

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

### **Decision notice**

**Date:** **5 November 2015**

**Public Authority:** **Hywel Dda University Health Board**

**Address:** **Headquarters  
Merlins Court  
Winch Lane  
Haverfordwest  
Pembrokeshire  
SA61 1SB**

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

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1. The complainant submitted a number of requests to Hywel Dda University Health Board ('the Health Board') relating to his removal from a list of registered NHS professionals. The Health Board provided some information, stated other information was not held and applied sections 12 and 14 of the FOIA to other requests. During the course of the Commissioner's investigation, the Health Board acknowledged that some requests were for the complainant's own personal data and advised that it had provided information relevant to these requests. The Health Board also withdrew reliance on sections 12 and 14 of the FOIA and introduced reliance on section 40(2) in relation to some information and section 42 in relation to another request. The Commissioner's decision is that, on the balance of probabilities, the Health Board does not hold any additional information other than that which it has disclosed (and the remaining withheld information). The Commissioner has also found that the remaining withheld information is exempt from disclosure under sections 40(1) and 40(2) of FOIA as it contains the personal data of the complainant and the personal data of third parties. The Commissioner does not require any steps to be taken.

#### **Request and response**

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2. The complainant submitted three requests to the Health Board on 23 April, 30 May and 2 June 2014. The full wording of these requests is reproduced at annex A to this decision notice.

3. Solicitors acting on behalf of the Health Board responded on 23 June 2014. The response confirmed section 12 of the FOIA applied to the parts of the requests within the three letters for details/copies of letters sent to the complainant's patients. However, templates of generic letters issued to patients were provided. The solicitors also stated that no telephone log of calls received from patients regarding the letters issued was held. In relation to the other requests about the oral panel hearing in August 2013, contained within the request of 2 June 2014, the response stated that section 14 of the FOIA applied to these requests as they were considered to be vexatious.
4. The complainant wrote to the Health Board's solicitors on 17 July 2014 expressing dissatisfaction with the response to his requests.
5. The Health Board provided the outcome of its internal review on 17 February 2015. The Health Board stated that, with regard to letters sent to the complainant's patients, with the exception of the proformas already supplied, copies of the letters were not held and "it would exceed the time limits specified in the FOIA Act to recreate this material". The Health Board also stated that it did not hold some of the information requested and confirmed that all other questions relating to previous internal and external hearings were considered to be vexatious and therefore section 14 of the FOIA applied.

### **Scope of the case**

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6. The complainant contacted the Commissioner initially on 14 December 2014. The complainant was advised that, before accepting complaints, the Commissioner required complainants to have exhausted a public authority's complaint process. The Commissioner wrote to the Health Board and advised it to treat the complainant's communication of 17 July 2014 as a request for an internal review and respond accordingly.
7. The complainant contacted the Commissioner again on 30 March 2015 following the Health Board's internal review response stating that he remained dissatisfied with the handling of his requests.
8. During the course of the Commissioner's investigation the Health Board disclosed some information relevant to the requests. The Health Board also withdrew reliance on sections 12 and 14 and introduced reliance on section 40(2) in relation to one request and section 42 in relation to another request. The Health Board also confirmed that other than the information withheld under sections 40(2) and 42, it did not hold any further recorded information relevant to the requests. The Health Board also acknowledged that some of the requests relating to the complainant's own personal data and fell to be considered under the

Data Protection Act 1998 ('the DPA'). The separate right of access provided by section 7 of the DPA therefore applies. The Commissioner has considered this separately. This notice only relates to the FOIA aspects of the complaint.

9. Based on the above, the scope of the Commissioner's investigation in this case is therefore to determine whether the Health Board holds any further recorded information other than that which has been disclosed to date, or which it has continued to withhold. In addition, the Commissioner has considered whether the Health Board should disclose the remaining withheld information, or whether it was correct in relying on the exemptions claimed.
10. As stated in paragraph 2, details of the requests are contained in a separate annex to this notice, together with details of the access regime under which they were considered ie FOIA or DPA, and the Health Board's final position in relation to each request.

