

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 May 2014

Public Authority: Rotherham NHS Foundation Trust

Address: Rotherham Hospital
Moorgate Road
Rotherham
S60 2UD

Decision (including any steps ordered)

1. The complainant has requested a copy of an internal audit report into the Electronic Patient Records ("EPR") system. The Trust has disclosed the majority of the report but has applied the section 40(2), 43(2) and 36(2) exemptions to withhold the remaining information.
2. The Commissioner decision is that the section 43(2) exemption is not engaged and the public interest favours disclosing information withheld under the section 36(2) exemption. He has also concluded that the section 40(2) exemption is not engaged in relation to the information withheld on page 9 of the EPR report. He therefore requires the Trust to disclose the information withheld on pages 6, 7, 9 and 11 of the EPR report.
3. The Commissioner has also found that the information withheld on pages 16 and 20 does not engage the section 40(2) exemption and should therefore be disclosed.
4. The information withheld on page 22 – the list of interviewees – does engage the section 40(2) exemption and the Trust has correctly withheld this information.
5. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld on pages 6, 7, 9, 11, 16 and 20 of the EPR report.

6. 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

7. On 27 June 2013, the complainant wrote to Rotherham NHS Foundation Trust ("the Trust") and requested information in the following terms:

"My request concerns internal audit reports on the EPR system.

To help clarify, can I have copies of any internal audit report into the EPR system which was received by the trust's board of directors or any sub-committee of the board of directors since June 1 2012."

8. The Trust responded on 5 July 2013. It stated that the report had only recently been presented to the Trust and it was still being considered. It therefore only provided the executive summary to the report and withheld the remaining information on the basis of section 36, 40(2) and 43 of the FOIA. The Trust did explain to the complainant that it would issue a further response by 2 August 2013 once it had the opportunity to consider the report and respond appropriately.
9. The Trust wrote to the complainant again on 26 July 2013 and disclosed some additional information, namely the recommendations and Trust actions from the report. It explained that it still considered the rest of the information in the report to be exempt on the basis of section 36, 40, 43 and also 31.
10. Following an internal review the Trust wrote to the complainant on 18 September 2013. It stated that it still considered the exemptions as cited in the response of 26 July to provide a basis for withholding the majority of the information in the report. That being said, the Trust did accept that some additional information in the Contents, Findings and Recommendations sections could now be disclosed.

Scope of the case

11. The complainant contacted the Commissioner on 26 September 2013 to complain about the way his request for information had been handled. In particular he stressed that full disclosure of the report was necessary

in order to understand the failure of the introduction of the EPR system and the impact this had on the Trust.

12. During the course of the Commissioner's investigation the Trust agreed to disclose more information to the complainant. It therefore disclosed the majority of the report with some minor redactions still remaining where it considered the information to be exempt on the basis of section 43, 36 and 40 of the FOIA.
13. The Commissioner considers the scope of his investigation to be to determine if the Trust has correctly applied these exemptions to the remaining withheld information in the EPR report.

Reasons for decision

Section 36(2)(b)(i) and (c)

14. Section 36(2) of the FOIA states that:

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information –

(b) would, or would be likely to, inhibit –

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

15. The exemptions listed in section 36(2) are qualified exemptions so are subject to public interest tests. However, before considering the public interest the Commissioner must first consider whether any of the exemptions are engaged.
16. For any of the exemptions listed as section 36(2) to apply the qualified person for the public authority must give their reasonable opinion that the exemption is engaged. The qualified person for the Trust is the Chief Executive. The Trust has provided the Commissioner with evidence to demonstrate that the opinion has been sought and provided. The Commissioner has next gone on to consider whether the opinion of the qualified person was a reasonable one.

17. The Commissioner has recently issued guidance on section 36 of the FOIA. It states the following: "*The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason: not irrational or absurd'. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable.*"¹
18. In order to determine whether any of the subsections of 36(2) is engaged the Commissioner will consider:
 - whether the prejudice claimed relates to the specific subsection of section 36(2) that the Trust is relying on;
 - the nature of the information and the timing of the request; and
 - the qualified person's knowledge of or involvement in the issue.
19. The Trust had identified information on pages 6, 7, 9 and 11 of the EPR report which it considers should be withheld on the basis of section 36(2) (c). It had explained to the complainant that this information related to third parties and was of commercial relevance and disclosure would be likely to have an adverse effect on the Trust's internal governance and administration. The Trust did not consider that it could be more specific about the information redacted from these pages without providing information which it considered exempt. The Commissioner has gone into more detail about this information in the confidential annex.
20. It is the view of the Trust that the disclosure of this information would be likely to prejudice the effective conduct of public affairs (36(2)(c)).
21. It was initially also thought that the disclosure of the information would be likely to inhibit the provision of advice (36(2)(b)(i)) and the free and frank exchange of views for the purposes of deliberation (36(2)(b)(ii)). However, following the internal review, the Trust determined that it was only section 36(2)(c) which would be engaged due to the ongoing investigations and no longer considered section 36(2)(b)(i) or (ii) to be applicable.

¹ Information Commissioner's section 36 FOIA guidance, http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx, November 2011, page 6.

22. Despite this there was some confusion over which subsections of section 36(2) were being relied upon by the Trust. In its first response to the Commissioner's initial enquiries, the Trust indicated it was relying on all subsections of section 36(2) which was contrary to the position at the internal review stage. However, at this time it was withholding more information that was later disclosed. At this later stage, the Trust sought the opinion of the qualified person again on the remaining withheld information. When asking the qualified person for her opinion it was done on the basis of section 36(2)(b)(i) and (c).
23. The Trust has provided sufficient evidence to illustrate that the qualified person was provided with information explaining that she was required to form a reasonable opinion in relation to the application of section 36(2)(b)(i) and (c). It is clear that having reviewed this information the qualified person formed the opinion that the disclosure of the redacted information would be likely to prejudice the effective conduct of public affairs and inhibit the free and frank provision of advice.
24. Having considered the points outlined above the Commissioner is satisfied that the opinion of the qualified person is a reasonable one. Therefore he considers that sections 36(2)(b)(i) and (c) are engaged. He will now go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

25. The Trust has acknowledged what it considers to be "*the very strong public interest in accountability for expenditure of public money and for proper governance of public organisations, particularly where there have been significant criticisms of the management of expenditure.*"
26. The complainant has also argued there is a strong public interest in disclosure of the entirety of the EPR investigation report, particularly due to the amount of money involved and the fact that the failure of the patient record system led to formal intervention by the regulatory body, Monitor. As such there is a strong public interest in accountability in this case.

Public interest arguments in favour of maintaining the exemption

27. When making a judgement about the weight of the public authority's arguments under section 36(2), the Commissioner will consider the severity, extent and frequency of prejudice to the effective conduct of public affairs.
28. At the time of the request the Trust argued that disclosure of the information would raise genuine concerns about the provision of future

advice and how forthright and clear this may be if it was believed that the Trust may disclose this information.

29. Whilst the Trust recognised the public interest in accountability to allow for understanding of any failings that may have occurred it considered that the public interest in this had been met by the disclosure of the majority of the EPR report, especially considering that the Trust was still in the process of considering the recommendations in the report to determine what actions it would take. For this reason it considered that disclosure of the withheld information could lead to *"difficulties ... from 'allegations' which may prove to be unfounded and any misattribution of blame"*.
30. The Trust had stated that it considers there is a strong public interest in it being able to commission and obtain full and frank reports when things have gone wrong. The Trust considers that those providing audit services to the Trust must be in a position to give a robust indication of their views but it must be appreciated that these views are sometimes formed without the benefit of full and detailed information.

Balance of the public interest arguments

31. The Commissioner firstly wants to note that the arguments presented by the Trust in support of the application of the section 36 exemption have been limited and confused with some of the arguments presented in relation to the section 43 exemption. As such he has taken into account the points made by the Trust and has followed some of the arguments through to understand the position of the Trust.
32. The Trust has alluded to the need for a 'safe space' in its submissions (although not referred to as a 'safe space' in its arguments) and the Commissioner generally accepts that these arguments are applicable where there is a need to debate issues and make decisions away from public scrutiny. The Commissioner is not clear from the submissions from the Trust why a safe space would be required in relation to the information that has been redacted from the EPR report under section 36.
33. The information withheld is from the 'Detailed findings' section. Within this section there are subsections which then contain findings, recommendations and trust actions. The information on pages 6 and 7 is in the subsection on objectives and is in the 'findings' part of this subsection. Similarly, the information withheld on page 9 is in the financial governance and management subsection in the 'findings' part. On page 11 the information is in the user engagement subsection, again in the 'findings' part.

