

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

### **Decision notice**

**Date:** 11 August 2014

**Public Authority:** Wirral University Teaching Hospital NHS Trust

**Address:** Arrowe Park Road  
Upton  
Wirral  
Merseyside  
CH49 5PE

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

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1. The complainant asked whether any of the Trust's directors had been suspended pending the outcome of a disciplinary investigation and requested a copy of the reports of any such investigations. The Trust confirmed that one director had been suspended but that following the subsequent investigation no disciplinary action was taken. It refused to provide the investigation report, citing section 40(2) – third party personal data, as its basis for doing so.
2. The Commissioner's decision is that the Trust is entitled to withhold the information under section 40(2).
3. The Commissioner does not require the public authority to take any further action in this matter.

#### **Request and response**

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4. On 12 January 2014, the complainant wrote to Wirral University Teaching Hospital NHS Trust (the Trust) and asked a series of 20 questions which, in general terms, related to the circumstances in which any directors of the Trust had left their employment and any disciplinary

action taken against directors or against other staff involved in internal disputes with directors. The Trust responded by providing answers to some of the questions and informing the complainant that other information was not held.

5. On commencing his investigation the Commissioner wrote to the complainant explaining his interpretation of the request and identified those elements of the request that appeared to be still outstanding. The outstanding issues related to whether any director had been suspended and, if so, why. The complainant was provided with the opportunity to clarify whether there were any other matters he wanted investigating. As he has not raised any additional points, the Commissioner's investigation has focussed on the complainant's right of access to information relating to the circumstances under which any directors were suspended.
6. Questions 14 to 16 of his request sought information in the following terms:
  - "Between August 2013 and the present date, I am interested in discovering:
    14. How many directors of the Trust were suspended from their posts whilst an internal (or external) investigation was carried out.
    15. The particular outcome of these investigations.
    16. A copy of the investigator's report in each case (redacted as required to protect personal information under the DPA)."
7. The Trust responded on 24 February 2014. In respect of these three questions it stated that one director was suspended from post pending an internal investigation but that the investigation did not lead to any disciplinary action being taken.
8. Following an internal review the Trust wrote to the complainant on 11 April 2014. It repeated its responses to the questions 14 and 15. The Trust went on to explain that it was withholding the information on the investigation under section 40(2) of FOIA because it constituted the personal data of the individuals involved, including the suspended director, and its disclosure would breach the Data Protection Act 1998 (DPA).

## **Scope of the case**

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9. The complainant contacted the Commissioner on 16 April 2014 to complain that he had not been provided with all the information he had asked for.
10. The Commissioner considers the matter to be resolved is whether the Trust is entitled to withhold the information on the investigation which followed the suspension of the director under section 40(2).
11. The information captured by the request includes a number of appendices. Initially the Trust did not consider the appendices fell within the scope of the request. However once it recognised they did, it withheld the majority of the information contained within those appendices under section 40(2). In his role as a regulator of both the DPA and FOIA, the Commissioner has considered whether the remaining parts of the appendices should also be withheld under section 40(2).

## **Reasons for decision**

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### **Section 40(2) – third party personal data**

12. So far as is relevant, section 40(2) of FOIA states that a public authority is not obliged to disclose personal data about someone other than the requestor, if to do so would breach any of the data protection principles contained in the DPA.
13. The first data protection principle states that the processing of personal data, which includes its disclosure, shall be fair and lawful and in particular must comply with one of the conditions set out in Schedule 2 of that Act. It is this principle which the Trust believes would be breached if the report was disclosed.
14. The first issue to establish is whether the report constitutes personal data. Personal data is defined in section 1 of the DPA as being information which both identifies and relates to a living individual. The individuals to which the information relates are known as 'data subjects'. The Commissioner has been provided with a copy of the information that is captured by the request. He is satisfied that it contains the personal data of a number of individuals including the director. The report is clearly about the conduct of certain individuals who are the main focus of the investigation and who can easily be identified from the information. It also contains the personal data of other individuals, for

example those connected with the events that triggered the director's suspension.

15. The Commissioner and the Trust have considered whether the information could be redacted in such a way that it could be disclosed without revealing the personal data of those concerned. The Commissioner has concluded that this would not be possible. This is because the fact that the director had been suspended would have been widely known within the Trust itself and most staff would have recognised that the report related to that director regardless of what redactions were made from it. The Commissioner also considers that it would be impossible to release any meaningful information without staff being able to deduce who the other principal data subjects were or revealing something about the nature of the allegations against the director. Furthermore the Commissioner is satisfied that the suspension of the director was reported in the press. As a consequence, a much broader audience would be able to identify the individuals in question.
16. When considering whether a disclosure would breach the first data protection principle the Commissioner's approach is to start by considering if the disclosure would be fair. The consideration of fairness will take account of the possible consequences of disclosure on the director and the other principal data subjects together with their expectations, both at the time the issues were investigated and at the time of the request, of how the information would be used. Finally it will consider the legitimate interest in the public having access to the report and balance these against the rights of the data subjects. In practice these issues are often interlinked.
17. In respect of the consequences of disclosing the information on the director the Commissioner is mindful of the fact that the Trust has already revealed that the investigation did not lead to any disciplinary action being taken. Therefore it could be argued that there could be no, or little, detriment to anyone if the report was disclosed. The counter argument is that, as the allegations were not proven, those concerned are entitled to put the events behind them and move on with their careers. To disclose the report at the time of the request would have frustrated that process, and caused further distress for the director and others. On balance the Commissioner is satisfied there would be some detriment to the principal data subjects if the report was disclosed.
18. The expectations of the data subjects regarding how the information gathered during the investigation would be used, including to whom it would be disclosed, would be shaped by a number of things. As a general rule staff would have an expectation that information

