

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 March 2023

Public Authority: North Cumbria Integrated Care NHS Foundation Trust (the trust)

Address: Maglona House
Kingstown Broadway
Carlisle
CA3 0HA

Decision (including any steps ordered)

1. The complainant has requested the trust to disclose an investigation report into the conduct of a junior member of staff. The trust disclosed some information and parts of the report, but felt the remainder is exempt from disclosure under section 40 of FOIA. For three questions, it refused to comply and cited section 12 of FOIA, as it considered the cost to comply would exceed the cost limit.
2. The Commissioner's decision is that the trust is entitled to rely on sections 12 and 40 of FOIA. He has however found the trust in breach of sections 1, 10 and 17 of FOIA.
3. The Commissioner does not require any further action to be taken.

Request and response

4. On 13 May 2022, the complainant wrote to the trust and requested information in the following terms:
"1. What investigations and or audits has the trust conducted into the matter of the unqualified nursing assistant acting outwith her

competency by running neurology clinics and advising on medication, including controlled medication?

2. Please give dates of any investigations and or audits, and the seniority of staff conducting the investigations and or audits.
 3. Were any of the staff who conducted these investigations and or audits previously involved in this nursing assistant's line of management?
 4. What oversight did the Director of Nursing have of this matter?
 5. Please share the summarised outcome of the relevant investigations and or audits.
 6. Please share the summarised action plans arising from the relevant investigations and or audits.
 7. Please share copies of the relevant investigations and or audits
 8. Can the trust say from its digital records (or if it has ascertained from other records), how many neurology patients were seen by [name redacted] acting outwith her clinical competency? If so, please advise how many.
 9. Can the trust say, from its digital records (or if it has ascertained from other records), in how many cases [name redacted] gave advice on medication? If so, please advise how many.
 10. Has the trust fulfilled its duty of Candour to the patients and families who were seen by [name redacted], when acting outwith her competency? How many patients and families has the trust contacted and apprised of the breaches in care by [name redacted]?
 11. Please indicate what safeguarding action was taken by the trust to prevent this individual from harming patients or placing patients at risk in the future.
 12. Please indicate if any qualified trust nursing staff responsible for [name redacted]'s supervision and management have been investigated, disciplined or referred to the Nursing and Midwifery Council."
5. The trust responded on 27 May 2022. While it addressed the subject matter of the request it did not provide a response to the questions in accordance with its obligations under FOIA.
 6. The complainant requested an internal review on 1 July 2022.

7. The trust carried out an internal review and notified the complainant of its findings on 26 July 2022. It provided some information about the investigation and its outcome but refused to disclose the report itself, citing section 40 of FOIA. In relation to questions 8, 9 and 10, the trust refused to comply (as it estimated that it would exceed the cost limit prescribed by FOIA to do so) and applied section 12 of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 27 July 2022 to complain about the way their request for information had been handled. They disagree with the application of section 12 of FOIA to three questions. They are also unhappy that the trust will not disclose the investigation report and considers it is a matter of public interest to do so. They also believe the trust should at least provide the terms of reference and any actions or recommendations sections of the report, as it is worded, rather than providing its own summary of those sections in its disclosure to the request.
9. During the Commissioner's investigation the trust decided to review the report itself and disclose what it can from those sections referred to by the complainant. For the remainder of the report, it remains of the view that it is exempt from disclosure under section 40 of FOIA. It also claimed a late reliance on sections 36 and 41 of FOIA and notified the complainant accordingly.
10. The Commissioner has obtained a copy of the withheld information and more detailed submissions from the trust. He is satisfied that the remaining sections of the report are exempt under section 40 of FOIA. He is also satisfied that section 12 of FOIA applies to questions 8, 9 and 10. The following section of this notice will now explain why.

Reasons for decision

Section 40 – personal data

11. Section 40(2) says that information is exempt information if it is the personal data of another individual and disclosure would contravene one of the data protection principles.
12. In this case, the complainant has requested a copy of an investigation report into the conduct of a junior member of staff (data subject); an investigation which took place 8 years ago. The Commissioner is satisfied that the remaining withheld information is the data subject's

personal data in its entirety – they can be identified as they are named throughout it and the sole focus of the report is their professional conduct whilst they worked for the trust.

