

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 October 2020

Public Authority: Cumbria, Northumberland, Tyne and Wear NHS Foundation Trust

Address: St. Nicholas Hospital
Jubilee Road
Gosforth
Newcastle upon Tyne NE3 3XT

Decision (including any steps ordered)

1. The complainant requested information from Cumbria, Northumberland, Tyne and Wear NHS Foundation Trust ("the Trust") about a survey carried out by users of the Northern Region Gender Dysphoria Service ("NRGDS"). The Trust provided some information, but stated that the survey results were exempt from disclosure under section 40(2) of the FOIA – third party personal data.
2. Subsequently, the Trust stated that it also considered the survey results to be exempt under section 36(2) of the FOIA – prejudicial to the effective conduct of public affairs, and/or section 38(1) of the FOIA – endangering health and safety.
3. The Commissioner's decision is that some parts of the withheld information comprise special category personal data, and were correctly withheld under section 40(2). She has also determined that the remainder of the information is exempt from disclosure under section 36(2)(c).
4. The Commissioner does not require the Trust to take any steps.

Request and response

5. On Saturday 23 November 2019, the complainant wrote to the Trust to request information of the following description:

"NRGDS asked service users back in June for participation in a survey, for publication this month, on potential improvements for NRGDS – the original survey was at [link provided].

Participants were informed that the survey was designed to be fully anonymised – so unless this was not the case, there should be no problems releasing the data.

Please could I have a copy of

1) The questions

2) The responses

3) Any reports, summaries, or action plans that came out as a result in electronic formats?"

6. On 23 December 2019, the Trust responded and provided the survey questions. It withheld the survey responses (point 2 of the request) under section 40(2) of the FOIA – personal information, explaining that that *"some of the responses did include specific details about their experiences of the service that could make them identifiable"* and that disclosure of the information would not be fair or within the participants' reasonable expectations.
7. The Trust also stated that the information requested at point 3 was intended for future publication, and was therefore exempt under section 22 of the FOIA.
8. The complainant requested an internal review on 2 January 2020. Regarding the survey responses (point 2), she argued that the Trust had applied section 40(2) too widely, and it should have been able to provide her with some redacted information. She queried whether the public interest test had been carried out correctly with regard to the information withheld under section 22 (point 3). She was also unhappy with the date of the response to the request.
9. The Trust sent her the outcome of its internal review on 30 January 2020. It upheld its position with regard to the survey responses being exempt under section 40(2). With regard to the information requested at point 3, it clarified that, in fact, no reports, summaries or action plans had yet been drafted, and so were "not held" at the date of the request.

Scope of the case

10. The complainant contacted the Commissioner on 30 January 2020 to complain about the way her request for information had been handled.
11. The Commissioner wrote to the complainant and explained that her investigation would focus only on point 2 of the request, the survey responses, unless the complainant instructed her otherwise; no further instructions were received.
12. During the course of the investigation, the Trust advised the Commissioner that, in its view, it had correctly considered that the survey responses were wholly exempt under section 40(2). In addition, it also considered that the information would be exempt from disclosure under section 36(2) of the FOIA – prejudicial to the effective conduct of public affairs – and/or section 38(1) of the FOIA – endangering health and safety. The Trust also advised the complainant of this.
13. This decision covers whether the survey responses are exempt from disclosure under section 40(2) of the FOIA. In the event that some or all of the information is found not to be exempt under this section, the Commissioner will go on to consider the other exemptions cited.

Reasons for decision

Section 40(2) – third party personal data

14. 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.
15. In this case, the relevant condition is contained in section 40(3A)(a)¹. 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”).
16. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

Act 2018 ("DPA"). If it is not personal data, then section 40 of the FOIA cannot apply.

17. 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?

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

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

19. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
20. 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.
21. 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.
22. In this case, the survey responses clearly *relate to* living individuals, since they record and describe the participants' personal experiences of the NRGD Service. The subject matter of the information is, clearly, extremely sensitive.
23. However, the key question for the Commissioner has been to determine whether individuals are *identifiable* from the survey responses, which, in this case, have been compiled onto an Excel spreadsheet. Regardless of the sensitivity of the subject matter, if the information does not identify any individual(s), then it is not those individuals' personal data and section 40(2) cannot apply.
24. The complainant has argued that the survey was intended to provide the Trust with information that was, by virtue of the way the survey was designed, provided anonymously. She also considered that if any identifying information was contained in the survey, the Trust should still be able to provide her with some redacted information.
25. The Commissioner has considered the information. It is in the form of an Excel spreadsheet, with 56 columns in which data may have been recorded relating to each participant. The type of data being recorded,

however, varies widely. It includes the participants "ticking" from a range of options; selecting from a scale of likelihood from 1-9; yes/no responses; and "free text" (where the participant drafts the response entirely themselves, which may, therefore, be either brief or fairly lengthy).

26. Some data is also recorded which the participant has not entered themselves: specifically, a "respondent number", a "collector number", the IP address of the server being used by the participant, and the time and date of the survey being completed. These appear to have been automatically generated by the process of completing the survey.
27. Four columns are entirely blank: these are headed Email address, First name, Last name, and Custom Data. The Commissioner understands that there was no option to complete anything in these columns.
28. The Commissioner is aware that surveys of this type will state that data is being collected in "anonymised" form, as indeed the complainant has pointed out in this case. However, this does not automatically mean that no part of any response could ever lead to the identification of an individual. Rather, it is a general indication that the persons collecting the data are not asking for the specific identity of each respondent.
29. With regard to this, there was, evidently, no requirement (or option) to enter a name or email address. However, the participants in the survey were free, in some cases, to enter as much text as they wished in support of a particular view or in response to a particular question. This left open the possibility of the participants including details which could lead to their identification, not only to individuals within the Trust, but also to the wider world. It also left open the possibility that participants may, directly or indirectly, have identified other individuals, such as medical professionals whom they had dealt with.
30. In considering identifiability, in addition to considering any withheld data which may, in itself, identify (or lead to the identification of) individuals, the Commissioner will also consider the possibility of identification taking place due to linking the withheld data with other available data. As her Anonymisation Code² provides, the Commissioner's view is that (when considering the application of section 40(2)) *"public authorities have to assess whether releasing apparently anonymised data to a member of the public would breach the data protection principles. This is intended to ensure that public authorities take into account the*

² Anonymisation: managing data protection risk code of practice <https://ico.org.uk/media/1061/anonymisation-code.pdf>

additional information that a particular member of the public might have that could allow data to be combined to produce information that relates to and identifies a particular individual – and that is therefore personal data” (Anonymisation Code, p. 19).

31. Therefore, in determining whether data identifies a living individual, the Commissioner will consider any identifying factors in the data itself, and also the possibility that the data could be combined with other information in the public domain or already in the possession of others.
32. The Commissioner will also consider the possibility of identification by a “motivated intruder”, defined in the Anonymisation Code as *“a person who starts without any prior knowledge but who wishes to identify the individual from whose personal data the anonymised data has been derived”*. A motivated intruder is, the Code explains, someone who may undertake standard investigative techniques, such as use of the internet or making their own enquiries, to use the “anonymised” data to identify people.
33. It is acknowledged in the Anonymisation Code that certain types of data may be more attractive to a motivated intruder. These include sensitive health data. The Code points out the need for public authorities to exercise caution in considering whether to disclose “anonymised” data of this type (Anonymisation Code, p. 20).
34. In this case, the Commissioner has considered the withheld information in light of all of the above factors, regarding whether or not individuals are identifiable.
35. In her view, some columns of the spreadsheet do contain data which render individuals identifiable, in various ways. It is not appropriate to disclose specific examples or extracts. However, the Commissioner has determined that living individuals are identifiable in one or more of the following ways, from certain columns:
 - The participants’ IP (internet protocol) address: this relates either to an individual’s home address, and/or to their own personal electronic device;
 - “Free text” responses about participants’ experiences and views: these relate to personal experiences of the NRGDS and are of an anecdotal nature. They cover matters such as relationships with family, treatments undergone and length of time waiting to be referred to the NRGDS. Opinions of a personal nature are freely expressed. The Commissioner has considered these responses in detail, and considers that this information could lead to the

identification of the participants by persons connected with the Trust, and/or by a motivated intruder;

- Other "free text" information which identifies a medical professional, either directly, or by geographical location or other description.
36. The Commissioner has therefore determined that the information in these columns comprises the personal data of living individuals.
 37. The columns which the Commissioner has determined comprise personal data are labelled on the spreadsheet as follows: E, J, Q, R, U, AG-AS inclusive, and AX-BE inclusive.
 38. Having determined that the information in these columns comprises personal data, the Commissioner has considered below whether or not it may, nevertheless, be disclosed under the FOIA.
 39. However, by its nature, a spreadsheet of information relevant to the request may be considered in discrete sections. The Commissioner has determined that the information in the remaining columns: that is, columns A-D inclusive, K-P inclusive, S, T, V-AF inclusive and AT-AW inclusive (columns F-I inclusive are blank) does not identify living individuals, and therefore does not comprise personal data.
 40. She finds that section 40(2) of the FOIA is not engaged in respect of the information in the columns described in paragraph 39. This information is considered further on in this notice, from paragraph 58 onwards.
 41. The remainder of this section applies to the columns which the Commissioner has determined comprise personal data, described above in paragraph 37.
 42. In the circumstances of this case, having considered this information, the Commissioner is satisfied that it falls within the definition of "personal data" in section 3(2) of the DPA.
 43. 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.
 44. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

45. 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".

