

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 21 January 2015

**Public Authority:** South London and Maudsley NHS Foundation Trust

**Address:** Maudsley Hospital  
Denmark Hill  
London  
SE5 8AZ

#### Decision (including any steps ordered)

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1. The complainant has requested a copy of an investigation report that was commissioned to investigate an incident that occurred on a ward at the South London and Maudsley NHS Foundation Trust (the Trust) in late 2012. The Trust initially relied on the future publication exemption (section 22) in FOIA to withhold a version of the report. Upon its publication, parts of the report were withheld under the health and safety (section 38) and third party personal data (section 40(2)) exemptions in FOIA, although these were later released to the complainant. However, during the course of the Commissioner's investigation it became apparent that the Trust had only considered a summary of the report rather than a version containing the complete findings. A further partial disclosure of the complete report was made with the remaining information withheld under sections 38(1)(b) and 40(2) of FOIA. The Commissioner has found that section 40(2) but not section 38(1)(b) of FOIA is engaged. He therefore requires the disclosure of the information to which section 38(1)(b) has been applied.
2. 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

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3. On 11 June 2013 the complainant requested information in the following terms:

*An independent investigation was commissioned to investigate the incident that happened on 2012-10-01 at River House at Bethlem Royal Hospital. It was due to be completed early 2013, however on 2012-11-08 and 20 [sic] 2013-03-20 you responded to two previous Fol requests about this investigation that it was still ongoing. It is now more than eight months since the incident occurred, so hopefully the report has been received and ratified.*

*In compliance with the Fol act, can you please send me a copy of this investigation report.*

4. The Trust responded on 9 July 2013. It advised the complainant that the independent investigation into the incident at River House had been completed and the associated report was planned to be published by the end of the month. In light of the imminent disclosure the Trust considered that the information intended for future publication (section 22) exemption in FOIA applied. No indication was given at this stage that the Trust had considered the public interest test attached to the exemption.
5. The complainant wrote to the Trust on 1 August 2013 and asked it to provide a link to the requested report as he had been unable to locate a copy on the Trust's website. In the absence of a response, the complainant wrote to the Trust on 14 August 2013 and asked for an internal review to be carried out. The Trust replied on 28 August 2013 and stated that it was aiming to publish the report the following day.
6. In correspondence of 30 August 2013 the complainant acknowledged the Trust's publication of the report. However, he questioned the Trust's decision to redact parts of the report and highlighted its apparent failure to specify the exemption used to justify the redactions.
7. The Trust treated the points raised in the complainant's correspondence as a request for an internal review. This was subsequently completed and the outcome of the review provided on 27 September 2013. The Trust explained that its intention was always to publish information about the root cause of the incident and the recommendations and key actions arising from the independent investigation. However, beyond these sections, the Trust had decided that some of the information featured in the report was exempt from disclosure under the prejudice to the effective conduct of public affairs (section 36), health and safety (section 38) and third party personal data (section 40) exemptions in

FOIA. The Trust did though provide the complainant with details of the qualifications of the authors of the investigation report.

## Scope of the case

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8. The complainant contacted the Commissioner to complain about the Trust's decision to withhold information covered by his request.
9. For reasons that do not need to be entered into as part of this notice, the Trust decided during the course of the Commissioner's investigation to formally disclose an unredacted version of the summary report that had been the subject of its considerations. Upon receipt, however, the complainant considered that omissions in the report indicated that there was a fuller report underpinning the summary findings, which would be covered by the scope of the request.
10. The Trust explored this possibility and found that there was a more substantial report, referred to from this point as 'the Report', from which the summary derived. The Trust decided that parts of the Report could be released but considered the remainder engaged sections 38 and 40 and, with regard to the public interest test in section 38, the public interest favoured maintaining the exemption.
11. It is therefore for the Commissioner to consider whether the Trust's decision to withhold information in the Report complied with FOIA. His findings in respect of each of the exemptions cited are set out below.

## Reasons for decision

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### Background

12. The Introduction and Executive Summary to the published version of the Report<sup>1</sup> provide information about the incidents that were the subject of the independent investigation and the terms of the investigation itself.

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<sup>1</sup>[http://www.slam.nhs.uk/media/255726/slam\\_rh\\_incident\\_underlying\\_detail\\_redacted\\_140528.pdf](http://www.slam.nhs.uk/media/255726/slam_rh_incident_underlying_detail_redacted_140528.pdf)

For ease of reference, the Commissioner reproduces parts of these sections below:

### **1. Introduction**

*This is the report of an independent investigation commissioned by South London and Maudsley NHS Foundation Trust, following two separate but related patient incidents on the night of the 1<sup>st</sup> October 2012, involving Norbury patients on Spring Ward.*

*This report refers to ten patients, whom for the purposes of confidentiality have been anonymised (referred to as patients A to J), as have staff and other individuals referred to in this report.*

[...]

### **2. Executive Summary**

*On the night of the 1<sup>st</sup> October 2013, two days after Norbury Ward had moved to Spring Ward, two separate but patient-related disturbances occurred on Spring Ward, where Norbury patients had been temporarily relocated as part of a phased programmed [sic] of planned ward moves, to facilitate essential health and safety works being carried out in River House (RH).*

13. Due to the escalation of the incidents, the police were called to assist staff resolve the disturbances.
14. The Report identified a number of issues relating to the causes of the incidents and the way in which the incidents were handled. Following its conclusions, the authors of the Report made a number of recommendations to the Trust.

### **Section 38 – Health and Safety**

15. Section 38(1) states that information is exempt information if its disclosure under the legislation would, or would be likely to –
  - (a) *endanger the physical or mental health of any individual,*
  - (b) *endanger the safety of any individual*
16. The exemption is qualified by the public interest test. This means that where section 38(1) is shown to be engaged by virtue of the prejudice that would, or would be likely to, occur, section 2(2) of FOIA requires a public authority to consider whether in all the circumstances of the case,

the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

17. The Trust has confirmed it is seeking to rely on section 38(1)(b) of FOIA.
18. In his guidance on the section 38 exemption<sup>2</sup> the Commissioner explains that the use of the term 'endanger' does not represent a departure from the test of prejudice mechanism contained in other exemptions. It is now common ground that the test of prejudice is made up of three conditions, each of which must be satisfied in order for an exemption to be engaged. First, the harm that is envisaged would, or would be likely to, occur should relate to the applicable interests described in the exemption. Second, there must be a causal relationship between the potential disclosure and the prejudice that the exemption is designed to protect against. Third, it is necessary that the risk of the prejudice occurring is real and significant. The Commissioner considers that the same three conditions are built into the test of endangerment.
19. The Trust has argued that the disclosure of information redacted in the report would be likely to endanger the safety of both the staff and patients of River House. The Commissioner is satisfied that the nature of the harm being argued by the Trust is relevant to the exemption and therefore the first condition in the endangerment test is satisfied. He has therefore gone on to the next condition; that is, whether there is a causal link between disclosure and the harm referred to by the Trust.
20. In his guidance on the prejudice test<sup>3</sup>, the Commissioner accepts that it may not be possible for a public authority to provide concrete proof that the prejudice being claimed would or would be likely to result. This is because the test necessarily relates to an effect that could happen in the future. Therefore, in the absence of certainty, the Commissioner considers that a public authority's arguments on the test of prejudice or endangerment must reflect a logical connection between the disclosure and the prejudice.
21. It is understood that environments in which patients are treated, and cared for, can be challenging not only for staff but also for the patients. The Report itself states that the "interface between care and security

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<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1188/awareness\\_guidance\\_19\\_-\\_health\\_and\\_safety.pdf](https://ico.org.uk/media/for-organisations/documents/1188/awareness_guidance_19_-_health_and_safety.pdf)

<sup>3</sup> [https://ico.org.uk/media/for-organisations/documents/1214/the\\_prejudice\\_test.pdf](https://ico.org.uk/media/for-organisations/documents/1214/the_prejudice_test.pdf)

requires special management and leadership, in a complex and difficult environment. It requires people working together with a common purpose." This difficulty was made plain on the night in question, with the incidents involving patients that had been temporarily relocated from Norbury Ward to Spring Ward. According to the Trust's website, the purpose of the service on Norbury Ward is "to ensure that mentally disordered offenders are assessed and treated effectively, in the least restrictive environment", aiming to "manage the risk, reduce further offending and support recovery throughout the person's stay."<sup>4</sup>

22. A public authority operating in the healthcare field will have a duty of care to patients and staff, which will involve having appropriate safeguards in place to minimise the risk of harm to individuals. In this context a public authority must carefully consider any disclosure that could potentially undermine its ability to operate effectively, particularly where the information relates to safety procedures, protocols and strategies. The Commissioner recognises that by releasing some of the Report, the Trust has attempted to strike a balance between transparency and ensuring the safety of patients, Trust staff and other officials. Notwithstanding this point, it is the role of the Commissioner to decide whether the Trust has demonstrated a link between the prejudice being claimed and the disclosure of the withheld information. In his view, it has not.
23. The reasons for coming to this position are three-fold. Firstly, the Trust has not explained how the information could be exploited and used in a way that would, or would be likely, to endanger the safety of individuals. Nor is this clear from an inspection of the information itself. Secondly, insofar as it was accepted that the disclosure of safety procedures, protocols and strategies could in certain circumstances have a prejudicial effect, the Commissioner considers that the Report is not sufficiently detailed to precipitate this harm. Thirdly, the Report confirms that the function of Norbury Ward had been reviewed and some changes already made to address operational issues identified as a result of the incidents. The combination of these points has led the Commissioner to conclude that the Trust has failed to evidence a causal relationship between disclosure and the harm described by the exemption.
24. As the conditions in the endangerment test are not met, it follows that section 38(1)(b) is not engaged. The Commissioner has not therefore been required to consider the balance of the public interest test.

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<sup>4</sup> <http://www.slam.nhs.uk/our-services/service-finder-details?CODE=SU0001>

## **Section 40(2) – third party personal data**

25. Section 40(2) of FOIA provides an exemption to the public right to access recorded information where it is the personal data of a third party. In order for the exemption to be engaged, the disputed information must constitute the personal data of a third party and disclosure of the personal data would contravene a data protection principle contained in the Data Protection Act 1998 (DPA). For the purposes of a disclosure under FOIA, it is the first data protection principle that is likely to be relevant. This requires the fair and lawful processing of personal data.
26. Personal data is defined by section 1 of the Data Protection Act 1998 (DPA). This describes it as data which relate to a living individual, who can be identified from that data, or from that data and other information. In other words, information will only be personal data where it 'relates to' an 'identifiable individual'.
27. The Trust has explained that staff and patient details have been redacted in the sections of the Report which relate directly to the two incidents that occurred at River House. It acknowledges that individuals are not named in the report but considers the individuals could still be identified from job titles, confidential clinical details together with the description of the incidents that too place.
28. In the extract of the Introduction to the Report quoted above it states that information relating to individuals had been anonymised for the purposes of confidentiality. Where it is not possible to identify the subject of information from the material to be disclosed, either on its own or in combination with other pieces of information available to the general public, it is no longer necessary to consider the application of section 40(2) of FOIA. This is because the information would not constitute personal data.
29. The test of whether information is truly anonymised is if, on the balance of probabilities, a member of the public can identify individuals by cross-referencing the 'anonymised' data with information or knowledge already available to the public. Perhaps the most obvious example of a situation in which an individual could be identified from information is where a record contains the name of that individual.
30. This is not a relevant consideration in this case, however, because as stated the names of individuals have not been included in the Report. Nevertheless, this does not rule out the possibility that identification could still occur through the piecing together of the relevant facts known about the incidents. For instance, even in the absence of a name, it is conceivable that a person could be recognised from the information by a

member of the public familiar with River House if a distinctive characteristic of an individual was referenced. The risk of identification may potentially be increased where, as here, the context in which an individual is referenced relates to an event that is particularly noteworthy or memorable.

31. In borderline cases the Commissioner and the Information Tribunal have previously adopted the test of whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence the test highlights the potential risk of re-identification of an individual from information which is meant to be anonymised.
32. In his Anonymisation Code of Practice<sup>5</sup> the Commissioner explains that the 'motivated intruder' test is useful because it sets the bar for the risk of identification higher than considering whether a 'relatively inexperienced' member of the public can achieve re-identification, but lower than considering whether someone with access to a great deal of specialist expertise, analytical power or prior knowledge could do so. The Code also recognises that problems with re-identification may arise where one individual or group of individuals, for example a family member, already knows a great deal about the other individual. These individuals may be able to determine that anonymised data relates to a particular individual, even though an 'ordinary' member of the public would not be able to do this.
33. However, even though such a risk may exist, the Commissioner considers that the privacy risk posed could, in reality, be low where one individual would already require access to so much information about the other individual for re-identification to take place. Therefore a relevant factor is whether anything new will be learnt about the other individual. Significantly, the use of the term 'identification' connotes a degree of certainty and must involve more than making an educated guess.
34. Even without names, the Commissioner considers that the Report contains information relating to the patients from which they could be identified. This is because the Report, in places, goes into some detail about the patients involved in the incidents. Furthermore, the Report

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<sup>5</sup> <https://ico.org.uk/media/for-organisations/documents/1061/anonymisation-code.pdf>



tells us that a particular patient was being treated at a particular location on a particular day.

35. The case for the identification of staff members is perhaps less clear-cut. In some cases a job title may only refer to one individual or at least a limited pool of individuals, which will increase the risk of identification. However, this is not the case for all the members of staff, which raises the possibility that some but not all of the staff could be identified from the Report. However, the Commissioner has ultimately concluded that a member of the public with a reasonable knowledge of the staff working in a specific department of the relevant NHS organisation would be able to identify an individual. Insofar as information contained in the Report would therefore constitute personal data, the Commissioner must next consider whether disclosure would breach the first data protection principle.
36. The starting point when assessing whether the first principle is satisfied is to consider whether it would be fair to a data subject to disclose their personal data. To test whether disclosure would be fair in the circumstances, the Commissioner will take into account the following competing interests:
  - (i) A data subject's reasonable expectations of what would happen to their personal data.
  - (ii) The consequences of disclosure.
  - (iii) The balance between the rights and freedoms of the data subject and the legitimate interest of the public in disclosure.
37. For the release of personal data to be permitted, the Commissioner must also have regard to the sixth condition of schedule 2 of the DPA, as well as to the question of whether disclosure would be lawful.
38. With regard to a data subject's reasonable expectations, the Commissioner has found it appropriate to make a distinction between the patients on the one hand and the members of staff on the other. At paragraph 70 of his guidance on section 40<sup>6</sup>, the Commissioner explains that the "expectations of an individual will be influenced by the distinction between his or her public and private life. This means that

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<sup>6</sup> <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>

that it is more likely to be fair to release information that relates to the professional life of the individual.”

39. The Commissioner considers that the patients referred to in the Report, unlike members of staff acting in an official capacity, would have had little or no reasonable expectation that their personal data would be placed in the public domain. In the Commissioner's view, this remains true of all the patients irrespective of their particular involvement in the incidents at River House. A further important factor relating to the question of whether it would be fair to release a patient's personal data concerns the issue of 'sensitive personal data'.
40. Section 2 of the DPA describes eight categories of information that should be considered as sensitive personal data; that is, information that individuals will regard as the most private and will therefore require a greater degree of protection. Paragraph (e) of section 2 refers to personal data consisting of information as to the data subject's 'physical or mental health or condition'. It is apparent that information relating to the patients would fall within this description and would therefore be sensitive personal data. Where sensitive personal data is concerned the Commissioner considers that in the majority of cases it will be in the reasonable expectation of the individual that such information will not be disclosed. The Commissioner has found no reason to deviate from this position on this case. Taking into account these findings, the Commissioner has found that disclosure would breach the first data protection principle on the basis that it would be unfair, thereby automatically engaging section 40(2) of FOIA.
41. The Commissioner now turns to whether the release of the personal data of the staff members referred to in the Report would be fair. As explained, it is commonly accepted that an individual acting in an official capacity should have a greater expectation that information relating to his or her role could be released. The Commissioner recognises that disclosure of personal data will always involve some intrusion into privacy but that intrusion may on occasion be warranted. This will particularly be the case where the information relates to actions and decisions made by officials of a public authority, who are ultimately acting on the public's behalf. However, any finding must take into account all the circumstances of the case, including the seniority of a data subject's role and the nature or content of the information.
42. In this case the Commissioner considers that while there will be grounds for arguing that staff members should expect some degree of scrutiny of their involvement in the incidents, he also understands that for staff to have additional details of their connection with the incidents placed in the public domain could be distressing. Consequently, to strike an appropriate balance between promoting transparency and protecting an

individual's privacy rights, the Commissioner has considered the weight of the legitimate interest of the public in disclosure.

43. There is no doubt that the public will have a legitimate and significant interest in knowing more about potentially serious shortcomings in the way patients were managed and the risks this posed for the safety of not only the patients themselves but also staff. This interest will relate in part to how the incidents arose but will particularly extend to the recommendations about how practices should be improved with a view to protecting against a similar incident occurring in the future.
44. The Commissioner is aware that significant parts of both the summary of the Report and the Report itself have already been released. In his view, the disclosed information to a greater extent sets out the key information relating to the incidents and the resulting findings, recommendations and advice. The Commissioner considers that to disclose the personal data contained in the Report would not add value to the public's understanding of the incidents. Placing this consideration against the potential distress that a further release of personal data could cause, the Commissioner has again found that the disclosure would be unfair and therefore section 40(2) of FOIA is engaged.

## Right of appeal

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45. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

46. 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.
47. 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** .....

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
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