

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 February 2014

Public Authority: Aneurin Bevan Health Board
Address: St Cadocs Hospital
Lodge Road
Caerleon
Newport
NP18 3XQ

Decision (including any steps ordered)

1. The complainant has requested details of the ethnicity of nurses disciplined or dismissed over a five year period in relation to the non-disclosure of criminal convictions. The Aneurin Bevan Health Board ('the Health Board') refused to provide the information by virtue of section 40(2) of the FOIA. The Commissioner's decision is that the Health Board correctly relied on section 40(2) to withhold this information. The Commissioner requires no steps to be taken by the Health Board.

Request and response

2. On 10 June 2013, the complainant wrote to the Health Board and requested the following information in respect of nurses disciplined or dismissed over the past five years:
*"1. What was the nature of the crimes committed by those nurses?
2. Could I also request [to disclose those Nurses Ethnicity]?"*
3. The Health Board responded on 9 July 2013. It provided information in respect of item one of the complainant's request but whilst it confirmed that it held the information relevant to item two, it refused to provide the information on the basis of section 40(2) of the FOIA.
4. Following an internal review the Health Board wrote to the complainant on 25 July 2013. It stated that it agreed that the information provided in

its response of 9 July 2013 was that which could be released in line with the provisions of the FOIA and the Data Protection Act 1998 ('the DPA').

5. The complainant was also advised to contact his legal representative as part of his ongoing employment tribunal case.

Scope of the case

6. The complainant contacted the Commissioner on 26 July 2013 to complain about the way his request for information had been handled.
7. He expressed concern at the Health Board's decision not to disclose the ethnicity of one of the employees sacked due to their failure to disclose their criminal conviction whilst the Health Board retained three white people with similar or serious convictions.
8. The scope of the Commissioner's investigation is solely in relation to whether the Health Board correctly relied on section 40(2) of the FOIA to withhold the ethnicity of the disciplined/dismissed nurses. The complainant's concerns regarding the decisions taken by the Health Board in relation to the nurses are beyond the remit of the Commissioner and he notes that the complainant has addressed these concerns via an on-going employment tribunal.

Reasons for decision

Section 40(2) – personal information

9. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure would breach any of the data protection principles.
10. In order to reach a view regarding the application of this exemption, the Commissioner has firstly considered whether the requested information does in fact constitute personal data as defined by section 1(1) of the Data Protection Act 1998 ('the DPA').

Is the requested information personal data?

11. Personal data is defined at section 1(1) of the DPA as:

"personal data means data which relate to a living individual who can be identified-

(a) from those data,

(b) from those data and other information which is in the possession of, or likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."

12. When considering whether the information is personal data, the Commissioner has taken into consideration his published guidance: *"Determining what is personal data".¹*
13. On the basis of this guidance, there are two questions that need to be considered when deciding whether disclosure of information into the public domain would constitute the disclosure of personal data:
 - (i) "Can a living individual be identified from the data, or, from the data and other information in the possession of, or likely to come into the possession of, the members of the public?"*
 - (ii) Does the data 'relate to' the identifiable living individual, whether in personal or family life, business or profession?"*
14. The Commissioner notes that the information withheld under this exemption is the ethnicity of nurses disciplined or dismissed by the Health Board in a five year period from 2008 to 2013 inclusive.
15. The Commissioner recognises that in many cases, individuals cannot be identified even from a very small number of statistics. However, in this case, the Health Board has informed the Commissioner that although the ethnicity of the individuals may not in itself lead to the identification of an individual, in combination with information already released in relation to the number of individuals involved, the organisation within which they work, the nature of the crimes, the time period specified and the outcomes of the disciplinary investigations, this could lead to the identification of the individuals themselves or third parties.

1

http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/what_is_data_for_the_purposes_of_the_dpa.pdf

16. When considering the request, the Health Board was mindful of the Commissioner's guidance 'determining what is personal data' and in line with this guidance has considered the means used not just by a member of the public but by "a determined individual with a particular reason to want to identify individuals".
17. The Health Board has further confirmed that in this case, the complainant is a nurse dismissed from the organisation for breach of contract in relation to having a conviction of fraud against the NHS and for gross misconduct. The complainant is pursuing the matter via an ongoing employment tribunal which is being actively defended by the Health Board and he is currently suspended by the Nursing and Midwifery Council.
18. The complainant's information is therefore included not only within the responses provided to date, but within the withheld information, effectively reducing the number of individuals to which the information relates to six.
19. The Health Board has further confirmed that in response to previous FOIA requests for information in relation to this matter, the complainant has been informed of the number of nurses, the outcome of the investigations and nature of the offences committed. In its view, based on the small numbers involved, the information already in the public domain and known to the complainant, combined with his personal interest in the matter, would make it possible for the complainant and other individuals to identify some if not all of the remaining six individuals to which the information relates.
20. Having considered the Health Board's arguments, the Commissioner accepts that the withheld information is personal data, as it relates to living individuals who could be identified from it. He has therefore gone on to consider whether disclosure of the information would breach any of the principles of the DPA. The Health Board considers that disclosure of the requested information would breach the first principle of Data Protection Act 1998 ('the DPA).

Would disclosure contravene the first data protection principle?

21. The first data protection principle requires that the processing of personal data be fair and lawful and,
 - 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 met.

22. In the case of personal data, both requirements (fair and lawful processing, and a schedule 2 condition) must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data principle.

Would disclosure be fair?

23. In his consideration of whether disclosure of the withheld information would be fair, the Commissioner has taken the following factors into account:
- a. The reasonable expectations of the data subjects.
 - b. Consequences of disclosure.
 - c. The legitimate interests of the public

The reasonable expectations of the data subjects

24. The Commissioner's guidance regarding section 40 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 life.² Although the guidance acknowledges that there are no hard and fast rules it states that:

"Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned."

25. The Commissioner's guidance therefore makes it clear that where the information relates to the individual's private life (i.e. their home, family, social life or finances) it will deserve more protection than information about them acting in an official or work capacity (i.e. their public life). However, not all information relating to an individuals' professional or public role is automatically suitable for disclosure.

²http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_speci alist_guides/PERSONAL_INFORMATION.ashx

26. In this case, as referred to in paragraphs 2 and 14 of this notice, the Commissioner notes that the information withheld under this exemption is the ethnicity of the seven nurses disciplined or dismissed from the Health Board in respect of their failure to disclose a criminal conviction.
27. The Commissioner considers that the requested information relates partly to the data subjects' professional lives and partly to their personal lives. However, the very nature of the information falls within the category of sensitive personal data as defined by section 2 of the DPA, and as such tends to hold a greater expectation of confidentiality than non-sensitive personal data.
28. The Commissioner is mindful that information regarding disciplinary proceedings and criminal convictions would not normally be disclosed into the public domain. He is therefore satisfied that the data subjects' would reasonably expect that information which would identify them as being disciplined or dismissed for failure to disclose a criminal conviction would remain confidential.

Consequences of disclosure

29. The Commissioner's guidance states that:

"Disclosure is unlikely to be fair if it would have unjustified adverse effects on the employees concerned. Although employees may regard the disclosure of personal information about them as an intrusion into their privacy, this may often not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life."

30. The Commissioner acknowledges that the information provides details of inappropriate conduct and criminal convictions, which in some cases, has been considered worthy of dismissal and as confirmed in paragraph 27 of this notice, falls within the definition of sensitive personal data. The consequences of disclosure into the public domain are therefore likely to cause greater distress to the data subjects than the disclosure of non-sensitive information.
31. The Commissioner considers that further dissemination of this information into the wider public domain could seriously harm the data subjects' future attempts to find employment. The Commissioner is also mindful that the potential personal social embarrassment caused to these individuals by disclosure would not be insignificant.
32. The Commissioner acknowledges that the individuals have already been through the legal process to have criminal convictions, and their cases

have been considered by their employer and in some instances are being pursued via an employment tribunal. Additional distress as a result of a wider disclosure of their identity does not therefore appear to the Commissioner, as either proportionate or justified.

The legitimate public interest in disclosure

33. Notwithstanding the data subjects' reasonable expectations, or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
34. The Commissioner notes that the individuals were employed as nurses and therefore in a position of care of potentially vulnerable individuals. He therefore considers that in addition to the broad general principles of accountability and transparency of public sector organisations, there may be a legitimate public interest in the disclosure of the identity of the individuals in question.
35. However, in weighing up the balance between the reasonable expectations of the data subjects and the consequences of disclosure of this (sensitive) personal information, against the legitimate public interest in disclosure, the Commissioner considers that the balance is weighted significantly in favour of non-disclosure. He is therefore satisfied that the Health Board appropriately withheld the disputed information on the basis of section 40(2) of the FOIA.

Right of appeal

36. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

37. 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.
38. 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

Andrew White
Group Manager – Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF