

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 24 August 2015

**Public Authority:** The Rotherham NHS Foundation Trust  
**Address:** Moorgate Road  
Rotherham  
S60 2UD

#### Decision (including any steps ordered)

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1. The complainant made a freedom of information request to the Rotherham NHS Foundation Trust ("the Trust") for information regarding the resignation of the Trust's former Medical Director. The Trust refused the request by relying on the section 40(2) (personal information) exemption. For part of the request the Trust refused to confirm or deny whether the requested information was held under section 40(5)(b)(i).
2. The Commissioner has investigated the complaint and found that section 40 was correctly applied. The Commissioner requires no steps to be taken.

#### Request and response

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3. On 27 November 2014 the complainant made a freedom of information request to the Trust which asked for information regarding the Trust's former Medical Director. It read as follows:
  - i. I would like the recorded information held by the trust since I first asked questions of the press office on or around November 12 about the re-emergence of former medical director, [a named individual], at another trust. This would include all relevant internal correspondence, including that between the press office and other departments/personnel in the trust and all other correspondence or recorded information relating to my queries.*

- ii. Separately, I ask for all recorded information held on any investigation into [a named individual's] conduct...*
  - iii. ...and all relevant correspondence and recorded information relating to [a named individual's] departure from the trust.*
4. The Trust failed to respond to the requests within 20 working days but following the involvement of this office a response was issued on 28 January 2015. In response the Trust disclosed all of the information it held in respect of the first request. For the second request it said that it could neither confirm nor deny if the information was held under section 40(5)(b)(i) (personal information) of FOIA. For the third request, for information relating to the former medical director's departure from the Trust, it confirmed that information was held but that it was being withheld under section 40(2).
5. The complainant subsequently asked the Trust to carry out an internal review of its handling of the request and asked that it reconsider its response in light of public comments made by the former medical director which suggested the reasons for his departure from the Trust were due to ill health.
6. The Trust presented the findings of its review on 3 March 2015 which upheld the initial response to the request.

## **Scope of the case**

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7. On 5 March 2015, following the completion of the internal review, the complainant contacted the Commissioner to complain about the Trust's decision to refuse his second and third requests by relying on the section 40(2) exemption. It is the Commissioner's understanding that the complainant is not challenging the Trust's response to his first request.

## **Reasons for decision**

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

8. Section 40(2) provides that information is exempt if it is the personal data of someone other than the applicant and disclosure would contravene one of the data protection principles.

9. Section 40(5)(b)(i) provides that the duty to confirm or deny does not arise where giving the confirmation or denial would itself contravene any of the data protection principles.

## **Request 2**

10. For part 2 of the request the Trust has refused to confirm or deny whether the requested information is held. It explained that to do so would contravene the first data protection principle which requires that personal data be processed fairly and/or lawfully.

11. In deciding whether section 40 is engaged the first thing to consider is whether the requested information is personal data. Personal data is defined in the Data Protection Act 1998 as:

*"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;*

12. Clearly information about an investigation into an employee's conduct would identify that individual and therefore the Commissioner is satisfied that if the requested information were held it would amount to personal data.
13. The next thing to consider is whether confirming or denying if the requested information is held would contravene the first data protection principle. In assessing whether confirming or denying if information is held would be unfair and thus constitute a breach of the first data protection principle, the ICO takes into account a number of factors. This includes considering the expectations of the individual, the consequences of disclosure and any legitimate interests in confirming or denying of the requested information is held.
14. As regards the expectations of the individual the Commissioner takes the view that information relating to an internal investigation or disciplinary hearing will carry a strong expectation of privacy. Employees, including senior employees, expect that details of their employment are treated confidentially by their employer, particularly information about their conduct and/or performance. Therefore, the

Commissioner is satisfied that if the requested information was held there would be a strong expectation of privacy and this suggests that confirming or denying if the requested information is held would be unfair.

15. Furthermore, the Commissioner would also accept that confirming or denying if the information is held is also likely to be distressing to the individual concerned as it would be seen as an unwarranted intrusion into his private life. Given the context of the request where the complainant believes that there was something improper about the individual's departure from the Trust, the Commissioner is satisfied that confirming or denying if the information is held would indeed be unfair.
16. However, notwithstanding individuals' expectations of privacy or any harm that could be caused, there may be occasions when it is still fair to confirm or deny if information is held if there is a public interest in doing so. In this case the complainant had sought to argue that there was a legitimate interest in greater transparency around the departure of this individual from the Trust, in particular because he had been absent from the Trust on full pay for what he said was a year and which he suggested was contrary to NHS guidelines. He also highlighted the fact that both the individual and his new employer had made comments to the effect that his absence from the Trust was entirely due to ill health and this required clarification.
17. The Commissioner is limited in what he can say about why exactly the exclusion from the duty to confirm or deny is being applied, for fear of revealing whether the requested information is or is not held. However, the Commissioner would say that having considered the arguments advanced by the Trust he is satisfied that confirming or denying if the requested information is held would amount to the disclosure of personal data and this would be unfair to the individual concerned. He also finds that whilst confirming or denying if the requested information is held might help to clarify the circumstances surrounding the departure of the individual named in the request this is heavily outweighed by the public interest in protecting his privacy. The Commissioner has decided that section 40(5)(b)(i) is engaged.

### **Request 3**

18. The information falling within the scope of request 3 is a copy of the individual's resignation letter to the Trust. The Trust has confirmed that this information is held but is withholding it by relying on the section 40(2) exemption. As with request 2, the Trust argues that disclosure of this information would contravene the first data protection principle.

19. The Commissioner has found that the withheld information is personal data, given that it clearly identifies the individual concerned, and so the key question again comes down to whether disclosure would contravene the first data protection principle. On this point the Trust argued that the individual had a reasonable expectation that the contents of the letter would remain private, given that it relates to internal personnel matters between himself and the Trust. The Commissioner would accept that this is the case because employees do not expect that information surrounding their resignation will be made public in response to freedom of information requests or otherwise. Whilst senior staff may expect that their employers might make a public statement announcing their departure, as indeed happened in this case, this would not extend to the disclosure of private correspondence.
20. In considering the possible consequences of disclosure the Trust also argued that disclosure of the requested information would be unfair because it may well affect his current and/or future prospects of employment. The Commissioner would also accept that disclosure is likely to be distressing and in his view this is reinforced by the fact that the Trust has not obtained consent to disclosure. Indeed the Commissioner understands that the individual has objected to any disclosure of information about his departure.
21. As with the first request, the Commissioner has considered whether there is a legitimate interest in disclosure which would mean that the Trust should disclose the information in spite of any concerns about the individual's privacy. In the Commissioner's view there is nothing remarkable or exceptional about the withheld information and disclosure would add very little to public understanding of the circumstances surrounding the departure of this person. On the other hand, disclosure would be an invasion of privacy as it would in all likelihood lead to increased scrutiny and press attention which would be distressing. For these reasons the Commissioner has decided that disclosure would be unfair and therefore contravene the first data protection principle. Section 40(2) is engaged.

## Right of appeal

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22. 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@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)

23. 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.
24. 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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**Wilmslow**  
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