

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

### **Decision notice**

**Date:** 03 December 2019

**Public Authority:** Wirral University Teaching Hospital NHS  
Foundation Trust

**Address:** Arrowe Park Road  
Upton  
Wirral  
Merseyside  
CH49 5PE

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

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1. The complainant has requested information relating to physical assaults on staff. The Wirral University Teaching Hospital NHS Foundation Trust (the Trust) refused to provide the requested information citing the exemption under section 40(2) of the FOIA (third party personal data) as its basis for doing so.
2. The Commissioner's decision is that the Trust has incorrectly applied section 40(2) of FOIA to the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - To disclose the suppressed numbers for Q7, Q8 and Q11.
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 3 December 2018 the complainant made the following request for information: (The Commissioner has added the question numbers.)

*'Under the Freedom of Information Act, please could you provide me with the following information (most likely as reported through the Security Incident Reporting System (SIRS)):*

- 1. The total number of physical assaults on staff recorded in 2016/17 (financial year from April 2016 to March 2017) and in 2017/18 (financial year from April 2017 to March 2018)*
  - 2. The total number of physical assaults on staff recorded that involved medial factors in 2016/17 and in 2017/18*
  - 3. The total number of times physical injury was caused in 2016/17 and in 2017/18*
  - 4. The total number of times was restraint used following a physical assault in 2016/17 and in 2017/18*
  - 5. The total number of times was seclusion used following a physical assault in 2016/17 and in 2017/18*
  - 6. Total number of criminal sanctions applied in relation to physical assaults in 2016/17 and 2017/18*
  - 7. Total number of civil and administrative sanctions applied in relation to physical assaults in 2016/17 and 2017/18*
  - 8. The total number of times intended police action in relation to physical assaults was recorded as charge in 2016/17 and 2017/18.*
  - 9. The total number of times intended police action in relation to physical assaults was recorded as verbal warning in 2016/17 and 2017/18.*
  - 10. The total number of times intended police action in relation to physical assaults was recorded as no action in 2016/17 and 2017/18.*
  - 11. The total number of times it was recorded that the victim did not want police to pursue the matter in relation to physical assaults in 2016/17 and 2017/18.*
  - 12. Total number of staff reported by the trust at March 31, 2017 and at March 31, 2018.*
- Please provide this information as a spreadsheet or CSV file.'*

6. On 13 March 2019 the Trust responded to each question. The complainant queried the single figure responses. The Trust provided an amended response on 16 April 2019 providing figures for each financial year. It withheld information from Q7, Q8 and Q11 as the small numbers could lead to identification of the people concerned, citing section 40 of the FOIA.

7. On 30 April 2019 the complainant requested an internal review. She argued that the exact numbers should not be suppressed under section 40.
8. On 12 June 2019 the Trust provided the outcome of the internal review. It upheld the decision to refuse the exact numbers for each financial year and cited section 40(2) (Personal Information) of the FOIA.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 19 June 2019 to complain about the way the request for information had been handled.
10. The Commissioner considers the scope of this case to be to determine if the Trust has correctly applied section 40(2) FOIA to the withheld information - the suppressed figures withheld at Q7, Q8 and Q11.

### **Reasons for decision**

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#### **Section 40 Personal information**

11. 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.
12. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. 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 set out in Article 5 of the General Data Protection Regulation (GDPR) ('the DP principles').
13. 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.
14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) of the Data Protection Act 2018

that data would breach any of the data protection principles under the DPA.

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

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

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

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

17. 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.

18. 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.

19. The Commissioner’s guidance on what is personal data<sup>2</sup> states that if information ‘relates to’ an ‘identifiable individual’ it is ‘personal data’ regulated by the DPA.

20. The information in this case doesn’t directly identify individuals. However, because the name of an individual is not known, it does not mean that an individual cannot be identified. The aforementioned guidance states the following:

*‘A question faced by many organisations, particularly those responding to Freedom of Information requests, is whether, in disclosing information that does not directly identify individuals, they are nevertheless disclosing personal data if there is a reasonable chance that those who may receive the data will be able to identify particular individuals.’*

It also states:

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<sup>2</sup><https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf> & [https://ico.org.uk/media/for-organisations/documents/1549/determining\\_what\\_is\\_personal\\_data\\_quick\\_reference\\_guide.pdf](https://ico.org.uk/media/for-organisations/documents/1549/determining_what_is_personal_data_quick_reference_guide.pdf)

*'The starting point might be to look at what means are available to identify an individual and the extent to which such means are readily available. For example, if searching a public register or reverse directory would enable the individual to be identified from an address or telephone number, and this resource is likely to be used for this purpose, the address or telephone number data should be considered to be capable of identifying an individual.'*

*'When considering identifiability it should be assumed that you are not looking just at the means reasonably likely to be used by the ordinary man in the street, but also the means that are likely to be used by a determined person with a particular reason to want to identify individuals. Examples would include investigative journalists, estranged partners, stalkers, or industrial spies.'*

21. The Commissioner directed the Trust to the recent first tier tribunal decision which considered the suppression of small numbers [http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1995/Miller,%20Claire%20EA-2016-0265%20\(20.04.17\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1995/Miller,%20Claire%20EA-2016-0265%20(20.04.17).pdf) and the Upper Tribunal decision which upheld the decision that individuals would not be identified if the small numbers were disclosed. (Information Commissioner v Miller – GIA/2444/2017 (EA/2016/0265))
22. The Trust referred to another tribunal decision in support of its case. In (Bridges) v Chief Constable of South Wales [2019] (see - <https://www.judiciary.uk/wp-content/uploads/2019/09/bridges-swp-judgment-Final03-09-19-1.pdf>) it considered facial recognition data and how an individual might be identified from data, together with other information, by way of indirect identification or individuation.
  - Indirect identification has a low threshold for the risk of identification - only where data combined with other information "appears in reality to be insignificant" that the data should not be regarded as "personal data".
  - Individuation or "singling out" - a person will be sufficiently individuated where they are "singled out and distinguished from all others"
23. The Trust stated its view that, given the small numbers of people involved, the individuals represented by the actual data are identifiable either through indirect identification or through singling out. It had suppressed the numbers to remove the risk of identification of an individual.
24. In its internal review to the complainant the Trust explained that:

- The personal data would include both the victims of physical assault and the perpetrators.
- All the victims are (or have been in the past) employed as members of staff of the Trust, this makes the "pool" of individuals from whom particular individuals might be identified a potentially small one.
- Another FOIA request might seek to have this information provided to them broken down by the various locations and sites from which staff operate.
- Disclosure of the actual figures would enable a person who was also in possession of information relating to the criminal, civil and administrative sanctions to identify the individuals denoted by the figures.
- Considering the "motivated intruder test" in the Commissioner's guidance, it is not unreasonable to conclude that such information would be capable of being obtained by journalists with the means, resources, journalistic expertise and motivation to do so in the interests of journalism.

25. In its response to the Commissioner's questions, the Trust remained of the view that disclosure of the actual data risked identifying the individuals involved either through indirect identification or through singling out. The Trust considered that:

- The common characteristics of being employed by the Trust and victims of an assault operate as aids to identification of individuals. The "pool" of people is a relatively small one. Trust staff are a community of people for the most part living and working in a relatively small geographical area.
- Knowledge of the actual numbers of individuals, coupled with information derived from, for example, local news reports, social media activity and a person's knowledge of the local area, might lead to identification of individuals.
- There is a high likelihood that information about an incident of assault on a member of Trust staff will be known among Trust staff, both through "official" channels (such as the reporting of an investigation into an incident, and staff members seeking support from colleagues) and "unofficial" channels (as a result of an incident having been witnessed, or through information becoming known generally within the Trust), and that that information may also be used in combination with data to identify an individual.

- The likelihood of such indirect identification and singling out is higher in this case, noting the complainant's professional interest and expertise as a journalist.
26. In summary the Trust considered that the "threshold of risk" of indirect identification is a low one (see paragraph 22 above): only where the risk of identification from data combined with other information "appears in reality to be insignificant" should data not be regarded as "personal data". The factors described above make the risk of identification more than "insignificant".
  27. The Commissioner notes that the Trust employs 5,600 staff over 2 main hospital sites and in 2 community settings. The Commissioner also notes that the Trust has not provided to the complainant any identifiers with the numbers such as site location or hospital department.
  28. The Commissioner is not convinced by the Trust's arguments above that disclosure of the suppressed numbers identifying the total number of civil and administrative sanctions (Q7), the total number of times intended police action was recorded as charge (Q8) and the total number of times the victim did not want to pursue the matter (Q11) would lead to the identification of the individuals themselves.
  29. Although there is potentially a risk of self-identification in that a person may point to the suppressed number for 'victim did not want to pursue the matter' (Q11) and decide that their injury was one of those few, it is not clear to the Commissioner how some-one else could link the number to an identifiable individual. There is no information by reference to an identifier such as a name, an identification number, location data or an online identifier and no information with any biographical significance.
  30. In the same way, disclosing a number (say '2' or '3' or '4') does not in itself link to staff knowledge of an incident or link to other information in the local news or via social media.
  31. In summary, the Commissioner is not convinced that the Trust has provided sufficient evidence to link the suppressed numbers to any of the identifiers as listed in paragraph 17 above.
  32. This is in line with the Commissioner's previous decision which considered the same information. (See <https://ico.org.uk/media/action-veve-taken/decision-notices/2019/2616155/fs50841016.pdf>)
  33. The Commissioner considers that the information does relate to a living person but does not relate to a person who is identifiable. It is not reasonable to assume that individuals could be identified if the 6 suppressed numbers were disclosed.

34. Therefore, the Commissioner is satisfied that the requested information in this case does not constitute personal data. As it is not personal data then section 40 of FOIA cannot apply and the Commissioner does not need to go on to determine whether disclosure would contravene any of the data protection principles.
35. In conclusion the Commissioner has decided that the Trust has failed to demonstrate that the exemption at section 40(2) is engaged.



## Right of appeal

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

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

37. 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.
38. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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