

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 January 2024

Public Authority: Essex Partnership University NHS Foundation Trust

Address: The Lodge
Lodge Approach
Runwell
Wickford
Essex
SS11 7XX

Decision (including any steps ordered)

1. The complainant has requested information relating to specific doctors. Essex Partnership University NHS Foundation Trust, ("the public authority") refused to confirm or deny whether the information is held, citing section 40(5) (personal information) of FOIA.
2. The Commissioner's decision is that section 40(5) has been applied correctly.
3. The Commissioner does not require further steps.

Request and response

4. On 11 August 2023, the complainant wrote to the public authority and requested:

"I have some questions in relation to [Name of doctor one]

1. How many complaints were made to you, in total, about this doctor? To the GMC (of which you are aware)?

2. The nature of the complaints.

3. When was the first complaint made?

4. Were there any deaths due to this doctor's incompetence?

5. How many of this doctor's patients died a) while a patient and b) within one year of being treated by them?

6. Did this doctor or hospital/trust ever go to court as a result of their work as a doctor; if so, how many times?

7. If the doctor did go to court, please provide the court name/s and case number/s.

I repeat all the questions above in relation to [Name of doctor two]."

5. The public authority responded on 11 September 2023. It refused to confirm or deny whether the information was held, in relation to either doctor named in the request, for questions 1-3, citing section 40(5B)(a). For questions 4-7, the public authority refused to comply, citing section 12(1).
6. The complainant requested an internal review on 27 September 2023. The complainant pointed to a previous decision of the Commissioner's¹ in support of why the public authority's application of section 40(5B)(a) was inappropriate. They also refuted the public authority's application of section 12 and clarified, in relation to questions 6 and 7, they were only interested in court appearances in relation to 'unnatural' patient deaths.

¹ [ic-218871-n6b8.pdf \(ico.org.uk\)](#)

7. The public authority provided its internal review outcome on 27 September 2023. It changed its response slightly, clarifying that section 40(5B)(a) applied to the request in its entirety but, in the alternative, section 12(2) still applied to questions 4-7.
8. It also clarified that:

“the Trust is mindful of and has applied in principles explained in decision IC-218871-N6B8. However, a key factor in that case was that it related to a clinician where the GMC register recorded that there were conditions on the individual’s licence to practise. That is not the case here.”

Scope of the case

9. The complainant contacted the Commissioner on 24 October 2023 to complain about the way their request for information had been handled.
10. The complainant clarified:

“I wish to challenge their use of FOIA 40(5B)(a) and 12(2) to refuse answering my questions 5-7... I am not disputing their response to questions 1-4.”
11. Therefore, the Commissioner considers that the scope of his investigation is to determine whether the public authority was correct in its handling of questions 5-7.
12. The Commissioner will first consider the public authority’s application of 40(5B)(a) and whether it was correct to neither confirm nor deny the information requested in questions 5-7 was held.
13. Depending on his findings, the Commissioner may go onto consider the public authority’s application of section 12(2) also.

Reasons for decision

Section 40(5B)(a) – personal information

14. Section 1(1)(a) of FOIA states that a public authority must confirm whether or not it holds information that’s been requested. This is what’s known as ‘the duty to confirm or deny.’
15. However, there are exemptions from the duty to confirm or deny. When applying one of these exemptions, a public authority must consider the

consequences of providing both responses, regardless of whether or not the information is actually held.

16. For example, if a public authority doesn't hold the requested information, it should consider what would be revealed by denying it held the information but also by confirming it held the information. Neither confirm nor deny responses should be used consistently, regardless of whether the requested information is held, to avoid any inferences being made.
17. Under section 40(5B)(a)(i) of FOIA a public authority is not obliged to comply with section 1(1)(a) if simply confirming whether or not it holds the requested information would contravene any of the principles relating to the processing of personal data that are set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
18. In order for the public authority to correctly rely on section 40(5B)(a)(i), the following 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

Would confirming or denying whether the requested information is held constitute the disclosure of a third party's personal data?

19. Section 3(2) of the Data Protection Act 2018 ('DPA18') defines personal data as:

"any information relating to an identified or identifiable living individual."
20. 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.
21. There are two doctors named in the request. So, if the public authority were to comply with section 1(1)(a), this would, in itself, reveal something about the doctors in question. It would reveal whether at least one of the doctor's patients died in the circumstances outlined in question 5 and whether at least one of the doctor's, or the Trust's went to court as a result of their work.
22. Either outcome would result in the disclosure of the personal data of the doctors named in the request.

23. Even though complying with the duty to confirm or deny would result in the disclosure of personal data, this doesn't mean that the public authority automatically shouldn't do so. The Commissioner must consider whether such a confirmation or denial would contravene any of the data protection principles referred to in paragraph 17.

Would confirming or denying whether the requested information is held contravene one of the data protection principles?

24. The most relevant principle is Article 5(1)(a). This states that:

"Personal data shall be processed lawfully, fairly and in a transparent

25. 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) of the UK GDPR

26. 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."

27. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information made 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 disclosure, or in the case, confirmation or denial that the requested information is held, 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.