## **Reasons for decision**

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### **Section 1 – general right of access**

#### **Section 8 – valid request**

11. Section 1 of the FOIA states that any person making a request for information is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request and, if that is the case, to have that information communicated to him.
12. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the authority to check that the information is not held and he will consider any other reasons offered by the public authority to explain why the information is not held. He will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information was held; he is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.
13. As stated in paragraph 2 details of the three requests which are the subject of this notice are contained in a separate annex to the notice. The Commissioner has numbered the requests (a) to (r) for ease of reference throughout this notice and included in the annex are details of the access regime under which they were considered by the Health ie FOIA or DPA, and the Health Board's final position in relation to each

request. Some requests are repeated in the three items of correspondence sent by the complainant, and where appropriate the Commissioner has grouped these for consideration.

14. The Health Board has stated that it does not hold the following information:

- Requests (a), (b), (d) and (o) - copies of letters (and details) of patients who were sent certain letters by the Health Board.
- Requests (e), (p) and (r) - telephone logs of calls received from patients who were sent certain letters by the Health Board.
- Request (g) - a certificate of signed-for postage that confirms receipt of the copy of the minutes forwarded on 23 October.
- Request (h) - confirmation of receipt of the copy of the minutes by the panel members.
- Request (i) - panel members' confirmations that the minutes are a true record of what occurred at the Panel Hearing of 20/21 August 2013 .
- Request (j) - confirmation that the Health Board received a copy of the letter dated 19 March 2014 regarding the complainant's contract with the Health Board .
- Request (k) - Has HDUHB received a report of an investigation regarding the queries raised pre, during and post the panel hearings held in July and August 2013 about patients that were referred to the HDUHB Referral Refinement Scheme?
- Request (l) - a copy of the HDUHB report following investigation of the named patients.
- Request (m) - a copy of the HDUHB report following the investigation of [name redacted]'s concerns for these patients.

**Requests (a), (b), (d) and (o) - letters sent by the Health Board to patients containing specific references**

15. The complainant submitted a number of requests for copies of, and dates of letters sent by the Health Board to his patients containing four particular reference numbers. As the reference numbers contain the complainant's initials, the Commissioner has redacted these when details of the requests have been reproduced in the annex to this notice.

16. The Health Board stated that the letters referred to in these requests were created using a mail merge function where a template letter and a list of recipients ('data file') are incorporated in a print programme when batch letters are required. The Health Board has disclosed copies of the template letters used to create the letters but states that it does not hold the addresses of the patients to whom the letters were sent ie the data file.

17. The Health Board advised that it obtained information on the relevant patients to whom the letters were sent from NHS Wales Shared Services. On receipt of the patient details, a mail merge recipient document (data file) comprising the patient names and addresses was created in order to send the relevant letters. Once the letters were created via mail merge, the data file was then deleted by the Health Board. The Health Board stated that the information was deleted in accordance with the fifth data protection principle in the DPA which requires that personal data must not be kept for longer than is necessary.
18. The Health Board confirmed that it did not maintain any other records showing the date the letters were issued and to which individual patients they were sent as this is not normal practice. In addition, the Health Board explained that it is standard practice for all mail to be collected and taken to one of its mail rooms and franked in conjunction with all other mail. As such, no record is held of the date that each batch of letters was sent/franked.

**Requests (e) and (p) and (r) - telephone logs of calls received from patients that were sent certain letters by the Health Board**

19. The Health Board advised the Commissioner that:

"currently the Health Board's telecommunications systems, due to legacy issues and multiple exchanges, cannot have call logging facilities attached. It is impossible for the Health Board to hold telephone logs on its system or track incoming calls".

20. In light of the above, the only information that the Health Board *could* have held relevant to these requests would be manual notes of telephone calls recorded by staff. The Health Board advised that it consulted with staff within the relevant department who confirmed that no manual telephone notes were made. As such the Health Board's position is that it does not hold any information relevant to these requests. The Health Board also confirmed that it does not have any policies or procedures requiring staff to make notes of telephone calls.

**Request (g) - a certificate of signed-for postage that confirms receipt of the copy of the minutes forwarded on 23 October 2013**

21. The Health Board confirmed that the minutes sent to the complainant on 23 October 2013 were sent by standard mail and not recorded delivery. As such, the Health does not hold a certificate of signed-for postage. As the complainant did not receive the package, a further copy of the minutes was later sent to him by recorded delivery on 26 March 2014.

**Request (h) - Confirmation of receipt of the copy of the minutes by the panel members**

**Request (i) - Panel members' confirmations that the minutes are a true record of what occurred at the Panel Hearing of 20/21 August 2013**

22. During the course of the Commissioner's investigation, the Health Board disclosed a number of emails from panel members in relation to their review of the draft minutes of the panel hearing on 20/21 August 2013.
23. The Health Board confirmed that it does not hold any recorded information relating specifically to confirmation of receipt of the minutes of the panel hearing by panel members or panel members confirmation that the minutes were a true record of the hearing. However, the emails disclosed relating to the review of the draft minutes indicate that panel members received the draft minutes and reviewed them.

**Request (j) - confirmation that the Health Board received a copy of the letter dated 19 March 2014 regarding the complainant's contract with the Health Board**

24. The Health Board advised the Commissioner that the letter referred to in this request was sent by the complainant to NHS Shared Services Partnership and not the Health Board itself. Therefore, the letter was never received, and is not held by the Health Board and as such, the Health Board does not hold any recorded information to answer this request. Furthermore, during the course of the Commissioner's investigation the Health Board indicated that it did not consider this request to be a valid FOIA request as it is asking for a yes or no answer rather than recorded information.

**Request (k) - has HDUHB received a report of an investigation regarding the queries raised pre, during and post the panel hearings held in July and August 2013 about patients that were referred to the HDUHB Referral Refinement Scheme?**

**Request (l) - a copy of the HDUHB report following investigation of the named patients**

**Request (m) - a copy of the HDUHB report following the investigation of [name redacted]'s concerns for these patients – request (m)**

25. The Health Board stated that the Glaucoma Referral Refinement Service became part of the Welsh Eye Care Services (WECS) under Band 2 further investigations. As such the running and audit of the service (including ensuring that relevant investigations take place) is undertaken by the Welsh Government and the clinical lead for WECS. The Health Board advised the complainant of this on 19 May 2015 and suggested he redirect these requests accordingly.

26. In light of the above the Health Board confirmed it does not hold any recorded information relevant to these requests. In addition, the Health Board indicated to the Commissioner that as request (k) requires a yes or no answer, it does not consider it to be a valid FOIA request.

### **The Commissioner's view**

#### *Section 8 – valid request*

27. Although the Health Board has responded to requests (j) and (k) it does not consider the requests to be valid FOIA requests and has treated them as “normal course of business” requests.
28. Section 8 of FOIA states that a request for information is a request which is in writing, states the name of the applicant and a correspondence address, and describes the information requested. As the requests were in writing and provided both the complainant's name and an address for correspondence, the Commissioner has gone on to consider whether requests (j) and (k) meet the requirement of section 8(1)(c) of the FOIA and describe the information requested.
29. Section 8(1)(c) is only concerned with the validity of the description, it cannot be used to refuse requests that are unclear. Requests (j) and (k) do not ask for recorded information and are instead phrased as questions designed to obtain a confirmation or denial (ie a yes or no answer) from the Health Board as to whether it has received particular documents. The Commissioner's view is that these items are not requests for information as per section 8 of the FOIA. As they are not requests for information the Commissioner cannot include them in his decision.

#### *Section 1 – information held*

30. Based on the representations provided by the Health Board the Commissioner is satisfied that it has carried out adequate searches of the places where relevant information would be held. There is no evidence of any inadequate search or grounds for believing there is a motive to withhold information. The Commissioner has also considered the Health Board's representations as to why it does not hold any relevant information. The Commissioner's view is that the Health Board's explanations of why it does not hold information relevant to the requests are reasonable in the circumstances. For example, in relation to request (g) for a certificate of signed-for postage, it is clear to the Commissioner that if the document in question was sent by standard post, the Health Board will not hold a certificate of signed-for postage.
31. Based on the searches undertaken and the other explanations provided by the Health Board, the Commissioner is satisfied that, on the balance

of probabilities, the Council holds no further recorded information relevant to the complainant's requests other than that which has already been disclosed to him, or withheld under sections 40(2) and 42. The Commissioner has therefore gone on to consider the Health Board's application of these exemptions.

### **Section 40 – the exemption for personal data**

32. The Health Board has withheld information relating to request (n) as it considers it is subject to legal professional privilege. The Health Board also considers that arguments could be made for the request in question to be considered under either access regime ie the DPA or the FOIA. In relation to request (f) (which was repeated in request (q)) the Health Board has withheld the names and addresses of individual patients who were sent a particular letter under section 40(2). Details of these requests are below:

Request (n) – "Please forward the legal reasons why HDUHB choose not to divulge matters regarding patients that have been referred by me".

Requests (f) and (q) - "...copies of letters sent by HDUHB to my patients containing the reference PtLtr/[initials redacted]/Response"

33. Although the Health Board considers information relevant to request (n) exempt under section 42(1) of the FOIA, having viewed the information in question, as it appears to relate to the complainant the Commissioner believes it appropriate to consider section 40(1) of the FOIA. The Commissioner will not proactively seek to consider exemptions in all cases, but in cases where personal data is involved the Commissioner believes he has a duty to consider the rights of data subjects. These rights, set out in the DPA, are closely linked to article 8 of the Human Rights Act 1998 ('the HRA') and the Commissioner would be in breach of his obligations under the HRA if he ordered disclosure of information without having considered these rights, even if the public authority has not cited the exemption.

### **Section 40(1) – the applicants own personal data**

34. Under section 40(1) information that is requested which constitutes the applicant's 'personal data' is exempt information. This exemption is absolute and requires no public interest test to be conducted. In addition, in relation to such information public authorities are not obliged to comply with the obligation to confirm or deny whether they hold the requested information, by virtue of section 40(5)(a).
35. In this case it is apparent that the information which the Health Board has withheld in relation to request (n) under section 42(1) of the FOIA is the personal data of the complainant. The document in question relates



to the complainant's communications and dealings with the Health Board and there is reference to the complainant by name throughout the document. The complainant is clearly identifiable from the information and the information is significant and biographical to him. The Commissioner considers that he is a 'data subject' within the meaning of the section 40(1) exemption. He therefore concludes that the information would be his personal data and that the section 40(1) exemption applies. As stated in paragraph 8 of this notice the Commissioner has considered the data protection aspects of this complaint separately.

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

36. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the FOIA would breach any of the data protection principles or section 10 of the DPA.
37. The Health Board has withheld details of individual patients who were sent a letter containing a particular reference number. It considers that the information constitutes the personal data of the patients concerned and that disclosure would breach the first data protection principle.

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

38. In order to rely on the exemption provided by section 40, the information being requested must constitute personal data as defined by section 1 of the DPA. It defines personal information as data which relates to a living individual who can be identified:
  - from that data,
  - or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
39. In considering whether the information requested is "personal data", the Commissioner has taken into account his own guidance on the issue<sup>1</sup>. The two main elements of personal data are that the information must "relate to" a living person, and that person must be identifiable. Information will "relate to" a person if it is about them, linked to them,

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts them in any way.

40. The withheld information in this case comprises the names and addresses of individual patients who were sent a particular letter by the Health Board. The Commissioner is satisfied that the information relates to living individuals who may be identified from that data. The requested information therefore falls within the definition of personal data as set out in the DPA.

### **Would disclosure breach one of the data protection principles?**

41. Having accepted that the information requested constitutes the personal data of a living individual other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles. He considers the first data protection principle to be most relevant in this case. The first data protection principle has two components:

- personal data shall be processed fairly and lawfully; and
- personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

### **Would disclosure be fair?**

42. In considering whether disclosure of the information requested would comply with the first data protection principle, the Commissioner has first considered whether disclosure would be fair. In assessing fairness, the Commissioner has considered the reasonable expectations of the individual concerned, the nature of those expectations and the consequences of disclosure to the individual. He has then balanced against these the general principles of accountability, transparency as well as any legitimate interests which arise from the specific circumstances of the case.

#### *Reasonable expectations*

43. The complainant considers that the requested information should be disclosed to him because the letters were sent to his patients/former patients and relate to his removal from a list of NHS professionals authorised to practice in a particular field.
44. The Health Board has disclosed templates of all the letters it has sent to the complainant's patients/former patients. The Health Board has withheld the names and address of the recipients of the letters. The Health Board considers the letters which were sent to the patients in question to be private and personal communications. The letters were

issued under the duty of care the Health Board has in respect of patients to advise them of the current status of the medical professional who had previously treated them, ie that they had been removed from a list of NHS professionals.

