Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **4 November 2019**

Public Authority: **Oxford Health NHS Foundation Trust**
Address: **Littlemore Mental Health Centre**
Sandford Road
Littlemore
Oxford
OX4 4XN

Decision (including any steps ordered)

1. The complainant has requested information relating to the qualifications obtained by a member of staff at Oxford Health NHS Foundation Trust (the Trust). The Trust withheld the 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 was entitled to withhold the requested information under section 40(2) of the FOIA.

3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 1 December 2018, the complainant wrote to the Trust and requested information in the following terms:

   "Please could you advise me of the qualifications of [redacted name] *who is head of FASS."*

5. The Trust responded on 4 December 2018 and refused to provide the requested information citing section 40 of the FOIA as its basis for doing so.

6. The complainant requested an internal review on 28 December 2018.

7. Following an internal review the Trust wrote to the complainant on 25 January 2019, maintaining its original position.

Scope of the case

8. The complainant contacted the Commissioner on 3 February 2019 to complain about the way her request for information had been handled. The complainant does not feel it is right to refuse the requested information as she feels that anyone being treated by a doctor or a nurse is entitled to know what qualifications they have.

9. The Commissioner considers the scope of this case is to determine whether the Trust is entitled to rely on section 40 of the FOIA as a basis for refusing to provide the requested information.

Reasons for decision

Section 40 personal information

10. Section 40(2) of the 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.

11. In this case the relevant condition is contained in section 40(3A)(a)[1]. 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 ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').

12. 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 the FOIA cannot apply.

13. 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 DP principles.

[1] As amended by Schedule 19 Paragraph 58(3) DPA.

Is the information personal data?

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

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

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

16. 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.

17. 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.

18. The information requested is the qualifications of a named individual.

19. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the named individual. She is satisfied that this information both relates to and identifies the named individual concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

20. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

21. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

22. 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".*

23. In the case of an 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, fair and transparent.

24. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

25. The Commissioner considers that the lawful basis most applicable is basis 6(1)(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*"[2].

26. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the 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.

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

Legitimate interests

28. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of

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[2] 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*".

accountability and transparency for their own sakes, as well as case-specific interests.

29. Further, a wide range of interests may be legitimate interests. 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.

30. The Commissioner understands from the complainant's correspondence that the individual named in the information request is treating members of the complainant's family. The Commissioner therefore considers that the complainant's interest in the qualifications of the individual named in the request is case-specific but is nonetheless a legitimate interest for the complainant.

31. The Trust has also acknowledged that there is a legitimate interest in ensuring that employees are sufficiently trained and qualified to carry out their role.

Is disclosure necessary?

32. '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 the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

33. The Trust has stated that professional registration is a sufficient measure of an employee's training and qualification, and is therefore of the view that any further proof is unnecessary.

34. The Trust explained that it is subject to requirements of the Care Quality Commission's (CQC) legislation, and has specially referred to Regulation 18 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, which requires that "[s]*ufficient numbers of suitably qualified, competent, skilled and experienced persons must be deployed in order to meet the requirements of this part".*

35. The Trust has stated that it is independently inspected by the CQC against this regulation, and the CQC is able to take regulatory action if the Trust does not comply with this requirement. Consequently, the Trust is of the view that the disclosure of the requested information under the FOIA is not necessary to meet that requirement.

36. The Trust has explained that the baseline requirement, to meet its legal obligations, for clinical staff is to have an appropriate professional

registration. It went on to explain that members of the public can check whether or not a member of staff is professionally registered against the public registers, such as the Nursing and Midwifery Council and/or the Health and Care Professions Council. The Trust has reiterated that disclosure of professional qualifications is not necessary to achieve this.

37. The Trust also invited the Commissioner to apply its reasoning from the decision notice issued under case reference number FS50783266[3] as to the necessity of disclosure of similar information in this request.

38. Having considered the withheld information and the Trust's arguments, the Commissioner considers that disclosure of the requested information is not necessary to meet the legitimate interest in ensuring that Trust employees are sufficiently trained and qualified to carry out their role. However, it is apparent that the complainant considers there is a legitimate interest in the disclosure of the requested information.

39. 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).

The Commissioner's view

40. 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).

[3] https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2614852/fs50783266.pdf

Right of appeal

41. 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
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

42. 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.

43. 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
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