

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 November 2021

Public Authority: NHS Improvement
Address: Skipton House
80 London Road
London
SE1 6LH

Decision (including any steps ordered)

1. The complainant has requested information acquired during the course of an independent review. NHS Improvement ("NHSI") disclosed some information but variously relied on section 36 (prejudice to the effective conduct of public affairs), section 40 (third party personal data) and section 41 (actionable breach of confidence) of the FOIA to withhold the requested information.
2. The Commissioner's decision is that almost all of the material within the scope of the request is covered by either section 40(2) of the FOIA, section 41(1) of the FOIA, or both exemptions. However, for reasons explained below, the Commissioner would have made more substantive redactions than NHSI made.
3. For reasons that are expanded upon below, the Commissioner does not require NHSI to take further steps in respect of this complaint. However, she has made comments in Other Matters which NHSI should have regard to when dealing with future, similar, complaints.

Background

4. The background to this case involves the death of the complainant's son whilst in the care of a particular NHS Trust. In order to protect the family's privacy, the Commissioner has removed as much information specific to the incident as possible.

5. Following the death, a Learning Disability Mortality Review (LeDeR) was established, to consider whether there were lessons to be learned from the incident. When concerns were expressed about the effectiveness of that review, NHSI appointed an independent investigator ("the Investigator") to carry out a further independent review. The independent review interviewed or took statements from a number of individuals involved in the process, including one key doctor involved in the complainant's son's treatment ("the Doctor") and an official who had some involvement with the LeDeR process ("the Official"). The final report contained no fewer than 21 recommendations.

Request and response

6. On 22 October 2020 the complainant requested information of the following description:

"Please accept this FOI request for the following information:

"[1] The response from [the Doctor] to [the Investigator]'s questions regarding [my son's] LeDeR Independent Review. This should have been received by [the Investigator] in the [redacted] timeframe.

"[2] All email/written correspondence between [the Investigator] and [the Doctor] or [the Doctor]'s representative(s) (e.g. solicitor(s), [redacted] Trust) between [dates redacted].

"[3] The report produced following the interview and questions asked of [the Official] by [the Investigator] on or around [date]."

7. NHSI did not initially respond to this request and the Commissioner was required to issue a decision notice compelling it to respond.
8. On 29 March 2021, NHSI responded. It provided some information within the scope of elements [2] and [3], but withheld the remaining information within the scope of the request. In respect of element [1], it relied on the following exemptions:
 - Section 36 – prejudice to the effective conduct of public affairs
 - Section 40(2) – third party personal data
 - Section 41 – actionable breach of confidence
9. In respect of element [2], NHSI relied on section 40(2) and 41 to withhold the remaining information. In respect of element [3] it relied

on section 40(2) to withhold the remaining information – although it provided it to the complainant outside of the FOIA.

10. The complainant requested an internal review on 17 April 2021. NHSI sent the complainant the outcome of its internal review on 29 April 2021. It upheld its original position.

Scope of the case

11. The complainant contacted the Commissioner on 5 May 2021 to complain about the way his request for information had been handled.
12. On 5 November 2021, NHSI issued a further response. It now relied additionally on section 40(1) (personal data of the requestor) and section 21 (reasonably accessible to the requestor) of the FOIA to withhold some information.
13. The Commissioner is conscious that the requestor in this case has a strong personal connection to the information. However, her duty under section 50 of the FOIA is to determine whether a public authority has complied with the legislation. A key principle of the FOIA is that it is applicant and motive-blind. That means that the public authority is (in most circumstances) not able to consider the identity of the requestor or why they wish to have the information. The NHSI should provide the same response to any requestor making the same request.
14. A second key principle of FOIA is that, once information is disclosed, it is considered to have been disclosed to the world at large. It is the equivalent of NHSI publishing the information on its website.
15. The Commissioner accepts that the NHSI was, in responding as it did, attempting to balance its obligations under FOIA, its Data Protection obligations and its wish to be helpful to the requestor. The Commissioner cannot pass judgment on the way that balancing has been carried out – she can only determine whether the complainant was entitled to receive more information under the FOIA.
16. As sections 41 and 40(2) are absolute exemptions (ie. there is no requirement to complete a public interest test) and have been applied to most of the withheld information, the Commissioner will look at those exemptions first. If neither of those exemptions applies to the information within the scope of element [1], she will consider whether section 36, section 21 or section 40(1) would apply to that information.

Reasons for decision

Section 41 – actionable breach of confidence

17. Section 41(1) of the FOIA states that:

Information is exempt information if—

- (a) it was obtained by the public authority from any other person (including another public authority), and*
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

18. The Commissioner's guidance states that, in order for this particular exemption to apply, four criteria must be met:

- the authority must have obtained the information from another person,
- its disclosure must constitute a breach of confidence,
- a legal person must be able to bring an action for the breach of confidence to court,
- that court action must be likely to succeed.

19. The information within the scope of element [1] consists of a written response, provided by the Doctor to a number of questions posed by the Investigator. The information within the scope of element [2] consists of several chains of emails between the Investigator and either the NHS Trust that employed the Doctor or the Doctor's legal representative. Finally the information within the scope of element [3] is a note recording an interview with the Official.

20. NHSI appears to have applied this exemption inconsistently, as some emails and documents which contain ostensibly confidential information have been provided, whilst others, which originated from NHSI (and have therefore not been provided by another party) have been redacted.

21. The Commissioner considers that this exemption covers information falling within the following categories – all of which have been received from another party:

- a) The information falling within the scope of element [1]

- b) Any information falling within the scope of element [2] pertaining to the complainant's son's medical treatment
- c) Any information falling within the scope of element [2] pertaining to the Doctor's opinions.
22. In respect of the information falling within the scope of either category a and c, the Commissioner considers that the Doctor would be able to bring an action (at least in theory) against NHSI. In respect of information falling within the scope of category b, the Commissioner considers that the complainant and his family would be able to bring an action if NHSI disclosed the information to the world at large. Therefore the first and third criteria above are satisfied.
23. Turning next to the second criteria, in determining whether a breach of confidence would occur, the Commissioner applies the three step test set out in 1968 by Judge Megarry in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415:
- the information must have the necessary quality of confidence,
 - it must have been imparted in circumstances importing an obligation of confidence, and
 - there must have been an unauthorised use of the information to the detriment of the confider.
24. Information will have the necessary quality of confidence if it is not already in the public domain and it is not trivial. The Doctor's formal response to the investigation is clearly not already in the public domain and, given that the investigation related to a death, such information is, by definition, not trivial. Whilst there is a large amount of information about the complainant's son already in the public domain, the Commissioner has not been made aware that the very specific information about his medical treatment contained in the withheld emails has been published elsewhere. That information will not be trivial. Finally having viewed the information being withheld within the scope of category c, the Commissioner notes that the information is not in the public domain and is not trivial either.
25. The Commissioner does not consider that information relating to the establishment or carrying out of a LeDeR or independent review for the complainant's son is information that has been provided in confidence. The original wording of the request names the complainant's son and the fact that his death was the subject of this review was in the public domain at the point that the request was responded to.

26. Whilst NHSI has redacted the name of the complainant's son where it appears in the email chain, except for where the emails link to specifics of his care, the Commissioner does not consider that this information has the necessary quality of confidence because it is information already in the public domain. Furthermore, the Commissioner considers that, if NHSI was concerned about redacting confidential information from public disclosure it should have gone further than merely redacting the name – it should have considered whether the complainant's son might have been identifiable by other means.
27. Information does not have to be accompanied by a binding legal agreement in order to be confidential. There are certain circumstances which imply a duty a confidence upon the person receiving the information – for example the duty of a doctor to their patient. The carrying out of an investigation (especially one into a serious incident) is one in which participants expect their views to be treated in confidence.
28. In the case of this particular review, those who participated did so voluntarily and NHSI has confirmed that it would have been unable to have compelled them to have done so. The Commissioner is therefore satisfied that all three categories of information were provided in circumstances in which confidence was implied – even if not explicitly stated.
29. Turning finally to the issue of detriment, NHSI stated that:

"Given the nature of the information provided to NHSI/I, and the circumstances in which they were provided, we consider disclosure would cause a detriment to [the Doctor]."

