

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 5 July 2019

**Public Authority:** Parliamentary and Health Service Ombudsman (PHSO)

**Address:** PHSO CityGate  
47-51 Mosley Street  
Manchester  
M2 3HQ

### Decision (including any steps ordered)

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1. The complainant has requested the PHSO to disclose the name of each senior member of staff and their job title in the organisation. The PHSO disclosed the requested information for the majority, but refused to disclose the names of its in house clinical advisors citing section 40 of the FOIA.
2. The Commissioner's decision is that the PHSO is entitled to withhold the names of its in house clinical advisors in accordance with section 40 of the FOIA. She therefore does not require any further action to be taken.

### Request and response

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3. On 7 December 2018, the complainant wrote to the PHSO and requested information in the following terms:
  - "1. Please provide the name of each senior member of staff and their corresponding job title. Please also state the pay grade for each. Previously, senior pay grades were '0', '1' and '2'.
  2. Please provide the job title of each unfilled senior position. Where interviews have been carried out for positions as yet unfilled, please state the date(s) of the interviews.

3. Please indicate all new senior staff employed since 10 September 2018.
4. If you have used recruitment agencies to recruit senior staff since 10 September 2018, please provide their names.”
4. The PHSO responded on 9 January 2019. It provided the requested information but refused to disclose the names of grade 2 staff and the name of a senior lawyer and solutions architect, which fitted within the scope of question 3 of the request under section 40 of the FOIA.
5. The complainant requested an internal review on 10 January 2019. He stated that in his view the names of grade 2 staff should be disclosed. The complainant also raised some further queries with the PHSO.
6. The PHSO completed its internal review on 31 January 2019 and notified the complainant of its findings. It decided to disclose the name of the solutions architect and the senior lawyer, previously redacted. But confirmed that it remained of the opinion that the names of clinical advisors is exempt from disclosure under section 40 of the FOIA.

### **Scope of the case**

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7. The complainant wrote to the Commissioner on 14 February 2019 to complain about the way his request for information had been handled. He stated that the PHSO had disclosed the names of senior staff but refused to disclose the names of its clinical advisors, citing section 40 of the FOIA for its reasons for doing so. He believes the information should be disclosed. He referred to the PHSO’s argument that disclosure could lead to harassment and intrusion and stated that no evidence has been presented to support this. The complainant also stated that he has only asked for their names so there would be no way of connecting any particular advisor to a particular case or decision. He also confirmed that the PHSO had a staff turnover of 43% in 2017/18. He considers disclosure of the withheld information would allow members of the public to assess the turnover of senior staff and to draw important conclusions on how effectively the organisation is being managed.
8. The Commissioner considers the scope of her investigation to be to establish whether the PHSO is entitled to withhold the names of its clinical advisors under section 40 of the FOIA.
9. To clarify (and if you refer to the wording of question 1 of the request) the Commissioner is considering the disclosure of the names of employed/staff clinical advisors. According to the table disclosed, 8 were withheld. The PHSO has confirmed that it has over 900 clinical advisors

on its books but the majority are individually contracted to consider a particular case or an individual piece of work.

## Reasons for decision

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### Section 40 personal information

10. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
11. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
12. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
13. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

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

14. Section 3(2) of the DPA defines personal data as:

*"any information relating to an identified or identifiable living individual"*.

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

17. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
18. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subjects. The names of the data subjects quite obviously is information that both relates to and identifies those concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
19. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
20. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

21. Article 5(1)(a) of the GDPR states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

22. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
23. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

### **Lawful processing: Article 6(1)(f) of the GDPR**

24. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and"*

*freedoms of the data subject which require protection of personal data, in particular where the data subject is a child*<sup>2</sup>.

25. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
26. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

#### *Legitimate interests*

27. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
28. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

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<sup>2</sup> Article 6(1) goes on to state that:-

*"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".*

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".*

29. The complainant stated that the public has a right to know how frequently the PHSO is changing senior staff in its efforts to provide a satisfactory service. He believes the requested information will make it easier for members of the public to find out the full facts regarding PHSO turnover, which in 2017/18 was 43% and draw their own conclusions on how effectively the organisation is being managed.
30. The Commissioner considers there may be legitimate interests in knowing who the PHSO uses when clinical advice is required. In some of its cases clinical advice is required to enable the PHSO to consider the merits of the complaint and decided whether it is justified or unjustified. There is a legitimate interest in knowing who has provided such expert advice and in them being held accountable for that.

*Is disclosure necessary?*

31. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
32. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

33. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
34. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.

35. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
36. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
37. The PHSO has said that there is a real risk of harassment and abuse to its clinical advisors should their identities be disclosed. It stated that this can and does cause harm and distress to those individuals who have an expectation of confidentiality as per their contract with the PHSO. The disclosure of identities further risks frustrating its lawful purpose as a public service ombudsman as it relies on expertise from NHS clinicians who are under no obligation to provide professional peer review and advice to its investigations.
38. It stated that this view has been previously supported by the Commissioner in the following case:

[https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560287/fs\\_50576766.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560287/fs_50576766.pdf)

The PHSO confirmed that the Commissioner was satisfied in this case that there is a real risk that clinical advisors would be vulnerable to harassment either by being directly contacted by those dissatisfied with the PHSO's findings or by internet campaigns. The PHSO said that it is not simply that this would be distressing, it could also have an impact on the ability of the clinical advisor to perform their other NHS duties. As a consequence the clinical advisors would have a reasonable expectation that their names would only be made available on a case by case basis.

39. The PHSO commented that although there is some legitimate interest in disclosing this information it does not outweigh the potential consequences for the advisor. It stated that as an ombudsman that handles complaints against health organisations it might ask for advice about complaints from someone with specialist knowledge in the relevant area (for example psychologist, midwife or obstetrician). It engages an extensive range of clinical advisors who are all registered practising NHS health professionals on a draw down basis to provide independent knowledge. It stated that there are about 900 independent clinical advisors. Its current policy is that the clinical advisors will remain anonymous to safeguard their objectivity and privacy so that they are not exposed to public pressure and harassment.

40. It went on to say that the contracts with its clinical advisors state:

" your advice and your identity may be disclosed in part or full to the complainant and organisations/staff being investigated concerned."

This means that the advice and identity of the clinical advisors may be shared with the person who makes the complaint and the organisation that the complaint is about. The complainant may receive the names and advice of clinical advisors in the draft report, which would later be anonymised in the final report. But the complainant is advised that the report is confidential and by law they (and the organisation complained against) cannot make the contents public.

41. The Commissioner notes it is the PHSO's policy not to make public the identity of its clinical advisors, whether in connection with a particular complaint or investigation or not. She therefore accepts that the clinical advisors' expectations will be that their identity will remain private and confidential unless they consent to its public disclosure or there are exceptional circumstances. She acknowledges that on occasions the identity of the clinical advisor and the advice they provide is made known to the complainant and the organisation complained against. But notes that this is only in the draft report and both are informed that they are not permitted to make any of the contents (including the identity of the clinical advisor) public. The finalised report is then anonymised. The Commissioner considers this 'need to know' form of disclosure is wholly different to disclosure under the FOIA. Disclosure under the FOIA is to the world at large for anyone to see and with no restrictions. Once it is disclosed under FOIA both the data subject and the PHSO has very little control over it.

42. With regards to their seniority, it is acknowledged that the more senior positions in a public authority should expect more transparency and accountability. However, the Commissioner is satisfied that clinical advisors are not decision makers within the PHSO even though the advice they provided will often be very influential. Although the role may attract a senior grade this reflects their specialism and expertise rather than their responsibility for decision making. They do not perform a public facing role.

43. It is noted that in this particular case the request is not asking for the name of a clinical advisor in connection with a particular case (one of the reasons given by the complainant in support of disclosure). This is therefore different to the request that was considered in the decision notice referenced in paragraph 38 above. However, the Commissioner is wary of the fact that disclosure under FOIA is to the world at large. It is therefore available to anyone else that may request it. The in house clinical advisors will inevitably be used before those that are not in



house, unless the in house advisors do not have the relevant expertise. The information already disclosed to the complainant lists the area of expertise for those in house advisors. If it is known in a given case that a clinical advisor specialising in nursing or psychiatry was used (and there are in house advisors with those areas of expertise), and the information requested here was disclosed, it would be possible to link or assume a link between specific cases and a particular advisor.

44. The Commissioner accepted in the case referred to in paragraph 38 that there is a real risk that clinical advisors would be vulnerable to harassment either by being directly contacted by those dissatisfied with the PHSO's findings or by internet campaigns. In this case the PHSO explained further that this has included looking for, collating and publishing information such as presentations they have delivered in the past and where they work with GMC numbers compiling a mosaic of information. Such harassment would cause them distress and upset and potentially impact on their ability to carry out their roles for the NHS.
45. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
46. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

## Right of appeal

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47. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

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

48. 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.
49. 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**