

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 7 June 2007

Public Authority: George Eliot Hospital NHS Trust ('the Trust')
Address: Lewes House
College Street
Nuneaton
Warwickshire
CV10 7DJ

Summary

The complainant requested information about the circumstances surrounding the departure of a previous Chief Executive of the public authority. The public authority refused to disclose the information on the basis that it was personal data and disclosure would breach the Data Protection Act. The public authority also refused to disclose this information on the basis of section 41. The Commissioner has reviewed the requested information and has decided that the public authority correctly applied section 40 in this case. In view of this, the Commissioner did not consider the public authority's application of section 41.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On the 2 November 2005 the complainant submitted the following request to the Trust:

'Please forward me the circumstances under which the last executive, Mr Tuscon Dunn, was initially suspended from duty and the circumstances of his eventual departure from the trusts board. The lack of public information has been concerning and, no doubt, has led to speculation and rumour. I feel that the hospital, as a public body, has a duty to inform the local

population of the original situation that arose, the circumstances and how it was dealt with. I would also request that the names of the board members who made the decisions be known.

3. On the 5 December 2005 the Trust provided the complainant with a response to his request. With regard to the final part of the complainant's request, the Trust informed him of the five members of the board who had been involved in the decision making process surrounding the departure of Mr Dunn. The Trust also confirmed to the complainant that it held information about the circumstances in which Mr Dunn was initially suspended from duty and the reasons why he and the Trust parted company. However, the Trust explained to the complainant that it considered this information exempt from disclosure by virtue of two sections of the Act: section 40 because the requested information constituted personal data and to disclose it would breach the first principle of the Data Protection Act 1998 ('DPA'), and section 41 because the requested information was provided in confidence.
4. The complainant wrote to the Trust on 8 December 2005 and asked it to conduct an internal review into its handling of his request. The complainant specifically noted that 'no request was made for personal details of the person in question but the events surrounding the suspension etc. After all the Trust has already published his name and the fact that he was suspended in the local press. This has put these details in the public domain already.'
5. On the 2 February 2006 the Trust informed the complainant of the outcome of its internal review.
6. The Trust informed the complainant that the information which he requested could be classified into three categories:
 - (i) the reasons why Mr Dunn was suspended
 - (ii) the reasons why the Trust and Mr Dunn agreed that he would leave the Trust's employment
 - (iii) an agreement between Mr Dunn and the Trust as to his terms of departure.
7. The Trust confirmed to the complainant that it considered the information contained within points (i) to (iii) above to be the personal data of the Mr Dunn. The Trust explained to the complainant that under the first data protection principle it is unlawful to process personal data unless one of the conditions in Schedule 2 of the DPA is met. The Trust informed the complainant that it had given particular consideration to whether the sixth condition in schedule 2 is satisfied. The sixth condition states that:

'The processing is necessary for the purposes of the 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'

8. The Trust explained to the complainant that when having considered the sixth condition it had concluded disclosing the requested information would be unwarranted because it would be prejudicial to Mr Dunn to put into the public domain the matters that gave rise to his suspension, given that those matters were never the subject of a concluded investigation. The Trust also suggested that it considered that it would be unduly prejudicial to put into the public domain the contents of the termination agreement between Mr Dunn and the Trust because the agreement contained a confidentiality clause.
9. Furthermore, on the basis of the confidentiality clause contained with the termination agreement, the Trust told the applicant that section 41 applied to this information because if the Trust disclosed it under the Act it would commit an actionable breach of confidence.

The Investigation

Scope of the case

10. The complainant contacted the Commissioner on 6 February 2006 in order to complain that the Trust had incorrectly applied the exemptions cited above as a basis to withhold the requested information. The complainant cited two reasons why he believed the exemptions had been incorrectly applied by the Trust. Firstly, the complainant suggested that information he requested did not constitute personal data and secondly, disclosure of the requested information would be in the public interest because NHS funding may have been involved.

Chronology

11. The Commissioner contacted the Trust on 16 February 2007. The Commissioner explained to the Trust that having reviewed the correspondence provided by the complainant he was aware of the Trust's reasoning behind the application of sections 40 and 41 to the requested information. However, the Commissioner invited the Trust to provide him with any further submissions in order to support the use of these exemptions. The Commissioner also asked the Trust to provide him with a copy of the information described at (i) to (iii).
12. The Trust provided the Commissioner with a copy of the withheld information on 2 April 2007 along with a detailed explanation of why it considered this information to be exempt from disclosure under the Act. The Commissioner wrote to the Trust on 26 April 2007 and asked it to clarify a number of outstanding issues. The Trust provided the Commissioner with a response on 9 May 2007. The arguments advanced by the Trust are discussed below in the analysis section of this decision notice.

Analysis

Section 10

13. The Commissioner has established that the complainant submitted his request on 2 November 2005 and the Trust responded to this request on 5 December 2005. This response was outside of the twenty working day time limit stipulated by the Act. Therefore the Commissioner considers that the Trust breached section 10 of the Act by failing to respond to the request within twenty working days.

Section 40

14. Section 40(2) provides an exemption for information which is the personal data of any third party, where disclosure would breach any of the data protection principles contained in the Data Protection Act 1998. (The relevant sections of section 40 are included in the legal annex attached to this notice).
15. In order to rely on the exemption provided by section 40, the information being requested must therefore constitute personal data as defined by the DPA. The DPA defines personal information as:

'...data which relate to a living individual who can be identified
a) from those data, or
b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'

16. The complainant has argued that the information he requested did not ask for personal details of Mr Dunn, only the circumstances surrounding his departure from the Trust's employment and therefore the withheld information does not constitute personal data. However, as illustrated above the DPA's definition of personal data encompasses much more information than simply an individual's personal details (e.g. their name and address).
17. Having reviewed the information listed in (i) to (iii) the Commissioner is satisfied that it falls within the description of personal data as defined by the DPA. This is because Mr Dunn is the focus of the withheld information and can be clearly identified from it. Furthermore, the information also consists of expressions of opinions about Mr Dunn and details of the intentions of the Trust in relation to Mr Dunn's employment as Chief Executive.

The first data protection principle

18. The Trust has argued that the information in (i) to (iii) is exempt from disclosure because to do so would breach the first data protection principle.

19. The first data protection principle has two components:
 1. Personal data shall be processed fairly and lawfully and
 2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.
20. The full text of the first principle and a list of Schedule 2 conditions are included in the legal annex.
21. The Commissioner agrees with the Trust's assessment that in this case the most applicable condition which may be met is the sixth condition in Schedule 2 (see paragraph 7 above).
22. In considering whether disclosure of Mr Dunn's personal data would contravene the requirements of the first data protection principle the Commissioner has taken the following factors into account:
 - Mr Dunn's reasonable expectations of what would happen to his personal data
 - The existence of a compromise agreement between Mr Dunn and the Trust
 - Mr Dunn's seniority within the Trust
 - Legitimate interests of the local residents and relevant stakeholders in knowing the details of severance awards paid to senior employees weighed against the effect on Mr Dunn of disclosure of the requested information.
23. The Commissioner has noted that the reasons which led to Mr Dunn's initial suspension focused on a number of issues which were never fully investigated by the Trust. Essentially, these issues were not investigated because Mr Dunn and the Trust parted company. The Commissioner acknowledges that because these issues were never fully investigated by the Trust to the point of a substantive conclusion, Mr Dunn did not have the chance to formally defend himself against the allegations made about him. Therefore, the Commissioner believes that it would be unfair to disclose the information relating to allegations made against Mr Dunn.
24. In considering this point the Commissioner has considered the Trust's argument that disclosure of the requested information would be prejudicial to Mr Dunn's interests. The Commissioner accepts that given that Mr Dunn did not have the opportunity to defend himself against allegations which in some part led to his departure from the Trust, disclosure could lead to unwarranted damage if his current employment role and future employment opportunities were affected.
25. The Trust informed the Commissioner that when Mr Dunn and the Trust parted company in May 2005 both parties entered into a compromise agreement which set out the terms of Mr Dunn's departure. The Commissioner recognises the important role that compromise agreements, such as that entered into between Mr Dunn and the Trust, can play in employer/employee relationships. Such agreements can avoid the time, expense and stress of litigation in an

