

1 March 2023

Reference number: IC-213931-C3P3

Request

You asked us: *"...i would like to make a request under the Freedom of Information Act please. On July 19 last year Guy's and St Thomas' Foundation Trust had an IT outage because of the heatwave. They notified the ICO and the ICO later submitted two sets of questions to the trust before deciding not to launch a full investigation. i would like to see a copy of both sets of questions and the trust's answers to these questions please."*

We received your request on 2 February 2023.

We have handled your request under the Freedom of Information Act 2000 (the FOIA).

Our response

We have searched our records and can confirm we hold information in the scope of your request.

Our outbound questions to the data controller are withheld from disclosure under section 31(1)(g) and section 44 of the FOIA.

We can rely on Section 31(1)(g) of the FOIA where disclosure:

"would, or would be likely to, prejudice – ... the exercise by any public authority of its functions for any of the purposes specified in subsection (2)."

In this case the relevant purposes contained in subsection 31(2) are 31(2)(a) and 31(2)(c) which state:

"(a) the purpose of ascertaining whether any person has failed to comply with the law" and

"(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise ..."

Section 31 is not an absolute exemption, and we must consider the prejudice or harm which may be caused by disclosure.

The ICO may revisit this case if we are provided with new information or we are advised about detriment experienced by an affected data subject. Disclosure could jeopardise the ICO's ability to obtain information relating to this case from the data controller. This could affect our ability to take regulatory action which creates a prejudice to the ICO.

Disclosure could result in this, as well as other data controllers/parties, being reluctant to engage with the ICO in the future. This would affect our ability to complete our regulatory functions, including enforcement of the law, which creates a prejudice to the ICO as well as to the public.

We also have to carry out a public interest test to weigh up the factors in favour of disclosure and those against. In this case, the public interest factors in disclosing the information are –

- Increased transparency in the way in which Guy's and St Thomas' NHS Foundation Trust has responded to the ICO's enquiries.
- Increased transparency in the way in which the ICO conducts its investigations.

The factors in withholding the information are –

- The public interest in organisations being open and honest in their correspondence with the ICO without fear that their comments will be made public.
- The public interest in maintaining the ICO's ability to conduct investigations into complaints as it thinks fit.
- The ICO may revisit this case if we are provided with new information or we are advised about detriment experienced by an affected data subject. Disclosure could jeopardise the ICO's ability to obtain information relating to this case from the data controller. This could affect our ability to take regulatory action which is not in the public interest.
- Disclosure could result in this, as well as other data controllers/parties, being reluctant to engage with the ICO in the future. This would affect our ability to complete our regulatory functions, including enforcement of the law, which is against the public interest.

Having considered all of these factors we have taken the decision that the public interest in withholding the information outweighs the public interest in disclosing it.

Section 44 also applies to these outbound questions because some of our questions were created using information provided to us by Guy's and St Thomas' NHS Foundation Trust.

Section 44(1)(a) states;

'(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it -

(a) is prohibited by or under any enactment'

The enactment in question is the Data Protection Act 2018. Section 132(1) of part 5 of that Act states that:

"A person who is or has been the Commissioner, or a member of the Commissioner's staff or an agent of the Commissioner, must not disclose information which—

(a) has been obtained by, or provided to, the Commissioner in the course of, or for the purposes of, the discharging of the Commissioner's functions,

(b) relates to an identified or identifiable individual or business, and

(c) is not available to the public from other sources at the time of the disclosure and has not previously been available to the public from other sources,

unless the disclosure is made with lawful authority."

Section 132(2) lists circumstances in which a disclosure can be made with lawful authority, however none of them apply here.

The responses we received from the data controller are also withheld under section 44 of the FOIA.

Next steps

You can ask us to review our response. Please let us know in writing if you want us to carry out a review. Please do so within 40 working days.

You can read a copy of our full review procedure [here](#).

If we perform a review but you are still dissatisfied, you can complain to the ICO as regulator of the FOIA. This complaint will be handled just like a complaint made to the ICO about any other public authority.

You can [raise a complaint through our website](#).

Your information

Our [Privacy notice](#) explains what we do with the personal data you provide to us, and set out your rights. Our retention schedule can be found [here](#).

Yours sincerely



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