

Freedom of Information Act 2000: Section 40(2)

Section 40(2) together with the conditions in section 40(3)(a)(i) or 40(3)(b) provides an absolute exemption if disclosure of the personal data would breach any of the data protection principles.

'Personal data' is defined in sections 3(2) and (3) of the Data Protection Act 1998 ('the DPA 2018') and means any information relating to an identified or identifiable living individual. 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.

We have concluded that, in this instance, the information requested could contain third party personal data.

Under Section 40(2) of the FOIA, personal data is exempt from release if disclosure would breach one of the data protection principles set out in Article 5 of the GDPR. We consider the principle being most relevant in this instance as being the first. This states that personal data must be:

"processed lawfully, fairly and in a transparent manner in relation to the data subject"

The lawful basis that is most relevant in relation to a request for information under the FOIA is Article 6(1)(f). This 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".

In considering the application of Article 6(1)(f) in the context of a request for information under FOIA it is necessary to consider the following three-part test:-

- **The Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- **The Necessity test:** Whether disclosure of the information/confirmation or denial that it is held is necessary to meet the legitimate interest in question;
- **The Balancing test:** Whether the above interests override the interests, fundamental rights and freedoms of the data subject.

Our consideration of these tests is set out below:

1. Legitimate interests

Your request indicates you are interested in obtaining figures on qualifying patients accessing advocacy services in hospitals across Wales broken down by the following categories - NHS mental health hospitals, independent mental health hospitals, other NHS and any other setting. We have concluded that, in this instance, providing data broken down by those categories would result in numbers of less than 5 within the data resulting in the data becoming sensitive and potentially patient identifiable. To produce the level of data within the categories over the time period requested would also result in the compilation of the data taking in excess of permitted 24 hours. However, data has been provided for all indicators over the specified time period for all health boards for the total of all hospitals across Wales.

Is disclosure necessary?

Following the above analysis, the Welsh Government is of the view that it is not necessary to disclose the disaggregated sensitive data which could lead to the identification of individual patients.

2. The balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

As we do not believe that disclosing figures of less than 5 is justified, there is no requirement on us to undertake a test to balance the legitimate interests against the right of individuals, as the fundamental rights and freedoms provided by the DPA are not being challenged.