34. The Commissioner would accept that if the withheld information was contained in the recommendations or trust actions parts of the various subsections there may be a legitimate argument that a safe space was required, at the time of the request when the report was still being considered, in order to allow the Trust to decide on how best to implement any recommendations. However, as the withheld information is contained in the more factual findings section it is more difficult to accept any validity to a safe space argument.
35. The Commissioner considers it important to highlight that the report was an internal audit report prepared by Price Waterhouse Cooper (PWC) to assist the Trust in identifying what went wrong.
36. At the time of the request the problems with the EPR system were widely known and documented. The regulator, Monitor, had issued enforcement action relating to the EPR² and the Health Service Journal had reported on the issues with the EPR system³. In fact, the Trust itself had highlighted the problems it had faced with the new system in its Annual Report 2012/2013⁴. This report stated that the implementation of the EPR system had *"quite a significant negative impact on this year from a financial perspective and ... to some extent patients' experience of the service. We have resolved many immediate issues and have completed a review of the whole system which has identified further issues ..."*
37. The Annual Report also suggests there were concerns from patients about the EPR system, stating *"the number of formal complaints received for the year increased ... From this year's figure, of the 949 complaints, 171 of these directly relate to the Contact Centre and issues regarding the implementation of the MEDITECH EPR system"*. The Commissioner considers this supports the strong public interest in disclosure of the full report as it shows there were genuine concerns from patients stemming from the new EPR system, an issue that was documented in the media and of cause for concern by the regulator at the time the request was made. He therefore accepts that disclosure of

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http://www.monitor.gov.uk/sites/default/files/Rotherham%20enforcement%20undertakings%20s106_0.pdf

3 <http://www.hsj.co.uk/hsj-local/acute-trusts/the-rotherham-nhs-foundation-trust/analysed-rotherhams-it-system-and-performance-struggle/5058521.article#> (full article not available online)

4 http://www.therotherhamft.nhs.uk/key_documents/

the information withheld under this exemption would assist the public in understanding what went wrong and making the Trust accountable in the face of a situation which had financial and patient care implications.

38. The Trust has alluded to a potential chilling effect that may occur to the provision of future advice. With regards to the 'chilling effect'; the Commissioner would generally give some weight to the argument that disclosing information that is being used to influence decisions could affect the frankness and candour with which relevant parties would continue to contribute and provide advice for discussions on an issue. The weight that can be given is stronger when the public authority can demonstrate that the information clearly relates to a matter which is still effectively "live" and can show that the information in question has been used, or is being used, to influence decisions and debates on an issue.
39. The Commissioner has looked at the information which the Trust has identified as being exempt under section 36 and notes that it consists of primarily factual information, given that it is all contained in the 'findings' parts of each subsection. Taking this into account alongside the general argument presented by the Trust that disclosure would be likely to inhibit the free and frank provision of advice; the Commissioner is not minded to accept there is much weight to this argument and the potential 'chilling effect' on future communications. This is because the information withheld under this exemption is of a factual nature and is the detail of findings from the internal audit that was carried out by PWC. The information does not contain advice on possible solutions; this is contained in subsequent sections which have already been disclosed. The information also does not appear to have been provided in the context of information on any debate or decision.
40. The Commissioner has been mindful of decisions of the Information Tribunal⁵ where broad arguments that disclosure would affect the frankness and candour with which relevant parties would contribute to discussions and provide advice were rejected. As the Trust has not expanded on its arguments that disclosure would be likely to affect the free and frank provision of advice the Commissioner does not consider there to be much validity to the 'chilling effect' arguments in this case.
41. The Commissioner recognises the decision regarding the withheld information in this case is finely balanced. However, as he does not accept the chilling effect arguments carry much weight and he is not

⁵ Office of Government Commerce v Information Commissioner [EA/2006/0068 & EA/2006/80]

mindful to accept a safe space was required when considered in the context of the specific information which has been withheld; he has concluded that the public interest in disclosure outweighs that in maintaining the exemption as the failure of the EPR system had a large impact financially on the Trust and on the standards of patient care and data quality at the Trust. The Commissioner therefore considers the need for accountability and transparency in this case to be high and balances the public interest in favour of disclosing the information.

42. As the Commissioner has concluded that the balance of the public interest with regard to the section 36(2) exemptions favours disclosure he has now gone on to consider the application of the other exemptions – section 43 and section 40 of the FOIA.

Section 43 – prejudice to commercial interests

43. Section 43(2) of the FOIA states that information is exempt if its disclosure would, or would be likely to prejudice the commercial interests of any person holding it.
44. When the Trust initially responded to the Commissioner it stated it no longer wished to rely on the section 43(2) exemption to withhold any information from the report. This was at a point when the Trust was still withholding more information from the report that it has since disclosed. However, during its more recent communications with the Commissioner, the Trust has reapplied section 43(2) to the same information it also considered section 36(2) to apply to. The Trust argued that disclosure would be likely to prejudice its own commercial interests and those of other commercial organisations.
45. The Commissioner refers back to the information in the confidential annex which describes the relationships with these companies in more detail. As the Trust has stated it considers disclosure would be likely to prejudice the commercial interests of it and other parties the Commissioner has considered the likely prejudices to these different parties separately.

Prejudice to the commercial interests of third parties

46. The Commissioner would normally expect a public authority to obtain arguments from third parties themselves and does not accept speculative arguments from the public authority.
47. The Commissioner asked the Trust if it had consulted with either of the third parties to establish why they considered disclosure would be likely to prejudice their commercial interests. In the case of one of the parties the Trust explained it had not consulted with the company but made a judgement on the likely impact of disclosure on the company based on

its understanding of its activities and commercial market. Further detail is provided in the confidential annex to this decision notice.

48. For the other company, the Trust explained it had kept it updated on the FOIA request verbally and had received expressions of concern about disclosure of parts of the report as it was considered that this disclosure could affect its commercial reputation.
49. With regards to the company who the Trust did not consult with, the Commissioner has determined that the Trust was not able to provide a sufficient level of detail to support the arguments it has advanced on behalf of this company. The Commissioner notes that the Trust has, in fact, not provided any arguments beyond simply stating that this company's commercial interests would be likely to be prejudiced. As such he cannot accept that there is a causal link between the disclosure of the withheld information and the likely prejudice to this company's commercial interests.
50. The Commissioner has considered the arguments presented to it about the potential prejudice to the other company's commercial interests. Although he has not been provided with any evidence that consultation with this company took place he has accepted the Trust's assertions that the company was verbally asked for its views on disclosure. He has considered the central argument presented by the Trust in the confidential annex and has concluded that the Trust has not sufficiently demonstrated the causal link between disclosure of the information in the EPR report and the prejudice it considers likely to occur.
51. The Commissioner therefore does not consider it has been sufficiently demonstrated there would be any prejudice to the commercial interests of third parties. He has next gone on to consider the application of section 43(2) in relation to the Trust's own commercial interests.

Prejudice to the commercial interests of the Trust

52. The Trust considers the disclosure of this information may also have a likely prejudice to its own commercial interests.
53. The Trust has explained that it has an ongoing commercial relationship with the companies involved in providing the Meditech product. The Trust argues that if this commercial relationship was damaged it would have an adverse impact on the Trust's ability to implement an EPR system without incurring additional costs.
54. The Trust, in its initial refusal of the request, had explained that it was continuing to procure an EPR system and the release of information in the report could prejudice the effectiveness of this procurement. It did not expand on this argument in subsequent responses and the

Commissioner offered the Trust the opportunity to provide further arguments in support of its position that disclosure would be likely to prejudice its own commercial interests.

55. The Trust did not provide any further detail on this likely prejudice and whilst the Commissioner can appreciate that the relationship between the providers of Meditech and the Trust was strained due to the disclosure of much of the information in the report; he is not minded to accept that the additional disclosure of the remaining withheld information would cause any further detriment. In any event, the Trust has failed to demonstrate how this would affect the continued procurement of the EPR system and how this would in turn incur additional and unnecessary costs.
56. As such the Commissioner has concluded that the Trust has not sufficiently demonstrated that the section 43(2) exemption is engaged. As a result he has gone on to consider the remaining exemption applied by the Trust – section 40(2).

