

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 November 2012

Public Authority: NHS Surrey
Address: Cedar Court
Guildford Road
Leatherhead
Surrey
KT22 9AE

Decision (including any steps ordered)

1. The complainant has requested the salary paid to the Chief Executive of NHS Surrey as well as a monthly salary breakdown of benefits, expenses, pension contributions and total remuneration. NHS Surrey initially refused to provide any information for the 2011-12 year as it was to be published in its upcoming Annual Report and was therefore exempt under section 22 of the FOIA. The remaining information was withheld on the basis of section 40(2).
2. The Commissioner's decision is that section 22 is not engaged but section 40(2) does apply and provides a valid basis for withholding this information. The Commissioner also found that the refusal notice breached the requirements of section 17 of the FOIA.

Request and response

3. On 8 May 2012, the complainant wrote to NHS Surrey and requested information in the following terms:

"Can you please disclose the details of the salary paid to the Chief Executive Officer (CEO) for NHS Surrey (Surrey PCT) for the following periods:

- 30 – 31 March 2010
- 01 April 2010 to 31 March 2011

- *01 April 2011 to 31 March 2012*

I would like this information in the form of a monthly salary breakdown followed by a breakdown of the following information:

- *Benefits*
 - *Appropriate expenses by type*
 - *Pension contributions*
 - *Total remuneration"*
4. NHS Surrey responded on 29 May 2012. It provided links to its previous Annual Reports containing information on Director remunerations and stated that the requested information for 2011-12 would be published in the 2011-12 Annual Report due to be available in July 2012.
 5. The complainant requested an internal review on 29 May 2012 indicating that he had already viewed the Annual Reports prior to his request and was seeking more specific information.
 6. Following an internal review NHS Surrey wrote to the complainant on 15 June 2012. It stated that the published Annual Reports discharged its duties to provide salary and pension information for senior staff and that section 22 (information intended for future publication) applied to the information for the 2011-12 year as it would be published in the upcoming Annual Report.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular, the complainant explained he did not consider section 22 to be engaged as the information due to be published in the Annual Report (salary and other financial information in bands) was not the information requested (exact salary details and pension information).
8. During the course of the investigation the Commissioner explained to NHS Surrey that he agreed with the complainant and did not accept that section 22 was engaged in relation to the 2011-12 information as it was not intending to publish the exact information requested by the complainant. As a result NHS Surrey dropped its reliance on the section 22 exemption and instead sought to rely on section 40(2) to withhold all the information.
9. The focus of the Commissioner's investigation has therefore been the application of section 40(2) to withhold the requested information.

Reasons for decision

Section 17 – refusal of the request

10. Section 17(1) states that a public authority which is relying on a claim that the information is exempt, must, within the time for complying issue a refusal notice which:
 - (a) states the fact that information is exempt,
 - (b) specifies the exemption in question, and
 - (c) states why the exemption applies.
11. NHS Surrey responded to the complainant's request on 29 May 2012. The information disclosed in this response (by way of a link to Annual Reports) was the salary band and banded pension contributions and remuneration for the CEO for the years preceding 2011-12. Whilst the response did not state what information was being withheld or which exemption was being applied to withhold any information the Commissioner considers this response to be a refusal notice. As the refusal notice did not state any exemptions or clarify what information was being withheld the refusal notice was in breach of section 17(1) of the FOIA.

Section 40(2) – personal information

12. Section 40(2) of the FOIA states that information is exempt if it constitutes the personal data of a third party (other than the applicant) and one of the conditions listed in section 40(3) or 40(4) are satisfied.
13. During the investigation the Commissioner asked NHS Surrey to confirm the exemption it was relying on to withhold the requested information after it accepted that section 22 was not engaged. NHS Surrey confirmed it was relying on section 40(2) but did not give very prescriptive explanations. The Commissioner has therefore, after considering the nature of the requested information and previous decisions he has made for similar requests, proceeded on the basis that NHS Surrey is relying on section 40(3)(a)(i) to engage the exemption – that the information is that of a third party and disclosure would contravene any of the principles of the Data Protection Act 1998 ("DPA").
14. In order to establish whether section 40 has been correctly applied the Commissioner has first considered whether exact salary details and specific breakdowns of amounts paid in pension contributions and expenses would constitute the personal data of third parties.

15. Section 1 of the DPA defines personal data as data which relate to a living individual, who can be identified from that data, or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
16. The Commissioner considers that the salary details and other specific financial contributions of the CEO clearly fall within the description of person data as defined by the DPA. This is because the information relates directly to identifiable living individuals.
17. The Commissioner has gone on to consider whether disclosure of this information would be in breach of the first data protection principle. The first principle requires that the processing of personal data is fair and lawful and he has first considered whether disclosure of the information would be fair.
18. In considering whether disclosure would be fair the Commissioner takes into account the following factors:
 - Whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned;
 - The individual's reasonable expectations of what would happen to their information; and
 - Balancing the rights and freedoms of the data subject with legitimate interests.
19. The Commissioner has also taken into account his guidance on "Requests for personal data about employees"¹ which contains specific guidance on requests for salaries and bonuses and previous decision notices for exact salary details of senior staff².
20. The Commissioner has considered the requested information and the arguments presented by NHS Surrey that staff would have no reasonable expectation that their exact salary details and other information would be disclosed beyond the already published banding. The Commissioner accepts that this is the case but the fact that an individual has an expectation that information about them will not be

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http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Environmental_info_reg/Practical_application/section_40_requests_for_personal_data_about_employees.ashx

² FS50163927, FS50363389

disclosed does not necessarily mean that this expectation is a reasonable one.

21. The Commissioner's guidance suggests that when considering what information third parties should expect to have disclosed about them a distinction should be drawn as to whether the information relates to the third party's public or private lives. The guidance states that *"salary information relates to people's personal financial circumstances and disclosure of the exact salary of an individual is more intrusive than giving a salary band ... it may also prejudice the individual's interests in ongoing financial or legal negotiations."*
22. The Commissioner considers that public sector employees should expect some information about their roles and the decisions they take to be disclosed. He notes that over the last few years public authorities have published an increasing amount of information on salaries of officials in the public sector and this is true of NHS Surrey who do publish salary details, benefits, pension contributions and remunerations for its senior staff in bands in its Annual Reports.
23. The information requested in this case is the personal information of the most senior member of staff at NHS Surrey and the Commissioner therefore considers it reasonable that the CEO would expect some details about their salary to be placed in the public domain but it is also reasonable to assume they would not expect their exact salary details to be made publicly available.
24. Whilst disclosure of a salary band may infringe on a person's privacy there is a distinction between this and disclosure of the exact salary details requested. Disclosure of the exact details would clearly lead to a greater infringement into the privacy of the individuals as it would reveal the specific details of the person's financial situation. It is therefore reasonable to consider that disclosure of this information would cause the individual unwarranted distress or unjustified damage.
25. In relation to the final factor, the legitimate interest in the public knowing this information, the Commissioner considers the public has a right to access information about the efficient and proper use of public money and there is a legitimate public interest in openness and transparency in public bodies in relation to the amount of money it pays its senior managers.
26. NHS Surrey argues there are no exceptional circumstances in this case which warrant the publication of further salary details such as any controversy over the CEO's role and the information already published is sufficient to satisfy the legitimate public interest in openness in relation to how money is spent on management in the public authority.

27. The Commissioner has concluded that the disclosure of the exact salary information would lead to a greater infringement of the individual's legitimate right to privacy than is outweighed by the legitimate public interest in disclosure. This is because the Commissioner accepts that there is already significant information provided in bands by NHS Surrey to allow for public scrutiny and there appears to be no circumstance which creates any greater need for the public to know the specific salary information in this case.
28. The Commissioner therefore considers that disclosure of this information would be unfair and in breach of the first data protection principle. As such, section 40(2) is engaged and the information is therefore exempt from disclosure.

Right of appeal

29. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

30. 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.
31. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
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