

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 March 2023

Public Authority: Gateshead Health NHS Foundation Trust
Address: Queen Elizabeth Hospital
Sheriff Hill
Gateshead
Tyne and Wear
NE9 6SX

Decision (including any steps ordered)

1. The complainant made a request for information regarding complaints about a named surgeon. Gateshead Health NHS Foundation Trust (the Trust) refused to confirm or deny whether it holds the requested information under section 40(5B)(a)(i) FOIA.
2. The Commissioner considers that the Trust incorrectly applied section 40(5B)(a)(i) FOIA to refuse to confirm or deny whether the requested is held.
3. The Commissioner requires the Trust to take the following step to ensure compliance with the legislation.
 - The Trust must provide a response confirming or denying whether the requested information is held in compliance with section 1(1)(a) FOIA. If this information is held this should be disclosed in accordance with section 1(1)(b) FOIA or the Trust should explain the exemptions from disclosure being relied upon in accordance with its obligations under section 17 FOIA.
4. The Trust must take this step 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. The complainant made the following information requests to the Trust on 2 February 2022:

“I am requesting information on a [redacted] surgeon named [name redacted] who was a surgeon at the QUEEN ELIZABETH HOSPITAL IN SHERIFF HILL GATESHEAD.

- 1/ How many complaints were made in total about this surgeon.
 - 2/ The nature of the complaints.
 - 3/ When the first complaint was made.
 - 4/ Was there any deaths due to this surgeon's incompetence.
 - 5/ How many complaints made on hip operations only.
 - 6/ How long was this surgeon allowed to perform operations after last complaint.
 - 7/ Were there any complaints made by other Surgeon's or staff and what did they consist of.
 - 8/ Was there any compensation awarded due to the complaints and if so how much on each separate incident.
 - 9/ Did the surgeon or hospital ever go to court due to complaints by this surgeon if so how many times.
 - 10/ If the hospital/surgeon did go to court can you give me details of court case ie when it was and case number.
 - 11/ Was this surgeon ever struck off.”
6. On 9 February 2023, the Trust responded to the request. It refused to confirm or deny whether it holds the requested information under section 40(5B)(a)(i) FOIA.
7. On the same date the complainant asked the Trust to carry out an internal review.
8. On 23 February 2023 the Trust provide the internal review, it upheld its response.

Scope of the case

9. The complainant contacted the Commissioner on 28 February 2023 to complain about the way the request for information had been handled.
10. The Commissioner considered the scope of his investigation to be to determine if the Trust was correct to refuse to confirm or deny whether the requested information is held under section 40(5B)(a)(i) FOIA.

Reasons for decision

Section 40 – personal information

11. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.
12. Therefore, for the Trust to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request the following two criteria must be met:
 - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

13. Section 3(2) of the DPA 2018 defines personal data as:- "any information relating to an identified or identifiable living individual".
14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. 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.
16. The Commissioner is satisfied that if the Trust confirmed or denied whether it holds the requested information it would result in the disclosure of a third party's personal data. This is because it would confirm or deny the existence of complaints about the surgeon named in the request. The first criterion set out above is therefore met.
17. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent the Trust from refusing to confirm whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.

18. The Commissioner agrees that the most relevant data protection principle is principal (a).

Would confirming whether or not the requested information is held contravene one of the data protection principles?

19. Article 5(1)(a) UK GDPR states that:- "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
20. In the case of a 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 – or as in this case the public authority can only confirm whether or not it holds the requested information - if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) UK GDPR), be fair, and be transparent.

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

21. 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.
22. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) UK GDPR which provides as follows:- "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"¹

¹ 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 2018) and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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".

23. In considering the application of Article 6(1)(f) UK GDPR in the context of a request for information under 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 confirmation as to whether the requested information is held (or not) 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.

24. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

(i) Legitimate interests

25. 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, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

26. The Commissioner considers that the public has a legitimate interest in knowing whether a surgeon has been the subject of a complaint.

(ii) Is confirming whether or not the requested information is held necessary?

27. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.

28. The Commissioner considers that disclosure of the requested information would be necessary to meet the legitimate interests in this case.

(iii) Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

29. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject(s)' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.

30. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that confirmation or denial may cause;
- whether the information is already in the public domain;
- whether the information is already known to some individuals;
- whether the individual expressed concern to the confirmation or denial; and
- the reasonable expectations of the individual.

31. In the Commissioner's view, a key issue is whether the individual concerned has a reasonable expectation that their information will not be disclosed or that the public authority will not confirm whether or not it holds their personal data. 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.

32. It is also important to consider whether disclosure (or confirmation or denial) would be likely to result in unwarranted damage or distress to that individual.

33. During the Commissioner's investigation, he checked the named surgeon's registration on the Medical register on the General Medical

Council's website. The named surgeon is listed with sanctions on their registration.

34. Due to the information that is currently publicly available on the GMC's website regarding the named surgeon's registration (and was publicly available at the time of the request), the Commissioner considers that the data subject would have a reasonable expectation that the Trust may confirm or deny whether the information requested in this case is held. Furthermore due to the publicly available information, any damage or distress caused by confirmation or denial would be significantly limited.
35. Based on the above factors, the Commissioner has determined that there is sufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms, and that confirming whether or not the requested information is held would be lawful.

Fairness

36. Even if it has been demonstrated that confirming or denying whether the withheld information is held under FOIA would meet the condition for lawful processing under Art. 6(1)(f) UK GDPR, it is still necessary to show that such a confirmation or denial would be fair and transparent under principle (a).
37. Under principle (a), the provision of confirmation or denial must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in the provision of confirmation or denial to the public.
38. In considering whether confirming whether or not the requested information is held is fair the Commissioner takes into account the following factors:
 - The data subject(s) reasonable expectations of what would happen to their information;
 - The consequences of providing confirmation or denial (if it would cause any unnecessary or unjustified damage or distress to the individual(s) concerned); and
 - The balance between the rights and freedoms of the data subject(s) and the legitimate interests of the public.

Reasonable expectations

39. In the Commissioner's view, a key issue to consider in assessing fairness is whether the individuals concerned have a reasonable expectation that the Trust will not confirm whether or not it holds their

personal data. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information (if held) relates to an employee in their professional role or to them as individuals and the purpose for which they may have provided their personal data.

40. The Commissioner accepts that surgeons may have a reasonable expectation that the Trust would not confirm or deny the existence of complaints where there is no other information in the public domain regarding their fitness to practice. However in this case as there are currently public sanctions on the surgeon's registration, the Commissioner considers that they would have a reasonable expectation that the Trust would confirm or deny whether it holds the requested information.

Consequences of providing confirmation or denial

41. With regard to the consequences of providing confirmation or denial that the requested information is held upon a data subject, the question – in respect of fairness – is whether such provision would be likely to result in unwarranted damage or distress to that individual.
42. As explained above any damage or distress that would be caused by confirmation or denial would be limited in this case due to the information in the public domain regarding the surgeon's fitness to practice.

The balance between the rights and freedoms of the data subjects and the legitimate interests of the public

43. Under principle (a), confirming or denying whether a third party personal data is held must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in providing confirmation or denial to the public.
44. Despite the reasonable expectation of individuals and the fact that damage or distress may result from the provision of confirmation or denial, it may still be fair to provide confirmation or denial that the requested information is held if it can be argued that there is a more compelling public interest in doing so.
45. In considering any legitimate interest in the public having confirmation or denial that the requested information is held, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.

46. In this case given there would be a reasonable expectation on the part of the data subject that the Trust may confirm or deny whether it holds the requested information and the fact this would be unlikely to cause damage and distress under these particular circumstances, the legitimate interests surrounding whether or not complaints against the named surgeon are held is compelling.
47. Based on the above factors, the Commissioner has determined that confirming whether or not the requested information is held would be fair.

Would confirming whether or not the information is held be transparent?

48. Under principle (a), confirming or denying whether the requested information is held must be transparent to the data subject.
49. As the Commissioner has determined that that disclosure would not be unlawful and would be fair for the reasons given, the Commissioner is satisfied that confirming whether or not the requested information is held would be transparent.

Commissioner's view

50. In this instance, the Commissioner has decided that the Trust has failed to demonstrate that section 40(5B)(a)(i) is engaged.

Right of appeal

51. 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

52. 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.
53. 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.....

Gemma Garvey
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