"This has been a high-profile case with reports published by various media outlets. We consider disclosing the detail of this interview would cause [the Doctor] distress and would be likely to have an impact on their work and personal life."

"In respect of the information which relates to [the complainant's son]'s treatment, we consider this information should not be disclosed under the FOIA. We have not received consent from [the complainant's son]'s family to disclose this information under the FOIA and effectively to the "world at large". Therefore we consider an actionable breach of confidence could be bought [sic] by members of his family."
30. The Commissioner is satisfied that disclosure of this information would cause a detriment as it would impinge on the Doctor's privacy. The Doctor is also likely to suffer damage and distress where disclosure is

contrary to a reasonable expectation of privacy – which would be the case here.

31. It is also apparent that, at least at the time of the request, there was a realistic prospect of a police investigation. It is not clear exactly what role the Doctor would have had in that investigation, but there would have been a clear detriment to the Doctor if she was unable to present her evidence in the same manner as any other individual involved in that process. The Doctor is also the subject of a General Medical Council investigation and, once again, uncontrolled disclosure might prejudice that investigation.
32. In respect of the complainant's son, the detriment would result to his right to confidentiality – a right which continues beyond his death - and to his family as a result of private medical information being released into the public domain.
33. The Commissioner is therefore satisfied that publication of this information, otherwise than under the FOIA would be a breach of confidence.
34. The final criteria for section 41 to apply is that a breach of confidence must be an actionable breach. As Lord Falconer (the promoter of the FOIA as it was passing through Parliament) said during the debate on the FOIA

"...the word "actionable" does not mean arguable...It means something that would be upheld by the courts; for example, an action that is taken and won. Plainly, it would not be enough to say, 'I have an arguable breach of confidence claim at common law and, therefore, that is enough to prevent disclosure'. That is not the position. The word used in the Bill is 'actionable' which means that one can take action and win."
35. The Commissioner therefore considers that it is not sufficient to merely claim that a breach of confidence might be brought. Any action must be likely to succeed.
36. To determine whether an action would be likely to succeed, the Commissioner must assess whether the public authority might be able to put forward a public interest defence.
37. This is not the same as the sort of public interest test that would be applied to a qualified exemption. There must be clear and compelling public interest reasons that would override the duty of confidence.
38. The Commissioner recognises that the public interest in this case is stronger than usual. The information concerns the death of a vulnerable

young person in a place where he should have expected to be safe. There is a strong public interest in understanding what went wrong so that the circumstances do not repeat themselves.

39. However, the Commissioner notes that the incident has now been the subject of not one, but several reports. It is also evident, both from the withheld information and from information in the public domain, that a police investigation has been contemplated as well as an investigation by a professional body (the GMC).
40. Certainly in the case of the information falling within the case of categories b and c, disclosure of this information would not add significantly to public understanding of the events that took place beyond what has already been either placed into the public domain or into the confidential reports that have been produced.
41. Turning to the information in category a, the Commissioner notes that the information was provided for the purpose of compiling an investigation report. She has not seen any suggestion that the Doctor's evidence has been subsequently mis-represented. Given the possibility of a police and professional investigation and the effect that disclosure might have (or have had) on such investigations, the Commissioner is not convinced that NHSI would have had a reasonable prospect of relying on a public interest defence.
42. The Commissioner is therefore satisfied that disclosure of any of these three categories of information, outside of the FOIA, would leave NHSI exposed to an actionable breach of confidence. She is therefore satisfied that section 41 applies to this information.
43. Looking specifically at the questions posed to the Doctor, the Commissioner notes that NHSI has heavily redacted information relating to the medical treatment of the complainant's son. Whilst the Commissioner is satisfied that such information should be withheld, she considers that the remaining information is so incomplete that it has the potential to be misleading. She would therefore have ordered that the entire document be withheld under section 41 – although she notes that NHSI has already provided the complainant with a copy of this document outside of the FOIA.

Section 40 – third party personal data

44. 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.

45. 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').
46. 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.
47. 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.

Is the information personal data?

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

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

49. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
50. 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.
51. 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.
52. In the Commissioner's view, the information falling within the scope of element [3] of the request will clearly be the personal data of the Official. The original wording of the request names the Official and therefore any information NHSI provided must, by definition, relate to the Official. Given the nature of the information requested, no amount of redaction would anonymise the information.
53. It is not clear to the Commissioner why NHSI did not seek to rely on section 41 to withhold this information as it would appear to meet the

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

same criteria that she set out in respect of the information falling within the scope of element [1]. Although the document itself does not appear to have been created by a third party, it records the views of the Official – who does not appear to have been an employee of NHSI at that time – and would therefore be information provided by a third party. Nevertheless, she is required to assess whether the exemptions NHSI *has* applied have been correctly applied – not whether other exemptions would be equally or more suitable in the circumstances.

54. The information within the scope of element [2] consists of several chains of emails between the investigator and either the Doctor's legal representatives of the particular Trust where the Doctor is employed. Leaving aside the information which engages section 41, the remaining information can be sorted into the following categories
- d) Administrative information relating to the logistical challenges of setting up an interview with the Doctor.
 - e) Discussion around the establishment and potential scope of a police investigation – and the extent of the involvement the Doctor might (or might not) have in such a process.
 - f) The involvement of other doctors in the interview process
 - g) Contact details of the various senders and recipients of the emails
55. NHSI has attempted to deal with all four categories of information by simply redacting the names and pronouns. In the Commissioner's view, this is not sufficient.
56. As has been noted above, the Commissioner recognises that NHSI has attempted to be as helpful as possible to the requestor. However, disclosure under the FOIA is disclosure to the world at large. NHSI must therefore consider the request and its context before deciding how to respond.
57. The original wording of the request names the Doctor. Therefore any information which falls within the scope of element [2] must, by definition, relate to the Doctor – if it does not relate to the Doctor, it does not fall within the scope of the request.
58. Having viewed both the unredacted and the redacted versions of the emails, the Commissioner considers that it is fairly obvious to deduce where the Doctor is referred to, either by name or by pronoun. The Doctor is therefore identifiable and can thus be linked to the particular information in the emails.

59. In the case of information falling within category e, that information is criminal offence personal data, because it relates to the scope of a potential criminal inquiry and the role that the Doctor might play within any inquiry that took place. NHSI should therefore have redacted not just the Doctor's name, but any parts of any email that referred to a criminal inquiry.
60. In respect of category d, the information within scope relates to the logistical discussions around arranging an interview with the Doctor. To the extent that it has any connection to the Doctor, the connection is weak and does not relate to the Doctor's family or personal life. The Commissioner is therefore satisfied that such information would not be the Doctor's own personal data – although she notes that the bulk of this information is exempt under section 41 anyway.
61. In respect of category f, NHSI has redacted the names of the doctors only. The Commissioner considers that this would have been sufficient to have anonymised this particular section of information.
62. Finally, the Commissioner turns to category g which encompasses various individuals and their contact details. Given that the request specifically sought emails either sent or received by the Investigator, the Commissioner considers that it is once again simple to deduce where in the withheld information the Investigator's name appears.
63. The Investigator's name and the fact that they investigated this particular case was placed into the public domain with the publication of the report in question. The Commissioner can therefore see no reason why the Investigator's name needed to be withheld.
64. The name of the Doctor's legal representative is not in the public domain and would be that individual's personal data (as well as the Doctor's).
65. Turning to contact details, the Commissioner accepts that, in some cases, these will directly identify the individuals concerned and in others they can be linked to the individuals concerned. Either way, these are the personal data of the individuals to whom they relate.
66. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that some of the information relates to individuals who are identifiable. She is satisfied that this information both relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
67. 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.

