

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 September 2023

Public Authority: North East Ambulance Service
NHS Foundation Trust

Address: Ambulance Headquarters
Bernicia House
The Waterfront
Goldcrest Way
Newburn Riverside
Newcastle upon Tyne
NE15 8NY

Decision (including any steps ordered)

1. The complainant has requested information regarding an investigation commissioned by the North East Ambulance Service NHS Foundation Trust (the Trust). The Trust provided some of the information but withheld other information citing sections 21, 41 and 40(2) of FOIA for doing so.
2. The Commissioner's decision is that the Trust cited section 41 of FOIA appropriately for the most part and that the information should not be released, except for the majority of part three of the request. However, he has decided that the Trust cited section 21 incorrectly and the exemption is not engaged. He has only considered section 40(2) in relation to part three of the request where it is not engaged for reasons set out in this decision.
3. The Commissioner requires the Trust to take the following steps to ensure compliance with the legislation.

- Disclose the 'Terms of Reference' as set out on pp 5-11 of the report.
 - Disclose the 'Recommendations' on pp 187-190 with the exception of paragraph 2 on p.187.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 5 February 2023 the complainant wrote to the Trust and requested information in the following terms:

"I write to you, requesting information under the provisions of the FOIA 2000. My request is for the following information, which I am aware is held by you the public body. I respectfully request the following information from an Investigation by [redacted names] in 2020, who were commissioned by the trust to investigate a number of concerns raised by whistleblowers at the trust.

- 1) The terms of reference for the [redacted names] investigation
- 2) The conclusions or finding of the said investigation
- 3) The recommendations of the said investigation
- 4) Was the said investigation shared with the regulators, the CQC and NHSE
- 5) If the investigation was shared with the regulator, the CQC and NHSE, what date (s) was the investigation shared and with whom.
- 6) Should the NEAS be unable to provide the above, a full redacted copy of the investigation is requested..."

6. The Trust responded on 1 March 2023 to each part as follows:

- 1) Withheld under section 21 of FOIA (information accessible by other means).
- 2) Withheld under sections 21, 41 (information provided in confidence) and 40(2) of FOIA (personal information).
- 3) Withheld under sections 21, 41 and 40(2) of FOIA.

- 4) Response provided.
- 5) Response provided.
- 6) Withheld under section 41 of FOIA.
7. On 2 March 2023 the complainant requested an internal review.
8. However, for unknown reasons there was a failure in transmission when the Trust tried to provide its internal review on 28 April 2023. Therefore the complainant did not receive it until 9 August 2023. The review maintained the Trust's position.

Scope of the case

9. The complainant contacted the Commissioner on 27 June 2023 to complain about the way their request for information had been handled.
10. The Commissioner noticed that the Trust had not provided a promised internal review via the route used by the complainant and rang the Trust to query why this was. The Trust was unaware that the complainant had received neither the letter it sent on 31 March 2023 extending the time it required to carry out an internal review nor the review itself. He asked the Trust to provide the internal review letter. Although the failure in transmission should not have occurred, the Trust stated that they were both sent to the email address displayed on the letters.
11. Though the complainant appeared to accept that the letter sent by the Trust had been sent as per the stated date, they did not accept that the letter the Trust had sent extending the time taken to carry out the review had been sent as dated. They wrote to the Commissioner asking that this aspect be investigated.
12. The Commissioner explained that his regulatory powers do not extend to investigating alleged criminal offences under the Forgery and Counterfeiting Act 1981 because it is outside the scope of his role and powers.
13. The Commissioner considers that the scope of his investigation is to consider the Trust's citing of sections 21, 41 and 40(2) of FOIA to the withheld information.

Reasons for decision

Section 41 – information provided in confidence

14. Section 41(1) of FOIA provides that –

“(a) Information is exempt information if it was obtained by the public authority from any other person (including another public authority); and, (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person”.

15. The Commissioner’s advice on section 41 states that

“information will be covered by Section 41 if –

- it was obtained by the authority from any other person,
- its disclosure would constitute a breach of confidence.
- a legal person could bring a court action for that breach of confidence, and
- that court action would be likely to succeed.”¹

16. The Trust has cited this exemption for parts two, three and six of the request. The exemption doesn’t -

“cover information the authority has generated itself, although it may cover documents (or parts of documents) generated by the public authority if these record information provided in confidence by another person...”

Was the information obtained from any other person?

17. Section 41(1)(a) states that the information must have been obtained from “any other person”.

18. Although the Trust has generated the report itself, the reason it was generated in the first place is because of concerns raised by another person. Its content contains witness statements and the conclusions and findings reached were informed by these witness statements.

19. Parts two and six are engaged by the exemption at section 41 of FOIA.

¹ [information-provided-in-confidence-section-41.pdf \(ico.org.uk\)](https://ico.org.uk/information-provided-in-confidence-section-41.pdf)

20. However, the Commissioner does not accept that the information requested at part three of the request (recommendations) was correctly withheld under section 41 as it was not provided by any other person and can (with the exception of one paragraph) be disclosed without breaching confidentiality.

Would disclosure constitute an actionable claim for breach of confidence

21. The usual test for section 41 cases is set out in the case of *Coco v Clark* [1969] RPC 41 which sets out three elements which must be present in order that a claim can be made. According to the decision in this case a breach of confidence will be actionable if:

- the information has the necessary quality of confidence;
- the information was imparted in circumstances importing an obligation of confidence; and
- there was an unauthorised use of the information to the detriment of the confider.

22. The Trust explains that the investigators had “made a commitment to everyone” that they spoke to that their personal information would be kept confidential. It was explained to the complainant that:

“... all witnesses are referred to by a witness identification key and are not identified by name. The witness identification key is known only to the two investigators and the signatories of this letter. It will not be shared with anyone else”.

23. The investigation was conducted -

“under the Freedom to Speak Up: Raising Concerns (whistleblowing) Policy for the NHS and that all witnesses who participated in this investigation have the right to confidentiality unless there is a requirement to disclose by law or court order”.

For this reason the investigator advised that publishing a copy of the report “would constitute a breach of confidence to all those individuals to whom [they] made a promise and commitment during [their] investigation”.

24. However, for that claim to be ‘actionable’ within the meaning of section 41(1)(b) of FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed.

25. The Trust provided argument about some of the witnesses that cannot be reproduced here. Publishing the report -

“even if heavily redacted – will have two serious consequences.

1. Those individuals identified will have cause to take action that a confidence has been broken and are likely, in at least one or two cases, to do so because of the potential harm this will have on both other proceedings and their individual reputation and integrity.

2. This would seriously harm any future Freedom to Speak Up cases. In particular, if others saw that a promise of confidence was not kept and an investigation is published, it would very likely have the effect of preventing future whistle-blowers from coming forward”.

Does the information have the necessary quality of confidence?

26. In order for information to have the necessary quality of confidence, it must be more than trivial and not otherwise accessible.
27. The Commissioner has been provided with the withheld information. Having seen it, he considers that the information is serious and not otherwise accessible which gives it the quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

28. The complainant contends that,

“there is a strong public interest in the said document being placed into the public domain. This investigation cost the taxpayer over £35,000. Given its content, the public disclosure of it is strongly weighted. Especially given its significance to matters already in the public domain and the degree of public interest”.

29. They also raise issues about the culture in place at the Trust and whether it was meeting its statutory obligations.
30. The Trust has stressed that there is an obligation of confidence because the witnesses were promised confidentiality unless legally ordered to disclose the information.
31. Its view is that witnesses could be identified if the information was released, despite not being named and being given a witness identification key. The Trust considers that anyone with a knowledge of the organisation is likely to be “able to identify individuals on the report...quite easily”.

