care Act 2012<sup>4</sup>);
- proper compliance with CQC regulations (the Health and Social Care Act 2008 (Regulated Activities Regulations 2014<sup>5</sup>) including in relation to governance;
- and a specific responsibility under section 92 of the Care Act 2014<sup>6</sup> not to supply, publish or otherwise make available false or misleading

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<sup>2</sup> <https://ico.org.uk/media/1207/law-enforcement-foi-section-31.pdf>

<sup>3</sup> <https://www.legislation.gov.uk/ukpga/2006/41/contents>

<sup>4</sup> <http://www.legislation.gov.uk/ukpga/2012/7/contents/enacted>

<sup>5</sup> <https://www.cqc.org.uk/guidance-providers/regulations-enforcement/regulation-17-good-governance>

<sup>6</sup> <http://www.legislation.gov.uk/ukpga/2014/23/section/92/enacted>

information of a specified description set out in regulations. The specified regulations are the False or Misleading Information (Specified Care Providers and Specified Information) Regulations 2015<sup>7</sup>.

67. With regard to subsections (2)(a) to (d) the Trust did not identify the specific subsections of the legislation it cited that it considered applicable, neither has it provided any specific or detailed arguments.
68. To 'ascertain' is to make certain or prove. In this context it means that the public authority with the function must have the power to determine the matter in hand with some certainty. The public authority must not only be responsible for the investigation but it must also have the authority to make a formal decision as to whether that person has complied with the law. This could include taking direct action itself such as revoking licences or imposing fines, or it could involve taking a formal decision to prosecute an offender.
69. With regard to subsection (2)(j) - *the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work*

*Health and Social Care Act 2008 (Regulated Activities) Regulations 2014: Regulation 17*

*The intention of this regulation is to make sure that providers have systems and processes that ensure that they are able to meet other requirements in this part of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (Regulations 4 to 20A). To meet this regulation; providers must have effective governance, including assurance and auditing systems or processes. These must assess, monitor and drive improvement in the quality and safety of the services provided, including the quality of the experience for people using the service. The systems and processes must also assess, monitor and mitigate any risks relating the health, safety and welfare of people using services and others. Providers must continually evaluate and seek to improve their governance and auditing practice.*

70. It is the Commissioner's view that this regulation relates to processes and governance rather than an explicit statutory function such as for example, the function of the Health and Safety Executive.

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<sup>7</sup> <http://www.legislation.gov.uk/ukdsi/2015/9780111129234>

71. Having reviewed the various Acts referred to above the Commissioner is not satisfied that the Trust has evidenced that it has a single explicit statutory function to undertake investigations, and consequently section 31(1)(g) is not engaged.

### **Section 40(2) – Third party personal data**

72. Section 40(2) of the FOIA says that personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act (DPA). The request was considered in line with the DPA 1998 which was the appropriate legislation at the time.
73. The Trust has explained that there are a number of data subjects in the disputed information – for instance all of those who provided interviews form the appendices on pages 14 – 43. Pages 44 – 47 include case studies of particular patients by reference to their clinical situation, date of treatment, and/or hospital/NHS numbers. As stated in paragraph 13 the complainant has accepted that this information would be covered by section 40(2) and the Commissioner has not therefore considered these pages further.
74. However, for completeness the Commissioner has also considered whether pages 14 – 43 of the withheld information are in fact, exempt by virtue of section 40(2).
75. The Commissioner must first consider whether the requested information is personal data. If she is satisfied that it is, she then needs to consider whether disclosure of this information would be unfair and unlawful. If she finds that disclosure would be unfair and unlawful the information should not be disclosed and the consideration of section 40 of the FOIA ends here. However, if she decides that disclosure would be fair and lawful on the data subject(s) concerned, the Commissioner then needs to go on to consider whether any of the conditions listed in schedule 2 and 3, (sensitive personal data) if appropriate, of the DPA are also met.

#### *Is the information the personal data of third persons?*

76. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
77. The withheld information in this case is contained in the main body of the report relating to the investigation and statements from members of staff. The Commissioner has reviewed the main body of the report

(pages 1 – 13) and is satisfied that parts of the withheld information constitute personal data. There is some information that she does not consider personal data. This is where the Trust has referred to the 'team'.

78. With regard to pages 14 – 43 of the withheld information, this contains a list of names and job titles and a number of statements from staff. This clearly identifies those individuals, not just by name and job title, but also by the details contained in those statements. Pages 44 – 47 include details of particular patients, which the complainant has accepted in paragraph 13, would be exempt by virtue of section 40(2) and are not under consideration here.
79. Therefore the Commissioner has considered pages 1 – 13 as the main body of the report, and pages 14 – 43 further under section 40(2).
80. The Commissioner acknowledges the Trust's view that other members of the Trust's staff may be able to identify who the data subjects are, both from the specific references and from the surrounding context of the events described, job titles (which are unique to roles within the Trust), and where relevant, names.
81. As it is public knowledge that the Trust carried out this investigation, it is likely that other staff already know the department concerned. References to the 'team' would not disclose any personal data or additional information. It follows therefore that the Commissioner finds that section 40(2) does not apply to references of the 'team'. It has also therefore not been necessary to consider whether a condition under section 40(3) or 40(4) is satisfied.
82. However, it is clear that names of staff would enable individuals to be identified and therefore is considered to be personal data. The Commissioner has carried out basic internet searches with regard to individual job titles contained in the main body of the report and can find no reference to specific individuals. Nevertheless, the Commissioner finds that references to specific job titles would clearly identify individuals to other staff within the Trust and that this is therefore personal data.

### **Would disclosure be fair?**

83. Section 40(3)(a) of the FOIA says that personal data of third persons is exempt from disclosure if disclosing it would contravene one of the data protection principles or would cause damage or distress and so breach section 10 of the Data Protection Act (DPA).
84. In its submission, the Trust has told the Commissioner that disclosing the withheld information would be unfair and so would breach the first

data protection principle. The majority of its arguments relate to the interviews and statements of staff.

85. In assessing fairness, the Commissioner considers whether the information relates to the data subject's public or private life; whether the data subject has consented to their personal data being released and the data subject's reasonable expectations about what will happen to their personal data.
86. The Trust has confirmed that the information concerns the data subjects' public life although it does not relate to any 'public facing' matters. The Trust has also confirmed that it has not sought consent from the individuals for their personal data to be disclosed.
87. The Trust believes that the individuals would reasonably expect that their information would only be used in confidential circumstances by the Trust, and not disclosed 'to the world' under FOIA. The personal data has not been published by the Trust and the report has only been considered by a limited audience within the Trust.
88. The expectations of the individuals is set out within the report itself:  
  
*"The purpose of the interview is to establish the full facts in order to assess the most appropriate course of action. Today is therefore a fact finding discussion, to understand the events and to clarify the individual statement further. These interview notes will form part of the investigation and could be used as evidence in a disciplinary hearing if there is a case to answer."*
89. Conversely, there is no indication in the report that it would be published 'to the world' or that the individuals concerned would expect their personal data within it to be used for anything else beyond those purposes.
90. The report itself is also generally marked as "private and confidential and must not be reproduced in whole, or in part, without the prior consent of Northern Lincolnshire & Goole NHS Foundation Trust".
91. The Trust stated it is also concerned about the impacts of disclosure of the Report on the data subjects, and in particular that disclosure 'to the world' could
  - lead to a further deterioration in the interpersonal relationships covered by the Disputed Information;
  - Prejudice individuals' abilities to progress within the Trust or obtain work in other organisations;



Further impact on individuals' wellbeing, as evidenced by the distress apparent in the extract above.

92. More generally, and in the absence of particular seniority (and the staff here are not particularly senior) or other especially compelling reasons (and the Trust believes there are none), the long-established approach of both the Information Tribunal and the ICO is that internal disciplinary and grievance matters are properly exempt from disclosure under section 40(2).
93. The Trust did not consider it would be appropriate to ask staff for their consent to disclose the requested information. It considered that in these circumstances it would place unfair pressure on them to give what they may perceive to be the 'right' answer and the Trust may not be able to give full effect to their views.
94. The Trust further argued that information in the report (e.g. pages 9 and 10) provides a detailed analysis of the work of a small department, and therefore all the individuals are 'tarred with the brush' of descriptions of the department as a whole. Given the small numbers of staff involved, the specific team they were working in, and the precise factual context of the investigation it would not be reasonably practicable to anonymise the report whilst leaving any meaningful information for disclosure.

### **The Commissioner's decision**

95. In its submission to the Commissioner, the Trust argued that a redacted copy of the disputed information would be practically impossible to achieve. Redactions which avoided that would remove almost all of the content. Anything left would be in a form which would provide no assistance to the complainant.
96. As the Commissioner has determined that neither sections 31 or 36 of the FOIA are applicable to the report she has considered whether the redactions of personal data identified by the Trust would have the affect described above. Having reviewed the withheld information, in the Commissioner's view, this is not the case with regard to pages 1 - 13. If section 31 or section 36 had been applicable then almost all of the main report would be redacted, along with the names and job titles, which would make any disclosure meaningless. As it is, sections 31 and 36 do not apply so the main report is intact aside from the personal data.
97. Furthermore, the Trust's arguments with regard to the potential prejudice to individuals' abilities to progress within the Trust or obtain work in other organisations, are, at best, speculative.
98. Given the circumstances of this case the Commissioner considers that to disclose the names, job titles and number of staff interviewed contained

in pages 1 - 13 of the report, and the appendices and staff statements (pages 14 - 44) would cause distress to those concerned. She therefore finds it would be unfair and consequently section 40(2) has been correctly applied to this information.

## Right of appeal

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99. 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)

100. 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.

101. 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**