

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 14 March 2013

**Public Authority:** NHS Bristol  
**Address:** South Plaza  
Marlborough Street  
Bristol  
BS1 3 NX

### Decision

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1. The complainant made a request to NHS Bristol for information regarding a report into allegations she had made concerning breaches of the Code of Conduct for NHS Managers. NHS Bristol refused the request under the exemptions in section 31(1)(g) (law enforcement), section 40(2) (personal information) and section 41 (information provided in confidence). The Commissioner has investigated the complaint and found that the information is exempt from disclosure under section 40(1) as it is the personal data of the complainant. The Commissioner has also found that the section 40(2) exemption would apply in the event that any of the information is not the personal data of the complainant.
2. The Commissioner requires no steps to be taken.

### Request and response

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3. On 7 October 2012 the complainant made a request to the Trust for information about an investigation into allegations she had previously made concerning breaches of the Code of Conduct for NHS Managers. The request read as follows:

*"Please send me the following:*

1. *The HCC UK Ltd investigation report into my allegations of breaches of the Code of Conduct for NHS Managers by three senior NHS Bristol employees.*

*2. The conclusions of the investigation, including the outcome of the following HCC terms of reference:*

- a. to establish on the balance of probability whether the behaviour complained of was inappropriate/unacceptable.*
- b. provide the organisation with a sound basis for deciding what, if any, action should be taken.*

*3. The names of the witnesses interviewed.*

*4. The evidence on which the conclusions are based."*

4. The Trust responded to the request on 2 November 2012. It confirmed that it held a copy of the report referred to in the request but said that this was being withheld under the exemptions in section 40(2) (personal information) and sections 31(1)(g) and 31(2)(b) (the law enforcement exemption). For part 2 of the request the Trust explained that the investigator had found that the three NHS Bristol employees had not breached the NHS managers code of conduct in the way alleged in the complaint. For parts 3 and 4 of the request the Trust said that the information was exempt from disclosure under section 40(2) and in the case of evidence provided by witnesses, section 41 as well (information provided in confidence).
5. The complainant subsequently asked the Trust to carry out an internal review of its handling of her request. The Trust presented its findings on 22 November 2012, upholding its earlier response to the request.

## **Scope of the case**

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6. On 23 November 2012 the complainant contacted the Commissioner to complain about the Trust's decision to refuse the request.

## **Reasons for decision**

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7. The information requested by the complainant is contained within a report produced by an independent investigator to consider the allegations that managers employed by the Trust breached the NHS Code of Conduct for Managers. The Commissioner considers this to be the withheld information and has considered whether it is exempt from disclosure.

## **Section 40 – Personal information**

8. In its submission to the Commissioner the Trust had concentrated on the fact that the report constituted the personal data of the managers who had been complained about and therefore had applied the section 40(2) exemption which applies where the information is the personal data of someone other than the applicant. However, the Commissioner considers that since the complainant in this case is the person who made the allegations referred to in the report, the information will also be the complainant's personal data.
9. Where requested information constitutes the personal data of more than one individual, then both individuals are data subjects for the purposes of section 40. In situations like this, where a request is made by one of the data subjects the Commissioner's approach is to consider the information under the section 40(1) exemption.
10. There is no right of access to personal data about oneself under FOIA, as section 40(1) of FOIA provides that information is exempt if it constitutes personal data of which the applicant is the data subject. Personal data is defined in the Data Protection Act 1998 as:

*"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;*

11. As explained above, the complainant was the person who made the allegations considered in the report. The report outlines her allegations and evidence she gave to support them which includes how she felt she was treated by individuals within the Trust. For instance, in considering some of the allegations the report details the history of the complainant's interactions with the Trust and the managers concerned. The complainant is clearly identifiable from the report and the information is significant and biographical to her. The Commissioner is satisfied that the information is her personal data.