Section 40 – personal information

57. The Trust has redacted information on pages 9, 16, 20 and 22 of the report on the basis that it constitutes the personal data of third parties.
58. The information on page 9 relates to an organisation but the Trust argues that although this section of the report does not name an individual the individual within the company could be identified from this information and other information in the public domain.
59. The information on pages 16 and 20 relates to senior individuals at the Trust and consists of comments on the competency of these individuals gleaned from interviews.
60. The information on page 22 is a list of the names and job titles of the individuals interviewed by PWC during the internal audit.
61. Section 40(2) of the FOIA provides an exemption from information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be contrary to any of the data protection principles.
62. In order to determine if the information constitutes the personal data of any individual the Data Protection Act 1998 (DPA) defines personal data as *"data which relate to a living individual who can be identified – (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller."*

63. In the case of the list of interviewees the information clearly relates to and identifies individual and so is personal data. The information on pages 16 and 20 refers to senior individuals by job titles and could be identified from this due to their seniority in the Trust; this information would therefore clearly be personal data.
64. For the information redacted from page 9 of the report the situation is less clear. The Trust has argued that due to the size of the organisation the individual involved with the Trust could easily be identified in conjunction with other publicly available information. However, the information that has been withheld on this page refers to only the company and is about the company, not the individual within the company working with the Trust. The Commissioner accepts that it may be possible to identify the individual by disclosing the name of the company but he also notes that the company's involvement in the EPR implementation was already publicly known. The comments which have been withheld relate to the company, not to specific individuals and the Commissioner does not therefore accept that the information "*relates to*" an individual. For the information withheld from page 9 of the EPR report, the Commissioner therefore does not consider section 40(2) to be engaged.
65. As the Commissioner has accepted the other information withheld under section 40(2) is personal data he has next gone on to consider whether disclosure of this information would be in breach of any of the data protection principles. The Commissioner has focussed on the first data protection principle which requires that personal data be processed fairly and lawfully. In forming a view on whether disclosure would be fair, the Commissioner has taken into account the reasonable expectations of the data subject, the consequences of disclosure upon the data subject and whether there is a legitimate public interest in the disclosure of the information in question.
66. For the list of names of interviewees on page 22, the individuals interviewed were across a range of junior and more senior officials. It is important to note the report was an internal audit report prepared by PWC and the individuals who contributed comments to the report would have done so with an expectation that their personal data would not be disclosed. Whilst the Trust has not provided the Commissioner with specific evidence to demonstrate any confidentiality was guaranteed, given the internal nature of the report and the frankness of some of the comments which could be attributed to individuals, the Commissioner accepts the data subjects would have expected their contribution to the report to remain confidential.
67. The Commissioner is not aware there is any legitimate public interest in the disclosure of this information; he does not consider that disclosing

the identity of contributors to the report would increase accountability or assist in the public understanding of what went wrong. For this reason, the Commissioner considers the disclosure of the information withheld on page 22 would be unfair and therefore be a breach of the first data protection principle. The Trust has correctly applied section 40(2) to withhold this information.

68. The remaining information withheld under section 40(2) is the comments which can be attributed to senior officials at the Trust on pages 16 and 20 of the EPR report. In both these cases individuals are not specifically named but referred to by job titles which, due to their seniority, would easily identify the individuals.
69. The expectation of privacy in this case is different than with the list of interviewees. In this case the issue is that other people have made comments about these senior members of staff and the Commissioner must consider if their position in the Trust at the time was such that they had a diminished expectation of privacy.
70. The general approach of the Commissioner is that it will be less likely to be unfair to disclose information relating to an individual in a professional capacity than it would be in relation to information concerning an individual's private life. The likelihood of disclosure will generally increase with the professional seniority of the data subject, and where the relevant information relates to a public role they fulfilled at the time.
71. The Trust has argued that it does not consider that it would be fair to the individual identified on page 16 to be identified as the comment about this individual was selected as an illustration of a range of comments made about senior staff. The Trust has argued that the comments made on page 20 are of a personal nature and will focus attention on this senior member of staff. The Trust has also stressed that these are quotes from interviewees and are not necessarily reflected in the conclusions reached by PWC.
72. The Commissioner has considered the points made by the Trust but does not accept that the accuracy of the quoted comments can be taken into account in this case. He has considered whether the individuals who could be identified would have an expectation of privacy and what the potential consequences of disclosure would be and he accepts that the disclosure of this information may draw attention to these members of staff. However, the seniority of the roles these individuals were undertaking at the time of the report decreases any expectation of privacy as there would be have been some expectation they would be accountable and subject to criticism and scrutiny from other members of staff.

73. As to the consequences of disclosure, the Commissioner considers the main question to be whether disclosure would be likely to result in damage and distress to the data subjects. As the Commissioner accepts there may have been some diminished expectation of privacy due to the seniority of the staff, he does accept there may be some mild distress to the data subjects due to the nature of the comments and observations. However, as the Commissioner has found that there would be only a limited reasonable expectation of privacy due to the factors identified, the level of any distress which might result, viewed objectively, will be significantly reduced.
74. The next step for the Commissioner is to consider whether there would be any legitimate public interest in the disclosure of this information. Whilst section 40(2) is an absolute exemption and not qualified by the public interest, the public interest test is relevant here as even though disclosure may cause distress to the employees concerned, and they may have a reasonable expectation that the information will not be disclosed, this does not mean that disclosure would necessarily be unfair. The public authority must consider the legitimate public interest in disclosure and balance this against the rights of employees⁶.
75. The Commissioner's view is that there is a legitimate public interest in the disclosure of this information. As well as a general public interest in transparency in relation to the EPR system the Commissioner considers there is a specific public interest in senior members of staff being held accountable for their involvement in the EPR implementation. The Commissioner is aware that there were widely reported issues with operational and financial management at the Trust⁷ at the time the request was made and the Commissioner considers full disclosure to allow for transparency and accountability to therefore be important.
76. The Trust has argued that the information withheld on page 16 would be unfair to disclose as it uses one senior member of staff to illustrate a point and that disclosing this information would draw undue attention to

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Practical_application/section_40_requests_for_personal_data_about_employees.ashx

7 <http://www.ehi.co.uk/news/ehi/8392/monitor-blasts-rotherham's-epr-programme>

<http://www.bbc.co.uk/news/uk-england-south-yorkshire-21326246>

this one individual. However, the Commissioner considers the use of this one individual is important as it provides some clarity to the earlier sentence which references "*staff appointed into key roles*". The use of the job title in the next sentence demonstrates the key roles this paragraph of the report is referring to.

77. In order for disclosure to be in line with the first data protection principle, disclosure must be *necessary* in order for the legitimate interests identified above to be satisfied. This is required by Schedule 2 Condition 6 of the DPA. The Commissioner's published guidance⁸ on this matter states that disclosure should be necessary in order to satisfy a pressing social need. It also states that:

"...the general need for transparency regarding public bodies may constitute a sufficiently 'pressing social need'."

78. The Commissioner has already expressed his view that there is a need for transparency to increase accountability in this case and to allow the public to have a full picture of what happened and what went wrong.
79. A second issue that must be addressed when considering necessity is whether the information may already be available elsewhere. The Commissioner is not aware that the information is available elsewhere and the refusal of the Trust to disclose this information is taken as evidence that it is not available elsewhere.
80. In conclusion, whilst the Commissioner has found that the data subjects would hold an expectation of confidentiality and arguably might possibly suffer mild distress through the disclosure of this information, he has also found that the weight of these factors is reduced due to the position held by the data subjects at the time of the request and at the EPR system went live. He has also found that there is a legitimate public interest in the disclosure of this information and that disclosure would be necessary in order to satisfy that public interest. For these reasons, the Commissioner finds that disclosure would not be unfair to the data subject.

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http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf

81. For the first data protection principle to be satisfied, disclosure must be lawful, as well as fair. The approach of the Commissioner to the issue of lawfulness under the first data protection principle is that he will find that disclosure would be lawful unless the public authority has advanced convincing arguments as to why disclosure would be unlawful. In this case the Trust has advanced no arguments on the issue of lawfulness and the Commissioner has no reason to believe that disclosure would not be lawful.
82. The Commissioner has found that disclosure would be both fair and lawful and, therefore, would satisfy the first data protection principle. As there would be no breach of the first data protection principle through the disclosure of this information, the overall conclusion of the Commissioner is that the exemption provided by section 40(2) is not engaged in relation to the information withheld on pages 16 and 20.

Conclusion

83. The Commissioner has concluded that the section 43(2) exemption is not engaged and the public interest favours disclosing information withheld under the section 36(2) exemption. He has also concluded that the section 40(2) exemption is not engaged in relation to the information withheld on page 9 of the EPR report. He therefore requires the Trust to disclose the information withheld on pages 6, 7, 9 and 11 of the EPR report.
84. The Commissioner has also found that the information withheld on pages 16 and 20 does not engage the section 40(2) exemption and should therefore be disclosed.
85. The information withheld on page 22 – the list of interviewees – does engaged the section 40(2) exemption and the Trust have correctly withheld this information.

Right of appeal

86. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

87. 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.
88. 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

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