

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

### **Decision notice**

**Date:** 2 May 2019

**Public Authority:** Southern Health and Social Care Trust

**Address:** Ferndale House  
Bannvale  
10 Moyallan Road  
Gilford  
BT63 5JX

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

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1. The complainant has made a 12 part request for information relating to the costs attributable to a disciplinary investigation involving a relative of the complainant.
  2. In response, Southern Health and Social Care Trust (the Trust) stated that it had previously provided information relating to a member of staff who had been employed to carry out the investigation. It refused to provide information relating to a payment made to a barrister because it considered the information to be the barrister's personal data. The Trust stated that it did not hold any other information falling within the scope of the request.
  3. The Commissioner's decision is that, on the balance of probabilities, the Trust has provided all the information it is required to within the scope of the request, and has complied with its obligations under section 1(1) of the FOIA. The Commissioner has also decided that the Trust has correctly withheld the information relating to the payment made to a barrister under section 40(2) of the FOIA.
  4. The Commissioner does not require any further steps to be taken as a result of this decision notice.
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## Request and response

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5. On 20 October 2016 the complainant made a request to the Trust, via his then Member of the Legislative Assembly (MLA) and in correspondence with the Trust on 12 April 2017, requesting information of the following description:

*"I would ask you to ascertain the total cost (itemized to confirm we are being told the truth)) which I believe would be around £----- in order that someone is held accountable for the unnecessary exorbitant expenditure. This should include*

*Pay for two senior investigators (took six months) they stated this was a very time consuming thorough investigation and meticulously carried out.*

*Pay for six very senior managers for SAI investigation (took six months) Stated this was extremely complicated and involved the top Pharmacist, BSO and others.*

*Three senior managers Discipline hearing plus preparation and note taker.*

*Three senior managers Appeal hearing plus Observer plus preparation and note taker (aborted)*

*Three senior managers Appeal hearing plus Observer plus preparation and note taker*

*All the legal fees in connection with the above*

*Fees for office staff in transcribing/typing and correspondence.*

*Preparation for Industrial Tribunal including legal advice and preparation*

*Payment of Barrister and Solicitors in connection with Tribunal*

*Preparation and submission of papers to the NMC*

*Legal advice and for preparation of papers NMC*

*Attendance of two senior managers at the NMC hearing for six days."*

6. The Trust responded on 10 May 2017. It explained that the costs relating to the disciplinary investigation, SAI investigation, disciplinary hearing and disciplinary appeal were not specific costs incurred to the

Trust for this purpose. It clarified that they were payroll cost. It went on to explain that the members of staff involved in the investigations and hearings were carrying out the work as part of their required role and function. It confirmed that it was not possible to separate the specific costs for the purposes of the processes relating to the specific disciplinary hearing that had been requested. The Trust confirmed that that there were no additional costs incurred by the external advisors to the disciplinary panel. The Trust stated that one member of the investigating team for the disciplinary investigation was specifically employed under a 'bank' contract to carry out the investigation for the Trust and to attend the disciplinary hearing and appeal. The Trust understands that this information was previously provided to the complainant's relative, with the post holder's consent, in response to a previous request. The Trust stated that it could not provide a breakdown of specific costs. It explained that the information relating to the costs associated with the engagement of a barrister was personal data and it was not appropriate to provide this information. The Trust also stated that the costs for the Nursing and Midwifery Council (NMC) hearing were costs incurred by the NMC rather than the Trust itself.

7. The complainant was not satisfied with the response and wrote to the Trust on 18 June 2017, seeking a breakdown of the specific costs he had requested.
8. On 16 August 2017 the Trust wrote to the complainant stating that it had nothing further to add to its previous correspondence on the matter.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 19 September 2017 to complain about the way his request for information had been handled.
10. During the Commissioner's investigation the Trust provided her with evidence that it had previously provided the complainant's relative with the information relating to a member of staff who had been employed to carry out the investigation. The Trust also re-sent this information to the complainant on 14 March 2019.
11. The Commissioner considers the scope of this case is to determine whether the Trust is correct when it says it does not hold further information falling within the scope of the request.
12. The Commissioner will also consider whether the Trust is entitled to rely on section 40(2) of the FOIA as a basis for refusing to provide the withheld information in relation to the payment made to the barrister.

## Reasons for decision

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### Section 1 – general right of access

13. Section 1(1) of FOIA says that an individual who asks for information from a public authority is entitled to; (a) be informed whether the authority holds the information and; (b) if the information is held, to have that information communicated to them.
14. In scenarios where there is some dispute between the amount of the information identified by a public authority, and the amount of information that a complainant believes might be held, the Commissioner – in accordance with a number of First-Tier Tribunal decisions – applies the civil standard of the balance of probabilities.
15. The Trust has stated in its submission to the Commissioner that the recordings of the disciplinary process are a combination of both paper and electronic records. The Trust has clarified that the electronic records include emails and formal correspondence or minutes of meetings.
16. The Trust has stated that it does not have a case management system and its current HR electronic system does not have the function to manage cases. The Trust has therefore confirmed that it is not possible to determine the time spent on each case in the creation, reviewing and reporting process of the investigation. The Trust has stated that this level of detail is not recorded by the Trust either manually or electronically.
17. The Trust has stated that it has not carried out searches of its electronic systems because the disciplinary case the request relates to is held as a manual paper record in the staff member's file, and there is no process in which HR staff are required to record the time that is dedicated to each individual case.
18. The Trust has confirmed that there is no recording of time spent by each member of staff in dealing with different aspects of the investigation and disciplinary process. It explained that staff within its HR Department carry specific caseloads in relation to all aspects of employee relations, and the Trust does not have a specific caseload management system or similar functionality within the HR system. It went on to explain that the disciplinary case the request relates to is one of a number of cases that the members of staff would have been dealing with at the time.
19. The Trust has stated that, other than formal correspondence that would be stored both electronically and on the manual paper file, no electronic searches could be carried out. It confirmed that there is no information

in relation to staff time dedicated to specific cases recorded either electronically or on paper files.

20. The Trust has confirmed that there have been no changes to the files or filing systems since the request was made and therefore there is no new information available.
21. The Trust has stated that information relating to the investigation and disciplinary are held in manual paper records; however information relating to staff time dedicated to each case is not recorded.
22. The Trust has confirmed that the level of detailed information being requested was never recorded by the Trust.
23. The Trust has stated that it does not require staff to record time spent on individual tasks or cases as these are part of that staff member's normal duties as outlined in their job descriptions. It has explained that its staff are salaried to provide a range of roles and responsibilities as a service to the whole of the Trust. The Trust does not operate any internal recharging process for services provided by the HR team.
24. The Trust has confirmed that there are no statutory requirements on the Trust to either create this level of detailed information or to retain it.
25. The Commissioner understands the reasons why the complainant considers the information should be held. However, she can only consider what information was actually held at the time the request is received.
26. Having considered the response from the Trust, it is the Commissioner's view that, on the balance of probabilities, the Trust does not hold any additional information relevant to the request.

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

27. The section 40(2) exemption provides that any third party personal data (i.e. the personal data of anyone other than the individual making the request) is exempt from disclosure, if that disclosure would contravene any of the principles set out in Schedule 1 of Data Protection Act 1998 (the DPA 1998). Although the DPA 1998 has been superseded by the General Data Protection Regulation and the Data Protection Act 2018, the request was made on the 12 April 2017 and the Trust responded on the 10 May 2017 when the DPA 1998 was still in force. It is therefore the Commissioner's view that the DPA 1998 is the appropriate legislation to take into account, when considering whether the Trust was entitled to rely on section 40(2) of the FOIA to refuse to provide the withheld information in this case.

*Is the withheld information the personal data of third party individuals?*

28. In order to rely on the exemption provided by section 40(2) of the FOIA, the requested information must constitute personal data as defined by data protection legislation. As explained in the paragraph above, the Commissioner considers that the DPA 1998 was the relevant data protection legislation at the time the request was received and responded to by the Trust. The Commissioner has therefore considered the definition of personal data under the DPA 1998.
29. Section 1 of the DPA 1998 defines personal data as follows:
- "personal data" means 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 intentions of the data controller or any other person in respect of the individual'.*
30. The requested information being withheld in this case is in relation to the costs incurred by the Trust to engage Counsel for the Tribunal hearing. The Commissioner has clarified with the Trust whether the barrister is a sole practitioner or part of a partnership or corporation. The Trust has confirmed that the barrister is a sole practitioner.
31. In the Commissioner's view, it is clear that the withheld information 'relates' to a living individual, who is the focus of the request and it is therefore their 'personal data'.
32. The Commissioner notes that in his submission, the complainant has stated that he is not requiring the personal data of the barrister, just the amount of the costs.
33. When determining whether data is personal data for the purposes of the DPA 1998, the data has to 'relate to' a living individual, whether in their personal or family life, business or profession. In this case the withheld information relates to the barrister in their personal life and their profession, as it is requesting information about their income and is therefore their 'personal data'.

*Would disclosure breach the data protection principles?*

34. The data protection principles are set out in Schedule 1 of the DPA 1998. The first principle, which is the most relevant in this case, requires that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness.
35. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the third party individual, the potential consequences of the disclosure, and whether there is legitimate public interest in the disclosure of the information in question.

#### *Reasonable expectations*

36. The Trust has explained in its submission to the Commissioner that it had asked the barrister for their consent to release the withheld information. However, consent to release the information was not given. This is because the withheld information constitutes information about the barrister's income.
37. Whilst a public authority may seek the view of the individual concerned about whether their personal data should be disclosed it is not obliged to do so.
38. 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. In this case the information relates to the individual's income.
39. Although this information relates to the barrister's private life and their profession as a barrister, it is not strictly about their public life. As such, the expectation of privacy is increased and the Commissioner does not consider that the barrister would have had a reasonable expectation that information of this type would be placed into the public domain. This is supported by the fact that the barrister has not consented to the disclosure of their personal data.

#### *Consequences of disclosure*

40. Disclosure of the information is unlikely to be fair if it would have unjustified adverse effects on the individual concerned. Although individuals may generally regard the disclosure of personal information about them as an intrusion into their privacy, this may often not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life.
41. In the Trust's submission to the Commissioner, it has stated that it believes that to provide the withheld information would cause

unwarranted harm to the barrister. The Trust explained that the barrister operates in a commercially competitive profession, and the release of the withheld information could harm their ability to compete within this profession.

42. The Commissioner is of the view that disclosing the costs incurred by the Trust to engage Counsel for the Tribunal hearing would be disclosing the exact fee made to the barrister and she considers this is more intrusive. She is also of the view that the disclosure of this information could prejudice the barrister's interests in future negotiation of his rates for his services as the disclosure gives significant information about the barrister and will therefore have a detrimental effect on them.

*Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure*

43. The Commissioner accepts the legitimate public interest in disclosure includes the general public interest in transparency, public interest in the issue the information relates to and any public interest in disclosing the specific information. An informed and involved public helps to promote good decision making by public bodies and ensures trust and confidence in the governance and processes within those bodies.
44. However, given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) has been cited is in favour of protecting the privacy of the individual. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure which would make it fair to do so.
45. Whilst the Commissioner accepts that the specific information requested may be of interest to the complainant, she must consider whether disclosure of this information into the public domain would be in the wider public interest. The Commissioner has not been convinced there is any legitimate public interest in disclosure of the withheld information beyond simply increasing transparency within the public authority. Balanced against this, the Commissioner does not consider the disclosure of this information warrants overriding the rights and expectations of privacy of the individual to whom that information relates.
46. 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) of the FOIA is engaged and the information is therefore exempt from disclosure.



## Right of appeal

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47. 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)

48. 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.
49. 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**