

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 21 August 2017

**Public Authority:** University Hospitals of Leicester NHS Trust  
**Address:** Leicester Royal Infirmary  
Infirmary Square  
Leicester  
LE1 5WW

#### Decision (including any steps ordered)

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1. The complainant has requested the University Hospitals of Leicester NHS trust (the trust) to disclose the executive summary of the data protection audit report carried out by the Commissioner. The trust refused to disclose the information, citing section 31(1)(g) by virtue of section 31(2)(a)-(c) of the FOIA.
2. The Commissioner's decision is that the trust has appropriately relied upon section 31(1)(g) by virtue of section 31(2)(a) and (c) of the FOIA in this case. She therefore does not require any further action to be taken.

#### Request and response

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3. On 18 January 2017, the complainant wrote to the trust and requested information in the following terms:

"The Information Commissioner stated on her website that:

"The ICO has carried out a data protection audit of University Hospitals of Leicester NHS Trust with its consent.

University Hospitals of Leicester NHS Trust has asked us not to publish the executive summary of the audit report."

Therefore please disclose the executive summary of the audit report referred to by the Commissioner".

4. The trust responded on 15 February 2017. It refused to disclose the information relying on section 31(1)(g) of the FOIA, in that sections 31(2)(a)-(c) are engaged.
5. The complainant requested an internal review on 19 February 2017.
6. The trust carried out an internal review and notified the complainant of its findings on 31 March 2017. It stated that it remained of the opinion that section 31(1)(g) of the FOIA applied by virtue of section 31(2)(a)-(c). It also confirmed that it wished to rely on section 36 of the FOIA.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 7 April 2017 to complain about the way his request for information had been handled. Specifically, the complainant stated that the trust had failed to demonstrate and evidence the application of the exemptions cited.
8. The Commissioner will first consider the trust's application of section 31(1)(g) of the FOIA, in that sections 31(2)(a)-(c) are engaged. She will only go on to consider section 36 if it is found that some or all the information is not exempt under section 31.

### **Reasons for decision**

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9. Section 31(1)(g) of the FOIA states that information is exempt from disclosure if its disclosure would or would be likely to prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection (2).
10. Subsection (2) of section 31 of the FOIA states that the purposes referred to in subsection (1)(g) (and (i), although not relevant here) are-
  - (a) the purpose of ascertaining whether any person has failed to comply with the law,
  - (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

There are other purposes outlined in the FOIA, (d) to (j), but these have not been referred to here, as they are not relevant to the determination of this case.

11. The trust has argued that disclosure would be likely to prejudice the Commissioner's ability to regulate the Data Protection Act (DPA), more specifically the ability of the Commissioner to ascertain whether any person has failed to comply with the law, is responsible for improper conduct or whether there are circumstances which would justify regulatory action in pursuance of the DPA.
12. The trust explained that it approached the Commissioner with a view to gaining advice and assistance with its own data protection practices and overall compliance with the DPA. It agreed to a voluntary audit, this was completed but it asked the Commissioner not to publish the executive summary on her website, as she would normally do in such circumstances. It has since considered the potential disclosure of the requested information as a result of this request and another made directly to the Commissioner herself. On both occasions it objected to disclosure under the FOIA – therefore public disclosure, as it felt it had a right to do so considering it was the trust that approached the Commissioner for advice and assistance and it co-operated with the suggested audit voluntarily.
13. It stated that it considers disclosure would be likely to hinder the Commissioner's ability to regulate the DPA if the information was disclosed against its will because this would result in the trust and other data controllers being reluctant to approach the Commissioner herself and/or actively engaged voluntarily in audits. The trust confirmed that it would certainly be reluctant to engage informally and approach the Commissioner with any issues or concerns it may have about its current data protection practices and it considers it is fair to say that other data controllers would also be very reluctant to engage or approach the Commissioner with any issues. The trust advised that disclosure would therefore damage the Commissioner's relationships with its stakeholders and prejudice her ability to carry out her statutory functions in a timely, effective and resourceful manner. If data controllers were less reluctant to engage informally, the Commissioner would have to rely on more formal measures to carry out her statutory functions. More formal measures would be more costly and time consuming and this would effectively be a dis-service to the public.

