

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

### **Decision notice**

**Date:** 17 May 2019

**Public Authority:** The Leeds Teaching Hospitals NHS Trust

**Address:** St James's University Hospital

Beckett Street

Leeds

LS9 7TF

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

---

1. The complainant requested information relating to a review into a contract which governed the provision of orthopaedic surgery at Chapel Allerton Hospital, entered into by Leeds Teaching Hospitals NHS Trust ("the Trust"). The Trust withheld a report on the contract under section 40(2) of the FOIA (personal information) and section 41(1) of the FOIA (information provided in confidence) respectively, and also withheld a Trust review of the report under section 41(1) of the FOIA.
2. The Commissioner's decision is that the report is the personal data of the contributors to it; however, it is lawful, fair and transparent to disclose the report in accordance with Article 6(1)(f) of the GDPR. She has therefore determined that section 40(2) does not apply to the report.
3. She has also determined that section 41(1) does not apply to either of the withheld documents in this case.
4. The Commissioner requires the Trust to take the following steps to ensure compliance with the legislation.
  - Subject to paragraphs 110-112 below, disclose the report and the review, as defined in this notice, to the complainant.
5. The Trust 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.

## Background to the case

---

6. In April 2017, the Trust entered into a contract with Yorkshire Bone and Joint Centre LLP ("YBJC") for the provision of out-of-hours orthopaedic surgery services on behalf of Chapel Allerton Clinical Service Unit ("CSU").
7. In 2018, the Trust asked PwC to carry out a review of the contract with certain specific aims.

## Request and response

---

8. On 6 June 2018, the complainant wrote to the Trust to request information of the following description:

*"Under the Freedom of Information Act, please send me a copy of the external review completed into the Yorkshire Bone and Joint Centre contract for the provision of orthopaedic surgery at Chapel Allerton Hospital.*

*Please also send me the action plan developed as a result of the review and supply me with figures concerning the financial loss to the trust from the contract."*
9. On 8 August 2018, the Trust responded (stating that it had received the request on 11 July 2018) and refused to provide the information, citing the exemption at section 41(1) of the FOIA (information provided in confidence).
10. The complainant requested an internal review on the same day. The Trust sent him the outcome of its internal review on 31 August 2018. It upheld its original position.

## Scope of the case

---

11. The complainant contacted the Commissioner on 6 September 2018 to complain about the way his request for information had been handled.
12. During the course of the Commissioner's investigation, the Trust disclosed a document which it entitled "Front sheet – PwC Report YBJC", which had previously been withheld, to the complainant. It also provided the withheld information to the Commissioner for consideration.
13. The withheld information comprised two documents, as follows:

- A report entitled *Commercial Assurance Review – Sub-contract for the provision of Orthopaedic Surgery Services*, prepared by the firm PricewaterhouseCoopers (PwC) (“the report”);
  - A five-page document entitled *Commercial Assurance Review - Sub-contract for the provision of Orthopaedic Surgery Services*, comprising recommendations and agreed actions (“the review”);
14. The Trust advised the Commissioner that, in addition to applying section 41(1) of the FOIA to both documents, it considered that the report was exempt from disclosure under section 40(2) of the FOIA – third party personal data.
15. The following analysis covers whether the information has been correctly withheld under sections 40(2) and/or section 41(1) of the FOIA.

## Reasons for decision

---

### Section 40 – personal information (the report)

16. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester, and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
17. In this case, the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data (‘the DP principles’), as set out in Article 5 of the General Data Protection Regulation (‘GDPR’).
18. The first step for the Commissioner is to determine whether the withheld information (that is, the report) constitutes personal data as defined by the Data Protection Act 2018 (‘DPA’). If it is not personal data, then section 40 of the FOIA cannot apply.
19. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

---

<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

**Is the information personal data?**

20. Section 3(2) of the DPA defines personal data as:

*"any information relating to an identified or identifiable living individual"*.

21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

22. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

23. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

24. The Commissioner asked the Trust whose personal data it considered the report to be. The Trust identified three groups of individuals.

(1) The Trust argued that *YBJC* is referred to throughout the report and that the report is, therefore, the personal data of the surgeons working at the *YBJC*, as their identities are *"known publicly due to the size and composition of the department within the Trust"*.

(2) The Trust also stated that the report is the personal data of *"the contributors to the report"*; that is, the individuals who were interviewed in the preparation of the report, and who are, indeed, named in it.

(3) In addition, the Trust noted that, in certain paragraphs on page 19, the report refers to the opinions and actions of *"some [Trust] staff"*. It considers that these staff are identifiable *"due to the size and composition of the department within the Trust"* and that, therefore, these paragraphs are the personal data of certain individual staff members.

25. The Commissioner has considered whether the report can be said to be the personal data of these three groups of individuals.

