



FREEDOM OF INFORMATION ACT 2000 (SECTION 50)

DECISION NOTICE

Dated 5 June 2006

Public Authority: Newry and Mourne Health and Social Services Trust

Address: Daisy Hill Hospital
5 Hospital Road
Newry
BT35 8DR

Summary Decision and Action Required

The Commissioner's decision in this matter is that Newry and Mourne Health and Social Services Trust (the "Trust") has not dealt with the Complainant's request in accordance with Part I of the Freedom of Information Act 2000 (the "Act") in that it has failed to comply with its obligations under section 1(1) and section 17 of the Act.

In view of the fact that the Complainant has now received the information requested, the Commissioner does not require the Trust to take any remedial steps.

1.0 Freedom of Information Act 2000 – Application for a Decision and the Duty of the Commissioner

1.1 The Information Commissioner (the 'Commissioner') has received an application for a decision whether, in any specified respect, the Complainant's request for information made to the Public Authority has been dealt with in accordance with the requirements of Part I of the Act.

1.2 Where a Complainant has made an application for a decision, unless:

- a Complainant has failed to exhaust a local complaints procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or
- the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision. The Commissioner shall either notify the Complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the Complainant and the Public Authority.

2.0 The Complaint

2.1 On 3 September 2005 the Complainant requested the following information from the Trust in accordance with section 1 of the Act:

- “ i) Details of Directors’ salaries in the format recommended by DHSSPSNI (Ref HSS (F) 25/2004)
 - a. Salary including performance pay (at 01/04/2005)
 - b. Benefits in kind
 - c. Pension contribution
 - d. Total CETV at 31/03/2005
 - e. Total travelling and incidental expenses paid

In addition to pro forma recommendations please provide details of the number of working days per director spent away from the Trust on training courses, conferences, etc.”

The format recommended by the Department for Health, Social Services and Public Safety Northern Ireland (the “DHSSPSNI”) in the circular HSS (F) 25/2004, is a table comprising of financial information relating to senior executives such as salary bands and pension information.

2.2 The Trust responded on 5 September 2005, providing some of the information requested. The Trust did not address the Complainant’s request for the information to be provided in the format of the table from the DHSSPSNI circular.

The Trust stated that the Non-Executive Directors’ salary bands were already in the public domain, having been published in the Trust’s Annual Report, but that Executive Directors had “exercised their legal right to withhold consent to publication of salary, pension contributions and total CETV”.

The Trust provided salary bands as set by the Department for Health, the DHSSPSNI for the Executive Directors with the exception of the Chief Executive and the Director of Acute Services (also referred to by the Trust in correspondence as the Medical Director). The Trust also provided information about Executive Directors’ pensions, travelling and expenses, and working days spent away from the Trust.

2.3 The Complainant asked for an explanation of the Trust’s refusal to disclose salary bands for the Director of Acute Services on 3 October 2005, and the Trust responded on 4 October 2005. The Trust apologised for not stating the exemption under the Act being used to withhold the information. The Trust stated that the Director of Acute Services’ salary was not published as part of a pay band, “and therefore to disclose this information would contravene section 40 of the FOI Act (2000) as the Medical Director has not given authorisation to disclose his exact salary”.

2.4 On 7 October 2005 the Trust wrote to the Complainant again, relating to “the Trust’s interpretation of section 40(2) of the Act pursuant to which the Trust has

withheld details of the Director of Acute Services' salary". The Trust stated that "the next stage in the procedure set out by the Information Commissioner's Office would be for the Trust to hold an internal review of the decision made". The Complainant contacted the Trust on the same date to request clarification of the Trust's response.

- 2.5 The Trust wrote to the Complainant on 20 October 2005, stating that the Trust had not held an internal review, but had decided to provide the Complainant with a salary band relating to the part of the Director of Acute Services' salary which related to his duties in that post. This Director was also employed as a doctor under the Consultant Contract, and the Trust stated that they would continue to respect his wishes under the conditions of the exemption, stating that the Consultant Contract was available from the DHSSPSNI.
- 2.6 The Complainant wrote to the Commissioner on 1 November 2005 to make a formal complaint. He alleged that the Trust had not dealt with his complaint properly, and that it had claimed an exemption inappropriately.

3.0 Relevant Statutory Obligations under the Act

3.1 Section 1(1) provides that –

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

3.2 Section 11 provides that –

"(1) Where, on making his request for information, the applicant expresses a preference for communication by any one or more of the following means, namely –

- (a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,
- (b) the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and
- (c) the provision to the applicant of a digest or summary of the information in permanent form or in another form acceptable to the applicant,

the public authority shall so far as reasonably practicable give effect to that preference."

3.3 Section 17 provides that –

"(1) A public authority which ... is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request,

or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

3.4 Section 40(2) provides that:

“(2) Any information to which a request for information relates is also exempt information if –

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.

(3) The first condition is –

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene –

- (i) any of the data protection principles, or
- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded”.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

4.0 Review of the case

4.1 Scope of the Review

The Complainant asked the Commissioner to review the Trust's refusal to provide him with the information he requested. The Complainant alleged that the Trust did not deal with his request properly, and that the Trust had claimed an inappropriate exemption. The Complainant also alleged that the Trust did not follow its own procedures in dealing with his request.

4.2 On being contacted by the Commissioner on 29 November 2005, the Trust asked the Commissioner to clarify the exact nature of the complaint. The Commissioner contacted the Complainant and sought confirmation that the complaint should be interpreted as follows:

- i) The Trust wrongly withheld salary bands of the Chief Executive and Director of Acute Services / Medical Director;
- ii) The Trust did not provide an adequate refusal notice to the Complainant;
- iii) The Trust did not conduct an internal review of its original decision.

The Complainant confirmed this interpretation, and also complained that the Trust did not use the format requested by him in its response.

The Commissioner considered the correspondence between the Trust and the Complainant in relation to the provisions of the Act, and the Code of Practice issued by the Lord Chancellor under section 45 of the Act (the "Code"). In particular, the Commissioner considered the Trust's reliance on the exemption under section 40(2) of the Act.

In light of the fact that all of the information referred to at sub-paragraph 2.1 above (including salary bands for the Chief Executive and Director of Acute Services) has now been provided to the Complainant, the Commissioner's decision in this instance relates mainly to the Trust's reliance on the exemption under section 40(2) of the Act.

4.3 The Commissioner's Investigation

4.3.1 The Commissioner wrote to the Trust on 1 December 2005 and sought an explanation for its reliance on the section 40 exemption. The Commissioner also put a number of points to the Trust, a summary of the correspondence follows.

4.3.2 The Means of Communication

The Commissioner asked the Trust whether it considered the Complainant's request for the information to be provided in the format recommended by the DHSSPSNI circular as outlined in 2.1 above. The Trust did not accept that the circular required Trusts to follow the tabular format as given in the circular, but that it required Trusts to agree with individuals the disclosure of salary information, or to note "consent to disclosure withheld" if an individual did not give their consent to the information being disclosed. The Trust asserted that "in this sense" the information provided was in the format recommended by the circular, and in its view there was no breach of section 11 of the Act.

The Commissioner did not pursue this aspect of the complaint further as he was satisfied that the Trust had complied with its obligations under that section of the Act. The Commissioner is of the view that Section 11 of the Act relates to the means by which communication of the information to the applicant is to be made, as opposed to the actual format in which the information is presented. The Trust had provided the Complainant with a copy of the information and this in the Commissioner's view satisfies the requirements of section 11 of the Act.

4.3.3 The Refusal Notice

The Commissioner advised the Trust that its refusal notice of 3 October 2005 ought to have stated that an exemption applied, identified the exemption, and explained why it applied. The Trust accepted this, and advised the Commissioner that any future refusal notices issued by the Trust would meet these requirements.

However, the Commissioner also pointed out that the Trust did not include details of its complaints procedure in its refusal notice. The Trust indicated that it did provide the Complainant with an information leaflet, but the leaflet provided to the Commissioner stated that the Trust would tell applicants how to complain, it did not provide this information itself. The Trust agreed with the Commissioner to provide details of its complaints procedure in future refusal notices.

The Commissioner reminded the Trust of his duty to promote good practice, and his power to issue practice recommendations under sections 47 and 48 of the Act respectively. The Commissioner advised the Trust that he would monitor future compliance with the Act, and would consider using the powers mentioned above if the Trust continued to fail to comply with the requirements under section 17 of the Act.

4.3.4 The Internal Review

The Commissioner asked why the Trust did not carry out an internal review in response to the Complainant's letter of 3 October. The Trust replied that no internal review was conducted as the Director of Acute Services gave permission to disclose that part of his salary which related to his duties under that post. The Trust did not address the information which related to the Chief Executive, which was also withheld, in its response.

4.3.5 The Section 40(2) Exemption

The Commissioner asked the Trust to explain its reliance on the section 40(2) exemption, and provided the Trust with copies of the Commissioner's technical guidance note on access to information about public authority employees.

The Trust indicated its reliance on a letter issued by the DHSSPSNI, in November 2004, which stated that, whilst the DHSSPSNI would prefer senior managers to be "completely open about how much taxpayers' money they are paid", they "appreciate that individuals have the legal right to refuse to disclose this information". The Trust also indicated that it felt a member of staff's salary fell under the definition of "sensitive personal data" as set out in the Data Protection Act 1998 (the "DPA"). The Trust considered that disclosure of such sensitive personal data would contravene the first data protection principle as none of the conditions for processing under Schedule 3 to the DPA would in its view be met.

The Commissioner indicated to the Trust that salary information is not "sensitive personal data" within the meaning of section 2 of the DPA. The Commissioner also asked the Trust to consider Schedule 2(6)(1) to the DPA. This provides a ground

for processing personal data “for the purposes of legitimate interests pursued by the data controller, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject”.

In response, the Trust indicated that it had taken legal advice, and had been advised that disclosure of personal data could contravene the Human Rights Act 1998 and article 8 of the European Convention on Human Rights (the “ECHR”), the right to respect for private and family life. The Trust argued that disclosure of personal information may lead to a legal challenge under the Human Rights Act 1998 (the “HRA”) which the Trust had been advised “may be difficult to resist”.

The Commissioner also enquired as to what information, if any, had been given to senior staff about the processing and possible disclosure of their personal data. The Trust indicated that it did not provide any specific guidance to staff on this area.

4.3.6 Informal Resolution

As a result of the intervention of the Commissioner, the Trust did provide the Complainant with the salary bands for the Chief Executive and Director of Acute Services, although not in the format requested.

Therefore the Commissioner does not require the Trust to take any steps in relation to this complaint. However, the Commissioner considers that it would be right in the circumstances to proceed to a Decision Notice in this case because the issue of the disclosure of salary information of senior public officials is a matter of public interest.

5.0 The Commissioner’s Decision

5.1 The Commissioner’s decision in this matter is that the Trust has not dealt with the Complainant’s request in accordance with the following requirements of Part I of the Act:

5.2 Section 40(2)

The information requested is held electronically and therefore the Commissioner is satisfied that the information falls within paragraphs (a) to (d) of the definition of “data” in section 1(1) of the DPA. The Commissioner is satisfied that the information requested by the Complainant is personal data within the meaning of section 1(1) of the DPA as it is data which relate to a living individual (namely the Director of Acute Services). The Commissioner is therefore satisfied that the Trust were correct in considering the request under section 40(2) of the Act, being a request for personal information of a third party.

However, the Commissioner considers that the Trust incorrectly applied the provisions of section 40(2) under the Act and, in doing so, withheld information

inappropriately. The Commissioner is not satisfied that either the first or the second conditions under section 40(3) and 40(4) of the Act (outlined at para 3.4 above) are satisfied for the following reasons:

5.2.1 The first data protection principle

The Trust claimed that releasing the requested information would breach the first data protection principle because none of the conditions for processing under the DPA would be met. The first data protection principle requires that personal data are processed fairly and lawfully and must not be processed unless at least one of the conditions for processing in Schedule 2 to the DPA is satisfied.

5.2.2 Fairness

In forming a view on the issue of fairness, the Commissioner considered the seniority of the individuals concerned and is satisfied that it is fair to the individuals concerned, given their rank, to disclose the information sought. The Commissioner considers also that disclosure of the particular information requested would not cause unnecessary or unjustified distress or damage to the individuals concerned.

In relation to the issue of fairness to the individuals concerned, the Commissioner is mindful that, while the Trust itself did not expressly provide information to its staff on the possible disclosure of salaries, this matter was the subject of correspondence between the DHSSPSNI and the Northern Ireland Health and Social Services Trusts (the "Trusts"). In that correspondence the Trusts were advised of the "expectation that information in relation to the salaries and pension position of senior management would be recorded [in annual reports]". The DHSSPSNI also stated that it believed "those who are paid from the public purse should expect to be completely open about how much taxpayers' money they are paid". In light of these clear statements the Commissioner is satisfied that senior staff in the Trust ought to have had a reasonable expectation that salary bands and pension information for the posts they occupy would be made public.

5.2.3 Lawfulness

In considering lawfulness, the Commissioner considered whether disclosure would constitute a breach of confidence, breach the HRA or any law forbidding disclosure in this instance.

The Commissioner is satisfied that there is no relationship of confider and confidant in relation to the salary information held by the Trust, as the information requested is held by the Trust of its own accord. The Commissioner is satisfied, therefore, that to release the information would not constitute an actionable breach of confidence and, to that extent, that disclosure of the information requested would not be unlawful.

5.2.4 Human Rights Act 1998

The Trust has argued to the Commissioner that it is obliged to comply with the HRA, in relation to the right to respect for private and family life enshrined in Article 8 of the ECHR. Having regard to the nature of the information requested, the Commissioner is satisfied that the information requested is personal information within the meaning of section 1(1) of the DPA. However, the Commissioner is of the view that salary and pension information is not information which, if disclosed, would be likely to breach article 8 of the ECHR. Therefore the Commissioner does not accept the Trust's claim that the HRA prohibits disclosure in this instance.

5.2.5 Conditions for processing personal data

The Commissioner is satisfied that, having regard to the need for accountability of public funds and to ensure openness and transparency in this regard, there is a legitimate interest in disclosing salary bands of senior Trust staff. In light of that correspondence referred to at paragraph 5.1.2 above, the Commissioner is satisfied that senior staff ought to have had an expectation that such disclosures would be made. The Commissioner finds that the information does not concern the individuals' home or family life. Therefore the Commissioner is satisfied that the Trust can in fact satisfy the sixth condition in Schedule 2 of the DPA. This refers to processing which is "necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject ". The Commissioner is satisfied that disclosing the salary bands of senior staff would not be such unwarranted processing.

5.2.6 Section 40(4)

The Commissioner further considered whether the second condition set out under section 40(4) of the Act would be satisfied if the Trust disclosed the information requested. The second condition states that information is exempt from disclosure under the Act if it is exempt from the data subject's right of access to personal data under the DPA. The Commissioner is satisfied that there is no exemption under the DPA which would prevent an individual from accessing such information and therefore the second condition is not satisfied.

5.3 Section 17

The Trust refused the Complainant's request for information but when communicating this to the Complainant it failed to:

17(1)(b) – specify the exemption being relied upon, and

17(7) - include particulars of the procedure provided by the Trust for dealing with complaints about the handling of requests for information.

The Commissioner accepts that the Trust did address these deficiencies at a later stage (see 4.3.3 and 4.3.4 above), and therefore he does not require any steps to be taken in relation to the refusal notice in this case.

5.4 Section 11

The Commissioner is satisfied that the Trust has dealt with the Complainant's request in accordance with section 11 of the Act.

6.0 Action Required

The Commissioner does not require the Trust to take any remedial steps in this case. The Trust has now provided the Complainant with the information he requested.

7.0 Right of Appeal

Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process can be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 6000 877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk
Web: www.informationtribunal.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

Dated the 5th day of June 2006

Signed:

Phil Boyd
Assistant Commissioner

Information Commissioner
Wycliffe House
Water Lane
Wilmslow Cheshire SK9 5AF