

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 13 August 2007

Public Authority: Nottinghamshire Healthcare Trust
Address: The Resource
Duncan Macmillan House
Porchester Road
Nottingham
NG3 6AA

Summary

The complainant requested details of the proceedings against two senior executives of the Trust who, following an internal investigation into issues of corporate governance left the employment of the Trust. The Trust refused to disclose details of the proceedings on the basis that the information was the sensitive personal data of the two executives. The Commissioner has established that the requested information is in fact the personal data of the executives rather than their sensitive personal data. Nevertheless, the Commissioner has concluded that disclosure of their personal data would constitute a breach of the data protection principles and is therefore exempt from disclosure by virtue of section 40. However, the Commissioner also decided that the total cost of the proceedings is not the personal data of the executives and therefore this should be disclosed to the applicant.

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 26 February 2006 the complainant submitted the following request to the Trust:

'I understand that the Chief Executive, [names redacted] were suspended, subject to investigation and have now left the employment of the Trust. I

understand that this relates to an inappropriate use of funds. I would like to request details of the proceedings that were held and what was the inappropriate use of what were public funds under Freedom of Information Act'.

3. On 8 March 2006 the Trust confirmed to the complainant that it held information covered by the scope of his request but considered it exempt from disclosure by virtue of the exemption contained at section 40 of the Act.
4. The complainant subsequently asked the Trust to conduct an internal review into its handling of his request on 10 March 2006.
5. On 3 April 2006 the Trust informed the complainant that it had conducted an internal review and concluded that the information was exempt by virtue of section 40 and therefore the requested information would not be disclosed.

The Investigation

Scope of the case

6. On 3 April 2006 the complainant contacted the Commissioner and argued that the Trust had misapplied section 40 of the Act. With reference to the Commissioner's guidance on section 40, the complainant argued that disclosure of requested information would not be unfair as it related to the individuals' public, rather than private lives, and moreover the two individuals' were very senior managers within the Trust.

Chronology

7. The Commissioner contacted the Trust on 27 April 2006 and asked it to provide him with copies of the withheld information.
8. On 8 May 2006 the Trust provided the Commissioner with a list of allegations made against the two former employees of the Trust. The Trust informed the Commissioner that at the time of the complainant's request the proceedings that took place between the Trust and the two former employees were ongoing. Therefore the Trust suggested to the Commissioner that it would need the complainant to clarify exactly what type of information he required when he asked for details of the 'proceedings'. The Trust suggested that information the complainant may be interested in may be 'times, dates, duration, cost, lunch orders, panel members etc'.
9. On 13 March 2007 the Commissioner clarified with the complainant the type of information he required regarding the proceedings. The complainant confirmed that in addition to requiring the information suggested by the Trust he was also seeking information such as the agenda for the proceedings, minutes of the proceedings and the outcome of the proceedings which could be a report or summary of the panel's conclusions.

10. The Commissioner contacted the Trust on 16 March 2007 and asked it to respond to a number of points. The Commissioner asked the Trust to confirm which of the allegations concerning the two former employees that the Trust had already provided to the Commissioner were investigated and following an investigation, which were upheld. The Commissioner also asked the Trust to provide him with details of the proceedings related to the allegations about the two individuals, i.e. the agenda, minutes and outcome referred to above. Finally, the Commissioner asked the Trust to provide a detailed explanation of why it considered section 40 applied to the withheld information.
11. The Trust provided the Commissioner with a response on 26 April 2007. In this response the Trust confirmed which of the allegations against each employee were upheld. The Trust also provided a detailed explanation as to why it considered the requested information exempt from disclosure. The Trust noted that the requested information:

'concerns details of the allegations made against [names redacted], the proceedings against them and the outcome of those proceedings. The Trust considers the information to fall within the definition of "sensitive personal data" given in 2(g) of the DPA. Thus, in order to disclose the information that [the complainant] has requested, the Trust must be able to satisfy the condition that the processing must come within one of the conditions of Schedule 2 and also one of the conditions in Schedule 3, and further the Trust must be satisfied that the processing is fair and lawful. The Trust is not satisfied that this is the case'
12. The Trust provided the Commissioner with an outline of the issues it had considered when deciding whether any of the conditions in the DPA could be met. The Trust drew the Commissioner's attention to a number of factors it considered particularly significant in its reasoning.
13. The Trust noted that the express contractual terms agreed with both individuals included that as part of the proceedings the Trust was forbidden to disclose any details of its investigation, proceedings or outcome of these proceedings. Therefore, the Trust argued that the individuals had a reasonable expectation that information of the nature requested would not be disclosed. The Trust also informed the Commissioner that it believed that disclosure of the requested information would put the individuals at the risk of harm because disclosure of the requested information would cause unwarranted damage and distress to the individuals by affecting their personal and professional capacities and would seriously affect their current employment roles and any future employment. The Trust noted that it was aware of the difference between personal and public lives and that matters carried out in a professional capacity are likely to be open to disclosure. However, in the Trust's view 'disclosure of this information would go beyond the release of information about acts done in an official capacity and beyond the scrutiny of the use of public funds'.
14. However, in its letter of 26 April the Trust also explained that it could not voluntarily provide the Commissioner with a copy of the requested information because of the ongoing obligations of confidentiality it owed to these former

- employees. The Trust explained that the voluntary disclosure of this information would therefore be a breach of these terms and would expose the Trust to a risk of legal challenge on that basis.
15. The Commissioner contacted that Trust again on 3 May 2007 with regard to its refusal to provide him with a copy of the requested information. The Commissioner explained to the Trust that whilst he was sympathetic to the position the Trust was in, that in order for him to assess whether the Act had been applied properly by the Trust it was necessary for the Commissioner to review a copy of the exempt information. The Commissioner suggested to the Trust that as part of his investigations into public authorities' compliance with the Act he was regularly provided with information that was of a sensitive and personal nature, and furthermore information that was subject to the confidentiality agreements between public authorities and third parties. The Commissioner noted that this was particularly true of the cases very similar to this where the information covered by such an agreement related to the circumstances surrounding the departure of senior executives in public authorities. The Commissioner therefore repeated his request to be provided with a copy of the requested information. He also noted that if the Trust refused to provide a copy of this information then under section 51 of the Act the Commissioner had the power to serve a legally binding information notice on the Trust which would formally require it to provide the Commissioner with information.
 16. On 14 May 2007 the Trust contacted the Commissioner and explained that it maintained that to voluntarily disclosure copies of the requested information to the Commissioner would constitute an actionable breach of confidence which would result in the Trust being sued. The Trust suggested that if the Commissioner served an information notice it would be free to disclose the information without fear of breaching its contractual duties of confidence.
 17. The Commissioner served an information notice on the Trust on 4 June 2007. This notice required the Trust to provide the Commissioner with full details of the proceedings held in relation to the allegations made against the two former employees and that this disclosure should include any agendas for the proceedings, minutes of the proceedings, and the outcome of the proceedings which could be in the form of a report or summary. The notice also required the Trust to provide details of the times, dates, duration, cost and panel members involved in the proceedings.
 18. On 18 June 2007 the Trust provided the Commissioner with copies of the information requested in the information notice.

Analysis

Section 40

19. 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 ('DPA').

20. 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 data 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.'

21. In this case the Trust argued that the requested information also constituted the sensitive personal data of the individuals because it related to an alleged offence committed by the individuals. Section 2 of the DPA provides a number of definitions of sensitive personal data; the relevant sections for this case are:

'2. In this Act "sensitive personal data" means personal data consisting of information as to –

... (g) the commission or alleged commission by him of any offence.

(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings'.

22. The information requested by the complainant can be summarised as details of the allegations made against the individuals, details of the disciplinary proceedings which were held, including the outcome of these proceedings. Having reviewed this requested information the Commissioner is satisfied that the majority of it is the personal data of the individuals. This is because the individuals are the focus of the information and can be clearly identified from it. Furthermore, the information also consists of expressions of opinions about [names redacted] and details of the intentions of the Trust in relation to their future employment.

23. However, the Commissioner does not accept that information is the sensitive personal data of the individuals. The term 'offence' in section 2(g) and 2(h) of the DPA refers to a criminal offence. Having reviewed the list of allegations made against the two individuals, the Commissioner does not accept that any of these

allegations constitute criminal offences. Therefore, the Commissioner is not satisfied that the requested information constitutes the sensitive personal data of the individuals, only the personal data of the individuals.

24. Furthermore, the Commissioner does not accept that the total cost of the proceedings is the personal data of the individuals. The individuals are not identifiable from the figure which represents the total cost of the proceedings nor are they the focus of this information. As the Commissioner believes that the total cost of the proceedings is not personal data it cannot be exempt from disclosure by virtue of section 40 of the Act.

The first data protection principle

25. The Trust has essentially argued that the disclosure of the requested information would breach the first data protection principle and therefore it is exempt from disclosure under the Act.

26. The first data protection principle has two components:

1. Personal data must 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.

27. In considering whether disclosure of the individuals' personal data would contravene the requirements of the first data protection principle the Commissioner has taken the following factors into account:

- The individuals' reasonable expectations of what would happen to their personal data.
- The existence of a confidentiality clause between the individuals and the Trust.
- The individuals' seniority within the Trust.
- Legitimate interests of the local residents and relevant stakeholders in knowing the details of the details of the proceedings against the two individuals weighed against the effect on the individuals of disclosure of the requested information.

28. The Commissioner has established that following the outcome of the proceedings, both individuals entered into agreements with the Trust under which all parties agreed that details surrounding the termination of their employment with the Trust would not be disclosed by either party. On the basis of this agreement the Commissioner accepts that it was reasonable for the individuals to expect that details of their departure from the Trust would not be disclosed. Furthermore, the Commissioner understands that during the course of his investigation the Trust contacted both individuals and asked them if they were prepared to consent to the disclosure of the requested information. Although the Trust did not receive a response from [names redacted] expressly refused permission for any of his personal data to be disclosed in response to the complainant's request. One reason [name redacted] provided the Trust for refusing to consent to disclosure was the terms of the agreement signed between

himself and the Trust at the time of his departure which stated that details of the termination of his employment will not be disclosed to any third party.

29. The Commissioner's guidance on section 40 makes it clear that the seniority of the official should be taken into account when personal data requested under the Act: 'It may also be relevant to think about the seniority of the staff generally: the more senior a person is the likely it will be that to disclose information about him or her acting in an official capacity would be unfair'.
30. Prior to their departure from the Trust [names redacted] held the positions of Chief Executive and Executive Director: Adult Mental Health, Personnel and Communications, respectively. The Commissioner believes that an employee who makes decisions which involve the significant expenditure of public funds should expect greater scrutiny about their decisions and actions than junior colleagues; senior officials are paid out of public funds commensurate with their level of responsibility.
31. The Commissioner has noted that Trust suggested that the disclosure of the requested information would 'go beyond the release of information about acts done in an official capacity and beyond the scrutiny of the public funds'. Having reviewed the requested information the Commissioner does not consider this to be the case. In the Commissioner's view the activities undertaken by the individuals were carried about by the individuals by virtue of the positions they held as Chief Executive and Executive Director. The issue of whether or not these activities may have been 'inappropriate' as the request suggests, and therefore not acts done in the official role of the individuals, is irrelevant. These activities, whether inappropriate or not, did involve the use of public funds and therefore to disclose information about them would not involve disclosing information which would go beyond the scrutiny of public funds.
32. The complainant highlighted to the Commissioner that there had been a lot of speculation in the local health community and in the local press about the circumstances surrounding the departure of the two individuals. The Commissioner accepts that the public have a legitimate interest in knowing whether the Trust dealt with the allegations against such senior figures in the Trust in an appropriate fashion.
33. However, in line with paragraph 6 in Schedule 2 of DPA, the Commissioner considers that the public's legitimate interest in the requested information has to be weighed against the effect of disclosure on the individuals. This section of DPA states:

'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.'
34. The Information Tribunal in House of Commons v Information Commissioner and Norman Baker MP suggested 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). Basically for the sixth condition to be satisfied (and therefore meet the second limb of the first data protection principle) the arguments in favour of disclosure must outweigh those in favour of preserving the privacy and interests of the data subject.

35. On the basis of the issues outlined above, and the evidence available to him, the Commissioner has concluded that the rights and freedoms of the individuals' outweigh the interests of the local community. In reaching this conclusion the Commissioner has placed particular weight on a number of factors. Firstly, disclosure of the requested information would reveal the detail of the allegations made against the two individuals, the evidence, or lack of, that the Trust established to support these allegations and the outcome of the Trust's investigations and subsequent hearings into this matter. The Commissioner accepts that disclosure of this information may have a harmful affect on the current and future employment prospects of both individuals and therefore impinge upon the rights and freedoms of the individuals.
36. Secondly, the Commissioner accepts that the local community have a legitimate interest in knowing that the allegations made against the two senior executives of the Trust were properly dealt with by the Trust and that this interest would be met by the disclosure of the requested information. However, having reviewed the requested information the Commissioner is satisfied that the investigation into the allegations and subsequent proceedings were both in-depth and independently verified. Therefore, in the Commissioner's opinion the public interest in this matter being appropriately dealt with has to a large extent been met by the nature of this investigation. Consequently, although the public may have a legitimate interest in knowing the full details of the proceedings this interest is in some way met and counterbalanced by the nature of the investigation.
37. In conclusion the Commissioner believes that the Trust is correct to rely on section 40 to withhold the requested information. This is because disclosure would be unfair on the basis that the individuals had a reasonable expectation that the information about the proceedings would not be disclosed and furthermore, if this information was disclosed it would have a harmful affect on the individuals.

The Decision

38. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
39. The Trust were correct to refuse to disclose details of the allegations made against the two individuals, details of the proceedings which investigated these allegations and the outcome of these proceedings on the basis of section 40 of the Act.

40. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
41. The Trust was incorrect to refuse to disclose the total cost of the proceedings on the basis of section 40 because the information does not constitute personal data and therefore cannot be exempt from disclosure by virtue of section 40 of the Act.

Steps Required

42. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
43. Communicate to the complainant the total cost of the proceedings.

Failure to comply

44. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

45. 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 13th day of August 2007

Signed

**Jane Durkin
Assistant Commissioner**

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

Legal Annex

Freedom of Information Act 2000

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(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 9Reference: FS50104995
- (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, ¹⁰Reference: FS50104995
 - (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.”