

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 11 July 2019

**Public Authority:** South East Coast Ambulance Service NHS Foundation Trust

**Address:** Nexus House  
Gatwick Road  
Crawley  
RH10 9BG

### Decision (including any steps ordered)

---

1. The complainant has requested information relating to suspected illegal drug use. The South East Coast Ambulance Service 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. The Commissioner's decision is that the Trust has correctly applied section 40(2) of FOIA to the withheld information. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

### Request and response

---

2. On 24 September 2018 the complainant requested the following information:  
*'How many employees of SECAMB have been suspended/sacked in the last year for using drugs, or suspected of using drugs? For each one can you tell me the date first investigated, their sex, job role, which drug was in their possession, how long they were suspended for, and if they still work for SECAMB.'*
3. On 4 October 2018 the Trust responded (under reference FOI/18/09/15) with some information. There were less than 10 members of staff suspended for allegations of suspected (illegal) drugs use and all

suspensions had been lifted. Further details were exempted under section 40(2) - personal data.

4. On 5 October 2018 the complainant made a second request, which is the subject of this complaint:  
*'Can you supply minutes from all meetings in the last year with staff in regards to suspected drug use. Names, dates, and locations of the meeting can be retracted so as not to identify staff members.'*
5. On 9 October 2018 the Trust responded (FOI/18/10/07). It refused the request citing section 40(2) - personal data.
6. The complainant requested an internal review on 11 October 2018. He challenged this response as the personal data could be redacted.
7. The Trust sent the outcome of its internal review on 21 November 2018 upholding its position. It explained that *'disclosure of information would not be appropriate even with very substantial redaction. It is our view that the whole minutes are personal data which we cannot release without breaching our DPA obligations as those individuals are the subject of the meetings.'*

### **Scope of the case**

---

8. On 23 November 2018 the complainant contacted the Information Commissioner and after providing further documents the case was accepted on 6 December 2018.
9. The Commissioner invited the complainant to withdraw his case on 9 May 2019 as it was her initial opinion that the Trust was correct in its refusal to disclose this information. The basis for this view was that the Commissioner had previously considered a number of requests for information concerning fitness to practise cases or disciplinary cases and had concluded that section 40 of the FOIA had been cited correctly. (She referred to the decision notice FS50592346 - [https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560207/fs\\_50592346.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560207/fs_50592346.pdf))
10. However, the complainant declined to withdraw his case and wrote to the Commissioner on 9 May 2019 to restate that he did not want the personal information of those involved, *'but the details of what happened and the minutes. I would argue all names, locations etc can be redacted in order to keep their anonymity.'*

11. 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.

## Reasons for decision

---

### Section 40 Personal information

12. 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.
13. 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').
14. 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.
15. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

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

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

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

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. 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

---

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

more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

19. 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.
20. In this case, the Trust has withheld information about the investigation interviews relating to suspected illegal drug use. The Commissioner has viewed the withheld information and is satisfied that it relates to a number of named individuals.
21. The Commissioner has considered the complainant's view that the names and locations could be redacted and has referred to her guidance 'the Anonymisation Code: <https://ico.org.uk/media/for-organisations/documents/1061/anonymisation-code.pdf>. She notes that the documents contain health information, personal information, observations and opinions gathered to inform decisions about particular individuals. These are inextricably linked and not easily separated from the names and locations such that anonymization of the documents would be extremely difficult.
22. The Commissioner is therefore satisfied that all of the withheld information both relates to and identifies a number of individuals and falls within the definition of 'personal data' in section 3(2) of the DPA.
23. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the data protection principles.
24. The most relevant data protection principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

25. Article 5(1)(a) of the GDPR states that:-

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

26. In the case of a FOIA request, 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 (i.e. it would meet one of the bases of lawful processing listed in Article 6(1) GDPR as well as being generally lawful), be fair, and be transparent.

27. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

***Is the information special category data?***

28. Information relating to special category data is given special status in the GDPR.
29. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
30. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include special category data. She has reached this conclusion on the basis that within the withheld information there are many references to medical symptoms and the medical health of a number of individuals.
31. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
32. The Commissioner considers that the only conditions that could be relevant to a disclosure under FOIA are conditions (a) (consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
33. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOI request or that they have deliberately made this data public.
34. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of FOIA.
35. As some of the withheld information is not special category data, the Commissioner has gone on to consider if disclosure of the remaining information would contravene any of the data protection principles.

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

36. Article 6(1) of the 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.

37. The Commissioner considers that the lawful basis most applicable is basis (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>2</sup>.*

38. In considering the application of Article 6(1)(f) of the 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.

39. The Commissioner considers that the test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.

---

<sup>2</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) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

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

*Legitimate interests*

40. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
41. Legitimate interests may range widely. 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.
42. In the circumstances of this case the Commissioner understands that the complainant is interested in the '*details of what happened*' rather than any personal information.
43. The Commissioner is inclined to accept that the complainant has a legitimate interest in making this request and has gone on to consider whether this is necessary in order to meet the legitimate interest.

*Is disclosure necessary?*

44. 'Necessary' means more than desirable but less than indispensable or absolute necessity. 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 therefore be the least intrusive means of achieving the legitimate aim in question.
45. The Commissioner notes that the Trust has already provided the complainant with the number of staff suspended for allegations of suspected (illegal) drugs use in the past year and the outcomes. (All suspensions had been lifted.)
46. The Commissioner fully accepts that the Trust considered at length what information it could lawfully provide to the complainant and only withheld information that it considered to be personal information:  
  
*'Those individuals who were interviewed have the right to expect that their personal details remain confidential. There would not be the expectation that sensitive confidential information would be shared / published within the public domain and our duty of confidentiality to our employees would apply. Even at an internal Trust level this information was appropriately 'restricted / ring fenced' and only made available to those individuals who had a legal basis for access.'*
47. The Commissioner considers that further disclosure in the detail requested is not necessary to meet the complainant's legitimate interest

in this case. She notes that the complainant has clearly stated that he is not seeking the personal information and she considers that the complainant's legitimate aim has already been principally addressed.

48. To disclose the details of the investigation interviews would be intrusive and is not necessary in order to meet the legitimate interest in suspected illegal drug use.
49. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
50. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

*The Commissioner's view*

51. The Commissioner has therefore decided that the Trust was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).



## Right of appeal

---

52. 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)

53. 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.

54. 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**