12. Consequently, the Commissioner finds that section 40(1) is engaged and since this is an absolute exemption there is no public interest test to apply.
13. However the Commissioner notes that in one part of her request the complainant asks for the names of witnesses interviewed in the report which raises the possibility that some of the information could be released without disclosing the complainant's personal data. In this instance the Commissioner would say that should any of the information be found to not be the personal data of the complainant or, should it prove possible to isolate any of the information in such a way that it is not the personal data of the complainant, then he would find that section 40(2) would apply. Given that the Trust has provided a detailed submission on section 40(2) and for the sake of completeness the Commissioner has also carried out an analysis of section 40(2) in respect of the other individuals names in the report.
14. Section 40(2) provides that information is exempt if it is the personal data of someone other than the applicant and disclosure would meet one of two conditions. In this case it is the first condition which is relevant which is that disclosure would contravene one of the data protection principles.
15. In order for the exemption to be engaged the Commissioner has first considered whether the information amounts to personal data.
16. The Trust had cited the section 40(2) exemption on the basis that the report constitutes the personal data of the individuals who were the subject of the allegations and the investigation that was undertaken in response. The Trust has said that this investigation involved interviews with several members of staff and lay representatives who gave evidence in relation to the allegations. The report forms part of the personnel files of these individuals.
17. In the Commissioner's view the information clearly relates to the individuals who were the subject of the investigation. The individuals can be identified from that information and the Commissioner is satisfied that it is their personal data. The Commissioner would also note that some of the information is also the personal data of witnesses whose evidence was heard as part of the investigation.
18. Having satisfied himself that the information is personal data the Commissioner has gone on to consider whether disclosure would contravene any of the data protection principles listed in schedule 1 of the DPA 1998. In this case the Trust argues that disclosure would

contravene the first principle which requires that data be processed fairly and lawfully.

19. When considering whether a disclosure under FOIA would be fair the Commissioner's approach is to reach a balanced view after considering the following factors:
  - Does the information relate to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life)?
  - Has the individual named been asked whether they are willing to consent to the disclosure of their personal data?
  - The possible consequences of disclosure.
  - The reasonable expectations of the individual(s) about what will happen to their personal data.
20. As regards the expectations of the individuals concerned, the Trust has said that the information in the report was provided confidentially on the understanding that it would be used for the purposes of the investigation but would not be made public. The investigation was carried out in line with NHS Bristol's "Guidance on Investigating Complaints and Allegations Related to Employment" which makes it clear that this is confidential. The framework agreement for this specific investigation also makes it clear that it is confidential. The Commissioner also understands that the individuals who are the subject of the investigation have not consented to disclosure and have made it clear that they do not want the report to be made public. In light of this the Commissioner is of the view that the individuals named in the report would have a high expectation that their personal data would not be disclosed.
21. The Commissioner has taken into account the fact that the report relates to allegations about the activities of the employees during their working lives, as opposed to their personal lives. However the Commissioner has also been made aware that individuals named in the report have felt harassed and that their private lives have been impinged upon due to their involvement in the work to which the allegations relates. The Commissioner considers that disclosure would be likely to be distressing to these individuals and he is also mindful of the fact that the allegations considered in the report were ultimately found to be unproven.
22. However, the Commissioner's approach to cases like this is that, notwithstanding the data subjects' reasonable expectations or any damage or distress caused to him or her by disclosure, it may still be fair to disclose requested information if it can be argued that there is a more compelling public interest in releasing the information. Therefore

the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in disclosure.

23. The Commissioner would stress that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protecting an individual's personal data the Commissioner's 'default position' is in favour of protecting the privacy of the individual. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure; that is to say any public interest in disclosure must outweigh the public interest in protecting the rights and freedoms of the data subject.
24. In this case the complainant has argued that there is a public interest in a code of conduct investigation being seen to be reasonable, fair and impartial and that this overrides any privacy concerns. Whilst the Commissioner would accept that there is a public interest in knowing that complaints made to NHS bodies are dealt with properly, he notes that the conclusions of the investigations have been made public. The Commissioner's view is that given the strong expectations of privacy and the likely alarm and distress that disclosure would cause, the disclosure of the requested information would be disproportionate. Consequently, the Commissioner is satisfied that the section 40(2) exemption is engaged in this instance.

## Right of appeal

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25. 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: 0116 249 4253  
Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

26. 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.
27. 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 .....**

**Pamela Clements  
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Information Commissioner's Office  
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