13. The Commissioner appreciates that the complainant has a legitimate interest in this information and that would be met through disclosing the remaining elements of the report. It would allow them and others to see how the matter was investigated and handled by the trust at the time.
14. However, the Commissioner considers that the data subject would reasonably expect that their personal data would not be disclosed to the world at large under FOIA. Instead they would hold the expectation that it would remain private and confidential. The trust explained how only independent level 3 investigations are published, under the NHS England Serious Incident Framework¹. This report is a level 2 internal investigation and these are not published. The data subject would therefore have no reasonable expectation that the report would be published; and certainly not 8 years on from when the investigation took place.
15. The Commissioner is satisfied that disclosure would cause the data subject harm and distress, especially as the events described took place over 8 years ago. This would not be proportionate or fair.
16. The Commissioner considers that the complainant's legitimate interest in the disclosure of the requested information has now been met by the trust. It provided its own summary of the information it can disclose (term of reference, actions and recommendations which do not relate specifically to the data subject) in its internal review response to them. At the Commissioner's request it also disclosed the relevant sections of the report itself which do not constitute the personal data of the data subject.
17. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that disclosing the requested information would be unlawful as it would contravene a data protection principle; that set out under Article 5(1)(a) of the UK General Data Protection Regulation.

¹ [serious-incident-framework.pdf \(england.nhs.uk\)](https://www.england.nhs.uk/serious-incident-framework/)

Section 12 – cost limit

18. Section 12 states that a public authority is not obliged to comply with a request, if it considers the cost of compliance would exceed the appropriate limit. For the trust the appropriate limit is £450 or 18 hours of work.
19. It can only take into account the cost and time it would take to establish if it holds the requested information, to locate and retrieve that information and extract the requested information from any other information which is not relevant to the request.
20. The trust confirmed that it took it 3.5 hours to run the appropriate report to identify all the patients the member of staff saw. This brought up 287 patients. To answer questions 9 and 10 it would need to manually reviewed all 287 patient files and records to see if they met the criteria of the request. It has estimated that it would take at least 10 minutes per patient to access their records and read through all progress notes and letters to locate the requested information. This equates to 2870 minutes or 48 hours of work. At just 5 minutes per patient, it would still equate to 24 hours of work and the trust considers this is unrealistic in practice considering the volume of records and notes they would have to read through.
21. The Commissioner is satisfied that the cost to comply with these elements of the request would exceed the appropriate limit. It has explained how many patients there are and what it would need to do to locate and extract the information. Considering how medical information is held and the likely volume of it for some patients, it is reasonable to say that it would take on average 10 minutes per patient. Even at 5 minutes, the cost limit is comfortably exceeded.
22. For these reasons, the Commissioner is satisfied that section 12 of FOIA applies to these elements of the request.

Section 16 – advice and assistance

23. The application of section 12 of FOIA triggers the duty to provide advice and assistance so far as it is reasonably practicable to do so. The Commissioner notes from the internal review response that it indicated what information it believes it could provide to the complainant within the cost limit (information for questions 8 and 10).
24. Although brief, the trust has sought to provide advice and assistance by confirming to the complainant what it believes it can provide within the cost limit. The Commissioner is therefore satisfied that the trust met its obligations under section 16 of FOIA.

Procedural breaches

25. The trust did not issue a comprehensive response to the complainant, which adhered to the requirements of FOIA, until it carried out an internal review. It therefore failed to respond in full within 20 working days of receipt and failed to issue an adequate refusal notice in that timeframe too. The Commissioner has therefore recorded a breach of section 10 and 17 of FOIA in this case.

26. The Commissioner also considers that there was elements of the report that could have been provided to the complainant at the outset. The recorded information itself should be provided in response to a request unless the applicant specifically states in the request that they only require a summary. In this case the trust provided its own summary when this is not how the complainant required the information disclosing. As a result the Commissioner has also recorded a breach of section 1 of FOIA, as the trust failed to provide information to the complainant, to which they were entitled under section 1, within the statutory time for compliance. But as this was resolved during the Commissioner's investigation no further action is required.

Right of appeal

27. 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

28. 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.
29. 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

Samantha Coward
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF