

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 3 March 2011

**Public Authority:** Calderdale Primary Care Trust  
**Address:** F Mill  
Dean Clough  
Halifax  
HX3 5AX

### Summary

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The complainant requested information from Calderdale Primary Care Trust (the 'PCT') concerning the date, place and time a named individual had received sex change surgery. The PCT responded in accordance with the provision of section 1(1)(a) of the Freedom of Information Act 2000. The Commissioner considers that the PCT was excluded from its duty to respond to the request under section 1(1)(a) by virtue of the provisions of section 40(5)(b)(i). This is because, in responding to the request, it would inevitably disclose information which constitutes the personal data of the named individual in breach of the Data Protection Act 1998. The Commissioner does not require the PCT to take any steps in relation to the complainant's request.

### The Commissioner's Role

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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

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2. On 6 December 2009 the complainant made the following information request to NHS Calderdale Primary Care Trust (the 'PCT'):

*'The date that [name one removed] a transsexual was first registered with a GP in NHS Calderdale's area.'*

*The date that [name one removed] was first referred to Dr [name two removed] in London for overseeing her sex change surgery.*

*The date that funding for [name one removed]'s sex change was agreed.*

*The date, place and time [name one removed] had sex change surgery.*

*Please let me know the cost of obtaining this information.*

*The fact that [name one removed]'s funding and speedy surgery is public knowledge in the local community will ensure that there is no bar to me receiving this information'.*

3. On 11 January 2010 the PCT replied to the complainant's request in accordance with the provision of section 1(1)(a) of the Act. The PCT provided an explanation of its response.
4. On 7 March 2010 the complainant wrote to the PCT and requested an internal review regarding its response to her request for information.
5. No internal review was provided.

## **The Investigation**

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### **Scope of the case**

6. On 10 June 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the response of the PCT and its failure to provide an internal review.

### **Chronology**

7. On 28 September 2010 the PCT provided the Commissioner with additional arguments regarding its refusal to provide further information to the complainant.
8. On 19 October 2010 the Commissioner wrote to the complainant and asked her to provide evidence that the information she required was in the public domain (a point she had made in her request). The Commissioner informed her that in the absence of such evidence, his preliminary conclusion was that the PCT was correct to refuse to respond further.

9. The complainant did not provide any further evidence with respect to this point and did not accept the Commissioner's preliminary view.

## Analysis

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### Exemptions

10. The full text of section 1(1)(a) and (b) and section 40 of the Act is available in the Legal Annex at the end of this Notice.

### **Section 40(5)(b)(i) (Exclusion from the duty to confirm or deny)**

11. Taking into account the nature of the request and the effect disclosure would have in this case, the Commissioner has considered whether the PCT would have been automatically excluded from the duty imposed on it by the provisions of section 1(1)(a) by virtue of the provisions of section 40(5)(b)(i).
12. It is important to point out that the Act is applicant blind, except in very limited circumstances, none of which are applicable in this case. This means that a disclosure made under the Act is in effect a disclosure to the world at large, as any other applicant would be entitled to that same information upon request.
13. Personal data is exempt from disclosure under the provisions of sections 40(1) to 40(4) of the Act. In relation to a request regarding the personal data of a third party, section 40(5)(b)(i) further excludes a public authority from complying with the duty imposed by section 1(1)(a) if complying with that duty would contravene any of the data protection principles or section 10 of the Data Protection Act 1998 (the 'DPA') or would do so if the exemptions in section 33A(1) of that Act were disregarded.
14. Personal data is defined under section 1(1) of the DPA as data which relates to a living individual who can be identified from that data, or from that data and other information which is in the possession of the data controller or is likely to come into the possession of the data controller.
15. Whether or not a living named individual had undergone sex change surgery is clearly the personal data of that individual.
16. The Commissioner would like to clarify that the complainant's request was not to know whether or not the individual had undergone sex change surgery, but to know details about when that surgery took place.

17. However, responding to a request about the date of such surgery would inevitably reveal whether or not it had taken place.
18. The nature of the request therefore meant that the PCT's response in accordance with the duty under section 1(1)(a) would inevitably disclose personal data of a named individual.
19. In light of the above findings, the Commissioner considers that the proper approach would be to first consider whether or not in responding to the request, the public authority would have been excluded from the duty imposed by section 1(1)(a).
20. In line with the provisions of section 40(5)(b)(i), the Commissioner therefore first considered whether or not confirming or denying whether the named individual had undergone sex change surgery in the context of the request for the dates of that surgery would contravene any of the data protection principles.

**Would complying with section 1(1)(a) contravene the first data protection principle?**

21. The first principle of the Data Protection Act 1998 (the 'DPA') states that personal data must be processed fairly and lawfully.
22. In considering whether it would be unfair to confirm or deny that a named individual had undergone sex change surgery and whether this would therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:
  - Whether the requested information is sensitive personal data
  - The consequences of disclosure
  - The data subject's reasonable expectations of what would happen to their personal data
  - The balance between the rights and freedoms of the data subject and the legitimate interests of the public

*Sensitive personal data*

23. Any consideration of fairness must first determine whether the requested information is defined as sensitive under the DPA. The definition of sensitive personal data under section 2 of the DPA includes personal data which relates to an individual's physical or mental health or sexual life.
24. Confirming or denying whether an individual has undergone surgery involving a sex change clearly falls into sensitive personal data which relates to a person's physical health and sexual life. The Commissioner therefore considers the requested data to be sensitive personal data.

*Consequences of disclosure*

25. The complainant has argued that because the funding and speedy surgery received by this individual is public knowledge in the local community, the requested information should be provided to her. However the Commissioner would not necessarily consider this to be justification for disclosure of the information the complainant has requested.
26. The complainant has not provided the Commissioner with any evidence which demonstrates that the information she requires is in the public domain.
27. Disclosure of information under the Act constitutes disclosure to the world at large. It is clear that whether an individual has undergone sex change surgery is not information which should be in the public domain. It is a private matter and its disclosure may be distressing to the individual concerned.

*Reasonable expectations*

28. It is therefore apparent that whether or not sex change surgery has been performed is personal and confidential information and that the individual concerned would reasonably expect such information not to be made available. There is a clear expectation that medical information should remain confidential between a doctor and patient.
29. There is no indication in this case that consent has been obtained for disclosure of the information requested.

*The balance between the rights and freedoms of the data subject and the legitimate interests of the public*

30. It could be argued that it is in the legitimate interests of the public to know the waiting times for specific surgical operations and to know how these may vary in different areas or between different individuals.
31. However, information concerning surgical operations is clearly private and personal to the individual concerned and would not normally be provided to third parties.
32. The Commissioner is satisfied that confirming or denying whether or not a named individual had undergone sex change surgery would be unwarranted by reason of prejudice to the rights, freedoms and legitimate interests of the individual in question.

### *Conclusion*

33. The Commissioner notes that the information in this case is sensitive personal data as it relates to the data subject's physical or mental health or sexual life. As such, by its very nature, this has been deemed to be information that individuals regard as the most private information about themselves. Further, as disclosure of this type of information is likely to have a detrimental or distressing effect on the data subject, the Commissioner considers that it would be unfair to disclose the requested information.
34. The Commissioner is therefore satisfied that any response provided in this regard, in line with the provision of section 1(1)(a) would contravene the fairness element of the first data protection principle.
35. As the Commissioner is satisfied that complying with section 1(1)(a) would in this case contravene the first data protection principle, he has not gone on to consider the other data protection principles.
36. He therefore finds that the PCT was not obliged to respond to the complainant's request in accordance with the duty imposed on it by the provisions of section 1(1)(a) by virtue of the provisions of section 40(5)(b)(i).
37. The Commissioner will not proactively seek to consider exemptions in all cases before him, but in cases where personal data is involved, he believes he has a duty to consider the rights of data subjects. These rights, set out in the DPA, are closely linked to Article 8 of the Human Rights Act. The Commissioner may be in breach of his obligations under the Human Rights Act if he ordered public authorities to confirm or deny whether information was held under section 1(1)(a), or to disclose information under section 1(1)(b), without having considered these rights, even if the public authority has not cited the exemption in question. The Commissioner has taken into account his role as regulator of the DPA when deciding that the public authority was excluded from its obligations under section 1(1)(a) of the Act by virtue of section 40(5)(b)(i).

### **The Decision**

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38. The Commissioner's decision is that the public authority did not have a duty to comply with section 1(1)(a) of the Act on the basis of the exemption contained within section 40(5)(b)(i).

## Steps Required

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39. The Commissioner requires no steps to be taken.

## Other matters

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40. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following:
41. Part VI of the section 45 Code of Practice (the "Code") makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. Paragraph 38 of the Code clarifies that any written reply from a requester expressing dissatisfaction with an authority's handling of a request should be treated as a complaint and should be processed through the authority's complaints or 'internal review' procedure. The Commissioner is concerned that, in this instance, despite being repeatedly advised of the complainant's dissatisfaction, the authority failed to conduct an internal review. In future, the Commissioner expects that that authority will conduct internal reviews in accordance with the Code.
42. In light of the broad interpretation of the definition of personal data, the Commissioner would encourage the public authority to always initially consider the possibility of the application of section 40(5)(b)(i) when considering its response to a request of this nature in future. This will ensure that it also remains focussed on its responsibilities under the DPA as well as under the Act when responding to the request.

## Right of Appeal

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43. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

44. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 3<sup>rd</sup> day of March 2011**

**Signed .....**

**Faye Spencer  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**



## Legal Annex

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### General Right of Access

**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.”

### Personal information

**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)."

**Section 40(5)** provides that –

"The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
  - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
  - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

**Section 40(6)** provides that –

"In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded."

**Section 40(7)** provides that –

"In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act."

## **The Data Protection Act 1998**

### **Schedule 1 – the Data Protection Principles**

1. “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.”