relating to personnel matters will remain confidential. This is particularly the case in respect of disciplinary matters. However some of the individuals in this case, for example the director, hold a senior position within the Trust and therefore would have had a greater expectation that information regarding their role and performance could be made public. Nevertheless the Commissioner is satisfied that this would not extend to the disclosure of a report into a formal disciplinary investigation.

19. It is conceivable that had the allegations been substantiated the data subjects would have recognised that there was a greater public interest in disclosing the information and less merit in protecting their privacy. This would obviously depend on the nature of the allegations. In this case though, having considered the nature of the allegations and in particular the fact that the investigation did not lead to any disciplinary action, the Commissioner is satisfied that it would be reasonable for the data subjects to expect the information would remain confidential at the time the request was made.
20. As explained above, the final test of fairness involves balancing the legitimate interests of the public in having access to the information against the rights of freedoms of the data subjects. The Commissioner accepts that the public have a legitimate interest in understanding the circumstances in which a very senior manager of the Trust was suspended. The people served by the Trust clearly have an interest in how the Trust is being managed. This includes not only the performance of the director and the others referred to in the information, but the adequacy of the disciplinary process as applied to senior managers and the performance of those responsible for instigating and conducting the disciplinary process.
21. The Commissioner understands from an article in the local press that the Care Quality Commission had investigated concerns that there was culture of bullying at the Trust. (It is important to note that that the Care Quality Commission's investigation had concluded that there was no culture of bullying.) The press also reported that another regulator of the health sector, Monitor, was investigating the Trust's spending for the previous year. Even if ultimately there was found to be no substance to the concerns considered by these two regulators, the fact they had been raised increases the value in disclosing information on the management of the Trust. Against such a background there is a value in accessing information that might identify management failings which needed to be addressed, or, alternatively, that would re-assure the public about the Trust's performance. The Commissioner would emphasise that this should not be taken as inferring that the requested information in

anyway relates to the matters considered by the two regulators. It is simply that in light of the public airing of those issues, there is an additional value in there being increased transparency of the Trust's management.

22. However against these legitimate interests it is necessary to balance the rights and freedoms of the main data subjects, including the director. The investigation found that no disciplinary action was required and therefore those concerned are entitled to continue their roles within the Trust without information being disclosed that would extend the period of speculation by other staff that often accompanies a suspension. Furthermore as no action was taken against the director, or anyone else, they are entitled to rely on the Trust to maintain the confidentiality of the information; as already discussed individuals, reasonably, have a high expectation that information about personnel issues and in particular disciplinary ones, will be treated as being confidential.
23. On balance therefore the Commissioner finds that the legitimate interests of the public in accessing the report is outweighed by the rights of freedoms of the data subjects in this case. The Commissioner has also concluded that disclosing the investigation report would be detrimental to the main data subjects and be against their reasonable expectations. In light of this the Commissioner concludes that disclosing the information would be unfair to those who were the focus of the investigation. It follows that as disclosing the report would be unfair, to do so would breach the first data protection principle. There is no need to go onto consider the other elements of the first principle, ie whether the disclosure would be lawful or whether it would satisfy one of the conditions set out in Schedule 2 of the DPA.
24. As well as the principal data subjects the report also includes the personal data of others including the staff involved in the events which triggered the investigation. Their personal data is inextricably linked with that of main characters and so could not be disclosed without it being unfair to the principal data subjects. However even if it was possible to do so the Commissioner is satisfied it would be unfair to these other data subjects. This is explained further in the confidential annex to this notice.
25. The requested information includes a number of appendices. These contain witness statements and other pieces of evidence gathered during the investigation. The Trust has applied section 40(2) to the majority of the appendices that can be characterised as being the witness statements and submissions provided by a number of individuals. These all relate very directly to the substance of the issues

under investigation. The Commissioner is satisfied that these could not be released without disclosing the personal data of the principal data subjects including the suspended director. The Commissioner finds that this information is exempt from disclosure for the same reasons as the information contained in the main body of the report.

26. The Trust has not applied section 40(2) to other appendices including a list of those who provided statements to the investigation, lists of documents reviewed and examples of exchanges between a number of the data subjects. Having viewed these appendices the Commissioner considers that having regard for the information that is already available, primarily through press reports, these appendices could not be disclosed without revealing something of the matters under investigation and as such constitute the personal data of those involved. Therefore having regard for his role as regulator of the DPA the Commissioner he finds that these appendices are also exempt under s40(2)
27. The Commissioner does not require the Trust to take any further action in this matter.

## Right of appeal

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28. 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: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

29. 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.
30. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**