46. 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. The Commissioner has first considered the lawfulness of processing the personal data.

Is processing lawful?

47. 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.
48. In addition, if the requested data is "special category" data, in order for disclosure to be lawful and compliant with principle (a), it also requires one of the ten conditions for processing set out in Article 9 of the GDPR, to be met.

Is the information special category data?

49. Information relating to special category data is given special status in the GDPR.
50. 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 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.
51. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the information described in paragraph 37 of this notice does include special category data. She has reached this conclusion on the basis that the information relates to individuals' personal experiences of, and involvement with, gender dysphoria: the distress caused by a mis-match between a person's assigned gender (or sex) and their gender identity.
52. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the ten stringent conditions of Article 9 can be met.
53. The Commissioner considers that the only Article 9 conditions that could be relevant to a disclosure under the FOIA are condition (a) (explicit consent from the data subject) or condition (e) (data made manifestly public by the data subject) in Article 9.

54. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOIA request, or that they have deliberately made this data public.
55. As none of the conditions required for processing special category data is satisfied, there is no legal basis for its disclosure. Processing this special category data would be unlawful, and therefore would breach principle (a).

The Commissioner's decision

56. The Commissioner has therefore decided that the Trust was entitled to withhold all of the information described in paragraph 37 of this notice under section 40(2), by way of section 40(3A)(a). It is exempt from disclosure.
57. The Commissioner has next considered whether the remainder of the withheld information is, as argued by the Trust, exempt from disclosure under section 36(2) of the FOIA – prejudicial to the effective conduct of public affairs. If necessary, the Commissioner will go on to consider section 38(1).

Section 36(2) – prejudicial to the effective conduct of public affairs

58. The Trust considers that the survey responses are exempt under section 36(2)(c) of the FOIA.
59. Section 36(2) of the FOIA states that information is exempt from disclosure under the FOIA if, in the reasonable opinion of a “qualified person”, disclosure of the information:

(b) would, or would be likely to, inhibit—

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

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

60. In order to engage section 36(2), it is therefore necessary for a public authority to obtain the opinion of its “qualified person” as to whether inhibition or prejudice relevant to the subsection cited would be, at least, likely to occur as a result of disclosure of the information in question.

61. The Trust confirmed that the qualified person for the purposes of considering the request was Chief Executive Officer, John Lawlor. When reconsidering its response to the request, following the commencement of the Commissioner's investigation in August 2020, the Trust sought Mr Lawlor's opinion as to the application of the exemption.
62. The Trust explained that it described the withheld information to Mr Lawlor, together with an explanation as to the background of the case. The Trust has provided to the Commissioner a declaration signed by Mr Lawlor indicating that in his opinion, section 36(2)(c), specifically, was engaged with regard to the withheld information. He considered that it was likely that there would be prejudice to the effective conduct of public affairs, if the information were disclosed.
63. Regarding whether disclosure would "otherwise" prejudice the effective conduct of public affairs (section 36(2)(c)), the approach of the Commissioner to this subsection is that it should only be cited in relation to a prejudice that would not be relevant to any of the other exemptions in Part II of the FOIA.
64. As reasoning for citing section 36(2)(c), Mr Lawlor considered that disclosure of the requested information would be likely to impact on the Trust's ability to provide safe and effective healthcare.
65. Specifically, he considered that it would exacerbate issues already historically faced by the Trust in building up and retaining the trust of individuals with gender dysphoria, and would be likely to undermine that trust, and hinder the relationship between the Trust and those people whom the Trust was seeking to help. He considered that these ensuing issues may affect service users' access to Trust services and/or make them reluctant to access the services. This would then be likely to affect the Trust's ability to provide an effective service.
66. Mr Lawlor explained that the Trust intended to conduct further surveys and/or consult with service users in future, to continue to better develop its services in ways that meet the needs of individuals. He considered that disclosure of the survey responses would be likely to impact negatively on this and restrict this development, since individuals may be reluctant to share their true experiences in future, which would impact upon the effectiveness of the intended process.
67. He also explained that, at the date of the request, the Trust was yet to carry out its own analysis of the data. He considered that releasing it to the public in its "raw" form at that date would be likely to have prejudiced the effectiveness of this work, as it may have led to interruption or distraction from external commentary and speculation on selective parts of the data without full context.

68. In order to make a finding as to whether any of the subsections of section 36(2) is engaged, the Commissioner must consider whether the qualified person's opinion was a "reasonable" opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held, or the most reasonable opinion. The Commissioner only needs to satisfy herself that the opinion was reasonable; in other words, that it was an opinion that a reasonable person could hold.
69. The Commissioner will consider all relevant factors to assess whether the opinion was reasonable.
70. In this case, she is satisfied that the qualified person had knowledge of relevant matters in order to give his opinion. She is also satisfied that the prejudice that he envisaged is relevant to the subsection of the exemption that is being claimed.
71. The Commissioner notes that the qualified person is relying on the view that disclosure of the information "would be likely" to prejudice the relevant matters. This is a lower level of probability than "would", but one which is still significant. The Information Tribunal in *John Connor Press Associates v Information Commissioner* (EA/2005/0005, 25 January 2006), stated: *"We interpret the expression 'likely to prejudice' as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk."*
72. With this view in mind, the Commissioner has considered Mr Lawlor's opinion. She is satisfied that it was reasonable for him to hold the opinion that the effective conduct of the Trust's affairs would be likely to be prejudiced by the disclosure of the information, in the ways he has envisaged.
73. Since she accepts that his opinion was reasonable, the Commissioner has determined that the exemption at section 36(2)(c) is engaged. Since this is a qualified exemption, the Commissioner has considered the balance of the public interest in this case.

The balance of the public interest

74. Having accepted that the opinion of the qualified person – that prejudice to the effective conduct of public affairs, in the ways envisaged, would be likely to result – was reasonable, the role of the Commissioner here is not to challenge or reconsider her conclusion on the reasonableness of that opinion. Instead, her role is to consider whether the public interest

in disclosure equals or outweighs the concerns identified by the qualified person.

75. Having found that the qualified person's opinion was reasonable, appropriate weight must be given to that here. It would not be in the public interest to harm the ability of the Trust to carry out its work. As to how much weight this should carry in the balance of the public interests, the question here is what would be the severity, extent and frequency of the prejudice identified by the qualified person.
76. The Commissioner accepts that there was a relationship of trust between the participants in the survey and the Trust, with regard to what was intended to happen to the data being provided. In her view, there was a clear expectation (as with most workplace or customer surveys) that the responses would be analysed by individuals at the organisation, but were not intended to be shared more widely in their raw format. It is not, in the Commissioner's view, a material consideration that surveys of this nature do not require participants to identify themselves explicitly; they are conducted for a clearly limited purpose: for analysis, reflection and future planning within the relevant organisation.
77. For this reason, the Commissioner agrees that disclosure of the survey responses to the public, particularly in the circumstances of this case, would amount to a serious breach of trust, and would be highly likely to damage relationships between the Trust and users of the NRGDS.
78. She considers that this issue would be likely to cause significant prejudice to the effective operation of the Trust. In her view, it would affect the Trust's ability to consult effectively with users of its various services, in order to gather information, reflect on its performance and inform its future planning.
79. It is also a matter of concern to her that due to general mistrust of the way in which data will be handled, individuals may, in future, be put off from accessing the NRGDS, or services of a similar nature, which are intended to support individuals with mental and/or physical conditions.
80. She is satisfied that the Trust has identified correctly that there is a significant public interest in maintaining the exemption, on the basis of the severity, extent and frequency of the prejudice that would occur to its ability to conduct its business effectively.
81. As to whether there is sufficient public interest in the disclosure of the information to override this public interest in the exemption being maintained, the Commissioner has considered the data.

82. There is naturally some public interest in openness and transparency about participants' experiences of accessing the services provided by the NRGDS – after all, the Trust is publicly-funded – but the Commissioner notes that the Trust intends to meet this interest by publishing its findings from the survey in a “fully anonymised” form (she is informed that the necessary analysis is currently being carried out, as at the date of this notice).
83. In addition, with regard to the information under consideration in this section of the notice, she does not consider that it is of wide public interest.
84. The Commissioner is not persuaded that there is sufficient public interest in the disclosure of the information, to outweigh the severity, frequency and extent of the prejudice which has been identified as being likely to occur. She is therefore satisfied that the balance of the public interest favours the exemption being maintained.

The Commissioner's decision

85. The Commissioner's decision is that the remainder of the information on the spreadsheet was correctly withheld under section 36(2)(c) of the FOIA.
86. It has not been necessary in this notice to consider the Trust's application of section 38(1).
87. The Commissioner does not require the Trust to take any steps.

Right of appeal

88. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

89. 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.
90. 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
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