

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

### **Decision notice**

**Date:** 4 June 2020

**Public Authority:** **Cambridgeshire and Peterborough NHS Foundation Trust**

**Address:** **Elizabeth House  
Fulborn Hospital  
Fulbourn  
Cambridge  
CB21 5EF**

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

---

1. The complainant has requested a copy of a serious incident report. Cambridgeshire and Peterborough NHS Foundation Trust ("the Trust") relied on section 40(2) of the FOIA to withhold the information.
2. The Commissioner's decision is that the Trust has correctly relied on section 40(2) of the FOIA to withhold most, but not all of the information.
3. The Commissioner requires the Trust to take the following steps to ensure compliance with the legislation.
  - Disclose, to the complainant, the information identified in the Confidential Annex to this notice.
4. 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.

## Request and response

---

5. On 8 November 2019, the complainant wrote to the Trust and requested information in the following terms:

*"Please provide a copy of the review carried out by the trust in relation to the convicted killer Joanna Dennehy."*

6. The Trust responded on 21 November 2019. It stated that the report was Ms Dennehy's personal data and thus section 40(2) of the FOIA would apply.
7. Following an internal review the Trust wrote to the complainant on 2 January 2020. It reiterated its view that disclosure of the withheld information would be unlawful and would therefore violate the GDPR principles.

## Scope of the case

---

8. The complainant contacted the Commissioner 7 January 2020 to complain about the way his request for information had been handled.
9. The Commissioner considers that the scope of her investigation is to determine whether the withheld information is personal data and, if it is, whether disclosure would breach any of the GDPR principles.

## Background

---

10. Joanna Dennehy pleaded guilty in 2013 to three murders and two attempted murders that took place over a short period in 2007 in the Peterborough area. Despite her guilty plea, she was given a whole life sentence and thus became only the third woman in British history to be given a whole life sentence.
11. The Trust manages and provides mental health services in the region.

## Reasons for decision

---

### Section 40 personal information

12. 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.

13. In this case the relevant condition is contained in section 40(3A)(a). 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').
14. The first step for the Commissioner is to determine whether the withheld information 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.
15. 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.

***Is the information personal data?***

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

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

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. 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.
19. 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.
20. The majority of the report describes Ms Dennehy's interactions with mental health services in the period prior to the murders. This information clearly relates to Ms Dennehy and would have been used to inform decisions made about her.
21. At the end of the report there are a series of recommendations. Most of these relate directly to Ms Dennehy and her interactions with the Trust. However, there are also some recommendations that relate to the wider co-operation both within and between the Trust and social services.

22. In *Durant v Financial Services Authority* [2003] EWCA Civ 1746, the Court of Appeal held that:

*"Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest."*

23. Whilst the *Durant* ruling applied to the previous definition of personal data in the Data Protection Act 1998,<sup>1</sup> the Commissioner considers that the principles are still relevant: the information must have the data subject as its *focus*.
24. The Commissioner accepts that the report would not have come into existence if Ms Dennehy had not committed her crimes and that the bulk of the report has Ms Dennehy as its main focus. However, she also has to consider the exact content of the information and where it falls within the "*continuum of relevance or proximity to the data subject*."
25. In the Commissioner's view, there is a small amount of information within the document that, whilst loosely connected to the broader issue, have insufficient focus on Ms Dennehy and thus do not form part of her personal data. These paragraphs can stand on their own and are

---

<sup>1</sup> For completeness, the 1998 definition of personal data stated that:

*"'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;"*

comprehensible, even when severed from the remainder of the document.

26. Included in the information which the Commissioner does not consider to be Ms Dennehy's personal data are the titles of some of the officeholders to whom the report was circulated. Whilst the Commissioner notes that the individuals who held those offices would have been identifiable at the time of the request, she nevertheless considers that those individuals held senior roles within the organisation. Disclosing, to the world at large, that they received a copy of the report would have minimal impact on the individuals' privacy and the Commissioner considers that disclosure is necessary to satisfy the legitimate public interest in understanding how widely the report was circulated. She is therefore satisfied that all the information that she does not consider to be Ms Dennehy's personal data can therefore be disclosed.
27. However, as the remaining information *is* Ms Dennehy's personal data, the Commissioner has therefore gone on to consider the balance of her rights. 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.
28. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

29. 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".*

30. 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.
31. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
32. In addition, if and to the extent that, the requested data is special category data or criminal offence data, in order for disclosure to be lawful and compliant with principle (a), further conditions must be met.

***Is the information special category or criminal offence data?***

33. Information relating to special category data or to criminal offences is given special status in the GDPR.

34. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
35. Article 10 of the GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA, personal data relating to criminal convictions and offences includes personal data relating to:
  - (a) *The alleged commission of offences by the data subject; or*
  - (b) *Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.*
36. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the most of the report is comprised of both special category data *and* criminal offence data.
37. The Commissioner considers that it would be neither necessary to nor desirable to detail exactly which paragraphs of the report would fall within each category of personal data – not least because some parts will fall into more than one category. However, for the benefit of both parties in understanding her decision, she will set out below her broad approach to categorising the information within the report.
38. One specific issue of categorisation will be dealt with in the confidential annex.
39. Scattered throughout the report are references to various interactions that Ms Dennehy had had with the police and the criminal justice system prior to the first of her murders.
40. The Commissioner is aware that the fact that Ms Dennehy had previous convictions is in the public domain, however the report provides a more detailed overview of the facts and nature of these (and other) incidents.
41. The Commissioner therefore considers that where the report refers to an investigation undertaken by the police, to an arrest, to a crime, to illegal activity or to a conviction, this information will be criminal offence data.
42. A considerable chunk of the report is dedicated to setting out the chronology of Ms Dennehy's interaction with adult mental health services.

43. In his sentencing remarks, the judge in Ms Dennehy's case noted that the psychiatrist who had assessed her found that she had psychopathic disorder and a severe emotionally unstable personality disorder.<sup>2</sup> Therefore some information about Ms Dennehy's mental health is already in the public domain.
44. Nevertheless, the detail in the report of Ms Dennehy's interactions goes well beyond the relatively small amount of summary information already in the public domain. The Commissioner considers that disclosing this information would reveal much more about the state and history of Ms Dennehy's mental wellbeing. The Commissioner is therefore satisfied that, where the report refers to any interactions between Ms Dennehy and mental (or medical) health services this information is "health" information about Ms Dennehy and it is thus special category data about her.
45. Both special category data and criminal offence data are particularly sensitive and therefore warrant special protection. Special category data can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met. Criminal offence data can only be disclosed lawfully where a condition from Parts 1 to 3 of Schedule 1 of the Data Protection Act 2018 is met.
46. The two sets of conditions are different. However, the Commissioner considers that the only conditions, from either Article 9 or Schedule 1 DPA, that could be relevant to a disclosure under the FOIA are:
  - explicit consent for disclosure from the data subject; or
  - that the information had been made manifestly public by the data subject
47. The Commissioner has seen no evidence or indication that the Ms Dennehy has specifically consented to this data being disclosed to the world in response to the FOIA request – or that she has deliberately made this data public.<sup>3</sup>
48. The severity of Ms Dennehy's sentence reflects the heinous nature of the crimes which she committed. That being said, the fact that Ms Dennehy

---

<sup>2</sup> <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/the-queen-v-dennehy-sentencing-remarks-28022014.pdf>

<sup>3</sup> At her trial, Ms Dennehy declined to offer any defence or mitigation that was based upon her mental health and strongly declined the opportunity to do so.

is a convicted murderer does not mean that she loses all her rights to have her personal data protected. Although some of the rights are subject to balancing exercises, GDPR rights apply to everyone and the Commissioner must apply the same considerations as she would in relation to any other data subject.

49. As none of the conditions required for processing either special category data or criminal offence data are satisfied, the Commissioner thus considers there is no legal basis for disclosure of either of these types of information. Processing this data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

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

50. Having dealt with those elements of the report which constitute Ms Dennehy's special category and criminal offence data, there remains a small amount of information which falls into neither category but is nevertheless her personal data. Broadly speaking, this information is biographical information about Ms Dennehy's early life.
51. 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.
52. 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>4</sup>.

---

<sup>4</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"*.



53. 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;
  - 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.
54. 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*

55. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, commercial interests or wider societal benefits. These interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests or purely private concerns. However, the more trivial the interest, or the more unrelated the private concern is to the broader public interest, the less likely it is that any balancing test would conclude that unrestricted disclosure to the general public is proportionate.
56. The complainant argued that there was a legitimate interest in understanding whether or not the Trust had made errors in its handling of Ms Dennehy which could have prevented her crimes.
57. Whilst the Commissioner considers that this might be a legitimate interest in disclosure of the *entire* report, for the reasons explained above, most of the report cannot be disclosed. An individual would learn nothing about the Trust's actions or how it spends its money from this particular information and therefore this cannot be a legitimate interest in the information itself.
-

58. As no lawful basis for disclosure of this information exists, disclosure under the FOIA cannot therefore be lawful.
59. The Commissioner is thus satisfied that, with the exception of the information noted above and identified in the confidential annex to this notice, the Trust has correctly applied section 40(2) to withhold this information.

## Right of appeal

---

60. 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)

61. 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.
62. 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 .....**

**Phillip Angell**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**