

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 July 2023

Public Authority: Southern Health and Social Care Trust

Address: Ferndale
Moyallan Road
Gilford
BT63 5JY

Decision (including any steps ordered)

1. The complainant has requested information relating to a specific care home. Southern Health and Social Care Trust (the Trust) responded that part of the request was not a request for recorded information. It relied on section 40(2) of the FOIA to withhold the information in relation to the rest of the request. The complainant disputed the Trust's refusal to provide the information to part 1 of their request.
2. The Commissioner's decision is that the Trust was correct to rely on section 40(2) of the FOIA to refuse to provide the information to part 1 of the request in relation to the residents (service users). However he finds that section 40(2) of the FOIA is not engaged to the information to part 1 of the request in relation to the staff members.
3. The Commissioner requires the Trust to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with the information requested to part 1 of the request in relation to the staff members.
4. The Trust 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 31 August 2022 the complainant made the following information request to the Trust:
 - “1. Statistics relating to the number of positive cases, including dates, for staff and residents of Dungannon Care Home between 4 May 2020 and 26 June 2020. This information is relevant to me as a relative and nominated representative of a resident and as his care was affected by the sudden changes in staffing and level of care. I am not requesting any personal information such as names, just statistics and relevant dates.
 2. A copy of the final unredacted SAI report into the trips which took place in May 2020 from Dungannon Care Home to Trust led day centres. We currently have a heavily redacted copy of the draft report. We want a copy of the final report with on individual names redacted. Withholding the information which has been redacted means we cannot fully understand how the investigation was conducted and what actually happened at the time. There are significant inconsistencies in the recommendations and conclusions which are not explained in the report – this may be explained if information is not redacted.
 3. I want the final report published. It is in the public interest to publish the report rather than to hide it.”
6. The Trust responded on 31 October 2022 refusing to provide the information to parts 1 and 2 of the request citing section 40(2) of the FOIA as the reason for refusal – third party personal data.
7. For part 3 of the request, the Trust advised this is not a request for recorded information.
8. The complainant requested an internal review on 2 December 2022 to only the first part of the request, disputing the Trust’s application of section 40(2) of the FOIA to part 1 of their request.
9. The Trust provided its internal review on 12 January 2023 upholding its initial response to part 1 of the complainant’s request.

Scope of the case

10. The complainant contacted the Commissioner on 21 February 2023 to complain about the Trust's refusal to part 1 of their request.
11. The scope of the case is for the Commissioner to determine whether section 40(2) of the FOIA was applied correctly to part 1 of the complainant's request.

Reasons for decision

Section 40(2) of the FOIA – third party personal data

12. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
13. Section 3(2) of the Data Protection Act 2018 defines personal data as:
"any information relating to an identified or identifiable living individual."
14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. In this case the information being withheld is for the numbers of positive Covid 19 cases recorded for staff and residents at the care home for each day between 4 May 2020 and 26 June 2020.
16. The Commissioner is satisfied that the data 'relates' to living individuals. He needs to consider whether those individuals can be identified from that data.
17. The Trust told the Commissioner that its decision to withhold the statistical information is not its default position in response to information requests. However, it states that in this case the complainant is closely linked to the care home, they are a relative and part of the relatives group for the care home, and they would have a prior knowledge of staff who work there and the care homes service users.
18. The Trusts has said it has considered the "whose hands" approach as detailed in the Commissioner's draft anonymisation, pseudonymisation and privacy enhancing technologies guidance dated May 2021.

19. The Trust said it also considered the "Spectrum of Identifiability" flow chart in the Information Commissioner's Office Draft anonymisation guidance and this reinforced its belief that the information is personal data in the hands of the complainant.
20. It explained to the Commissioner that the statistics and dates may not make staff or service users identifiable in the hands of other individuals, but it would do in the hands of the complainant, revealing personal data about Members of staff.
21. The Trust has told the Commissioner that the normal staffing ratio on any shift is 1 RGN (registered general nurse) and 6 care assistants.
22. The Commissioner has considered the fact that the request was made 31 August 2022 for the information, which relates to dates in May and June 2020, some 2 years prior to the request.
23. The complainant may know staff members, but the Commissioner is not convinced they could work out which of these staff members were rostered to be working for which day, and then use the requested data to determine which staff members did not attend their shift due to testing positive for Covid 19.
24. A staff member may also not have attended work on any given day due to other scenarios such as annual leave, not being rostered that day, or another health reason. The Commissioner is not aware that the complainant would have access to those employee records in order to determine who should have been working but did not work on a particular day and the reason why.
25. For example, there may have been 6 care assistants rostered to work on a particular day. If a number of them tested positive and were unable to work that day, the complaint would not have knowledge of who was rostered to work that day, so would not know which staff members did not work due to a positive test.
26. The Commissioner is therefore satisfied that the complainant, or any other person, would not be able to determine which staff members tested positive for Covid 19 on any particular date. He therefore finds that the staff members would not be identifiable from the requested information.

Service Users

27. The Commissioner has considered the withheld information against amount of service users at the property. This being 16. The service users are different to the staff members, in that they would be at the property each day and therefore if the requested information relating to

them was released the Commissioner is satisfied it could potentially reveal which of the residents may or may not have tested positive for Covid 19 on any given day. The number of service users is quite low, and this makes them more likely to be identifiable.

28. The Commissioner accepts the Trust's position that the information, if released, would identify which individual/s had a positive test or not for Covid 19.
29. The next step disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on principle (a), which states:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."
30. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.
31. Information relating to special category data is given special status in the UK GDPR.
32. Article 9 of the UK GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
33. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include special category data. She has reached this conclusion on the basis that it would reveal which service users may or may not have tested positive for Covid 19.
34. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
35. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
36. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being

disclosed to the world in response to the FOIA request or that they have deliberately made this data public.

37. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of FOIA.

The Commissioner's decision

38. The Commissioner's decision is that the Trust is entitled to rely on section 40(2) of the FOIA to refuse to provide the information to part 1 of the request in relation to the service users. However, section 40(2) of the FOIA is not engaged to the staff members.
39. The Commissioner therefore requires the Trust to provide the complainant with the information falling within the scope of part 1 of the request which relates to staff members.

Right of appeal

40. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

41. 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.
42. 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

Ian Walley
Senior Case Officer
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Wycliffe House
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