

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

### **Decision notice**

**Date:** 13 May 2024

**Public Authority:** NHS Devon Integrated Care Board

**Address:** Aperture House  
Pynes Hill  
Rydon Lane  
Exeter  
Devon  
EX2 5AZ

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

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1. The complainant has requested copies of two emails dated 19 September 2023. NHS Devon Integrated Care Board ('the ICB') relied on section 40(2) of FOIA (third party personal information) to withhold the information.
2. The Commissioner's decision is that the ICB has correctly relied on section 40(2) of FOIA to withhold the information.
3. The Commissioner does not require further steps to be taken.

#### **Request and response**

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4. On 14 November 2023, the complainant wrote to the ICB and requested information in the following terms:

"Dear Devon Integrated Care Partnership,

We request full publication of 2 emails that have been to date suppressed by Devon ICB.

This refers to '2 emails are dated 19th September 2023' and we believe are between Devon ICB and an independent assessor called [NAME REDACTED].

Devon ICB have stated 'we would advise these are also excluded from sharing as the email content is largely about a process rather than the data subject'

We are very interested to hear all about process though the data subject persons name can of course be redacted."

5. The ICB responded on 28 November 2023. It stated that the information constituted third party data and it was refusing the request under section 40(2) of FOIA.
6. Following an internal review the ICB wrote to the complainant on 29 January 2024 and upheld its position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 28 January 2024 to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to establish whether the ICB is entitled to withhold the requested information under section 40(2) of FOIA.

### **Reasons for decision**

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#### **Section 40 - personal information**

9. Section 40(2) of 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.
10. 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 UK General Data Protection Regulation ('UK GDPR').
11. 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 FOIA cannot apply.

12. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

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

13. Section 3(2) of the DPA 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. 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.
16. 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.
17. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information does relate to the data subjects – that is, the assessor and other individuals. This is because the requested information concerns correspondence to and from an individual named in the request, as well as other individuals mentioned in the emails.
18. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.
19. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
20. The most relevant DP principle in this case is principle (a).

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

21. 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”.

22. 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.
23. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

24. 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>1</sup>.

25. In considering the application of Article 6(1)(f) of the 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 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.
26. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

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<sup>1</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 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”.

### **Legitimate interests**

27. In considering any legitimate interest(s) in the disclosure of the requested information under 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.
28. 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.
29. The Commissioner is satisfied that the complainant has a legitimate personal interest in the information being disclosed, and that there is a wider public interest in transparency about the processes used by health bodies to arrange assessments.

### **Is disclosure necessary?**

30. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
31. The ICB has explained that it does not consider the disclosure of the requested information to be necessary as it has already provided the complainant with information about its assessment and decision-making processes outside of FOIA.
32. As the request concerns two particular emails sent on 19 September 2023, the Commissioner considers that disclosure would be necessary and that there are no less intrusive means of achieving the legitimate aims identified.

### **Balance between legitimate interests and the data subjects' interests or fundamental rights and freedoms**

33. 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 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.

34. 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 to the disclosure; and
  - the reasonable expectations of the individuals.
35. 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.
36. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
37. The ICB has explained that the correspondence with the individual named in the request concerned possible engagement of assessment services and this did not progress. Therefore, the ICB considers that the named individual would not reasonably expect their personal information to be disclosed.
38. As there are other people named in the correspondence, and its subject concerns possible arrangements for an assessment process, the ICB considers that it also contains sensitive detail about personal medical information.
39. The ICB has suggested that the requested information could be used to damage the reputation of the named individual, although it notes that the content of the requested information itself does not contain anything prejudicial to the named individual.
40. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
41. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

## Right of appeal

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

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

43. 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.
44. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Keeley Christine**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**