

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 June 2024

Public Authority: Torbay and South Devon NHS Foundation Trust

Address: Belmont Court
Torquay
TQ2 7AA

Decision (including any steps ordered)

1. The complainant has requested information about a particular surgeon. The above public authority ("the public authority") relied on section 40(2) of FOIA (third party personal data) to withhold the information.
2. The Commissioner's decision is that the public authority should not have confirmed or denied that it held the requested information. He has therefore applied section 40(5B) of FOIA himself, proactively to avoid accidental revelation of personal information.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 9 January 2024, the complainant wrote to the public authority and requested information in the following terms:

"What I want to know is The Trust as per [the Chief Executive's] Letter to me dated the 8th of April 2022 which [sic] stated that the Trust was managing one of its surgeons [the Surgeon]'s behaviour,

'The department leads had already commenced the process of investigation within [sic] the Trusts unacceptable behaviours policy, I would like assure you that we do take complaints such as yours

extremely [sic] seriously and it appears that there was an evolving pattern of behaviour which had begun to be managed’.

“What I want know is what behaviour [sic] of [the Surgeon] was being managed and why and what had led to it being managed.

“[the Surgeon] has retired for the Trust, why?.”

5. The public authority responded on 16 January 2024. It confirmed that it held the requested information, but it relied on section 40(2) of FOIA to withhold it. A position it upheld following an internal review.

Scope of the case

6. The complainant contacted the Commissioner on 18 March 2024 to complain about the way his request for information had been handled.
7. The Commissioner considers that before he can determine whether any information has been correctly withheld, he should first look at whether the public authority should have confirmed or denied holding any relevant information in the first place. Sometimes the mere act of confirming or denying that information is held can itself reveal personal information about an individual.

Reasons for decision

8. This decision notice concerns section 40 of FOIA. Details of this section of FOIA can be found in the Commissioner’s [Decision notice support materials | ICO](#).
9. When it comes to section 40, a public authority should only be confirming or denying that it holds such information if do so if it would be lawful, fair and transparent. Specifically, publishing the fact that this personal information is held should be necessary to achieve a legitimate interest. If there are less intrusive means of achieving the aim than publishing the personal information, then publication is not necessary. The Commissioner’s decision notice support materials contain a more detailed overview of the legitimate interest test.
10. Section 40(5B) of FOIA allows a public authority to refuse to confirm or deny that particular information is held, if confirming or denying that particular recorded information was held would in turn reveal personal information about an individual.

11. When information is disclosed under FOIA, it is to the world at large. It is the equivalent of the public authority publishing the information on its website.
12. This request asked about a named surgeon and any steps the public authority took to manage that surgeon's behaviour. If the public authority confirms that it holds such information, it is publishing, to the world at large, the fact that the Surgeon had been subject to internal proceedings to manage their behaviour. That is the Surgeon's own personal information and they are identifiable from the request.
13. The Commissioner appreciates that the complainant already appears to have been told, in response to his earlier complaint, that the Surgeon had been subject to some form of management. However, no evidence has been presented to the Commissioner that would demonstrate that that fact is widely known by the general public. Confirming or denying that the information is held would therefore reveal new information about the Surgeon, not known to the general public.
14. The Commissioner accepts that the complainant wishes to establish the impact their previous complaint to the public authority has had on the Surgeon and the steps the public authority took in response. That is a legitimate interest, but a largely private one. There is also a general public interest in ensuring that NHS staff are behaving appropriately and that any inappropriate behaviour is dealt with.
15. Whilst there may be legitimate interests in confirming or denying that this particular information is held, the Commissioner does not consider that providing confirmation or denial is necessary to meet those interests. The complainant is able to make further corporate complaints if he believes his earlier complaint has not been properly dealt with.
16. Equally, the more general interest in ensuring employees are behaving appropriately can be managed by the public authority's own internal processes. Transparency can be achieved by publication of more generalised and anonymised statistics.
17. Confirming or denying that a specific identifiable individual has or has not been subject to internal behaviour management is therefore not the least intrusive means of achieving the legitimate interest. Consequently confirming or denying that the information was held would not be lawful.
18. Given his role as the regulator of data protection legislation, the Commissioner considers it appropriate to apply section 40(5B) of FOIA himself, proactively, to prevent the public authority from providing confirmation or denial that the information is held.

19. When dealing with future similar requests, the public authority needs to consider carefully the effect of confirming or denying that information is held. Just because it may have privately provided information to a specific requester in the past does not mean that information can now be considered to be in the public domain.

Right of appeal

20. 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

21. 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.
22. 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

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