

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 June 2017

Public Authority: NHS Improvement
Address: Wellington House
133-155 Waterloo Road
London SE1 8UG

Decision (including any steps ordered)

1. The complainant has requested information broadly concerning the Morecambe Bay Investigation into failings at Furness General Hospital's maternity unit. NHS Improvement (NHSI) has released some information with a small amount of information withheld under section 40(2) of the FOIA (third person personal data).
2. The Commissioner's decision is that NHSI is correct not to disclose the information it is withholding under section 40(2).
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.
4. NHS Trust Development Authority ('NHS TDA') and Monitor are now operating as a single integrated organisation known as NHS Improvement, although both statutory organisations remain in existence. NHS Improvement has taken on responsibility for dealing with FOIA matters for both NHS TDA and Monitor. In this decision notice, references to NHSI are references to Monitor.

Request and response

5. On 20 October 2016, the complainant wrote to NHSI and requested information in the following terms:
 2. *...With the above background, this first part of this FoI request is for the "briefing pack" and "handwritten notes" relating to the Monitor-UHMB 'Board to Board' meeting of 8.9.10, as described in Point 5.164 of 'The Report of the Morecambe Bay Investigation' published on 3.3.15.*
 3. *The second part of the FoI Request is for any letter or document dated during the period June to September 2010 incl., from David Bennett, Chief Executive of Monitor during almost all of the relevant period, or Miranda Carter, Monitor Assessment Director or Adam Cayley, variously described as Monitor Portfolio Director and Regional Director, indicating that Monitor paid specific attention to the concerns raised in the Halsall Letters.*
 4. *I request only electronic copies of documents- no paper copies requested."*
6. NHSI responded on 17 November 2016. It released a copy of the briefing pack Monitor prepared for a meeting between the Board of Monitor and the Board of University Hospitals of Morecambe Bay NHS Trust ('the Trust'). The names of four members of Monitor staff responsible for assessing the Trust's application to become an NHS foundation trust were redacted under section 40(2) of the FOIA.
7. Following an internal review NHSI wrote to the complainant on 21 December 2016. It acknowledged that it had incorrectly redacted some information – the name of the Senior Assessment Manager, Victoria Woodhatch. NHSI maintained its position that the remainder of the redacted information was correctly withheld under section 40(2).

Scope of the case

8. The complainant contacted the Commissioner on 12 January 2017 to complain about the way his request for information had been handled.
9. The Commissioner's investigation has focussed on whether the NHSI has correctly applied section 40(2) to the information it has withheld.

Reasons for decision

10. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of third persons, ie someone other than the requester, and the conditions under either section 40(3)(a) or 40(4) are also satisfied.

11. The Commissioner has therefore first considered whether the information the Trust has withheld is the personal data of third parties.

Is the information personal data?

12. The Data Protection Act (DPA) says that for data to constitute personal data it must relate to a living individual and that individual must be identifiable.

13. The information withheld in this case is the names of three members of Monitor staff – two Assessment Managers and a Legal Adviser - who were involved in assessing the Trust's application, in 2010, to become an NHS foundation trust.

14. The Commissioner is satisfied that this information relates to living individuals and that the individuals can be identified from it. The Commissioner is therefore satisfied that the withheld information is the personal data of third persons – the data subjects. The Commissioner has gone on to consider whether any of the conditions under section 40(3) have been met.

Would disclosure breach one of the conditions under section 40(3)?

15. Section 40(3)(a) of the FOIA says that personal data of third persons is exempt from disclosure if disclosing it would contravene one of the data protection principles or would cause damage or distress and so breach section 10 of the DPA.

16. In its submission, NHSI has told the Commissioner that disclosing the withheld information would be unfair and so would breach the first data protection principle.

17. In assessing fairness, the Commissioner considers whether the information relates to the data subject's public or private life; whether the data subject has consented to their personal data being released and the data subject's reasonable expectations about what will happen to their personal data.

18. NHSI has confirmed that the information concerns the data subjects' public life – their roles as part of the Monitor team that assessed the

Trust's application to be authorised as an NHS foundation trust. It has confirmed it has not sought consent from the three individuals for their personal data to be disclosed.

19. With regard to the data subjects' reasonable expectations, NHSI has told the Commissioner that the staff concerned would have the reasonable expectation that their names would not be put into the public domain. Although assessing the Trust's application (to become an NHS foundation trust) is a public function, the final decision-maker within Monitor, responsible for deciding whether to grant the assessment, was Monitor's Board and its committees, not the assessment team itself.
20. NHSI also argues that the three individuals concerned also held relatively junior posts: more junior than the Senior Assessment Manager (whose name has been disclosed), who in turn was more junior than the Executive Manager. Although these individuals would have liaised with the Trust, their roles were not public-facing; they were not responsible for publicly announcing or justifying the authorisation decision. NHSI has told the Commissioner that its general approach in other cases of authorisation has been that the names of the assessment staff are not publicly disclosed.
21. NHSI has confirmed that, given the factors above, its view remains that the individuals concerned have a reasonable expectation that their names would not be disclosed.
22. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to provide the information if there is an overriding legitimate interest in disclosure.
23. The complainant has referred to the Information Tribunal (IT) decision in EA/2011/0119, from 2013. In that case, the IT ruled that North Lancashire Teaching Primary Care Trust should disclose the names of nine members of staff redacted from a letter sent by the Chief Executive of the Trust to the Chief Executive of the North Lancashire Teaching Primary Care Trust.
24. The IT considered that the nine individuals concerned all had senior positions of responsibility within the Trust, such that an expectation of anonymity would be unreasonable. It considered that the Commissioner had not given a suggestion of other specific harm and the IT was satisfied that disclosure was necessary for the complainant's legitimate interests concerning how the Trust was managed.
25. The complainant in this case has similar concerns; namely, how the Trust was managed.

26. In its submission to the Commissioner, NHSI has said that it does not consider there are any overriding legitimate interests in disclosing the three names in this case. It recognises a legitimate interest in understanding the reasons for the decision to authorise the Trust as an NHS foundation trust. This is particularly so given subsequent failures in the quality of care provided by the Trust (and the resulting Morecambe Bay Investigation) and the concerns as to the extent to which quality concerns were properly identified and considered at the time of authorisation.
27. The Trust does not accept that this legitimate interest extends to knowing the identities of the junior staff and legal adviser involved. It argues that any legitimate interest in transparency is addressed by:
 - the information already disclosed, including the briefing pack and the detailed findings of the public investigation into these issues (ie the Morecambe Bay Investigation) which have been published; and
 - the fact that the identities of the individuals and bodies who made the decision to grant the Trust NHS foundation trust status (Monitor's Board/committees), the Senior Executive Director responsible for the matter (Miranda Carter) and the Senior Assessment Manager (Victoria Woodhatch) are already in the public domain and known to the complainant.
28. Schedule 2 of the DPA gives the conditions relevant for the purposes of processing personal data. The sixth condition says that processing must be necessary for legitimate interests. NHSI considers it has addressed the question of legitimate interests above and that its view is that there is no legitimate interest in disclosing the disputed information.
29. The Commissioner recognizes that the requested information is of particular interest to the complainant but disclosure under the FOIA is effectively disclosure to the world at large. Unlike in the IT decision discussed, the Commissioner does not consider the members of staff in this case have a level of seniority that would lead them to expect that their names would be put into the public domain. She has also noted the high profile nature of the Morecambe Bay Investigation which may lead to those involved in events concerning the Trust receiving unwarranted attention - even when they have been obliquely involved, such as the three individuals in this case. Moreover, the complainant has not provided compelling evidence as to why the names of these more junior members of staff are necessary for the purposes of pursuing his legitimate interest in the Trust's management.

30. The Commissioner is satisfied that the complainant's, and the wider public's, interests are sufficiently met by the disclosure of: the briefing pack; the disclosure of the name of the Senior Assessment Manager; and other information about the Morecambe Bay Investigation that is in the public domain, such as the Morecambe Bay Investigation Report (2015) which was not published at the time of the IT decision above.
31. The Commissioner is therefore satisfied that it would not be fair to disclose the disputed information in this case, and disclosure would therefore breach the first data protection principle. Since a condition under section 40(3) has been met, it has not been necessary to consider the condition under section 40(4).

Right of appeal

32. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

33. 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.
34. 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
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