

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 August 2021

Public Authority: Manchester University NHS Foundation Trust

Address: Cobbett House
Oxford Road
Manchester
M13 9WL

Decision (including any steps ordered)

1. The complainant has requested demographic, qualification and work experience information relating to the successful candidate for a particular role. Manchester University NHS Hospitals Trust withheld the requested information of the successful candidate under section 40(2) FOIA.
2. The Commissioner's decision is that Manchester University NHS Hospitals Trust ('MFT') correctly withheld the information under section 40(2) FOIA but failed to respond to the request within 20 working days and therefore breached section 10 FOIA.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 29 July 2020, the complainant wrote to the public authority and made her first request for information in the following terms:

"Under the Freedom of Information Act, please provide me with the following information about the recent recruitment for the role of Clinical Trials Administrator - job reference [redacted]:

1. *Total number of applicants that were shortlisted for the Clinical Trials Administrator position*
2. *The Nationalities of all applicants shortlisted for the Clinical Trials Administrator position*

3. The Race of all applicants shortlisted for the Clinical Trials Administrator position

4. The Ages of all applicants shortlisted for the Clinical Trials Administrator position

5. The highest Educational Qualification of all applicants shortlisted for the Clinical Trials Administrator position

6. The Age of the successful candidate that was offered the job

7. The Nationality of the successful candidate that was offered the job

8. The Race of the successful candidate that was offered the job

9. The highest Qualification (e.g. GCSE O/L) of the of the successful candidate that was offered the job

10. If the successful candidate declares previous experience working as a Clinical Trials Administrator or equivalent, please provide the number of years of experience declared

11. Total number of applicants that was NOT shortlisted for the Clinical Trials Administrator position

12. The Nationalities of all applicants NOT shortlisted for the Clinical Trials Administrator position

13. The Race of all applicants NOT shortlisted for the Clinical Trials Administrator position

14. The Ages of all applicants NOT shortlisted for the Clinical Trials Administrator position"

5. MFT responded to the first request for information on 26 January 2021. It applied section 40(2) FOIA to withhold the information about the successful candidate requested in questions 6-10 of the request.

6. On 31 January 2021, the complainant requested an internal review and made a second revised request for some further information in the following terms:

"..please provide me with the following information about the recruitment for the role of Clinical Trials Administrator - job reference [redacted].

1. Total number of applications received for the Clinical Trials Administrator position

2. The highest Educational Qualification of each of the applicants shortlisted for the Clinical Trials Administrator position (in my request, I did not mean what was the highest type of qualification of applicants but the highest educational qualification of each of the applicants shortlisted for this role).

3. The Age of the successful candidate that was offered the job

4. Country of origin of the successful candidate.

5. The highest Qualification (e.g. GCSE O/L) of the of the successful candidate that was offered the job

6. If the successful candidate declared previous experience working as a Clinical Trials Administrator

7. If the successful candidate declared previous experience working as a Clinical Trials Administrator or equivalent, please provide the number of years of experience declared.

With regards to Questions 6-10 in your response dated 26th Jan 2021, I do not agree that this is personal data as I did not ask for the successful candidate's name and I cannot identify the candidate because 6 candidates were shortlisted; so the successful candidate could be anyone of the 6."

7. In its internal review dated 15 March 2021, MFT provided a response to the complainant's revised request of 31 January 2021. MFT answered questions 1 and 2 of the revised request and upheld the application of section 40(2) FOIA in relation to questions 3-7. MFT stated:

"Although you did not ask for the individual's name, the Trust believes it would not require an extensive search in order to identify the successful candidate. The requested information is personal data about a third party".

Scope of the case

8. The complainant contacted the Commissioner on 21 March 2021 to complain about the way her revised request for information (in questions 3-7 of the revised request dated 31 January 2021) had been handled.
9. The complainant told the Commissioner that she did not believe the provision of the information about the successful candidate would lead to their identification as she had not asked for the successful candidate's name and had:

"...no interest at all to specifically look for the successful candidate and put a face to their name ..."

