

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 1 August 2017

**Public Authority:** Wirral Community NHS Foundation Trust

**Address:** St Catherine's Health Centre  
Derby Road  
Birkenhead  
Wirral  
CH42 0LQ

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to the person that was in charge of Eastham and Bebington District Nurse service in October 2015. The Trust provided the complainant with some of the requested information but refused to comply with part d of the request under section 40 FOIA.
2. The Commissioner's decision is that the exemption at section 40(5) is applicable in this case and therefore the Trust can neither confirm nor deny if the information requested at part d of the request is held as to do so would be a disclosure of personal data. She requires no steps to be taken.

#### Request and response

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3. The complainant requested information of the following description:
  - a. Who was the person that was in charge of Eastham and Bebington District Nurse service in October 2015?
  - b. How long had they been in office?
  - c. Do they still work for Wirral Community Foundation Trust?
  - d. Considering the gross misconduct of trust regulations, what

disciplinary action has been taken against this person for these serious breaches with respect of what happened to my father?

e. I would like to have a copy of all Sepsis training that was given at Wirral Community Trust before October 2015 and I would like a list of all levels of nurses that this training was given to please.

f. Before October 2015, was Sepsis training also given to nursing auxiliaries before going to see patients?

g. Also I would like to know the training given to all medical personnel in the trust on Sepsis since October 2015.

4. On 28 February 2016 the Trust responded. It provided information in relation to all of the request apart from part d as it said compliance with this part of the request would breach the Data Protection Act 1998.
5. The complainant requested an internal review on 6 March 2017. The Trust sent the outcome of its internal review on 5 May 2017. It upheld its original position but confirmed that the FOIA exemption it was relying upon was section 40 FOIA.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 12 April 2017 to complain about the way her request for information had been handled.
7. The Commissioner has considered whether the Trust can neither confirm nor deny whether the information requested at part d of the request is held under section 40(5) FOIA.

### **Reasons for decision**

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#### **Section 40(5)**

8. When a public authority receives a request for information under the FOIA, it normally has a duty under section 1(1)(a) of the FOIA to tell the requester whether it holds the information. This is called "the duty to confirm or deny". However, in certain circumstances, this duty does not apply and the public authority is not obliged to say whether or not it holds the information; instead, it can give a "neither confirm nor deny" response.

9. Section 40(5) of the FOIA sets out the conditions under which a public authority can give a "neither confirm nor deny" response where the information requested is, or would be, personal data. It includes provisions relating to both personal data about the requester and personal data about other people.
10. If the information would constitute personal data relating to someone other than the requester, then the public authority does not have to confirm or deny whether it holds it if one of the conditions in section 40(5)(b)(i) or (ii) applies.
11. There may be circumstances, for example requests for information about investigations or complaints, in which simply to confirm whether or not a public authority holds that personal data about an individual can, itself, reveal something about that individual. To either confirm or deny that the information is held could indicate that a person is or is not the subject of disciplinary action. If to do so would contravene data protection principles, for example because it would be unfair, then the public authority is not obliged to confirm or deny that it holds the information.

*If held, would the information be personal data?*

12. The Commissioner has first considered whether the requested information would be the personal data of any person.
13. The Data Protection Act 1998 (DPA) categorises personal data as data that relates to a living individual from which that individual can be identified. If held, the information would confirm whether or not the name of the individual provided in response to part a of the request was the subject of disciplinary action.
14. Therefore, the Commissioner is satisfied that the requested information would be personal data. If held, it would tell the public something about the individual, namely whether or not the person was the subject of disciplinary action.

*Would confirming or denying the information is held breach any of the data protection principles?*

15. If confirming or denying whether the information is held would contravene the first data protection principle, that personal data should be processed fairly and lawfully, section 40(5)(b)(i) is applicable.
16. In assessing fairness, the Commissioner considers the reasonable expectations of individuals concerned and what might be the likely consequences resulting from disclosure.

17. In this case confirming or denying whether the information is held would communicate whether or not the individual named in response to part a of the request was the subject of disciplinary action.
18. The Commissioner notes here that there may be situations in which it could be argued that giving the confirmation or denial to a requester would not necessarily contravene data protection principles because the requester already knows or suspects whether the public authority holds or does not hold the information.
19. The FOIA is motive and applicant 'blind', and the test is whether the information can be disclosed to the public at large, not just to the requester. Therefore an authority can only disclose or confirm or deny it holds information under the FOIA if it could disclose it, or confirm or deny it holds the information, to any member of the public who requested it.
20. The Commissioner recognises that individuals have a reasonable expectation that a public authority, in its role as a responsible data controller, will respect confidentiality in this regard.
21. The Commissioner considers that Trust staff will have a reasonable expectation that any disciplinary records held about them will remain confidential. Confirming or denying if disciplinary action was taken against a particular individual would be unfair as it may cause that individual some distress given the confidential nature of this type of information.
22. In conclusion, the Commissioner is satisfied that confirming or denying that the requested information is held would be unfair and thus contravene the first data protection principle. Therefore the Commissioner finds that the Trust is entitled to refuse the request on the basis of section 40(5)(i)(b) of the FOIA.
23. As the Commissioner has determined that it would be unfair to confirm or deny if the information is held, it has not been necessary to go on to consider whether this is lawful or whether one of the schedule 2 conditions is met.

## Right of appeal

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24. 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)

25. 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.
26. 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** .....

**Gemma Garvey**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**