45. The Health Board contends that the individuals in question would have had no expectation that a letter sent to them about previous medical treatment they had received would result in their personal information being disclosed into the public domain.
46. When considering what information third parties should expect to have disclosed about them, the Commissioner considers that a distinction should be drawn as to whether the information relates to the third party's public or private life. The Commissioner's view is that information which relates to an individual's private life (i.e. their home, family, social life or finances) will deserve more protection than information about them acting in an official or work capacity (i.e. their public life). In this case, it is clear that the withheld information relates to the individuals' private lives.
47. Given that the letters sent to the patients referred to previous medical treatment they received, the Commissioner is satisfied that the individuals would have a strong expectation that their personal data would be kept confidential by the Health Board and would not be disclosed into the public domain.

#### *Consequences of Disclosure*

48. The Health Board has not submitted any specific representations relating to the consequences of disclosure.
49. In assessing the consequences of disclosure, the Commissioner is mindful of the fact that it is not always possible to quantify or prove the impact that disclosure may have on the data subject. In this particular case, in light of the reasonable expectations of the individuals, the Commissioner considers that disclosure would amount to an infringement into the privacy of the individuals in question and has the potential to cause unnecessary and unjustified distress to the individuals.

#### *General principles of accountability and transparency*

50. There is always some legitimate public interest in the disclosure of any information held by public authorities. This is because disclosure of information helps to promote transparency and accountability amongst public authorities. This in turn may assist members of the public in understanding decisions taken by public authorities and perhaps even to participate more in decision-making processes.

51. In considering such matters, the Commissioner is mindful that whilst an individual may be aware that information does or does not exist because of their involvement in events, it does not follow that the general public is also aware of the existence of that information. Disclosure under the FOIA is a disclosure to the world at large. In a case such as this one, the decision for the Commissioner is whether the information requested should be placed in the public domain. The Commissioner recognises that the complainant has personal reasons for making the request in this case as the content of the letter related to him and the letters were sent to his former patients. However, neither the identity of the applicant nor any purely personal reasons for wanting the requested information is relevant to the consideration of a freedom of information request. FOIA is about disclosure to the public and public interests. It is not about specified individuals or private interests.
52. The Commissioner notes that redacted copies of the letters concerned have been provided to the complainant under the DPA as the information constitutes his own personal data. The Commissioner has been unable to identify any pressing social need for the names and addresses of the patients concerned to be put into the public domain.

*Section 40(2) - conclusion*

53. Taking account of all the circumstances of this case, the Commissioner is satisfied that disclosure of the names and addresses of the patients would be unfair and unnecessary in the circumstances and any legitimate interest of the public does not outweigh the individuals' expectations on how their personal data would be processed and any consequences of disclosure. Therefore the Commissioner is satisfied that the Health Board has correctly relied on section 40(2) of the FOIA to withhold/redact the information in this case.

**Other matters**

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54. Although they do not form part of this decision notice the Commissioner wishes to highlight the following matters of concern:

**Correct access regime**

55. Section 7 of the DPA gives an individual the right to request copies of personal data held about them – this is referred to as a right of subject access. During the course of the his investigation, based on the wording of the requests, the Commissioner asked the Health Board to consider whether any of the requests should have been considered as a subject access request under the DPA rather than a request under the FOIA. The Health Board subsequently accepted that some of the requests fell to be

considered under the DPA. As stated at paragraph 8 of this notice, the Commissioner has considered the data protection elements of the requests separately.

56. Responsibility for applying exemptions and determining whether a request should be considered under the FOIA or the DPA rests with the public authority and not the requestor. The Commissioner encourages public authorities to consider requests under the correct regime in the first instance. In this case the Health Board should have instigated its own procedures for handling subject access requests much earlier in its dealings with the complainant. Ideally, this should have been at the time it received the requests.

### **Internal Reviews**

57. Whilst there is no explicit timescale laid down by the FOIA for completion of internal reviews, the Commissioner considers that they should be completed as promptly as possible. The Commissioner believes that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
58. The Commissioner is concerned that in this case, the complainant expressed dissatisfaction with the Health Board's response to his requests on 17 July 2014 and the Health Board did not provide the outcome of its internal review until 17 February 2015. The Commissioner does not accept that exceptional circumstances existed to justify such a delay, and he therefore wishes to register his view that the Health Board fell short of the standards of good practice by failing to complete its internal review within a reasonable timescale. He would like to take this opportunity to remind the Health Board of the expected standards in this regard and recommends that it aims to complete its future reviews within the Commissioner's standard timescale of 20 working days.

## Right of appeal

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59. 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@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)

60. 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.
61. 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 .....**

**Anne Jones**  
**Assistant Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**