

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 28 February 2020

**Public Authority:** NHS Resolution

**Address:** 2<sup>nd</sup> Floor, 151 Buckingham Palace Road  
London  
SW1W 9SZ

#### **Decision (including any steps ordered)**

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1. The complainant has requested information on the volume of cases submitted to NHS Resolution's Practitioner Performance Advice Service in connection to the Royal Berkshire Hospital NHS Foundation Trust. NHS Resolution (NHSR) says it does not hold information falling within the scope of two parts of the request. It has released some relevant information and is withholding information that falls within one part of the request under section 36(2)(b)(i) and section 36(2)(c) (prejudice to effective conduct of public affairs). It considers the public interest favours maintaining these exemptions. NHSR considers that this information also engages the exemption under section 40(2) of the FOIA (third person personal data). The complainant disputes that the information is exempt from disclosure.
2. The Commissioner's decision is as follows:
  - The information requested in part 1 of the complainant's request is exempt from disclosure under section 36(2)(b)(i) and section 36(2)(c) of the FOIA and the public interest favours maintaining these exemptions. The information is also exempt information under section 40(2).
  - NHSR breached section 10(1) and section 17(1) of the FOIA as it did not communicate the relevant information it holds or issue a refusal notice in respect of other relevant information within 20 working days.

3. The Commissioner does not require NHSR to take any remedial steps.

## Request and response

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4. On 1 April 2019 the complainant wrote to NHSR and requested information in the following terms:

*"With respect to data held under the role of Practitioner Performance Advice (formally known as NCAS) and data relating to:*

*Royal Berkshire Hospital NHS Foundation Trust, Reading*

*Please provide the total annual numbers of new cases submitted / discussed by the Trust under the MHPS (Maintaining High Professional Standards) process.*

*Please provide:*

- 1) *annual total of new cases each year over the last 10 years*
- 2) *how long each case took prior to resolution*
- 3) *the annual number of cases upheld (under MHPS)*

*As this data will be figures only, there will be no risk of confidentiality or ability to identify those involved."*

5. NHSR responded on 9 May 2019. It refused parts 1 and 2 of the request, referring to sections 36(2)(b) and 36(2)(c) of the FOIA, and said the public interest favoured maintaining these exemptions. NHSR said it did not hold information falling within the scope of part 3 of the request.
6. Following an internal review NHSR wrote to the complainant on 13 September 2019. It had revised its position. NHSR released some information within scope of the request: the total number of cases over the last 10 years in which advice from the Practitioner Performance Advice service had been sought in connection with Royal Berkshire Hospital NHS Foundation Trust. It said that section 40(2) applied to part 1 of the request, the number of cases per year, because of the low numbers involved.
7. Finally, NHSR said that, as well as part 3, it does not hold information falling within the scope of part 2 either. NHSR provided some general information about its services.

## Scope of the case

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8. The complainant contacted the Commissioner on 13 September 2019 to complain about the way his request for information had been handled.
9. In his complaint to the Commissioner, the complainant explained that he is dissatisfied that NHSR is withholding information relating to part 1 of his request; a breakdown of the numbers of individuals going through NHSR's Practitioner Performance Advice Service each year for a period of 10 years.
10. In its submission to her, NHSR has confirmed that it is still relying on section 36(2) regarding the above information. The Commissioner's investigation has therefore focussed on whether NHSR can rely on section 36(2)(b)(i) and 36(2)(c) and section 40(2) of the FOIA to withhold the information requested in part 1 of the request, and the balance of the public interest where appropriate.
11. Finally, the Commissioner has considered the timeliness of NHSR's responses.

## Reasons for decision

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### **Section 36 – prejudice to effective conduct of public affairs**

12. Section 36(2)(b) of the FOIA says that information is exempt information if, in the reasonable opinion of a qualified person, disclosure would, or would be likely to inhibit, under subsection (i) the free and frank provision of advice or under subsection (ii) the free and frank exchange of views for the purposes of deliberation.
13. The Commissioner considers that section 36(2)(b)(i) concerns processes that may be inhibited at the time of the request and in the future, rather than harm arising from the content or subject matter of the requested information itself. The key issue in this case is whether disclosure would or would be likely to inhibit the process of providing free and frank advice for the purposes of deliberation, in this case deliberation associated with a Maintaining High Professional Standards process.
14. Section 36(2)(c) of the FOIA says that information is exempt information if, in the reasonable opinion of a qualified person, disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

15. This means that section 36(2)(c) can only apply in instances when the envisioned inhibition or prejudice to the effective conduct of public affairs does not concern the giving/receiving of advice or the exchange of views. A public authority may apply both section 36(2)(b) and section 36(2)(c) to information but the envisioned prejudice under section 36(2)(c) must concern something other than advice or the exchange of views, which are covered by 36(2)(b).
16. Section 36(2)(c) is concerned with the effects of making the disputed information public. Prejudice to the effective conduct of public affairs could refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose, but the effect does not have to be on the authority in question; it could be an effect on other bodies or the wider public sector. It may refer to the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure.
17. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised, qualified person for that public authority. The qualified person's opinion must also be a "reasonable" opinion, and the Commissioner may decide that the section 36 exemption has not been properly applied if she finds that the opinion given is not reasonable.
18. In its submission to the Commissioner, NHSR first gave her the following context in which the Practitioner Performance Advice Service ('the Advice service') receives cases. In particular it notes the sensitivity of the information it holds as a consequence of the specific environment in which it operates. NHSR believes this is directly relevant to the Commissioner's consideration of the complaint and the information the complainant is seeking.
19. The functions of the Advice service are set out in National Health Service Litigation Authority Directions 2013 from the Secretary of State for Health and Social Care (which given further to his statutory powers in section 7 of the NHS Act 2006). In particular these include:
  - "(a) to support NHS bodies that are concerned about the performance of an individual practitioner;*
  - (b) to provide advice and guidance on the handling of concerns about practitioners' performance and to monitor the effectiveness of such advice and guidance..."*
20. NHS Resolution is the operating name of the NHS Litigation Authority. As a Special Health Authority, NHSR is required by statute to discharge these Directions effectively and efficiently.

21. In discharging this role, NHSR provides impartial and expert advice to employers and contracting healthcare organisations to support the local management and resolution of performance concerns relating to individual doctors, dentists and pharmacists. It is not a regulator or decision-making body – any decisions about the ongoing management, employment or contractual status of a practitioner rest solely with the employer or contractor.
22. Involving the Advice service forms part of the process set out in *Maintaining High Professional Standards in the Modern NHS*. This is guidance which sets out the process by which NHS employers are expected to manage concerns about the performance of individual doctors (further to the Directions on Disciplinary Policies 2005 given by the Secretary of State). Failure to follow that process properly could expose an NHS body to a risk of legal challenge (for instance in the Supreme Court's decision in *Chabbra v West London Mental Health NHS Trust [2013] UKSC 80*).
23. Each year, the Advice service receives around 900 confidential requests for advice from across the wider NHS involving practitioners whose performance their employer or contracting body reports to be a cause for concern. The concerns may relate to behaviour, clinical capability, conduct, communication and/or team-working. It also receives a small number of requests for advice directly from practitioners themselves who have concerns about the management of their own conduct, performance or capability.
24. The concerns the Advice service helps employers to address also include health matters (for instance, addiction, or mental health), where these may be impacting on performance or patient safety. It will usually be contacted for advice where a healthcare organisation is considering excluding, suspending or restricting a practitioner's practice. Where patient safety is considered to be at risk or where there are allegations of serious misconduct, it is important for healthcare organisations to be able to take appropriate steps so that the situation can be thoroughly and promptly investigated. However, NHSR also recognises that such mechanisms should not be used without sufficient justification, as to do so can have an adverse impact on the practitioner, the wider team and the provision of clinical services.
25. For these reasons, NHSR works with healthcare organisations to help them consider the options available to them to understand and address the concerns, and to help ensure that their decisions are reasonable and proportionate to the circumstances. Where exclusion, suspension or restriction is thought to be appropriate, it will continue to work with the healthcare organisation to routinely monitor the position and advise on good practice, taking account of local and national policy requirements.

26. At the time at which it is asked to provide advice to an NHS employer, the concerns reported about an individual may not have been proven. Save for those occasions where NHSR undertakes an assessment itself (which tends to be in less than five per cent of its caseload), it is not testing the veracity of the concerns or perceived concerns presented to it, but rather its role is to advise healthcare bodies based on the information provided.
27. It is a common feature of NHSR's cases that, alongside its involvement, there can be a range of parallel activities or processes that are being engaged which can serve to increase the risk that individuals who are the subject of a case with the service could be identified. These processes are usually of a highly sensitive and contentious nature, and can include grievance, disciplinary or other employment relations processes. These involve the practitioner and other healthcare staff who themselves may or may not be the subject of a separate case with NHSR, as well as cases where clinicians may be subject to police or General Medical Council /General Dental Council investigations.
28. Additionally, in a number of cases the practitioner may themselves have represented concerns about their employer to the Advice service and, where they consider themselves to be a whistle blower, to other external agencies ('prescribed bodies') to whom disclosure would afford them legal protection against being treated unfairly or losing their job for so doing.
29. To determine, first, whether NHSR correctly applied the section 36(2) exemptions, the Commissioner must consider the qualified person's opinion as well as the reasoning that informed the opinion. To establish that the exemption has been applied correctly the Commissioner must:
  - i. ascertain who the qualified person (QP) was
  - ii. establish that the QP gave an opinion
  - iii. ascertain when the opinion was given; and
  - iv. consider whether the opinion was reasonable.
30. NHSR says it sought the views of its Chief Executive as its QP in considering this request. The Commissioner is satisfied that, in line with section 36(5)(o) of the FOIA, it is appropriate for this individual to act as QP.
31. Regarding the second of the above criteria, NHSR has provided the Commissioner with two records of the QP's opinion; both are dated and signed by the QP. As such, the Commissioner is satisfied that the QP gave an opinion.



32. Turning to the third criterion - when the opinion was given - as noted NHSR has two records of the QP's opinion. The Commissioner has noted that the first record gives the date the QP's opinion was sought as 11 March 2019 and the date that the QP confirmed her opinion and provided her signature was 12 March 2019.
33. Both these dates pre-date the date of the request, which was submitted on 1 April 2019. NHSR has explained that the current request followed a very similar request made in March 2019, for the same type of information; specifically, "*A breakdown by Trust of the number of requests for advice to the Practitioner Performance Advice (PPA) Service.*" NHSR says that in giving her opinion on the earlier case and verifying its relevance to the arguments in this case, the QP had sight of legal advice NHSR obtained, and consulted the Director of the Advice Service. NHSR noted that it recognised that each request should be considered on its own merits. It says that it had tested the particular arguments for the relevance of the earlier request to the current request from the complainant before it asked the QP to consider the matter.
34. NHSR goes on to say that during the internal review process for the current request, it made its QP aware of the specific Trust that it had consulted to consider what the impact of disclosure might be on the Trust's willingness to use NHSR's service. NHSR has provided the Commissioner with a copy of those email exchanges. The Trust stated that it would be concerned if the requested information was to be disclosed. At this point the QP had maintained her view that the section 36 exemptions were engaged.
35. As a result of this complaint to the Commissioner, NHSR says its QP formalised her opinion about the requested information in the second record of that opinion. That record is dated 4 February 2020 and 12 February 2020.
36. The Commissioner expects the QP to give his or her opinion in the period after the date of the request and before the public authority's response to that request, and by completion of the internal review at the latest. In this case, the QP first provided an opinion on an earlier, similar request. It may be the case, as NHSR has explained, that the circumstances of the current request were discussed, and that earlier opinion was considered to be applicable to this request. However, the Commissioner must disregard the opinion given on 12 March 2019. That opinion had been given about a different request. The Commissioner expects the QP to consider each request individually and to take account of the circumstances as they are at the time of each request. Simply drawing on past opinions on earlier requests risks undermining the integrity of the section 36 exemption.

37. Had that been the only opinion the QP had provided, the Commissioner would have been likely to find that the opinion was not reasonable, and that consequently, section 36 was not engaged. But the QP provided an opinion on the current request on 12 February 2020. This was five months after the internal review was carried out and, as such, is not ideal. However, a public authority can apply, or re-apply, an exemption at any time. NHSR may have misapplied section 36 at the time of the request, but it was entitled to effectively re-apply this exemption in February 2020 at which time the complainant had submitted his complaint to the Commissioner. The Commissioner must therefore find that the QP provided an opinion at an appropriate time.
38. Finally, the Commissioner has considered the fourth of the criteria – whether the QP's opinion is reasonable. It is important to note that this is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it is a reasonable opinion, and not necessarily the most reasonable opinion. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, she must find that the exemption is engaged.
39. The opinion given on 12 February 2020 is that the prejudice envisioned under section 36(2)(b)(i) and section 36(2)(c) would be likely to occur if the disputed information was disclosed. 'Would be likely' imposes a less strong evidential burden than the higher threshold of 'would'.
40. The QP's opinion was that section 36(2)(b)(i) (prejudice to the free and frank provision of advice) would be engaged because disclosing the information would be likely to undermine NHSR's advice request process by inhibiting Trusts and possibly clinicians from fully engaging in the process. This is because it was considered that disclosing the disputed information could lead to individuals being identified. That matter is discussed further under the section 40 analysis in this notice.
41. The QP's opinion was that section 36(2)(c) (otherwise prejudice effective conduct of public affairs) was also engaged because the Trust named in the request has advised NHSR that disclosing the information could result in individuals being identified. The QP considered that an element of the effective conduct of public affairs is to give weight to other public authorities' concerns. This avoids circumstances occurring where one public authority discloses information in response to an FOI request which another authority reasonably believes should not be disclosed. NHS bodies have a statutory duty to cooperate with one another. The QP considers that if NHSR was to disclose information that a Trust believes should not be disclosed, this would prejudice the relationship



