

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 August 2024

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 an SAI report of a trip which took place in May 2020 from (Name redacted) Care Home to Trust led day centres. Southern Health and Social Care Trust (SHSCT) relied on section 40(2) of FOIA (third party personal information) to withhold the information.
2. The Commissioner's decision is that SHSCT is entitled to withhold some of the information it holds under section 40(2) of FOIA as it is the personal data of another individual and disclosure would be unlawful.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 1 June 2023, the complainant wrote to the public authority and requested information in the following terms:

"I am requesting a copy of the final unredacted SAI report into the trips which took place in May 2020 from (Name redacted) Care Home to Trust led day centres. We currently have a heavily redacted copy of the report. We want a copy of the final report with only 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 and gives the impression of hiding information”

5. SHSCT responded on 21 June 2023. It disclosed a copy of the final SAI report with redactions throughout which would be exempt from disclosure under section 40(2) – Third party information of FOIA.
6. Following an internal review the public authority wrote to the complainant on 4 September 2023. It provided a further copy of the final SAI with redactions stating

“The trust has reviewed each of the sections in the report where redactions were applied.

The report does not contain the names of any individual staff of the care home. Within the context of the SAI report and information known to the families of the residents in the care home, the trust considers the information which has been redacted to be identifiable and therefore exempt from disclosure under section 40(2), third party information.

Having thoroughly reviewed the SAI report there are a small number of redactions that have been removed on Page 6, Page 7 and Page 8 resulting in your request being partially upheld.”

Scope of the case

7. The complainant contacted the Commissioner on 19 September 2023 to complain about the way the request for information had been handled as they believed the number of remaining redactions on the report to be unreasonable.
8. The complainant had previously brought a previous request to the commissioner for which a decision notice was issued under case reference IC-217791-W8Q7.¹

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4026032/ic-217791-w8q7.pdf>

9. The Commissioner considers that the scope of his investigation is to establish whether the public authority is entitled to withhold the requested information under section 40(2) of FOIA

Reasons for decision

Section 40 - personal information

10. Section 40(2) of 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.
11. 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').
12. 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 FOIA cannot apply.
13. 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?

14. Section 3(2) of the DPA defines personal data as:
"any information relating to an identified or identifiable living individual".
15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
17. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

18. The complainant has requested copies of the final SIA (Serious Adverse Incident) report for a trip which took place in May 2020 from (Name redacted) Care Home to a Trust led day centre which contains only the redactions of names of any individuals on the trip.
19. In its review response to the complainant, SHSCT explained
20. "The Trust has concluded the information that it holds (small number of care home residents and staff) together with all the means reasonably likely to be used by any other person to identify those individuals, that the information contained within the report is personal data. Taking a holistic view of all of the information contained within the report and the fact it can be attributed to individuals, it is reasonable in the circumstances to apply a higher level of protection to this information. Therefore the trust considers that it would be a breach of the first data protection principle to release this information as it would be unfair to those individuals concerned."
21. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information can be clearly categorised as personal data and that the individuals concerned (staff members and residents of the care home) can be identified from the information contained on the SIA by those mindful to do so.
22. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
23. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
24. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

25. Article 5(1)(a) of the UK GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

26. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.

27. In the case of an 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.
28. 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

29. 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”².

30. 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.
31. In considering this point, the Commissioner recognises that different members of the public will have different degrees of access to the ‘other information’ which would be needed for re-identification of apparently

² 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) 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”.

32. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

33. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
34. Further, 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
35. In their request for an internal review to SHSCT, the complainant stated

"We are not content with the response as it does not address our actual request of a copy of the report with only individual names redacted. We did not ask for the report to be issued with no redaction. We have not asked for a fully redacted report and we consider the amount of redaction in the copy we received to be unreasonable. We are also concerned at the use of the exemption as personal data can be redacted and the report is in the public interest.

To withhold this simply leads us to consider that the trust is hiding information relevant to (details redacted)"

36. The complainant explained to the Commissioner that they required a less redacted copy of the final SIA (Serious Adverse Incident) so they could be assured that the SAI has been conducted properly and that its findings are correct.

"There are significant parts redacted. In the earlier version of the report there were inconsistencies and incorrect interpretations in some parts that were redacted and the trust then addressed those. If I cannot see a lot of the report then I cannot be assured that the facts of r findings of SAI are correct. Given the SAI process allows the trust to investigate itself, I cannot fairly appeal to the NIPSO if I cannot see so much of the report."

37. The Commissioner accepts that the complainant has a legitimate interest in the information, but considers that this is largely a private concern, unrelated to any broader public interest.

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 is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified. The Commissioner therefore considers that disclosure of the requested information is necessary to meet that legitimate interest.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

40. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
41. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
42. On the face of it, the withheld information does not directly identify any individual. However, because SHSCT has implied that the information relates to a small number of care home residents and staff, the Commissioner has considered whether this information, when combined with other information either already in the public domain, or known to particular individuals, may nevertheless make identification possible.
43. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information

relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

44. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
45. The Commissioner is aware that disclosure under FOIA is considered as being made to the world at large, rather than to the requester only, and this includes to those individuals who may have a particular interest in the information (and additional knowledge of the specific circumstances of those involved) which is not shared by the wider public.
46. In considering this point, the Commissioner recognises that different members of the public will have different degrees of access to the 'other information' which would be needed for re-identification of apparently anonymous information to take place. In the Code of Practice³ on Anonymisation, he acknowledges that "...there is no doubt that non-recorded personal knowledge, in combination with anonymised data, can lead to identification."
47. The Commissioner considers that other individuals will have different levels of knowledge of the specific care home and incidents that led to an SAI (Serious Adverse Incident) report to be completed by SHSCT. If the information were to be released by SHSCT, using the other information, individuals, specifically staff and residents could be identified.
48. The Commissioner has had sight of the SAI report and considers that SHSCT has disclosed all that it reasonably and lawfully can to the complainant.
49. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
50. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

³ [Anonymisation: managing data protection risk code of practice \(ico.org.uk\)](https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/legitimate-interests/legitimate-interests-code-of-practice)

51. As such, the Commissioner's decision is that SHSCT was entitled to withhold the information under section 40(2) of FOIA.

Right of appeal

52. 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

53. 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.
54. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Michael Lea
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF