

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 12 November 2024

**Public Authority:** Northern Health and Social Care Trust  
**Address:** Causeway House  
Route Complex  
8e Coleraine Road  
Ballymoney  
BT53 6BP

### Decision (including any steps ordered)

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1. The complainant has requested the number of listed procedures carried out by a named surgeon. The Northern Health and Social Care Trust (the Trust) refused the request under section 40(2) of FOIA (third party personal data).
2. The Commissioner's decision is that the Trust was not entitled to rely on section 40(2) to refuse the request. The Commissioner requires the Trust to take the following steps to ensure compliance with the legislation:
  - Disclose the requested information to the complainant.
3. The public authority must take these steps within 30 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

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4. On 28 February 2024 the complainant wrote to the Trust and requested information in the following terms:

"I would appreciate if you could confirm the total number of listed operations as outlined below the following doctor has performed,

[Named individual and GMC number]

- 1) Number of Key hole hernia repairs
- 2) Number of invasive hernia repairs

Finally, the total of each of the following procedures

Herniorrhaphy  
Hernioplasty  
Laparoscopic Hernia Repair  
Femoral Hernia Repair  
Hiatal Hernia Repair"

5. Having sought and received clarification of the timeframe covered by the request, the Trust issued a refusal notice on 29 March 2024. The Trust advised that it could not disclose the requested information because it was personal data, citing section 40(3) of FOIA. The Trust advised that it could provide the total number of hernia procedures carried out by the Trust during a particular timeframe.
6. The complainant requested an internal review on 9 April 2024, and the Trust provided the outcome of that review on 13 May 2024. The Trust reiterated its position that it could not disclose the requested information on the basis that it comprised personal data. No further explanation was provided.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 13 May 2024 to complain about the way their request for information had been handled. The complainant did not accept that compliance with the request would involve the disclosure of personal data.

### **Reasons for decision**

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#### **Section 40: third party personal information**

8. 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.

9. The first step for the Commissioner is to determine whether the requested information constitutes personal data as defined by the Data Protection Act 2018 (the DPA). If it is not personal data, then section 40 of FOIA cannot apply.
10. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied. Essentially this means whether disclosure of that data 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 (the UK GDPR), or the right to object to processing.

### **Is the information personal data?**

11. Section 3(2) of the DPA defines personal data as:

“any information relating to an identified or identifiable living individual”.

12. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
13. 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.
14. 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.
15. The Commissioner observed that neither the refusal notice nor internal review letter explained how the requested information was considered personal data. He therefore asked the Trust to clarify this point.
16. The Trust stated that the requested information comprised personal data relating to a health professional, ie the surgeon named in the request.
17. The Commissioner accepts that the requested information relates to the named individual in terms of their work, ie performing medical procedures. Accordingly he is satisfied that the requested information falls within the definition of “personal data” in section 3(2) of the DPA.

18. Since the requested information is not the personal data of the complainant, it is third party personal data. The next step is therefore to determine whether disclosure would contravene any of the DP principles or the right to object.
19. In response to the Commissioner's enquiries the Trust stated that disclosure of the requested information would contravene the first DP principle. This is set out at article 5(1)(a) of the UK GDPR which states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
20. In the case of a request under FOIA 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.
21. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing, ie disclosure of the personal data into the public domain. It must also be generally lawful.

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

22. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.
23. The Commissioner considers that the lawful basis most applicable is Article 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"<sup>1</sup>.

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<sup>1</sup> 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) of FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:

24. Accordingly, 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.
25. The Commissioner considers that these tests should be considered in sequential order, ie if the legitimate interest is not met then there is no need to go on to consider the necessity test, and so on.

### **Legitimate interests**

26. 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.
27. Neither the Trust nor the complainant provided any details of potential legitimate interests, although the Commissioner recognises that the complainant did not accept that the requested information is personal data.
28. The Commissioner is of the opinion that there is generally a legitimate interest in the disclosure of information that facilitates openness and transparency. He accepts that disclosure of the requested information in this case would inform the public as to the number of hernia procedures carried out by the surgeon in question. In the Commissioner's opinion this constitutes a legitimate, albeit general, interest in disclosure.

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"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UKGDPR would be contravened by the disclosure of information, Article 6(1) of the UKGDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

### **Is disclosure necessary?**

29. Having identified a legitimate interest, the next step is to consider whether disclosure of the personal data in question is actually necessary to meet that legitimate interest. 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 be the least intrusive means of achieving the legitimate aim in question.
30. The Trust advised the Commissioner that it did not consider disclosure of the requested information necessary, although it did not expand on its position.
31. As set out above, the Commissioner has identified a legitimate interest in disclosure of the requested information, ie informing the public about the number of hernia procedures carried out by the surgeon. The Commissioner accepts that this specified legitimate interest may only be met by disclosing the requested information.

### **Do the above interests override the legitimate interests or fundamental rights and freedoms of the data subject?**

32. If the first two tests are satisfied, the public authority must balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, the authority should 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.
33. 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 has expressed concern about the disclosure; and
  - the reasonable expectations of the individual.
34. The Commissioner considers a key issue to be the extent to which a data subject has a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as:

- the individual's general expectation of privacy;
  - whether the information relates to an employee in their professional role or to them as a private individual; and
  - the purpose for which they provided their personal data.
35. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual. Disclosure under FOIA equates to publication to the world at large. The Commissioner must therefore balance the legitimate interests in disclosure against the data subject's interests when determining whether the information can be disclosed into the public domain, and not just to the complainant.
36. The Trust advised the Commissioner that the health professional concerned would not have any expectation that "their personal data pertaining to their work performance would be disclosed into the public domain".
37. The Commissioner is disappointed that the Trust did not provide a detailed explanation of its position. For example, it did not provide any evidence to support its claim about the individual's expectations. For example, it did not clarify whether it had consulted the individual about the request. In any event the Commissioner is mindful of his published guidance,<sup>2</sup> to which he referred the Trust, which sets out that the test is that of reasonable expectation.
38. The Commissioner observes that freedom of information legislation has been in place since 2000, and access rights have been in force since 2005. He considers it self-evident that those working in the public sector, providing public services, will be subject to reasonable public scrutiny. In the absence of any arguments to explain or support the Trust's position the Commissioner does not accept that it is reasonable for a surgeon, working in public healthcare, to expect that information relating solely to the work they perform would not be disclosed under FOIA.
39. The Commissioner has also considered the possible consequences of disclosure. Again, the Trust did not provide any arguments or information to demonstrate that it had considered this issue. The Commissioner's guidance says that where the requested information

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<sup>2</sup> <https://ico.org.uk/for-organisations/foi/section-40-and-regulation-13-personal-information/part-three-the-first-condition-would-disclosure-contravene-the-data-protection-principles/#Balancing>

relates to an individual's public life, as opposed to their private life, it is less likely that their interest will outweigh the legitimate interests in disclosure. In this case the information relates purely to the individual's public life.

40. The Commissioner is also mindful of the limited nature of the requested information. Disclosure would not offer the public any information about the quality of the care provided by the surgeon, or the outcomes of procedures undertaken. It would only provide insight into the volume of procedures conducted by one individual over a given timeframe. The Commissioner does not consider that this makes the information less meaningful to the public; he does however consider that it is accordingly less intrusive for the surgeon.
41. The Trust has not provided the Commissioner with any arguments or evidence as to why the specific requested information in this case should not be disclosed. The Commissioner has no reason to conclude that disclosure of the requested information would have a disproportionate or detrimental impact on the individual's privacy rights.
42. Even though it has been demonstrated that disclosure of this information under FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under principle (a), as set out at paragraph 19 above. These are that processing (and in this case disclosure to the public) must be generally fair and transparent.
43. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons. The requirement for transparency is met because as a public authority, the Trust is subject to FOIA.
44. The Commissioner would remind the Trust, and public authorities generally, that it is for them to demonstrate that they have properly considered requests and applied any exemptions claimed. The Commissioner is mindful of his role as the data protection regulator, and will not order the disclosure of personal data where to do so would contravene any of the DP principles. However, where the authority fails to satisfy the Commissioner that it has properly applied the law, the Commissioner is more likely to uphold the complaint, as he has done in this case.
45. Having taken into account all the circumstances of this case the Commissioner is not satisfied that the legitimate interest in disclosing some of the withheld information is outweighed by the rights and freedoms of the data subject, ie the surgeon named in the request.



46. Consequently the Commissioner finds that the Trust has failed to demonstrate that it was entitled to rely on the exemption at section 40(2) in respect of the requested information.

## **Right of appeal**

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47. 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)

48. 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.
49. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Sarah O’Cathain**  
**Senior Case Officer**  
**Information Commissioner’s Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**