between both organisations and defeat the purpose of that statutory requirement.

42. In his complaint to the Commissioner the complainant has indicated that he considers that the QP's opinion is not reasonable as he does not consider that it would be possible to identify anyone from the withheld information. He notes that in its refusal to disclose this information the Trust had said that the information could be used in combination with other available information to identify individuals. The complainant says that the Trust concerned does not publish the names of those under investigation or the outcome of investigations and it would therefore not be possible for any individual to be identified.
43. The complainant also considers that there is no evidence to suggest releasing the very limited data he has requested would impact on the organisation's ability to function effectively. He argues that the Trust has a contractual responsibility to discuss cases with NHR prior to undertaking an investigation.
44. The Commissioner is satisfied that the QP had sufficient appropriate information about the request to enable her to form an opinion on the matter of whether section 36(2)(b)(i) and section 36(2)(c) were engaged. She has noted the complainant's arguments but finds that all the points at paragraph 29 have been satisfactorily addressed. As a result, she must find that the QP's opinion is one a reasonable person might hold and that, therefore, the information in question engages section 36(2)(b)(i) and section 36(2)(c). The Commissioner has gone on to consider the public interest arguments.

### **Public interest test**

#### Public interest in disclosing the information

45. The public interest argument for disclosure that the complainant has provided is a general one; that there is public interest in the information being made available if it is requested.
46. In its refusal of the request, NHR acknowledged that there is an interest in being transparent about the healthcare organisations that seek advice from the Advice service. The Advice service is established to deliver services on behalf of the Secretary of State and there is a public interest in understanding how that is carried out.

#### Public interest in withholding the information

47. In its refusal, NHR argued that there is a strong public interest in ensuring the Advice service, which supports the resolution of concerns raised about doctors, dentists and pharmacists, delivers effectively. The

Advice service provides advice to healthcare organisations to effectively manage and resolve concerns raised about the practice of individual practitioners. NHSR said it had judged that releasing individual organisational information would prejudice the confidential nature of its dealings with healthcare organisations. NHSR also believed it would erode the relationship between Advice and healthcare organisations and would in turn dissuade organisations from approaching it about future matters.

48. NHSR also argued that the information in the public domain, which includes the numbers of the requests for advice that have been made to the Advice service (such as at page 59 of its Annual Report for 17/18) provide information which both addresses the public interest but also maintains the integrity of the service and the duty of confidence NHSR owes to organisations and individuals referred to it.

#### Balance of the public interest

49. The information in dispute in this case is the numbers of cases submitted to NHSR's Advice service in connection with a named NHS Trust each year across 10 years. The Commissioner does not consider that the complainant has made a strong public interest case for disclosing this information.
50. If there had been substantial numbers of referrals from that Trust to the Advice service, that might have indicated a systemic problem at the Trust. This might have strengthened the argument for the annual breakdown of numbers to be released – to see whether the referrals had increased or reduced over that 10 year period, for example. However, the number of cases referred from the Trust in 10 years - 17 - does not appear to the Commissioner to be a high number. In the Commissioner's view a breakdown of that figure across the 10 year period does not carry a great deal of public interest. That healthcare organisations (and practitioners) have the confidence to continue to engage confidentially with NHSR so that concerns about practitioners can be managed and resolved has significantly greater public interest.
51. Such public interest as there may be in the volume of cases that the Advice service deals with generally is met, in the Commissioner's view, through the information that is published, for example in NHSR's Annual Reports. Any wider public interest that there may be in Advice service cases that involve Royal Berkshire Hospital NHS Foundation Trust has been met, in the Commissioner's view through NHSR releasing the total number of cases referred over the 10 year period.

