

**Freedom of Information Act 2000 (FOIA)  
Environmental Information Regulations 2004 (EIR)**

**Decision notice**

**Date:** 1 July 2014

**Public Authority:** Great Western Hospitals NHS Foundation Trust  
**Address:** Marlborough Road, Swindon, SN3 6BB

**Decision (including any steps ordered)**

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1. The complainant has requested information relating to a complaint made against him.
2. The Commissioner's decision is that Great Western Hospitals NHS Foundation Trust (the Trust) has correctly applied section 40(2) to the withheld information.
3. The Commissioner does not require the Trust to take any steps a result of this decision notice.

**Request and response**

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4. On 5 December 2013, the complainant wrote to the nursing agency that he worked for as a bank nurse, and requested information in the following terms:

*"So that I may attempt to seek redress and to actively challenge this specific case, I now consider legal action against the person who has complained about me. To that end I request the name and contact details of this person so that the information may be passed to the Courts in any claim I may decide to make"*

5. On 24 December 2013, the Nurse Bank Manager emailed a reply to the complainant, explaining that the patient's details could not be disclosed for reasons of confidentiality, but assuring him that the matter was closed from the Trust's perspective without any further action being required. This was the Trust's first direct response to the complainant.

6. On 13 January 2014, the complainant wrote a further email to the Nurse Bank Manager, for the patient's name and contact details to be released and asking for formal documentation so that he could follow through the internal process to its conclusion.
7. The Nurse Bank Manager referred the email to PALS and to the Information Governance team for advice and support.
8. The Trust responded on 30 January 2014. It refused to provide the requested information citing section 40(2) of the FOIA as its basis for doing so.
9. Following an internal review the Trust wrote to the complainant on 17 February 2014 and maintained its original position.

### **Scope of the case**

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10. The complainant contacted the Commissioner on 19 March 2014 to complain about the way his request for information had been handled. The Commissioner advised the complainant that he should wait for the outcome of the internal review before proceeding with his complaint.
11. The complainant wrote to the Commissioner again on 1 April 2014 advising he remained dissatisfied with the Trust's response to his request.
12. The Commissioner considers the scope of this case to be to determine if the Trust has correctly applied section 40(2) of the FOIA.

### **Reasons for decision**

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#### **Section 40(2)**

13. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').
14. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

*"personal data" means 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, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”*

15. 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 data protection principles under the DPA. The Commissioner notes in this case that the council said that disclosure would breach the first data protection principle.

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

16. As explained above, the first consideration is whether the withheld information is personal data. The information is the name and address of a patient who made an informal complaint about an incident involving a nurse identified as “a bank nurse called [redacted].
17. Clearly the information requested relates to a living individual, who can easily be identified from that information. Therefore the Commissioner is satisfied that the information is personal data.

### **Does the disclosure of the information contravene any of the data protection principles?**

18. As the Commissioner is satisfied that the withheld information is personal data, he now needs to consider whether disclosure would breach the first data protection principle, i.e. would disclosure be unfair and/or unlawful.
19. The first data protection principle states that:  
  
*“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –*  
*(a) at least one of the conditions in schedule 2 is met, and*  
*(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”*
20. In deciding whether disclosure of this information would be unfair, the Commissioner has taken into account the nature of the information, the reasonable expectations of the patient, the consequences of disclosure on that patient and balanced the rights and freedoms of the complainant with the legitimate interests in disclosure.

### **Nature of the information and reasonable expectations**

21. The Commissioner recognises that information relating to complaints against individuals carries a strong general expectation of privacy due to the likelihood that disclosure could cause the patient, along with the subject of the complaint, distress.
22. The Trust explained that a patient made an informal complaint to its Patient Advice and Liaison Service (PALS) in relation to their admission. The Trust has an obligation to investigate all concerns raised. In the course of the investigation the requestor was asked to provide some information. The patient accepted the Trust's response as a satisfactory answer, and the complaint was closed.
23. The Commissioner considers that the withheld information in this case relates to the patient's private life, and he is satisfied that the complainant would have an expectation of confidentiality and privacy in relation to the requested information.

### **Consequences of disclosure**

24. In order to assess the impact of the consequence of disclosure on whether disclosure would be fair, it is necessary to consider whether disclosure of the withheld information would cause unwarranted damage or distress to the patient.
25. The Commissioner considers that disclosure would amount to an infringement into the privacy of the patient raising the complaint which has the potential to cause damage and distress, particularly as he has found that disclosure of the information requested would not have been within the patient's reasonable expectations.
26. The Commissioner considers that the potential distress could be that the patient, particularly if elderly, may have concerns about going into hospital in future, for fear of 'reprisal'. Although this may appear an extreme argument, given the high media profile of recent cases on the subject of neglect and abuse within the healthcare setting, it is not unrealistic.

### **Balancing the rights and freedoms of the data subjects with the legitimate interests in disclosure**

27. The Commissioner accepts that in considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for its own sake along with specific interests which in this case is the legitimate interest in the handling of a complaint against a bank nurse.
28. The Trust stated that although it might be argued that disclosure would be in the legitimate interests of the requestor to pursue litigation over an informal complaint to the Trust, this is considered to be unreasonable, disproportionate, unwarranted and prejudicial to the rights and freedoms of the patient, e.g. their right to enjoy their private and family life, and their right/freedom to raise informal complaints with a service-providing organisation without fear of counter-claim.
29. Although the Commissioner can appreciate why the information is of particular interest to the complainant, he is mindful of the fact that the FOIA is request and motive blind and has not seen any evidence to indicate that there is sufficient wider legitimate public interest which would outweigh the rights and freedoms of the patient in this case. The complainant's wish to access this information is a matter that the Commissioner can appreciate but it is nonetheless a personal need.

### **Conclusion on the analysis of fairness**

30. Taking all of the above into account, the Commissioner concludes that it would be unfair to the patient concerned to release the requested information. Disclosure would not have been within his reasonable expectations and the loss of privacy could cause unwarranted distress. He acknowledges that there is a legitimate interest in knowing that complaints are handled appropriately but does not consider that this outweighs the individual's strong expectations of, and rights to, privacy. The Commissioner has therefore decided that the Trust was entitled to withhold the information under section 40(2), by way of section 40(3)(a)(i).
31. As the Commissioner has decided that the disclosure of this information would be unfair, and therefore in breach of the first principle of the DPA, he has not gone on to consider whether there is a Schedule 2 condition for processing the information in question.

## Right of appeal

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32. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

33. 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.
34. 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**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**