14. The Commissioner has considered the arguments presented by the trust and, as she would usually expect the trust to engage with the public authority to which the likely prejudice relates, consulted her audit and information access (FOIA requests made to the Commissioner herself) departments. In this case, she is satisfied that section 31(1)(g) of the FOIA applies, in that section 31(2)(a) and (c) are engaged. She will now explain why.
15. The Commissioner relies heavily on the willingness of data controllers to co-operate and actively engage with her to enable her to regulate the DPA effectively and in a timely and cost efficient manner. She encourages data controllers to approach her office with any concerns or issues and will suggest voluntary audits in such circumstances or where she deems appropriate. In this case the trust did approach the Commissioner itself and was happy to engage in a voluntary audit so it could better understand what improvements or requirements were needed in relation to its current data protection practices. Although the Commissioner usually publishes an executive summary of such audits, in this case, the trust asked the Commissioner not to do so. The issue of publication/disclosure of under the FOIA has arisen twice since the audit and the trust has stated on both occasions that it does object.
16. Considering the need for data controllers and other stakeholders to work with the Commissioner, engage informally and voluntarily review and/or improve its data protection practices, the Commissioner considers the trust's clear objection to public disclosure must carry significant weight. The Commissioner does have formal statutory powers to audit certain sectors (central government and the NHS) but she does not have such powers in all sectors, so the reliance on co-operation and engagement is prevalent. It is also equally as important to those sectors that the Commissioner does have statutory powers to audit, as exercising such powers is a last resort. If stakeholders and data controllers were less reluctant to engage voluntarily, share information and agree to informal voluntary audits, it would make the Commissioner's ability to carry out her regulatory functions increasingly difficult and more time consuming.
17. The complainant has raised the point that because the Commissioner routinely publishes executive summaries of voluntary audits on her website and this is the general expectation of data controllers, that disclosure would be unlikely to have the effects described. The Commissioner disagrees. Whilst many summaries are published and this is the general expectation, if a data controller specifically asks for the summary not to be published the Commissioner will consider this objection. If a data controller has approached the Commissioner for help and assistance which resulted in a voluntary audit, the Commissioner would consider such objections to be reasonable. After all, the very fact that a voluntary audit has taken place is as a result of the data

controller approaching the Commissioner rather than the other way round. Whereas, a compulsory audit dependent upon the reasons for it may well be viewed differently.

18. For the above reasons, the Commissioner is satisfied that section 31(1)(g) by virtue of section 31(2)(a) and (c) is engaged in this case. She will therefore now go to consider the public interest test.
19. The trust stated that it acknowledges the public interest in transparency and accountability and in the public being assured that it has effective measures in place to ensure compliance with the DPA. However, in this case it considers the public interest rests in maintaining the exemption. It stated again that if disclosure were ordered it would be reluctant to engage so freely with the Commissioner again in future and that it is fair and reasonable to say that other data controllers would feel the same way. As the Commissioner relies on the co-operation and voluntary engagement of data controllers to perform her role, disclosure would be likely to prejudice her ability to carry out her functions and this is not in the interests of the wider public. Rather it is in the public interest for data controllers to raise issues and concerns at an early stage, seek the advice and assistance of the regulator where appropriate and implement quickly and effectively any improvements or suggestions made.
20. The Commissioner considers there is a public interest in members of the public having the necessary assurance that data controllers are handling personal data in accordance with the DPA and that they have the appropriate mechanisms in place for doing so. She accepts that there is also a public interest in knowing of any problems or issues with a particular data controller and in knowing how such matters are being addressed. However, in this case the Commissioner agrees that the public interest rests in maintaining the exemption. She considers there are stronger public interest arguments in favour of maintaining the Commissioner's ability to carry out her regulatory functions as efficiently and effectively as possible. She has accepted that disclosure would be likely to result in the trust and other data controllers being less willing to engage and co-operate with the Commissioner in future and that this would be likely to prejudice her ability to regulate the DPA. Such consequences are not in the wider interests of the public.
21. The complainant believes the Commissioner should consider subsection 31(2)(b) as well and the trust's application of section 36 of the FOIA. The Commissioner does not consider there is any need to do so, as the requested information is exempt from disclosure in its entirety under section 31(1)(g) by virtue of section 31(2)(a) and (c).

## Right of appeal

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22. 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)

23. 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.
24. 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** .....

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