10. The complainant also indicated that the requested information in the revised request about the successful candidate was needed for a discrimination claim against MFT that she had made in the Employment Tribunal.
11. While the Commissioner accepts that the complainant may have specific personal and legal reasons for wanting to access the requested information about the successful candidate, the Commissioner has to take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public. She must therefore consider the wider public interest issues and fairness to the successful candidate when deciding whether or not the information is suitable for disclosure.
12. The Commissioner considers the scope of her investigation to be to establish whether the public authority is entitled to withhold the requested information about the successful candidate under section 40(2) of the FOIA.
13. As the Commissioner is also the regulator of data protection legislation, she has decided that she has sufficient information to reach a decision in this case, based on the internal review arguments and her own expertise, without seeking further arguments from MFT. She has also not sought the withheld information as she does not consider that the content of the information itself would affect her decision.

Reasons for decision

Section 40 personal information

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').

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

16. 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.
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 the circumstances of this case, the information withheld by MFT in response to the complainant's revised request dated 31 January 2021 relates to one individual only - the age, ethnicity, qualifications, and work experience of the successful candidate for the role.
23. The Commissioner is satisfied that the information relates to the successful candidate and if it were disclosed it could be possible to identify that individual. In the Commissioner's view, this information amounts to the creation of a unique profile of the successful candidate. Whether their name is redacted or not makes little difference, as the individual could be identified from this profile alone.
24. The Commissioner does accept that the chances of any member of the public being able to cross-reference the information to identify a specific individual is not high but that there is a risk that the successful candidate could be identified by a person with knowledge of MFT or other NHS Trust matters.
25. Even if the complainant herself were unable to identify the successful candidate, because the information would be disclosed under FOIA to

the world at large, there is a distinct possibility that it would come into the hands of people who would be able to “de-anonymise” the data.

26. When considering the possibility of identification, the Commissioner applies the “Motivated Intruder Test.” This test starts with a hypothesis that there exists a person who wishes to identify the individual covered by the withheld information. The person is willing to devote a considerable amount of time and resources to the process of identification. They may have some inside knowledge (i.e. information not already in the public domain) but will not resort to illegality – they are determined but not reckless. The Commissioner looks to see how such a person would go about identifying the individuals involved.
27. Given the withheld information only relates to one individual (the successful candidate), links to visual characteristics (such as age and ethnicity) and contains special category personal data relating to ethnicity, the Commissioner accepts that this increases the possibility that the successful candidate could be identified by a motivated individual.
28. Therefore, the Commissioner accepts that the information falls within the definition of ‘personal data’ in section 3(2) of the DPA.
29. 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.
30. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

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

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

32. 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.
33. 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.
34. 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 an Article 9 condition for processing.

Is the information special category data?

35. Information relating to special category data is given special status in the UK GDPR. This type of information is seen as more sensitive or private.
36. Article 9 of the UK GDPR defines 'special category' as being personal data which reveals racial or ethnic origin, political, religious, or philosophical beliefs, trade union membership, and genetic data, biometric data, data concerning health, or data concerning a natural person's sex life or sexual orientation.
37. Having considered the wording of the revised request dated 31 January 2021, the Commissioner finds that the requested information does include special category data. She has reached this conclusion on the basis that question 4 of the revised request asks for the 'Country of Origin' of the successful candidate. This is clearly personal data revealing racial or ethnic origin.
38. 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 under FOIA, if one of the stringent conditions of Article 9 can be met.
39. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
40. The Commissioner has seen no evidence or indication that the successful candidate has 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.
41. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure of the 'Country of Origin' of the successful candidate. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.
42. As the complainant has also requested data in the revised request which is not special category data, (age, qualifications, and work experience) the Commissioner has must go on to consider whether there also is an Article 6 basis for processing.

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

43. Article 6(1) of the UK 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*" conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met

before disclosure of the information in response to the request would be considered lawful.

44. 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"*².

45. In considering the application of Article 6(1)(f) of the UK 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.

46. 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

47. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA (age, qualifications and work experience of the successful candidate) , the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sake, as well as case specific interests.

² 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".

48. 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.
49. The Commissioner recognises that there is a clear legitimate interest in ensuring equality and diversity in MFT's recruitment processes. This is set out in MFT's Equality, Diversity and Inclusion Policy Statement.
50. In this case, it is also clear that the complainant has a clear personal and legal interest in disclosure of the withheld information (age, qualifications and work experience) relating to the successful candidate.
51. The Commissioner notes that the complainant says she had commenced legal proceedings for discrimination against MFT in the Employment Tribunal before the complainant made her second revised request on 31 January 2021 for the specific information about the successful candidate. The complainant says she needs the withheld information about the successful candidate in order to pursue her claim.
52. The Commissioner does therefore consider that there is a legitimate interest in disclosure of information which may hold MFT to account and promotes equality and transparency in relation to its recruitment procedures.

Is disclosure necessary?

53. '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.
54. The Commissioner has already noted above that the complainant commenced legal proceedings against MFT in the Employment Tribunal **before** she made her revised request for information dated 31 January 2021. The Commissioner is aware of this because the complainant provided the Commissioner with any email to MFT dated 22 December 2020 confirming this fact. It said:

"I am writing to complain about your Freedom of Information team, who unlawfully refused to send me the information I requested (please see the attached) despite all my 6 emails to them that included 3 reminder emails. By this, the FOI has broken the law as I am entitled to receive this information. Therefore, please send the requested information as soon as possible to me. I have already started a case with the Employment Tribunal against your Trust in this matter and if I

do not receive the requested information, the court will force your Trust to provide it by law..."

55. The complainant also told the Commissioner on 20 March 2021 that the withheld requested information about the successful candidate was needed as MFT was "... *denying me important data and information that are crucial in this potential discrimination that I experienced. They would have known by now that I am planning to go to Court with this information..*".
56. The Commissioner notes that she is only able to consider whether there is a legitimate interest in disclosure of the information about the successful candidate to the world at large - at the time the complainant's revised request was made on 31 January 2021. Disclosure under the FOIA must be the least intrusive means of achieving the legitimate aim in question at that time.
57. While the Commissioner appreciates that in order to pursue her discrimination claim the complainant may need specific information about the successful candidate for the purposes of comparison, the Commissioner notes that on 31 January 2021, the complainant had already commenced legal proceedings against MFT in the Employment Tribunal.
58. In this particular case, therefore, the Commissioner is satisfied that there was a less intrusive means of achieving the legitimate aims identified than disclosing the information under FOIA. Given an Employment Tribunal case had been in progress for some time, a purpose of which would be to decide whether MFT has treated the complainant 'less favourably' in recruitment for the particular role, disclosure of information about the successful candidate for the purposes of comparison would in all likelihood occur according to the Employment Tribunal's rules of disclosure, subject to any necessary conditions which may limit the information being shared in open court.
59. The Commissioner is also aware that once proceedings have commenced in the employment tribunal, the complainant can apply to the Employment Tribunal for an order or direction that MFT provide her with the documents she considers relevant to her claim, and in particular, information about her comparators (which may very well include the age, ethnicity, qualifications and work experience relating to the successful candidate).
60. As the Commissioner has decided in this case that disclosure to the world at large is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing

and it is unlawful. It therefore does not meet the requirements of principle (a).

61. The Commissioner has therefore decided that the Trust was entitled to withhold the information under section 40(2) FOIA.

Timeliness

62. Section 10 of the FOIA states that responses to requests made under the Act must be provided "*promptly and in any event not later than the twentieth working day following the date of receipt.*"
63. In this case, MFT did not issue a response to the request dated 29 July 2020 until 26 January 2021– well in excess of the 20 working days required by the legislation.
64. The Commissioner's decision is that MFT failed to respond to the request within 20 working days and has therefore breached section 10 of the FOIA.

Right of appeal

65. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

66. 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.

67. 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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