52. On balance, the Commissioner is satisfied that there is greater public interest in the section 36(2) exemptions being maintained and the information requested in part 1 of the request being withheld.
53. Although she has found that this information engages the section 36(2) exemptions, the Commissioner has noted the complainant's concern regarding the identification of individuals – he considers this would not be possible if the numbers he has requested were to be released. For the sake of completeness and because the matter of individuals being identified was also a focus of NHR's reliance on section 36, the Commissioner has therefore considered whether this information also engages the section 40(2) exemption.

### **Section 40 – personal data**

54. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of third persons, ie someone other than the applicant, and a condition under either section 40(3A), 40(3B) or 40(4A) is also satisfied.
55. 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').

*Is the information the personal data of a third person?*

56. Section 3(2) of the DPA defines personal data as: '*any information relating to an identified or identifiable living individual*'.
57. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
58. 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.
59. 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.
60. In this case, the information being withheld is the numbers of cases submitted to NHR's Advice service in connection with the Royal Berkshire Hospital NHS Foundation Trust for each of 10 years. NHR has provided the Commissioner with this information. It considers that because the numbers are small – less than five for each of the years – it

would be possible to identify one or more individuals from that information.

61. The Commissioner must consider whether, if those numbers were released for each of the 10 years, one or more individuals working for the Royal Berkshire NHS Foundation Trust who have been the subject of requests for advice could be identified. If she finds that one or more individuals *could* be identified, the numbers will constitute the personal data of those individuals.
62. In its submission to the Commissioner, NHSR has noted the Commissioner's published guidance on section 40(2) and considered what the chances are of a sufficiently motivated person being able to identify an individual from the information in question. It considers that there is a reasonable (ie more than minimal – the threshold cited by the ECJ in *Breyer v Bundesrepublik Deutschland*) chance that a motivated person could identify, or to seek to identify/make an educated guess as to individuals concerned.
63. NHSR says that the information is very specific – it is an annualised breakdown of individuals subject to the Maintaining High Professional Standards (MHPS) process at Royal Berkshire NHS Foundation Trust, and the numbers of individuals involved is very low. NHSR has provided the Commissioner with the roles of those individuals and commented further on the spread of the numbers across the 10 years but the Commissioner does not intend to reproduce those details in this notice.
64. As disclosure of information under FOIA is to the world at large, NHSR considers this would include members of staff and colleagues of the individuals subject to MHPS/disciplinary processes by the Trust. NHSR considers that a 'motivated intruder' – that is, a sufficiently motivated person - could be a staff member or colleague of an individual subject to MHPS. They may be aware that there may be concerns about the individual's performance or in general terms about an individual who had, for example, been absent for a prolonged period in a given year without further explanation.
65. NHSR's concern is that the data concerns small numbers of individuals, in a small population (ie Royal Berkshire NHS Foundation Trust medical staff). This small population is well connected due to various working relationships throughout the organisation, rather than a wider population area, and the risk of identification therefore is substantially higher. The nature of a MHPS investigation is highly specific.
66. The concern that NHSR has is an example of the 'mosaic argument'. The term 'mosaic argument' is often used to refer to the argument that whilst it may not be prejudicial to disclose requested information in

isolation, it would be prejudicial where the requested information can be combined with other information already in the public domain or already known to the requester or others.

67. In addition, the 'motivated intruder' test that NHR has referred to has some relevance here. The 'motivated intruder' test involves considering whether someone without any prior knowledge would be able to identify individuals through anonymized information, if motivated to attempt this. Such an individual might, for example, carry out a web search, search archives or use social networking in order to identify an individual from whose personal data, anonymized data has been derived. An individual might also be in a position to search related records held by their employer.
68. Since, as NHR has noted, release under the FOIA is release to the wider world, it is the case that, potentially, Trust employees would have access to additional corporate information or knowledge that would, if they were motivated to do so, enable them to identify particular individuals if the disputed information was to be released.
69. Having considered the NHR's submission, the information being withheld and all the circumstances, the Commissioner is satisfied that the requested information, despite simply being small numbers across particular years, could lead to one or more individuals subject to the MHPS process being identified. She is therefore satisfied that this information can be categorised as their personal data; it relates to them and they could be identified from it.
70. In addition, NHR has explained that some of the information can be categorised as special category personal data. This is because it may concern a mental or physical health problem that is impacting on an individual's performance or conduct, or it might concern criminal behaviour. NHR says that even where the data is not special category per se because the concerns that have led to a MHPS referral do not relate to health issues or criminal behaviour, it is still at the more sensitive end of the spectrum because it arises in a quasi-disciplinary context. The Commissioner agrees with NHR's reasoning and considers that some of the information could be categorised as special category data, which must be handled with particular care.
71. The fact that information constitutes the personal data, and special category personal data, of identifiable living individuals, does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether any of the conditions under sections 40(3A), 40(3B) or 40(4A) have been met.

