

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 13 October 2023

**Public Authority:** Liverpool University Hospitals NHS Foundation Trust

**Address:** Aintree Hospital  
Lower Lane  
Fazakerley  
Liverpool  
L9 7AL

### **Decision (including any steps ordered)**

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1. The complainant has requested copies of lessons learned reports. The above public authority ("the public authority") provided redacted copies of each report, relying on sections 40 (personal data), 41 (breach of confidence) and 42 (legal professional privilege) of FOIA to make the redactions.
2. The Commissioner's decision is that the public authority has correctly relied on sections 40 and 41 to withhold information. In respect of section 42, the exemption applies to some, but not all of the information to which it has been applied. Where the exemption is engaged, the balance of the public interest favours maintaining it. The public authority breached section 17 of FOIA because it failed to provide a refusal notice, within 20 working days, stating all the exemptions that it ultimately came to rely upon to withhold information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
  - Disclose all the redacted information in the boxes titled "If known..." and "Do you recommend..." in each report with the exception of the documents the public authority has identified to the Commissioner as LLR 3, LLR 10 and LLR 26.
  - For document LLR 26 only, disclose the information contained in the box titled "Has the Trust..."

4. 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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5. On 5 June 2023 the complainant requested information of the following description:

“Can I please have copies of Lessons Learning Reports that are under the control of the Trust from 1 October 2019 onwards?”
6. On 30 June 2023, the Trust responded. It refused to provide the requested information. It relied on section 42 of FOIA to withhold the information.
7. The complainant requested an internal review on the same day. The Trust sent the outcome of its internal review on 28 July 2023. It revised its position. It now accepted that some of the requested information could be disclosed – however it maintained that section 42 applied to the remaining information. It also considered that section 40(2) of FOIA (third party personal data) would apply to some of the information.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 11 August 2023 to complain about the way his request for information had been handled.
9. On 14 September 2023, the public authority provided its submission and copies of the information it was withholding. It also informed the Commissioner that, as some of the individuals to whom the withheld information related were now deceased, it recognised that this information would no longer be personal data (which must relate to a living individual). It stated that it instead wished to rely upon section 41 of FOIA to withhold this information.
10. On 15 September 2023, the Commissioner contacted the complainant to scope out a potential informal resolution. He noted that his initial view was that some of the information might not be covered by the section 42 exemption and he asked the complainant whether he (the complainant) would be willing to withdraw the complaint if this

information were provided. The complainant declined this offer and explained that he was interested in all of the information being withheld.

11. The Commissioner considers that the scope of his investigation is to determine the extent to which any of the stated exemptions apply.

### **Reasons for decision**

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12. Section 40(2) of FOIA allows a public authority to withhold information, that is the personal data of someone other than the requester and where there would be no basis in data protection law that would allow that information to be published.
13. Data protection law states that personal data cannot be used without a lawful basis for that specific use.
14. The Commissioner notes that the unredacted versions of the reports contain detailed information such as dates, particular medical conditions and gendered pronouns that would allow the individual patient or, where different, the claimant, to be identified. He is therefore satisfied that this information is personal data.
15. Where the information relates to a patient who is still alive, the Commissioner considers that the information will be their special category personal data.
16. Special category data covers some of the most sensitive information about a person. It includes any information about that person's health or medical treatment history.
17. Special category data, because of its sensitivity, receives special protection under data protection law and there are only a few, narrow, lawful bases that allow for it to be used.
18. In the context of a request for information, the Commissioner considers that there would only be a lawful basis for publishing this information if the individual had consented to publication or if they had made the information public themselves.
19. There is no evidence that the individuals have consented to their personal data being published. Nor is there evidence that they have made the information public themselves. The Commissioner therefore considers that disclosure would be unlawful and section 40(2) of FOIA is engaged.

20. To the extent that the information relates to the person making the claim (and would therefore be their personal data – but not special category data), the Commissioner has considered whether there might be a legitimate interest that would allow the information to be published.
21. The Commissioner considers that any legitimate interest in understanding how the public authority handles claims is already met by disclosure of the other information in the reports and in the additional documents that the public authority has disclosed. Given that details of the patient will be exempt under either section 40 or section 41 of FOIA anyway, releasing information that relates only to the claimant would reveal very little about the merits of the claim or the manner in which it was handled.
22. There is no lawful basis that would allow this information to be published and therefore it is also exempt under section 40(2) of FOIA.

#### **Section 41 – Breach of confidence**

23. Section 41 allows a public authority to withhold information, that it has received from another person, if publishing the information would be an actionable breach of confidence.
24. The public authority has applied this exemption to medical information about patients who are now deceased.
25. The Commissioner accepts that such information has been provided to the public authority by another person (the patient) and that, even if that person is now deceased, others would be able to bring an action for breach of confidence. It is established law that a duty of confidence does not end merely because the confider has died.
26. Medical information is clearly not trivial and it is not in the public domain – so the information has the necessary quality of confidence.
27. The Commissioner considers it to be implicit that any information passed between a patient and their doctor is subject to a duty of confidence. Therefore the information has been provided to the public authority in circumstances that imply a duty of confidence.
28. Finally, the Commissioner considers that the patient and their family would suffer detriment as a result of any unauthorised disclosure because of the loss of their privacy. Therefore all the conditions are in place for a breach of confidence action under the common law to be brought.

29. For section 41 of FOIA to apply, a breach of confidence action must also be likely to succeed. An action is unlikely to succeed if the public authority were able to offer a public interest defence.
30. The Commissioner considers that there is no compelling public interest reason that would override the public authority's duty of confidence – and the complainant has not put one forward. Any public interest that might be served by disclosure is already met by disclosure of the other information, or by the procedures the public authority has in place for monitoring claims and learning appropriate lessons.
31. The Commissioner is thus satisfied that section 41 applies.

## **Section 42 – legal professional privilege**

32. Section 42 of FOIA allows a public authority to withhold information that would be covered by legal professional privilege.
33. Privilege will apply to communications between a client and their legal adviser for the purpose of seeking and receiving professional legal advice.
34. The public authority advised that each Lessons Learned Report (which follows a standard template) was completed by an external firm of solicitors after the relevant litigation process had concluded. The reports would then be provided to its legal services department who would share them with the Hospital Management Board Safety meetings where appropriate. The Commissioner is therefore satisfied that the appropriate client-adviser relationship exists.
35. There are two types of privilege: legal advice privilege and litigation privilege.
36. The public authority referred in its refusal notice to legal advice privilege. Having viewed the withheld information, the Commissioner considers that the privilege is litigation privilege.
37. Litigation privilege will cover information passed between a client and their adviser in relation to a process of litigation or information that has been created or acquired for the purposes of that litigation. "Litigation" is not confined to processes that take place in a courtroom. It can also cover the earlier stages of a legal process, such as the sending of letters before claim, or even preparatory steps taken to issue such letters. It will also include any out-of-court settlement of such a claim.
38. The Commissioner considers that the information within these documents is capable of attracting litigation privilege because each document relates to a specific claim that has been made against the

public authority and the action the public authority took to resolve that claim. Legal advice privilege will apply in situations where no process of litigation has occurred or is likely to.

39. However, simply because a piece of information has passed between a lawyer and their client does not automatically mean that it is privileged. The information must also relate to the conduct of the litigation or to the seeking, or the provision, of professional legal advice.
40. In *Three Rivers District Council and others v The Governor and Company of the Bank of England* [2004] UKHL 48, Lord Scott stated that:

“if the advice given by a lawyer to his client relates to the rights, liabilities, obligations or remedies of the client (either under private law or under public law), the advice will be given in a relevant legal context and will attract legal advice privilege.
41. All but one of the Lessons Learned Reports follows the same template – which the complainant will be familiar with as he has received redacted versions. The first few boxes outline a description of the events that to the claim being filed and what the claim alleged. There are then two further boxes which detail the outcome of each claim and the reasons why the claim was concluded in the manner that it was. Finally there are two boxes which detail any steps the public authority has already taken to address risks and any recommendations to prevent similar harms reoccurring. Not all the reports contain specific recommendations.
42. Looking at the last two boxes (and with three exceptions that he will discuss later) the Commissioner does not consider that these contain information that is covered by privilege.
43. Turning to the first box, the Commissioner considers this information to be purely factual. It does not concern advice, or the law. Given that the litigation has concluded in each case, revealing whether or not any form of internal investigation or mitigation has since taken place does not undermine the public authority’s legal position in that litigation. Although it has been provided by a professional legal adviser, the Commissioner does not consider this information to be privileged.
44. The title of the second box reads “Do you recommend any steps to reduce the risk of similar harm occurring? If so, please detail.” In theory, the information recorded in this box would be capable of attracting privilege but, having seen the actual information that falls within the scope of the request, the Commissioner is not satisfied that privilege is engaged.
45. Had the information related directly to steps recommended to prevent future claims, or to enable future claims to be settled earlier, or on more

favourable terms, the Commissioner would have accepted that such material was privileged. Had it set out the applicable laws or legal remedies available, it would equally have attracted privilege.

46. However, the actual information being withheld in this box does not cover such matters. There are no references to the law, to litigation or to legal remedies that might be available. It may be advice and it may have been provided by a professionally qualified lawyer, but it has not been provided in an appropriate legal context and does not relate sufficiently to the "rights, liabilities, obligations or remedies of the client (either under private law or under public law)."
47. The recommendations that are made relate to reducing the risk of **the harm** reoccurring, rather than reducing the risk of another **claim**.
48. Whilst reducing harm may also reduce the risk of a future claim, the Commissioner is not persuaded that for the actual information being withheld here, the connection is strong or direct enough to bring the information within the realms of privilege. Furthermore, he notes that all of the recommendations refer to changes in clinical or administrative processes. Whilst they appear to be logical and reasonable solutions arising from the facts of each case, the Commissioner can see no reason why such recommendations could only be obtained from a professional legal adviser – the recommendations would have been equally valid coming from a senior clinician or administrator.
49. Given the strong public interest in protecting privilege (that will be discussed in more detail below), the Commissioner considers that this exemption should not be construed so broadly as to cover any communication from someone with professional legal qualifications.
50. The Commissioner does not therefore consider that section 42 of FOIA is engaged in relation to the information contained in these boxes; with three exceptions.
51. The document the public authority has labelled LLR 26 follows a slightly different template to the others. Whilst the boxes contain ostensibly the same information, the wording of each title is subtly different and there is an additional box at the end titled "Please detail any examples of good/notable practice." In the Commissioner's view none of the last three boxes would attract privilege, for the same reasons outlined above.
52. The documents that the public authority has labelled LLR 3 and LLR 10 appear to have been filled out slightly differently to the rest because either or both of the final boxes contain details of the claim itself and



why it was resolved the way that it was. Both boxes also contain some personal data.

53. For these two specific reports (and only these reports), the information in the final two boxes does engage section 42 of FOIA as material relating to the conduct of a claim covered by privilege.
54. The details relating to the outcome of the claim and why that outcome came about are also covered by privilege.
55. These boxes contain detailed, granular information about the specific strengths and weaknesses of each claim and of the public authority's legal position in respect of such a claim. Whilst there is a mixture of both clinical and legal analysis, unlike with the material in the last two boxes of the form, here the clinical analysis directly informs the legal analysis in that the clinical evidence is used to determine whether the public authority's legal position was strong or weak. The Commissioner is satisfied that this is professional legal analysis that relates to a process of litigation.
56. The public authority has confirmed that this information is not already in the public domain and would only have been circulated to a small number of its staff. The Commissioner is satisfied that privilege has not been waived in this instance.
57. The material is therefore covered by litigation privilege and section 42 of FOIA is engaged.

### **Public interest test**

58. In respect of the material to which section 42 does apply the Commissioner has gone on to consider the public interest test.
59. It is well established law that, whilst section 42 remains subject to a public interest test, in reality only in rare circumstances will there be a sufficiently compelling public interest to justify disclosure.
60. This is because legal professional privilege is considered to be a fundamental part of the British justice system. Any person should be able to seek and to receive good quality professional legal advice. They should also be entitled to lay out the complete facts before their legal adviser so that that adviser can provide appropriate, candid and comprehensive advice. They should not fear that, in doing so, they will weaken their own position in any litigation.
61. It is not necessary to demonstrate that disclosure would harm ongoing or future litigation (although in this case the Commissioner accepts that there is a real prospect that the public authority's position in future



litigation could be undermined). Any disclosure that erodes that privilege erodes the ability of the justice system to operate fairly and efficiently.

62. The complainant offered no reasons as to why the public interest should favour disclosure in this case and the Commissioner can see no compelling reasons that would justify disclosure. Any public interest in ensuring that the public authority is conducting litigation fairly and with regard to the public purse is already met by the internal procedures it already has in place and by the disclosure of the other information regarding claims it has already provided to the complainant.
63. Where section 42 applies, the balance of the public interest favours maintaining the exemption.

### **Procedural matters**

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64. The public authority breached section 17 in its handling of this request because its late reliance on section 41 meant that it failed to provide a refusal notice, within 20 working days, that cited all the exemptions that it eventually relied upon to withhold information.

### **Other matters**

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65. The Commissioner notes that, on numerous occasions, the complainant has challenged both the Trust's reliance on section 42 of FOIA (or its EIR equivalent, regulation 12(5)(b)) and the Commissioner's decisions to uphold the use of that exemption. The Commissioner wishes to stress that he makes each decision on the basis of its own individual facts.
66. Secondly, the Commissioner wishes to highlight comments made by the complainant when submitting his complaint, where he said that:

"the Trust should be able to release more information that it has provided - this is in the context that the Trust has been not only less than open, transparent and honest in the information it provides but has been, on occasion, deliberately deceitful as well as obstructive and has launched a series of personal attacks against me."
67. The Commissioner wishes to place on record that, whilst he has occasionally disagreed with the public authority's use of exemptions, it is not his opinion that the public authority has been "less than open, transparent and honest in the information it provides." Nor has the complainant provided a shred of evidence to suggest that the public authority has been "deliberately deceitful."

68. The public authority has already disclosed a large volume of information in response to the complainant's frequent requests and has promptly disclosed information during the course of investigations when the Commissioner has indicated that information may not have been correctly withheld. Where the public authority has continued to withhold information, the Commissioner has generally agreed that it was correct to do so.
69. Finally, the Commissioner would once again draw the public authority's attention to his published guidance on vexatious requests and the associated caselaw.<sup>1</sup> In particular he would draw attention to the binding ruling of Judge Knowles in *CP v Information Commissioner* [2016] UKUT 0427 (AAC):
- "the public interest in the information which is the subject of the request cannot act as a trump card so as to tip the balance against a finding of vexatiousness."
70. Any public value to information that has been requested must be weighed against the motive of the requester, any lack of a serious purpose, the burden imposed by responding to this and other requests the requester may have submitted and any harassment or distress to the public authority's staff.

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<sup>1</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-14-dealing-with-vexatious-requests/>

## Right of appeal

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71. 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](mailto:grc@justice.gov.uk)

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

72. 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.
73. 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**