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

Legitimate interest test

28. The Commissioner must first consider the legitimate interest in confirming or denying the information is held, and essentially disclosing personal data, to the public and what purpose this serves. In considering any legitimate interest(s) under FOIA, the Commissioner recognises that a wide range of interests may represent legitimate interests; they can be the requester's own interests as well as wider societal benefits. These interests can include the broad principles of accountability and transparency that underpin FOIA, or may represent the private concerns of the requestor.
29. It's important to remember that disclosure under the FOIA is effectively disclosure to the world at large. The Commissioner is of the opinion that, if the requester is pursuing a purely private concern which is unrelated to any broader public interest, then disclosure is unlikely to be proportionate. Legitimate interests may be compelling or trivial, but trivial interests may be more easily overridden by the fundamental rights and freedoms of the data subject during the test under stage (iii).
30. The Commissioner doesn't consider it necessary to replicate why the complainant has a specific interest in this information. However, the Commissioner is satisfied there is a valid, private, legitimate interest being pursued here.
31. Furthermore, the complainant drew the Commissioner's attention to a Channel 4 dispatches documentary which investigated the public authority's services.²
32. The Commissioner understands that an inquiry³, launched to investigate the circumstances surrounding the deaths of mental health inpatients under the care of NHS Trusts in Essex, followed the Dispatches documentary.
33. This all adds to the legitimate interest the request represents. There's clearly a need for transparency and accountability in relation to this healthcare trust and this cascades down to its staff. As above, there's definitely a legitimate interest being pursued here.

² [Response to C4 Dispatches | Essex Partnership University NHS Trust \(eput.nhs.uk\)](https://www.essex.nhs.uk/our-services/our-people-and-teams/our-people-and-teams-articles/response-to-c4-dispatches-essex-partnership-university-nhs-trust)

³ [The Lampard Inquiry - investigating mental health deaths in Essex](https://www.essex.nhs.uk/our-services/our-people-and-teams/our-people-and-teams-articles/the-lampard-inquiry-investigating-mental-health-deaths-in-essex)

Necessity test

34. The Commissioner must also consider if confirmation or denial that the requested information is held is necessary for the purpose that this legitimate interest represents or if there is an alternative method of doing so.
35. 'Necessary' means more than desirable but less than indispensable or absolute necessity. The necessity test is a means of considering whether disclosure, or in this case confirmation or denial, under FOIA is necessary to meet the legitimate interest identified, or whether there is another way to do so that would interfere less with the privacy of individuals.
36. When raising their complaint, the complainant explained:

"If these two doctors are a risk to patients, we need to know now so we can apply to the GMC to investigate."
37. The Commissioner isn't convinced that confirmation or denial that this information is held, under FOIA, is necessary in order for the complainant to raise any complaint with the GMC.
38. The complainant has also expressed concern that:

"The inquiry won't start for several months. Further, these inquiries go on for years. It may be 5-7 years before we have a report.

I would contest that the public interest, and my interest, can't reasonably be expected to wait for several years."
39. The Commissioner acknowledges the circumstances behind the request. However, the information being requested here is intrusive. Whilst there is a legitimate interest in understanding standards of competence in the public sector, the Commissioner must consider the extent to which this will be met by the inquiry, rather than providing confirmation or denial in this instance. The inquiry will address any systemic failings within the public authority, rather than focusing on the performance of two individuals.
40. However, the Commissioner does acknowledge the need for the public authority to be transparent and accountable and this extends to its staff. Since the Commissioner is satisfied that disclosure is necessary to demonstrate this accountability and transparency, he'll go onto consider whether the identified interests in confirmation or denial outweigh the interests or fundamental rights and freedoms of the doctors, who represent the data subjects.

Balancing test

41. If the data subjects would not reasonably expect that their personal data would be disclosed to the public under FOIA, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
42. In performing this balancing test, the Commissioner has considered the following:
 - 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.
43. In the Commissioner's view, the balancing test should take into account whether the data subjects concerned have a reasonable expectation that their information would not be disclosed. This expectation may be influenced by a number of 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 which this personal information serves.
44. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
45. The public authority has explained:

"The types of information requested is not information that would normally be put into the public domain as a matter of routine. Additionally the type of information requested is of the nature which the clinicians would expect to be kept confidential, and the Trust as employer owes an obligation of confidence to its staff."
46. The Commissioner has no doubt that confirmation or denial in this instance (which, either way, would result in the disclosure of personal data) would cause distress to the data subjects. If the public authority confirms holding the requested information, speculation will follow as to which of the named doctors the information relates to. Furthermore, confirmation that the requested information is held wouldn't provide any context to the incidents and could be misinterpreted.

47. The complainant has argued:

“Replying to my questions would not violate the doctors' privacy as these deaths are reported to the coroner and published on the coroner's website. Further, all deaths in mental health trusts are treated as unnatural, are subject to Regulation 17 filings with the CQC, and are followed by inquests. Doctors' names are disclosed at the inquests and the doctors are called as witnesses.”

48. Disclosure under FOIA is disclosure to the world at large. The Commissioner is satisfied that the information the complainant is requesting is not in the public domain and inquests are not public forums. Whilst the Commissioner accepts the Dispatches documentary is in the public domain, it focuses on the trust as a whole and not individual doctors.

49. Ultimately, the Commissioner agrees with the public authority when it says:

“...weighing up the competing rights and interests, we are satisfied that to confirm or deny that the information is held would be a breach of the data protection principles and so we can neither confirm nor deny whether such information is held.”

50. The Commissioner isn't diminishing the legitimate interest behind this request; the requested information is important to the complainant for valid reasons. However, the complainant, or any other individual, can bring a complaint to the General Medical Council for investigation at any stage. Confirmation of denial isn't required for the regulatory body to look at any allegations about the doctors named in the request. Bearing in mind the nature of the information requested, and the harm and distress confirmation or denial would cause in this instance, the Commissioner believes the legitimate interest in this case doesn't outweigh the rights and freedoms of the data subjects.

51. The Commissioner therefore considers that there is no Article 6 basis for processing and disclosure of personal information in this instance through confirmation or denial in this case would be unlawful.

52. Since disclosure would be unlawful, the Commissioner doesn't need to consider whether confirmation or denial would be fair or transparent. The Commissioner also doesn't need to go onto consider the public authority's application of section 12.

Right of appeal

53. 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

54. 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.
55. 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

Alice Gradwell
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