*Is a condition under section 40(3A) satisfied?*

72. The condition under section 40(3A)(a) of the FOIA is that disclosure would contravene any of the data protection principles. The ICO considers that disclosure would contravene principle (a) under Article 5(1) of the GDPR.
73. 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*".
74. In the case of a FOIA request, 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.
75. 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.
76. The lawful basis most applicable is GDPR 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"*.
77. In considering the application of Article 6(1)(f) 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 subjects, the individuals from the Trust going through the MHPS process in this case.
78. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

*Is a legitimate interest being pursued?*

79. In considering any legitimate interest(s) in disclosing the requested information under the 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.

80. 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.
81. The information in this case has been summarised above. Clearly, the complainant has an interest in the information – he has requested it. The information he has provided to the Commissioner suggests that his interest is in NHSR demonstrating openness; he has not provided any further detail on this point. NHSR has also acknowledged that there is a legitimate interest in it being transparent.

*Is disclosure necessary to meet the legitimate interests?*

82. '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.
83. In its submission to the Commissioner, NHSR has confirmed that it does not consider that disclosure is necessary in this case. It considers that the information it has released – the cumulative total – and the general information it publishes meets the above interest and that disclosing the annual breakdown would be overly intrusive and unnecessary to fulfil the legitimate interest in disclosure.
84. To a large degree the Commissioner considers that the complainant's interests – to the degree that these have been communicated to her - have been satisfied through the information that NHSR released in response to his request, and through the general related information it publishes. However, for the sake of completeness the Commissioner has gone on to balance the legitimate interests and the data subjects' interests.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

85. In considering this balancing test, the Commissioner has considered the following factors:
  - the potential harm or distress that disclosure may cause
  - whether the information is already in the public domain

- whether the information is already known to some individuals
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
86. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as individuals' general expectations of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
87. In its submission to the Commissioner the NHSR has said that although the information relates to individuals in their professional capacity, they would have the reasonable expectation that this information – which the Commissioner has determined is their personal data – would not be released to the wider world as the result of an FOIA request. NHSR has noted that it is not practical or appropriate in the circumstances for it to contact the individuals concerned to request their consent to the information's release. However, it has said that the information is about individuals in a private capacity and in a highly confidential and sensitive context, because it relates to the MHPS disciplinary process. Furthermore, NHSR's website makes clear that the involvement of the Advice service in a specific practitioner's case is ordinarily confidential to the Trust and the practitioner concerned.
88. The Commissioner is satisfied that in this case the data subjects' interests and rights and freedoms outweigh such legitimate interests as have been identified. She agrees with NHSR that the individuals concerned would have the reasonable expectation that their personal data would not be disclosed and that, were it to be disclosed, this would cause them damage and distress.
89. The Commissioner therefore considers that there is no Article 6 basis for processing and so disclosing the information would be unlawful as it would contravene GDPR Article 5. Because 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.

### *Conclusion*

90. The Commissioner has decided that NHSR is entitled to withhold the information requested under section 40(2), by way of section 40(3A)(a). Since a condition under section 40(3A) has been satisfied it has not been necessary to consider the conditions under section 40(3B) or 40(4A).

### **Section 10 and section 17 – time for compliance**

91. Section 1(1) of the FOI says that anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b), to have the information communicated to him or her if it is held and is not exempt information.
92. Section 10(1) of the FOIA says that an authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of a request.
93. Section 17(1) of the FOIA says that where an authority is relying on a Part II exemption to withhold requested information, it should provide the applicant with a refusal notice within the time limit for complying with section 1(1) ie 20 working days.
94. In this case the complainant submitted his request on 1 April 2019. NHSR responded on 9 May 2019 at which point it advised it did not hold some information and refused to disclose the information it did hold under section 36. This was outside of the 20 working day deadline. NHSR did not communicate some relevant information it holds until 13 September 2019 following the internal review. It therefore breached section 10(1) and section 17(1) on this occasion.

## Right of appeal

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95. 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)

96. 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.
97. 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**