**(1) The YBJC**

26. With regard to the *YBJC*, the Commissioner notes that its website explains that the *YBJC* is *"a group of established orthopaedic surgeons from the Yorkshire region"* and that *"the group all are established NHS"*

*Consultants at Leeds Teaching Hospitals NHS Trust*". The surgeons are identified on the website.

27. However, the Commissioner has considered whether the report relates to these surgeons as individuals.
28. The Commissioner notes that the report defines YBJC as "*Yorkshire Bone and Joint Centre LLP*". That is, it refers to the limited liability partnership: a corporate entity.
29. In her view, applying the test of whether the information is "about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus", the report does not relate to the surgeons as individuals. Rather, it relates to the status and actions of a corporate entity: the Yorkshire Bone and Joint Centre LLP.
30. The Commissioner has therefore determined that the report is not the personal data of the surgeons who comprise YBJC since it does not relate to them.

## **(2) The contributors to the report**

31. The Commissioner has next considered the individuals who contributed to the report. These individuals are named on page 7 of the report; most are named again on page 26 in the *Terms of Reference* section.
32. The Trust argued that, since these individuals' views informed the contents of the report, it is their personal data.
33. The Commissioner notes that the contents of the report are based, in part, on PwC having reviewed documentation relating to the contract, and not only on the outcome of its interviews with the named individuals. However, she accepts that it is not practicable to separate out the two means by which information has been provided to PwC and incorporated into the report.
34. In the circumstances of this case, having considered the report, the Commissioner is satisfied that it relates to the individuals named on page 7. The report both relates to and identifies the individuals concerned, and, therefore, comprises their personal data as defined by section 3(2) of the DPA.
35. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

36. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

37. Article 5(1)(a) of the GDPR states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject"*.

38. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

Lawful processing: Article 6(1)(f) of the GDPR

39. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies. It must also be generally lawful.

40. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"*<sup>2</sup>.

41. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

(i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;

---

<sup>2</sup> Article 6(1) goes on to state that: *"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks"*.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that: *"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted"*.

- (ii) Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - (iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
42. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

*Legitimate interests*

43. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
44. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
45. In this case, the Commissioner considers that there is a legitimate interest in the disclosure of the report. It sheds light on the effectiveness of the contract between the Trust and YBJC, with specific reference to whether the contract was achieving value for money, whether it provides value for money for the future and whether it has been effectively managed and in line with the terms of the contract. As well as being matters of interest to the requester, the Commissioner considers that these are matters of public interest.

*Is disclosure necessary?*

46. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
47. In this case, the Commissioner notes that the complainant has specifically requested the report itself, together with the Trust's "action plan" and details of any financial loss.
48. While it is the case that some financial information about the contract may potentially enter the public domain via published accounts, the Commissioner considers that the least intrusive way of obtaining the

specific information contained in the requested report is for the report itself to be disclosed.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

49. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
50. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individuals expressed concern about the disclosure; and
  - the reasonable expectations of the individuals.
51. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
52. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
53. In this case, the report has been contributed to by eight senior employees or former employees of the Trust and/or the Chapel Allerton CSU. The report explains that they were interviewed by PwC in carrying out the review of the contract.
54. The Commissioner is aware that the interviews took place with some expectation of confidentiality, as is clear from the wording on the final page of the report: "*this document has been prepared only for [the] Trust*".



55. However, the Commissioner considers that senior employees of a public authority are aware that records of their evidence and/or views which relate to the organisation, whether expressed, for example, in correspondence, or in the preparation of a more formal document, may be requested and subsequently made public under the FOIA. Scrutiny of senior employees' views and actions contributes to an organisation's transparency.
56. The personal data in this case relates to the Trust and to the individuals' professional roles, and not to their personal lives.
57. The Commissioner therefore considers that the individuals would have some expectation that the evidence they provided in the interviews would be made public.
58. The Commissioner has considered whether there would be damage and distress to the individuals following disclosure of the report.
59. Clearly, the matters under review in the report relate to a contract between two corporate entities: the Trust and YBJC. However, the Commissioner considers that there would be a risk of damage or distress to individuals if any matters under review in the report were attributable directly to any named contributor.
60. The report is divided into four main sections: *Executive Summary*, *Background and Scope*, *Detailed Findings*, and *Appendices*.
61. The Commissioner notes that the majority of the report refers to the actions or concerns of "LTHT"; that is, the Trust, and does not attribute particular matters to specific named individuals. Regarding the majority of the report, therefore, in her view, while (as previously determined) the report can be said to "relate to" the contributors as identifiable individuals, there is minimal risk of damage and distress because the report's findings generally relate to the Trust as a corporate entity, and not to the conduct of any specific individual.
62. However, there is some information on page 6 of the report (part of *Background and Scope*) and on pages 8 and 12 respectively (part of *Detailed Findings*) where specific post-holders are referred to; for example, "CSU General Manager". These post-holders are named on page 7 of the report.
63. This information concerns specific actions and responsibilities of these post-holders in relation to relevant matters.
64. The Commissioner considers that there is a greater risk of damage and distress being caused to these individuals, since their individual roles in certain matters is highlighted.

65. However, the Commissioner is mindful that these are senior post-holders and that the report is solely concerned with matters pertaining to their employment and outcomes for the Trust, and not to their personal lives.
66. Based on the above factors, the Commissioner has determined that the legitimate interest in the disclosure of the report is not overridden by the data subjects' interests or fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing, and so the disclosure of the report would be lawful.

*Fairness and transparency*

67. Even though it has been demonstrated that disclosure of the requested information under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under principle (a).
68. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons. Her view is that this is the case here.
69. The requirement for transparency is met because as a public authority, the Trust is subject to the FOIA.

*The Commissioner's view: contributors to the report*

70. In this instance, with regard to the report being the personal data of the contributors identified specifically on page 7 of the report, the Commissioner has decided that the Trust has failed to demonstrate that the information is exempt under section 40(2) to the report.

**(3) Other Trust staff**

71. As explained at paragraph 23 above, the Trust also considered that two paragraphs of information on page 19 of the report are the personal data of some more junior members of staff, whose views and actions are referred to.
72. The Commissioner has therefore considered whether these two paragraphs are exempt from disclosure under section 40(2).
73. As previously set out in this notice, section 3(2) of the DPA defines personal data as: "*any information relating to an identified or identifiable living individual*". As explained, the two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

74. The Commissioner notes that the staff referred to on page 19 of the report have not specifically been interviewed by PwC in the preparation of the report. Rather, their views have, apparently, been reported by the contributors to the report.
75. The Commissioner considers that the views which have been expressed are general in nature, and do not lead directly to the identification of any specific individuals. She considers that only an extremely remote risk of identification of those individuals whose views have been reported would arise from the disclosure of the report.
76. She is satisfied that this risk is so remote that the information in the last two paragraphs on page 19 of the report is not the personal data of those employees, and therefore the exemption at section 40(2) of the FOIA does not apply in respect of it.

### **Other individuals**

77. While it has not been brought to her attention by the Trust, the Commissioner notes that three staff members at PwC are named on page 26 of the report. This matter has been ruled on in paragraphs 110-112 of this notice.

### **Conclusion – exemption at section 40(2)**

78. The Commissioner has concluded that, subject to paragraphs 110-112 below, the Trust is not entitled to withhold the report under the exemption at section 40(2) of the FOIA.

### **Section 41(1) – information provided in confidence**

79. The Trust has also argued that the report and the other withheld document in this case, the review, are both exempt from disclosure under section 41(1) of the FOIA.
80. Section 41(1) of the FOIA states that information is exempt from disclosure under the FOIA if:
  - (a) it was obtained by the public authority from any other person (including another public authority), and
  - (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

### ***Was the information obtained from another person?***

81. The Commissioner has considered whether the documents can be said to have been obtained from another person.

82. The Commissioner is satisfied that it is clearly the case that the report was obtained by the Trust from another "person"; that is, from PwC.
83. With regard to the review, the Commissioner notes that this is an internal Trust document, prepared by the Trust itself in order to reflect on the recommendations of the report, and to record agreed actions.
84. The Trust has explained that it considers that the contents of the review derive from the report, and that therefore the exemption at section 41(1) applies to it. The Commissioner has therefore considered the contents of the review.
85. She notes that the review is tabled into five columns, headed as follows: *Area, Recommendations, Management Response, RAG Rating*<sup>3</sup>, and *Comments*.
86. The Trust has explained that the information in the first two columns, headed *Area* and *Recommendations* respectively, derive directly from the PwC report.
87. It has conceded that the information in the other three columns does not; however, it considers that the information was created as "*a response from information from the original PwC report*" and would "*reveal the information which the Trust believes is exempt*".
88. The Commissioner agrees that the wording of the first two columns has been copied directly from the report and should therefore be considered, together with the report itself, as having been obtained from another person.
89. However, while the other columns contain the Trust's "*Management Response*" to the recommendations in the report, together with the RAG rating and general comments, the Commissioner disagrees that these comprise information obtained from another person. While they have, self-evidently, been written in response to the report, they comprise information generated by the Trust. No specific phrases from the report, nor detail of any specific recommendation from the report, is included in these three columns.
90. The Commissioner has therefore determined that the exemption at section 41(1) of the FOIA does not apply to those columns of the review which are headed *Management Response, RAG Rating, and Comments*

---

<sup>3</sup> This refers to a recommendation or action being given a rating of red, amber or green.

since they are not information which has been obtained from another person.