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

Would disclosure contravene principle (a)?

69. 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".

70. 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.

71. 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.

72. In addition, if the requested data is criminal offence data, in order for disclosure to be lawful and compliant with principle (a), it must also meet the requirements of Article 10 of the GDPR.

73. Article 10 of the GDPR defines 'criminal offence data' as being personal data relating to criminal convictions and offences. Under section 11(2) of the DPA personal data relating to criminal convictions and offences includes personal data relating to:

a) The alleged commission of offences by the data subject; or

b) Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.

74. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include criminal offence data, because it refers to a process of criminal investigation and who might be asked to give evidence to that investigation.

75. For the avoidance of doubt, the Commissioner is not stating that the any particular individual is currently under investigation for a criminal offence, only that at the time the withheld information was created, there was a clear suggestion of an investigation regarding a possible criminal offence and the withheld information indicates the individual(s) who would be involved.

76. Criminal offence data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure in

response to an information request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.

77. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under the FOIA are the conditions at Part 3 paragraph 29 (consent from the data subject) or Part 3 paragraph 32 (data made manifestly public by the data subject).
78. The Commissioner has seen no evidence or indication that the Doctor has specifically consented to this data being disclosed to the world in response to the FOIA request or that the Doctor has deliberately made this data public.
79. As none of the conditions required for processing criminal offence data are satisfied there is no legal basis for its disclosure. Processing this criminal offence data would therefore breach principle (a) and so the information falling within category e is exempt under section 40(2) of the FOIA.

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

80. The Commissioner now turns to the issue of the information within categories f and g.
81. 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.
82. 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.

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".

83. 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.
84. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.
85. A wide variety of interests can be legitimate interests. They can be specific or general, public or private, compelling or trivial. Whilst the Commissioner considers that there will almost always be a broad interest in transparency, in general, the less specific the interest, the more trivial it is and the more personal it is to the requestor, the less likely it is that the interest in publication will outweigh the rights of the data subject.
86. NHSI noted that:
- With respect to this specific case, there is a legitimate interest from the public to understand the full detail of how a patient with learning disabilities died and what information NHS Improvement holds in relation to this matter.*
87. In respect of category g, the email addresses and telephone numbers of the people involved in the email exchanges add nothing to public understanding of how this tragic event occurred. Nor would they shed any light on whether any of the reviews was adequately carried out. Disclosing the name of the Doctor's solicitor also adds nothing of any

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".

value to anyone trying to establish whether lessons have been adequately learned.

88. The Commissioner therefore considers that there is no legitimate interest in disclosure of information falling within category g.

Necessity test

89. Having considered the matter, the Commissioner is not convinced that the information within category f meets the necessity test.
90. The Commissioner is not clear as to the role the other doctors played. They were not the focus of the request. Revealing their names risks implying that they had done something wrong when, to the Commissioner's knowledge, no such determination has yet been made.
91. In this case the participation of the other doctors can be looked at through the process of reviews. Disclosing this information (which relates to their participation in interviews) does not add anything of substance to any review of their previous actions.
92. The Commissioner therefore concludes that it is not necessary to disclose the names of the doctors and, even if it were, she considers it likely that their rights as data subjects would outweigh any legitimate interest in disclosure.
93. Finally, the Commissioner turns to the information within the scope of element [3]. Once again, she finds that disclosure is not necessary. The Official's thoughts and comments were considered as part of the review process. No suggestion has been made that the Official's evidence has been mis-represented.
94. The Commissioner considers that the legitimate interest can be satisfied by less intrusive means than publication of the information. Disclosure is thus not necessary.
95. As disclosure is not necessary, there is no lawful basis for the processing of this personal data and therefore disclosure would be unlawful. NHSI is therefore entitled to rely on section 40(2) of the FOIA to withhold this information.

Remedial steps

96. Given that the Commissioner has found that a quantity (albeit a small quantity) of information that has been withheld is not covered by an exemption, she would ordinarily order the public authority to disclose that information – however she has decided against doing so in the particular circumstances of this case.

97. The complainant has already received a version of the emails which is far more comprehensive than the Commissioner would have required NHSI to disclose under the FOIA. NHSI has indicated that this information was disclosed outside of the FOIA.
98. If the Commissioner were to order the non-exempt information to be disclosed, the complainant would receive a copy of the same emails he already possesses. The only difference would be that this time the name of his son, of the Doctor and of the Investigator would now be visible in a small number of the emails. The Commissioner considers that it is obvious to the complainant, because of the wording of the request and his knowledge of the situation, where each of these names would sit within the broader email chain. Disclosing a fresh version would therefore be a worthless exercise because, in effect, the complainant already has this part of the withheld information. The emails that NHSI withheld in full or in substantial part (and which the complainant does not already have) are exempt from disclosure under either section 41 or 40(2) of the FOIA.
99. In the circumstances, the Commissioner does not consider that it is proportionate to order NHSI to take any remedial steps.

Other matters

100. The Commissioner recognises that the identity of the complainant is relevant to the way that NHSI dealt with this particular request. Cases like this do present difficulties for public authorities because, whilst the requestor may be seeking to have their request dealt with under the FOIA, that may, paradoxically, entitle them to receive less information – because of the applicant-blind nature of the FOIA.
101. The complainant clearly has a legitimate interest in receiving the requested information. The Commissioner does not have enough evidence to assess whether that legitimate interest is sufficient to overcome the data protection rights of the data subjects – nor would it be appropriate for her to make such an assessment in the context of a FOIA decision notice. The Commissioner can only deal with the legitimate interest in *publication* of the requested information.
102. NHSI has clearly attempted to be helpful to the complainant and, in stepping outside of the FOIA to disclose some information it has meant that the complainant has received more information than he would otherwise have been entitled to.
103. However, the Commissioner's view is that, when a public authority decides to deal with a request (or part of a request) outside of the scope

of the FOIA it should make that clear to the requestor, explain why it is taking such a step and explain what that means for the requestor's right of complaint to the Commissioner.

104. In this case, whilst NHSI did state that the information was being provided outside of the FOIA, its refusal notice did not explain as clearly as it could have done why NHSI had taken this step. By including consideration of this voluntary disclosure as part of the FOIA internal review it carried out, NHSI further blurred the boundaries between information being disclosed under FOIA and information being disclosed outside of the FOIA. Neither the review nor the refusal notice made clear that the complainant was not entitled to challenge the redactions NHSI had made to information it had provided outside of the scope of the FOIA.
105. Finally, the Commissioner would recommend that NHSI review its processes for redacting personal data in preparation for disclosure under the FOIA.
106. Simply redacting names does not automatically render information anonymous. Where a request names one or more individuals, a public authority should be alive to the possibility that information, purely by virtue of the fact that it falls within the scope of the request, can be linked to the individuals identified in the request. If it can be linked to them, the public authority should redact or withhold the entirety of the information that relates to the identifiable individual – unless it is satisfied that there is a lawful basis for the information to be disclosed. It should not just simply redact the name of an individual and assume that this is sufficient to break the link.

Right of appeal

107. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

108. 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.

109. 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

Roger Cawthorne
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