



**University Hospitals
of North Midlands**
NHS Trust

Nce 343-2223
Ref: FOIA Reference 2022/23-343b

Royal Stoke University Hospital
Data, Security and Protection
Newcastle Road
Stoke-on-Trent
Staffordshire
ST4 6QG

Date: 28th December 2022

Email foi@uhn.nhs.uk

Anna Bawden
anna.bawden@guardian.co.uk

Dear Ms Bawden

I am writing to acknowledge receipt of your email dated 24th November 2022 requesting information under the Freedom of Information Act (2000) regarding our response dated 21st September 2022 on sexual misconduct.

You emailed: I wish to appeal your decision to reject my FOI request.

'In your email, you gave me a link to a previous FOI request, thereby citing section 21 of the FOIA.

My grounds for challenging this decision are twofold:

1) The previous FOI is not identical to my FOI and therefore there are a lot of questions that it does not answer:

- i) who the alleged perpetrator was - staff, patients, visitors*
- ii) what the total number of incidents was over five years for each question*
- iii) how many staff have been disciplined for sexual misconduct/violence against patients or colleagues*
- iv) the time periods are not identical*

The ICO states in its guidance on section 21 that "Therefore, for section 21 to apply, it is necessary to consider Information reasonably accessible to the applicant by other means (section 21) 20130515 Version: 1.0 8 whether the entirety of the information is reasonably accessible to the applicant."

As the entirety of my FOI request is not replicated in the previous FOI, section 21 does not apply here.

2) Even where the previous FOI does give some figures, you have cited section 40 and used <5. This is also a misapplication of exemptions. I therefore dispute the trust's assessment of the risk of identification regarding personal data.

According to Article 4 of the GDPR, personal data means any information relating to an identified or identifiable natural person and an identifiable natural person is one who can be identified directly or indirectly in particular by reference to an identifier.

Recital 26 of the GDPR states:

(26) 'To determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used...either by the controller or by another person to identify the natural



person directly or indirectly. To ascertain whether means are reasonably likely to be used to identify the natural person, account should be taken of all objective factors such as the costs of and the amount of time required for identification taking into consideration the available technology at the time of the processing and technological developments.....'

When the data controller considers this they have to ask if there are any 'reasonably available means to re-identify the individuals' (according to the ICO's guidance) or individual to which the data refers. There is no such reasonably available means to re-identify anonymised individuals here.

The ICO's guidance on personal data and GDPR states:

The fact that there is a very slight hypothetical possibility that someone might be able to reconstruct the data in such a way that the individual is identified is not necessarily sufficient to make the individual identifiable. You must consider all the factors at stake.

Although the Scottish ICO does not have authority here, its guidance on personal data is still useful to consider:

17. In most cases, it will be easy to tell if information is personal data. The two main elements of personal data are that: (i) the information must "relate to" a living person (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) and (ii) the person must be identified – or identifiable – from the data or from the data and other information.

21. Breyer v Bundesrepublik Deutschland (see Appendix 1: Resources for a link to the judgment). The Court said that the correct test to consider is whether there is a realistic prospect of someone being identified. In deciding whether there is a realistic prospect of identification, account can be taken of information in the hands of a third party. However, there must be a realistic causal chain – if the risk of identification is "insignificant", the information won't be personal data.

24. Public authorities responding to requests for numbers will therefore have to determine whether members of the public would be able to identify individuals from the statistics if they are disclosed. It's important that the scope for anonymisation is considered when handling requests which capture personal data. See Appendix 1: Resources for some decisions on whether statistics are personal data.
Incidents vs complainants

Another issue to consider here is do the number of incidents represent the number of people involved? For example, is sexist graffiti, where there is no known perpetrator, recorded as an incident?

Furthermore, does the number of incidents actually represent the number of complainants? Or does a single incident sometimes involve multiple complainants and/or multiple perpetrators.

Both of the above are relevant to the application of Section 40. If the trust is anonymising low numbers of incidents but the actual number of complainants involved is more than five, or the incidents cover situations where no complainant and/or perpetrator has been identified then this exemption is not justified.

For the above reasons, I challenge that providing the totals for the five year period would meet the threshold of a realistic prospect of someone being identified. Also, if the number of incidents does not equal the number of complainants then exact figures for the annual data should also be disclosed. I have not asked for any personal details of the individual concerned; nor do I have any details about the incidents recorded. I don't know the ages of the patients or the staff involved, their gender or ethnicity, whether the staff are still employed, where the patients or visitors live (they may have moved out of the area or live elsewhere), etc, nor does the information provided enable me to discover those

personal details. There is no other publicly accessible information that leads to a risk of jigsaw identification when considered with the data I have requested.

The data to be published

The Guardian has conducted similar FOI investigations on sexual misconduct and racism in universities and schools. We have not published the annual figures requested; only the five year totals. See the following for further details:

Schools record more than 60,000 racist incidents in five years and the associated table of findings.

Sexual harassment allegations: find figures for UK universities

We also don't report year-by-year breakdowns in news stories about FOI investigations. (Usually, we only name the authorities with the highest numbers of incidents; this would usually be the top two or three or five at most. Even when these authorities are named, their high numbers are not presented as necessarily meaning that they are the worst performing organisations. Indeed, high numbers sometimes reflect robust recording and complaints procedures.)

You may ask why do we request year-by-year breakdowns if we don't intend to publish the data? We request this data because it can help identify trends, either in the sector as a whole, or in individual institutions, or certain types of institutions within a broader category. For example, this is data that might be compared with information about changes to an institution's training, policies or procedures. For example, has the number of incidents gone up or down because new incident reporting procedures have been introduced or new training has been provided to complaints handlers?

I therefore urge you to uphold my appeal and to provide me with actual five year totals for each question, which would obviate any concerns around identification of individuals, while answering each question as I have asked it.'

As of 1st November 2014 University Hospitals of North Midlands NHS Trust (UHNM) manages two hospital sites – Royal Stoke University Hospital, and County Hospital (Stafford). Therefore the response below is for the two sites combined from that date where appropriate.

UHNM has reviewed our response and has concluded the following:

Thank you for your response, outlining your concerns with the information provided to your FOI request 343-2223. Your comments have been reviewed and our response is provided below. Please note our response only references English FOI Act as Scottish law has no legal substance in England.

I have taken your two queries separately.

Query 1

The previous FOI is not identical to my FOI and therefore there are a lot of questions that it does not answer:

- Who the alleged perpetrator was – staff, patients, visitors
- What the total number of incidents was over five years for each question
- How many staff have been disciplined for sexual misconduct/violence against patients or colleagues
- The time periods are not identical

The ICO states in its guidance on section 21 that "Therefore, for section 21 to apply, it is necessary to consider Information reasonably accessible to the applicant by other means (section 21) 20130515 Version: 1.0 8 whether the entirety of the information is reasonably accessible to the applicant." As the entirety of my FOI request is not replicated in the previous FOI, section 21 does not apply here.

Response 1

Section 21 of the FOI Act (point 13) states information must be reasonably accessible to the applicant.' and Section 21 (point 23) states any of the requested information is in fact reasonably accessible to the applicant. In order to respond to your request we directed you to the Trust's Publication Scheme and referenced the particular published documents to enable you to obtain your responses; 168-2223 (June 2022) and 618-2122 (March 2022). Section 21 (point 41) states 'as long as an authority draws the attention of the applicant to the scheme such that it is clear how the requested information can be accessed, its obligations in this respect will generally be fulfilled.' I have therefore reviewed 168-2223 and 618-2122 to confirm the information you have requested is not contained within these previous FOI requests.

Therefore the application of exemption section 21 has been applied incorrectly and I have therefore asked for the information to be provided to you as per your spread sheet. Please find attached. Please accept my sincere apologies for this error.

Query 2

Even where the previous FOI does give some figures, you have cited section 40 and used <5. This is also a misapplication of exemptions. I therefore dispute the Trust's assessment of the risk of identification regarding personal data.

Response 2

Section 40 of the FOI Act states 'you should not disclose information under FOIA or the EIR if: it is the personal data of the requestor; or it is the personal data of someone else; and disclosure would contravene the data protection principles; disclosure would contravene an objection to processing; or the data is exempt from the right of subject access. In this case our exemption would be on the basis it is the personal data of someone else; section 40 (2).

The information you have requested is classified as special category information. The Trust does not have explicit consent to release this information nor has this information been made public by the individuals concerned. As you have also asked for information where the individual(s) have been disciplined we need to consider the implications of an offence being committed and the expectations of further processing of that information. We have already established consent has not been obtained so we need to consider applying legitimate interests to your request and in doing so assess the interests and rights of the individuals. We therefore asked the question whether it would be a reasonable expectation of the individuals to release this information and whether this information may already be known to some individuals. In both scenarios we concluded yes. However, as we can identify a legitimate interest to ensure appropriate action is taken against sexual misconduct we have provided the information in its entirety, except where the numbers are less than 5. We have therefore

categorised this information as per our response. I am of the opinion this part of your request is upheld.

*Please note that any individuals identified do not give consent for their personal data to be processed for the purposes of direct marketing.

UHNM NHS Trust is a public sector body and governed by EU law. FOI requestors should note that any new Trust requirements over the EU threshold will be subject to these regulations and will be advertised for open competition accordingly.

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An anonymised copy of this request can be found on the Trust's disclosure log, please note that all requests can be found at the following link: <http://www.uhnm.nhs.uk/aboutus/Statutory-Policies-and-Procedures/Pages/Freedom-of-Information-Disclosure-Log.aspx>

This letter confirms the completion of this request. A log of this request and a copy of this letter will be held by the Trust.

If you have any queries related to the response provided please in the first instance contact my office.

Should you have a complaint about the response or the handling of your request, please also contact my office to request a review of this. If having exhausted the Trust's FOIA complaints process you are still not satisfied, you are entitled to approach the Information Commissioner's Office (ICO) and request an assessment of the manner in which the Trust has managed your request.

The Information Commissioner may be contacted at:

Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF or via www.ico.org.uk.

If following review of the responses I can be of any further assistance please contact my secretary on 01782 671612.

Yours,





**University Hospitals
of North Midlands**
NHS Trust

Leah Carlisle
Head of Data, Security & Protection/ Data Protection Officer

