

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 November 2023

Public Authority: South Western Ambulance Service NHS
Foundation Trust

Address: Abbey Court
Eagle Way
Exeter
EX2 7HY

Decision (including any steps ordered)

1. The complainant has requested information from the South Western Ambulance Service Trust ("SWAST") in relation to a specific review. SWAST has provided some information but says that no further information is held in relation to the request.
2. The Commissioner's decision is that, on the balance of probabilities, SWAST does not hold any further information within the scope of the request. SWAST was also correct to withhold some personal data under section 40(2) of FOIA. However, SWAST failed to provide a response within 20 working days and, as such, it breached section 10(1) of FOIA.
3. The Commissioner does not require any steps as a result of this decision notice.

Request and response

4. On 11 July 2022, the complainant wrote to SWAST and requested information in the following terms:

“Trust Motorbike Review with supporting evidence all time stamped.”

5. SWAST responded on 2 November 2022. It refused to provide the requested information, citing section 22 of FOIA – intended for future publication.
6. Following an internal review, SWAST wrote to the complainant on 12 June 2023. It stated that it maintained section 22 of FOIA. However, it was now also relying on section 40(2) – personal information and section 41 – information provided in confidence.
7. During the Commissioner’s investigation, SWAST provided the complainant with a redacted copy of the report that it holds. It also advised that no evidence was submitted with the report.

Scope of the case

8. The complainant contacted the Commissioner on 31 July 2023, to complain about the way their request for information had been handled.
9. The Commissioner considers that the scope of his investigation is to determine if, on the balance of probabilities, SWAST holds any further information relevant to the complainant’s request.

Reasons for decision

Section 1 of FOIA- general right of access

10. Section 1 of the FOIA states that any person making a request for information is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request and, if that is the case, to have that information communicated to them.
11. In cases where a dispute arises over whether recorded information is held by a public authority at the time of the request, the Commissioner - following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it more likely than not that the public authority holds information relevant to the complainant’s request.

Complainant’s position

12. The complainant has advised that the explanation of the report’s findings did not feel consistent with their experience operationally. They

added that they were given further explanations for why the team had been stood down but without the report being seen.

13. The complainant has advised that they want to see if the report they have received is the original version.

SWAST's position

14. SWAST has explained that it originally withheld the report under section 40(2) as there was personal information included within it. Once this was removed, the report was provided to the complainant.
15. SWAST has also explained that there is only one report held, which is not timestamped but it does have the date on it. It also explained that no evidence was provided along with it and, therefore, no further information is held.

Commissioner's decision

16. The Commissioner understands the complainant's concerns and why they would want such information. He also understands why the complainant would consider that it is likely that further information would be held. However, FOIA only looks at information that is held by a public authority. There is no requirement for further information to be created to respond to a request for information. A public authority cannot provide information that it does not hold.
17. The Commissioner also notes that the complainant has advised that they want to receive all versions of the report. However, this would not fall within the scope of this request.
18. The Commissioner has considered SWAST's explanations for the change in withholding the information and why no other information is held that falls within the scope of the request.
19. It is the Commissioner's view that, on the balance of probabilities, SWAST does not hold any further information in relation to the complainant's request.

Section 40 – personal information

20. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

21. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
22. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (DPA). If it is not personal data then section 40 of the FOIA cannot apply.
23. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

24. Section 3(2) of the Data Protection Act 2018 defines personal data as:

"any information relating to an identified or identifiable living individual."

25. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
26. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of the individual.
27. The withheld information in this case, is the name of the author of a report.
28. The Commissioner is satisfied that this information both relates to and identifies the individuals in question. It therefore falls within the definition of "personal data" in section 3(2) of the DPA. None of the individuals are the complainant, so it is third party personal data.
29. The fact that information constitutes third party personal data does not automatically exclude it from disclosure under FOIA. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles.
30. 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."

31. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
32. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

33. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”¹.

34. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
 - i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
35. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interest

¹ Article 6(1) goes on to state that:- “Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”. However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:- “In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

36. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
37. The Commissioner is satisfied that the complainant has a legitimate interest in the information, as it relates to a previous job role they were in.

Is disclosure necessary?

38. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
39. The Commissioner understands why the complainant would want such information. However, as the majority of the report has been provided other than the author's name (along with information regarding disciplinarys although the complainant has not disputed this and as such, the Commissioner has not considered it), he does not consider that it would make any difference to the report information and, as such, he has determined that the disclosure of the individual's name to the world at large, is not necessary.
40. The Trust was therefore correct to withhold the personal data contained within the report under section 40(2) of FOIA.

Procedural matters

41. Section 10(1) of FOIA provides that, subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
42. Section 17(1) of FOIA provides that a public authority which, in relation to any request for information, is to any extent relying on a claim that

any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

43. In this case, the Trust took four months to provide its initial response to the complainant. It also applied different exemptions to the requested information before eventually providing the report to the complainant. As such, the Commissioner finds that section 10(1) and section 17(1) of FOIA has been breached.

Right of appeal

44. 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

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

45. 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.
46. 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

Michael Lea
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