- Employment Tribunal where an employer/employee relationship breaks down. By entering into compromise agreements public authorities can save significant amounts of public money by avoiding the need for costly and lengthy litigation. The Employment Rights Act 1996 established the opportunity for parties to enter into a compromise agreement such as that entered into here. This Act has built in safe guards into the compromise agreement process which ensure that employees receive independent and accountable legal advice before entering into such agreements.
26. The Commissioner believes that the right to access official information under the Act and the right to reach an equitable compromise in private in an employment dispute are not mutually exclusive. Therefore, when a public authority decides to enter into such an agreement with a senior executive, the Commissioner considers that a balance has to be struck between a public authority's duty to be transparent and accountable with regard to how and why it decided to spend public money in a particular way, and that authority's duty to respect their former employees reasonable expectations of privacy.
 27. In respect of this point, the Commissioner's guidance on section 40 makes it clear that the seniority of the official should be taken into account when personal data about them are being requested under the Act: 'It may also be relevant to think about the seniority of staff generally: the more senior a person is the less likely it will be that to disclose information about him or her acting in an official capacity would be unfair.'
 28. The Commissioner believes that an employee who makes decisions which involve significant expenditure of public funds should expect greater scrutiny about their decisions than junior colleagues; senior officials are paid out of public funds commensurate with their level of responsibility. In this case the Commissioner appreciates that the requested information relates to the departure of the Trust's most senior executive, its Chief Executive.
 29. However, in this case the Commissioner notes that the compromise agreement entered into between Mr Dunn and the Trust includes a confidentiality clause which is binding on both parties. On the basis of this confidentiality clause the Commissioner has concluded that it is reasonable that Mr Dunn would not have expected details surrounding his departure to be disclosed and consequently to do so would be unfair. In relation to this point, the Commissioner notes that the Trust was unable to contact Mr Dunn in order to ascertain whether he would consent to the disclosure of the requested information.
 30. The Commissioner appreciates that in the complainant's opinion disclosure of the requested information would be in the public interest. However, as section 40(2) of the Act is an absolute exemption, there is no need to consider the public interest test under the Act. Nevertheless the Commissioner acknowledges that the Information Tribunal in *House of Commons v Information Commissioner and Norman Baker MP* accepted 'that the application of Paragraph 6 of Schedule 2 of the DPA involves a balance between the competing interests broadly comparable, although not identical, to the balance that applies under the public interest test for qualified exemptions' (paragraph 90).

31. The Commissioner is aware that Mr Dunn's departure from the Trust received coverage in the local press and generated interest from the local community and particularly users of the Trust's services. The Commissioner accepts that the public do have a legitimate interest in knowing whether the decision taken by the Trust to part company with Mr Dunn in the way that it did represented an appropriate use of public funds.
32. However, the Commissioner believes that the public's legitimate interests must be weighed against the prejudices to the rights, freedoms and legitimate interests of Mr Dunn. On the basis of the issues discussed above, the Commissioner has concluded that the rights and interests of Mr Dunn outweigh the interests of the local community in this case. In reaching this conclusion the Commissioner has given particular weight to two points. Firstly, the right Mr Dunn has under the Employment Rights Act 1996 to reach a compromise agreement with his former employer and that the terms of that agreement remain private. Secondly, the fact a number of the allegations against Mr Dunn were never fully investigated.
33. In conclusion, the Commissioner believes that the Trust has correctly applied section 40 to the withheld information because none of the conditions in schedule 2 of the DPA can be met and its disclosure would be unfair.
34. As the Commissioner has concluded that all of the withheld information is exempt from disclosure by virtue of section 40, he has not considered whether any of the information is in fact exempt by virtue of section 41.

The Decision

35. The Commissioner's decision is that the Trust was correct to rely on section 40 of the Act as a basis to withhold the requested information.
36. However, the Commissioner has also concluded that the Trust breached section 10 of the Act by failing to respond to the request within 20 working days.

Steps Required

37. The Commissioner requires no steps to be taken.

Right of Appeal

38. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

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

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

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

Dated the 7th day of June 2007

Signed

**Gerrard Tracey
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Freedom of Information Act 2000

Section 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.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 40

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“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.”

Section 40(3) provides that –

“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.”

Section 40(4) provides that –

“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).”

Data Protection Act 1998

Schedule 1

The first principle states that:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met”.

Schedule 2

Conditions relevant for purposes of the first principle: processing of any personal data:

“1. The data subject has given his consent to the processing.

2. The processing is necessary-

- (a) for the performance of a contract to which the data subject is a party, or
- (b) for the taking of steps at the request of the data subject with a view to entering into a contract.

3. The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4. The processing is necessary in order to protect the vital interests of the data subject.

5. The processing is necessary-

- (a) for the administration of justice,
- (b) for the exercise of any functions conferred on any person by or under any enactment,

- (c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or
- (d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

6. - (1) The processing 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.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.”