32. In the absence of a public interest defence for the Trust disclosing information where the witnesses had been promised confidentiality, the Commissioner is satisfied that disclosure of the majority of the report would be an actionable breach of confidence that would be likely to win.
33. The Commissioner accepts that the exemption is engaged at part two of the request. He has also decided that the majority of the information requested at part six of the request should remain withheld under section 41 of FOIA because it wouldn't exist without the witness testimony.
34. Whilst the terms of reference (part three) were not explicitly stated as being withheld under section 41 the Commissioner is of the view that they would not engage the exemption as they were not provided by "any other person".

Section 40 personal information

35. The Trust has cited section 40(2) of the FOIA with regard to parts two and three of the request. However, the Commissioner does not propose to look at this exemption in relation to part two as he has already decided that it should be withheld under section 41.
36. 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.
37. 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 UK General Data Protection Regulation ('UK GDPR').
38. 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.
39. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

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

Is the information personal data?

40. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual".
41. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
42. 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 more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
43. 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.
44. The withheld information as a whole contains witness input which the Commissioner accepts could lead to the identification of individuals. However, the personal data exemption was not cited for the report (investigation) as a whole.
45. The Commissioner has concluded that part three of the request does not contain information that could lead to the identification of any individual.
46. In the circumstances of this case, having considered the withheld information, the Commissioner is not satisfied that the information relates to any individual. This information therefore does not fall within the definition of 'personal data' in section 3(2) of the DPA.

Section 21 – information accessible to applicant by other means

47. Section 21 of FOIA provides that information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.
48. The Trust refused to provide the requested information at parts one, two and three of the request under section 21 of FOIA. However, as the Commissioner has already decided that the information held under part two of the request should remain withheld under section 41 of FOIA, he does not propose to consider it further.
49. The Trust claims that the terms of reference for the investigation are reasonably accessible to the complainant for reasons that cannot be disclosed here but a letter was sent to the complainant which included the following: "The Trust's values and behaviours framework were utilised to assist in the assessment of findings and support the

conclusions and recommendations.” Its refusal to provide the information was based on the specific circumstances of the applicant/complainant.

50. The Trust states that its values have been “refreshed since 2020. But are still broadly the same and available on its website via this link - [Our vision and values - North East Ambulance Service - NHS Foundation Trust \(neas.nhs.uk\)](https://www.nhs.uk/about-us/our-organisation/our-vision-and-values). It argues that this is accessible to the complainant.
51. Conversely, the complainant argues that the letter referred to (14 May 2020) does not contain the requested information at part one. Their view is that the letter is “ambiguous and obfuscates any clear and meaningful information in relation to the investigation terms of reference...”
52. Although the Commissioner understands that the Trust’s view is that the terms of reference were provided to the complainant in May 2020, this was sent approximately 33 months before the request. The information was very succinct and directed the complainant to “broadly the same” values which is inadequate. The information in the public domain does not match what the applicant asked for. The same reasons would apply to the recommendations requested at part three.
53. Having seen the withheld information, the Commissioner does not accept that section 21 of FOIA applies to the information requested at parts one or three of the request.
54. As section 21 is not engaged, the Trust must release the information requested at part one and part three of the request (with the exception of one paragraph which is exempt under section 41 of FOIA) as set out at the beginning of this decision notice.

Other matters

55. The length of time it takes a public authority to conduct an internal review cannot be considered in a decision notice because it is not a formal requirement under the FOIA. Where a public authority chooses to do so, the code of practice established under section 45 of the FOIA sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales.
56. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 working days in exceptional circumstances.

57. The complainant asked for an internal review on 2 March 2023 and the Trust produced an internal review on 28 April 2023. However, as a result of unknown factors, the review was not received at that time. It was not received until August 2023. The Trust has accepted that this occurred. The Commissioner expects the Trust to ensure that this does not occur in future, as far as this is possible.

Right of appeal

58. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

59. 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.
60. 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

Janine Gregory
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF