

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 20 March 2018

**Public Authority:** West Hertfordshire Hospitals NHS Trust  
**Address:** Executive Offices  
Watford General Hospital  
Vicarage Road  
Watford  
Hertfordshire  
WD18 0HB

#### Decision (including any steps ordered)

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1. The complainant has requested the names of three members of staff at West Hertfordshire NHS Hospitals Trust ("the Trust") who were referred to in code form.
2. The Commissioner's decision is that the Trust has correctly applied section 40(2) (third party personal data) of the FOIA.
3. The Commissioner does not require the public authority to take any steps.

#### Request and response

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4. On 24 November 2016, the complainant wrote to the Trust and requested information in the following terms:

*"In your electronic health records you have encrypted codes referring to staff.*

*Please tell me the legal names of these encrypted codes:*

*EET*

*L60*

*GQE".*

5. The Trust responded on 1 December 2016. It stated that the request was too vague and asked the complainant to come back with more information in order to clarify his request.
6. Following a breakdown in communication between the Trust and the complainant, the Trust explained to the Commissioner on 17 May 2017 that the information the complainant was seeking would reveal the identity of three members of staff at the hospital.
7. The Trust then provided a response to the complainant's request on 30 May 2017 and applied sections 40(2) and 41(1)(b) of the FOIA. The following day the complainant requested an internal review.
8. Following an internal review the Trust wrote to the complainant on 18 August 2017. It upheld its original position and cited sections 40(2) and 41(1)(b) of the FOIA as the grounds for withholding the information.

### **Scope of the case**

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9. The complainant originally contacted the Commissioner on 9 February 2017 to complain about the way his request for information had been handled.
  10. The Commissioner asked the Trust to provide its final position. The Trust reiterated to the Commissioner that it considered the requested information should be classed as third party personal data as the names of junior members of staff are associated with the requested codes. It further held that section 40(2) applied to this data.
  11. The Trust also cited section 41(1)(b) of the FOIA in its response and agreed with the principle that the disclosure of the information to the complainant would constitute a breach of confidence.
  12. The Commissioner has firstly considered the Trust's application of section 40(2).
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## Reasons for decision

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### Section 40- Personal Information

13. Section 40 of the FOIA states that:

*“(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.*

*(2) Any information to which a request for information relates is also exempt information if-*

*(a) it constitutes personal data which do not fall within subsection (1), and*

*(b) either the first or the second condition below is satisfied.*

*(3) The first condition is-*

*(a) In a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act could contravene-*

*i. Any of the data protection principles, or*

*ii. Section 10 of the Act (right to prevent processing likely to cause damage or distress).”*

14. The Trust considers that the information requested constitutes the personal data of the individuals concerned and that disclosure would breach the first data protection principle. This is an absolute exemption which means that if the exemption is satisfied there is no additional public interest test to consider.

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

15. In order to rely on the exemption provided by section 40(2), the information being requested must constitute third party personal data as defined by section 1 of the Data Protection Act 1998 (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.
16. In considering whether the information is "personal data", the Commissioner has taken into account her own guidance on the issue. 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, 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.
  17. The withheld information in this case comprises the names of officers below managerial level. The Trust did, however, provide the complainant with a list of job titles the requested codes relate to.
  18. The first, EET, refers to a ward clerk. The second, L60, refers to a ward administrator and lastly GQE refers to an A&E receptionist. The Commissioner accepts that the individuals in this case would be identifiable from the information and therefore accepts that the information in the context of this request is personal data as defined by the DPA.

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

19. Section 40(2) together with the condition in section 40(3)(a)(i) provides an absolute exemption if disclosure of the personal data would breach any of the data protection principles. For the purposes of disclosure under FOIA, it is only the first principle- data should be processed fairly and lawfully- that is likely to be relevant.
20. 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 and the consequences of disclosure to the individuals. She has then balanced against these the general principles of accountability and transparency as well as any legitimate interests which arise from the specific circumstances of the case.
21. In a telephone conversation with the Commissioner on 2 November 2017, the Trust confirmed that all three of the requested codes related to junior members of staff and went back to 2010. The Trust advised the Commissioner that it has had a working assumption in place that the names of staff below managerial level are not disclosed in response to freedom of information requests.

22. In light of the above, the Trust contends that the members of staff in this case would have had no reasonable expectation that their names would be disclosed in response to this request. In line with the decision notice issued on the Chief Constable of Cheshire Constabulary under the reference FS50604580<sup>1</sup>, the Commissioner believes it is reasonable to expect that a public authority would disclose more information relating to senior employees than more junior ones.
23. The Commissioner is prepared to accept that a possible consequence of disclosing staff members' personal data is that the three individuals in question could be contacted directly by members of the public. This has the potential to disrupt the existing communication channels in place at the Trust.
24. The Commissioner appreciates that the complainant may have a personal interest in disclosure of the withheld information based on the context of the request. During the time of the investigation process, there had been a recent inquest held at which the requested codes were shown.
25. However, the Commissioner does not consider that it is necessary for the names of junior members of staff working with the Trust to be disclosed in order to meet the legitimate interest in accountability.
26. In conclusion, the Commissioner is satisfied that the junior members of staff would have a reasonable expectation in the circumstances of this case, based upon established custom and practice, of their names being redacted from any disclosures made under the FOIA.
27. The Commissioner does not consider that any legitimate interests of the public in accessing the information are sufficient to outweigh the data subjects' rights to privacy. As the Commissioner has decided that the disclosure would be unfair, and therefore in breach of the first principle of the DPA, she has not gone on to consider whether there is a Schedule 2 condition for processing the information in question.
28. The Commissioner therefore upholds the Trust's application of section 40(2) to the withheld information.

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<sup>1</sup> Para 18, <https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1560727/fs50604580.pdf>

### **Section 41- Information provided in confidence**

29. The Commissioner is satisfied by the Trust's application of section 40(2) of the FOIA so therefore she will not be considering its application of section 41(1)(b).

### **Conclusion**

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30. In conclusion, the Commissioner accepts that, although the complainant may have a strong personal interest in the withheld information, there is no wider legitimate public interest in disclosing it which would outweigh the likely distress caused to the data subjects.
31. The Commissioner has therefore decided that the Trust was entitled to withhold the information under section 40(2), by way of section 40(3)(a)(i). As the Commissioner has decided that the disclosure of this information would be unfair, and therefore in breach of the first principle of the DPA, she has not gone on to consider whether there is a Schedule 2 condition for processing the information in question.

## Right of appeal

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32. 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)

33. 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.
34. 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 .....**

**Alun Johnson**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**