

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 September 2020

Public Authority: Gloucestershire Hospital NHS Foundation Trust
(the Trust)

Address: Cheltenham General Hospital
Sandford Road
Cheltenham
GL53 7AN

Decision (including any steps ordered)

1. The complainant has requested information relating to complaints about a named doctor and deaths statistics on a ward the named doctor was associated with. The Trust refused to confirm or deny whether some of the requested information was held, it withheld some of the requested information under section 40(2) FOIA and confirmed that it did not hold some of the requested information under section 1(1)(a) FOIA.
2. The Commissioner considers that the Trust correctly applied the exemptions at section 40(2) and 40(5) FOIA and that on the balance of probabilities, the remaining information requested is not held by the Trust under section 1(1)(a) FOIA.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 12 September 2018 the complainant requested information of the following description:
 - "a. In conjunction with ID 4564 can the Trust's complaint department now search for any complaints where [named doctor] is listed as the 'investigation lead'.
 - b. How many doctors and how many Consultants in the employ of the Trust as of 1 January 2018 have been a) disciplined and how many b) dismissed, as at the date of this reply.
 - c. By 12 month periods, how many patients have died on

Woodmancote Ward since [named doctor] became Head Ward Doctor there? The same statistics please since she moved onto the ward in any doctoring capacity and by 12 month periods, those for the ward before she moved onto it.

d. Please state the number of doctors and of consultants working on Woodmancote Ward in January 2017 whose professional registrations bore restrictions of any kind, or do now."

5. On 19 November 2018 the Trust responded. It applied section 14 FOIA to parts a and c of the request as it considered these to be vexatious. It confirmed that the answer was 'none' for parts b and d of the request.
6. The complainant requested an internal review on 21 November 2018 in relation to the Trust's response to parts a and c of the request. The Trust sent the outcome of its internal review on 14 February 2019. It revised its position, it provided the death statistics requested at part c but refused to confirm or deny whether it holds the information requested at part a under section 40(5) FOIA.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The complainant confirmed that the scope of part 'a' of the request is for complaints made about [named doctor] which are five years and older. He also confirmed that it is the Trusts refusal to confirm or deny whether it holds the information requested at part 'a' under section 40(5) FOIA that he now wished the Commissioner to investigate. The complainant also confirmed that he is not satisfied with the disclosure in relation to part 'c' of the request as this asked for death rate statistics for both before and after [named doctor] moved to the ward. As he does not know the precise date the doctor moved to the ward the figures provided have not been separated out as he had requested.
9. During the course of the Commissioner's investigation, the Trust located some information that could fall under part 'c' of the request but withheld this under section 40(2) FOIA.
10. The Commissioner has considered whether the Trust has correctly applied section 40(5) FOIA to part 'a' of the request and whether it has correctly applied section 40(2) FOIA to the information located in relation to part 'c' and whether there is further recorded information held under section 1(1)(a) FOIA other than this or that which has already been provided.

Reasons for decision

Part 'a' – section 40(5)

11. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.
12. Therefore, for the Trust to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of part 'a' of the request the following two criteria must be met:
 - * Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - * Providing this confirmation or denial would contravene one of the data protection principles.
13. Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?
14. Section 3(2) of the DPA 2018 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. 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.
17. In this case confirming or denying whether the requested information is held would disclose whether or not the named doctor had been the subject of a complaint. This would therefore disclose personal data relating to a living and identifiable individual.
18. For the reasons set out above the Commissioner is satisfied that if the Trust confirmed whether or not it held the requested information this would result in the disclosure of a third party's personal data. The first criterion set out above is therefore met.
19. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not

automatically prevent the Trust from refusing to confirm whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.

20. The Commissioner agrees that the most relevant data protection principle is principal (a).

Would confirming whether or not the requested information is held contravene one of the data protection principles?

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

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

23. In the case of a 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 – or as in this case the public authority can only confirm whether or not it holds the requested information - if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), be fair, and be transparent.

Lawful processing: Article 6(1)(f) GDPR

24. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.

25. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows: -

"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"¹.

¹ 1 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 2018) provides that: -

26. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under 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 confirmation as to whether the requested information is held (or not) 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.

27. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

(i) Legitimate interests

28. In considering any legitimate interest(s) in confirming or denying whether the requested information is held under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

29. In this case the requester has a significant interest in the Trust confirming or denying whether the requested information is held as it relates to a doctor who treated one of his relatives.

"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".

30. The Trust recognises that there is a wider public interest in understanding whether medical staff have been the subject of complaints and ensuring their fitness to practice.
31. The Commissioner does consider that there is a legitimate interest in the confirming or denying whether the requested information is held.

(ii) Is confirming whether or not the requested information is held necessary?

32. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
33. In this case the Trust has argued that there are alternative procedures for the complainant to raise his concerns. In particular the Trust has directed the complainant to the General Medical Council (GMC).
34. The Commissioner does consider that there is an alternative route for the complainant to raise his concerns regarding the named doctor. However confirming or denying whether the requested information is held would be necessary to meet the wider legitimate interests in disclosure identified by the Trust.

(iii) Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

35. It is necessary to balance the legitimate interests in confirming or denying whether the requested information is held against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of confirming or denying whether the requested information is held. For example, if the data subject would not reasonably expect that the Trust would confirm or deny whether the requested information is held to the public under the FOIA in response to the request, or if such confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirmation or denial.
36. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that confirmation or denial 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; and
 - the reasonable expectations of the individual.
37. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that the Trust would not confirm or deny whether the requested information is held. 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.
38. It is also important to consider whether confirmation or denial would be likely to result in unwarranted damage or distress to that individual.
39. In this case the Trust has explained that the data subject would not expect the Trust as their employer to confirm or deny whether complaints had been made.
40. The Trust provided the Commissioner with some background information regarding other FOIA requests and correspondence with the complainant regarding the named doctor. As a result the data subject is feeling harassed and confirmation or denial in this case is likely to cause further damage and distress.
41. The Trust again reiterated that it is open to the complainant to refer his concerns regarding the named doctor to the GMC.
42. 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.
43. 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.

Part 'c' – section 40(2)

44. 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.

45. In this case the relevant condition is contained in section 40(3A)(a)². 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').
46. 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.
47. 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?

48. Please see paragraphs 14-16 above explaining how personal data is defined.
49. In this case the withheld information is the date on which the Trust first has a record of the named doctor treating a patient on the specified ward.
50. The Commissioner is satisfied that the information relates to the data subject. She is satisfied that this information both relates to and identifies the named doctor concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
51. 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.
52. The most relevant DP principle in this case is principle (a).

² As amended by Schedule 19 Paragraph 58(3) DPA.

Would disclosure contravene principle (a)?

53. 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".

54. 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.

55. 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

56. 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"³.

³ 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".

57. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, please see paragraphs 26-27 above.

Legitimate interests

58. In considering any legitimate interest(s) in the disclosure please see paragraph 28 above.

59. In this case the requester has a significant interest in the withheld information as it relates to a doctor who treated one of his relatives.

60. The Trust recognises that there is a wider public interest in disclosure of the death statistics on the Ward and therefore provided this information to the complainant for the years 2016-2017 and 2017-2018. It recognises that there is a wider public interest surrounding accountability and hospital standards. It does not however consider that there is a legitimate interest in disclosure of death statistics alongside when a particular doctor worked on a ward.

61. The Commissioner does consider that there is a legitimate interest in the requested information, particularly if there are concerns regarding the standards of a doctor who has treated patients on a ward.

Is disclosure necessary?

62. Please see paragraph 32 above regarding the test for necessity.

63. The Trust does not consider that the test for necessity is met. It argued that the test for necessity has been considered by the High Court, which found that there must be a pressing social need for any interference with privacy rights and that the interference must be proportionate. The only information located is the Trust's record of the named doctor having first treated a patient on the Ward. The Trust does not consider it addresses the issues raised regarding the doctor's status on the Ward (which will be addressed under section 1(1)(a) FOIA below) nor does it represent a definitive start and end date on the Ward. Furthermore the doctor would have been treating patients on other Wards at the time as well.

64. Whilst the information does not confirm a date on which the named doctor became a 'Head Ward Doctor' on the Ward, it is the recorded information held by the Trust indicating when the doctor first treated a patient on the Ward and therefore goes some way to meeting the

legitimate interests identified alongside the Trust's disclosure of the death statistics. Disclosure would therefore be necessary in this case.

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

65. Please see paragraphs 35-38 regarding balancing the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms.
66. In this case the Trust has explained that the data subject would not expect the Trust to disclose the requested information alongside the requested death statistics.
67. The Trust provided the Commissioner regarding some background information regarding other FOIA requests and correspondence with the complainant regarding the named doctor. As a result the data subject is feeling harassed and disclosure in this case is likely to cause further damage and distress.
68. The Trust again reiterated that it is open to the complainant to refer his concerns regarding the named doctor to the GMC.
69. 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.
70. 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.

Part 'c' – section 1(1)(a)

71. Section 1(1)(a) of FOIA states that, "Any person making a request for information to a public authority is entitled – to be informed in writing by the public authority whether it holds information of the description specified in the request". Section 1(1)(b) of FOIA states that, "If that is the case, to have that information communicated to him".
72. The Trust has explained that although Consultants can have 'base' wards (ie wards which they regard as their 'base'), they are not formally attached to a ward and can treat patients across different wards. These informal 'base wards' can change frequently for many reasons. It is possible for Consultants to make personal arrangements with other Consultant colleagues to exchange base wards due to operational

pressures, decisions and professional preferences. Additionally, the care of the elderly wards (COTE wards) themselves can change geographical location within the Trust, medical staff can look after COTE patients located on non-COTE wards, and will also routinely cover leave and absences of Consultant colleagues on other wards. Service reconfigurations also require changes in staffing and changes of the location in which those colleagues are working.

73. The Commissioner's understanding is therefore that Consultants are not formally attached to one particular ward.
74. The Trust also clarified that the role of "Head Ward" doctor does not exist and a ward is not dedicated to any one Consultant. The Trust is therefore clear that it would not hold recorded information regarding the date on which the named doctor became 'Head Ward Doctor' on the specified ward as this role does not exist.
75. The complainant does consider the post of 'Head Ward Doctor' exists and that this is occupied by a nominated individual. He has said that this is based on a telephone call in May 2020 and correspondence he has had with the Trust relating to other FOIA requests.
76. Based upon the Trust's submissions, it has confirmed that COTE wards are not dedicated to one ward consultant, whether a 'Head Ward' doctor or a nominated 'Ward Consultant'. Whilst the Commissioner acknowledges the complainant's position that there is a named dedicated Ward Consultant based upon his previous contact with the Trust, the Trust's position has been made clear to the Commissioner as the asset owners and following further searches conducted following the Commissioner's investigation enquiries. Despite the conflicting position of the Trust and the complainant, the Commissioner can only conclude on the balance of probabilities, that further recorded information is not held under section 1(1)(a) FOIA, other than that which has now been provided to the complainant or which the Commissioner has found to be exempt under section 40(2) FOIA.

Right of appeal

77. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

78. 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.
79. 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.....

Gemma Garvey

Senior Case Officer

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