91. While the exemption does not apply, the Commissioner notes that individual Trust employees' initials are provided in the column headed *Management Response*. When read in conjunction with the report, these individuals are identifiable as being some of the contributors to the report; that is, senior post-holders at the CACSU and/or the Trust. The Commissioner has therefore determined that the initials are those post-holders' personal data, since they relate to identifiable, living individuals.
92. For the reasons explained previously in this notice, however, the Commissioner is satisfied that disclosure of the specific individuals' initials would be lawful, fair and transparent in accordance with Article 6(1)(f) of the GDPR.

**Conclusion – section 41(1) – columns three, four and five of the review**

93. The Commissioner has therefore determined that columns three, four and five of the review should be disclosed in their entirety to the complainant.

***Would disclosure constitute an actionable breach of confidence?***

94. Returning to the first two columns, the contents of which derive directly from the report, and to the report itself, the Commissioner has considered whether disclosure would constitute an actionable breach of confidence.
95. In considering whether disclosure of information constitutes an actionable breach of confidence, the Commissioner will consider the following:
  - Whether the information has the necessary quality of confidence;
  - Whether the information was imparted in circumstances importing an obligation of confidence; and (if so)
  - Whether disclosure would be an unauthorised use of the information to the detriment of the confider.
96. The Commissioner has therefore considered this in the circumstances of this case.

Does the information have the necessary quality of confidence?

97. Information will have the necessary quality of confidence if it is more than trivial, and is not otherwise accessible. The Trust has argued that both of these things apply in this case.
98. The Commissioner agrees that the subject matter of the report, and of the first two columns of the review (that is, the recommendations for the Trust contained in the report) is not trivial, and is not accessible elsewhere. She is satisfied that the information has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

99. The Commissioner's guidance, referenced previously, explains that an obligation of confidence may apply where the confider has attached explicit conditions to any subsequent use or disclosure of the information, or where the restrictions on use are obvious or implicit from the circumstances. The confider, in this case, is PwC.
100. The Commissioner has considered the wording at the end of the report, which states: *"This document has been prepared only for Leeds Teaching Hospitals NHS Trust and solely for the purpose and on the terms agreed with Leeds Teaching Hospitals NHS Trust in our agreement dated 11 January 2018. We accept no liability (including for negligence) to anyone else in connection with this document, and it may not be provided to anyone else"*.
101. However, the Commissioner notes that this goes on to say: *"In the event that, pursuant to a request which Leeds Teaching Hospitals NHS Trust has received under the Freedom of Information Act 2000... [the Trust] is required to disclose any information contained in this document, it will notify PwC promptly and will consult with PwC prior to disclosing such document... it shall ensure that any disclaimer which PwC has included or may subsequently wish to include in the information is reproduced in full in any copies disclosed"*.
102. The Commissioner notes that PwC acknowledges that the report may be requested under the FOIA and appears to seek only an assurance that the disclaimer (quoted above) is reproduced along with the rest of the information.
103. In any event, the Commissioner has full remit in this case to order disclosure, regardless of whether a relevant third party has been consulted.

104. In the circumstances of this case, having reviewed the contents of the report and the first two columns of the review in detail, the Commissioner does not consider that the contents of the withheld information are obviously sensitive to PwC.
105. The Trust has not provided an explanation as to why PwC would take action for breach of confidence, were the information to be disclosed. It has stated that "*individuals*" may issue legal proceedings; however, it does not appear to be referring to PwC and has not provided any specific arguments which pertain to PwC taking legal action.
106. The Commissioner is not satisfied that the Trust has established that an obligation of confidence attaches to the information.
107. She is, therefore, not satisfied that disclosure of the information would constitute an actionable breach of confidence, which means that the exemption provided by section 41(1) is not engaged.

**Conclusion – section 41(1) – the report and first two columns of the review**

108. The Commissioner has therefore determined that the exemption at section 41(1) does not apply to the report or to the first two columns of the review.

**The Commissioner's decision**

109. Since no exemption is engaged in this case, the Commissioner orders disclosure of the report and the review, subject to paragraphs 110-112 below.
110. As explained previously, the Commissioner has noted that three individual employees at PwC are named on page 26 of the report.
111. In her view, these individuals would have no expectation that their names would be disclosed as having prepared, on behalf of PwC, the report, and she further considers that there would be no legitimate interest in the disclosure of their names. She has therefore determined that these names are exempt from disclosure under section 40(2) of the FOIA.
112. The Commissioner therefore orders that these names be redacted prior to the disclosure of the report.

## Right of appeal

---

113. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

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

114. 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.

115. 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 .....**

**Ben Tomes  
Team Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**