

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 January 2018

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

Decision (including any steps ordered)

1. The complainant has requested minutes and any other material concerning particular meetings with Monitor. NHS Improvement (NHSI) has released some information and says that information it has withheld is exempt from release under section 40(2) of the FOIA (third person personal data).
2. The Commissioner's decision is that the withheld information is exempt from release under section 40(2).
3. The Commissioner does not require NHSI to take any steps.

Request and response

4. On 30 March 2017, the complainant wrote to NHSI and requested information in the following terms:

"On 15.6.10 the Chief Executive and Finance Director of North Lancashire PCT met Monitor at Westmoreland General Hospital to discuss the University Hospitals of Morecambe Bay NHST application to Monitor to be authorised as a Foundation Trust.

On the same day the Chief Executive and Finance Director of Cumbria PCT also met Monitor for the same topic of discussion at the same venue.

This FoI request is for the minutes of both of these meetings and any other documents and/or emails held by Monitor/ NHSI which summarise and/ or describe and/ or report on those meetings and/ or are concerned with the arrangement of those meetings AND which are dated in the month of May, June and July 2010. I include the month of May only to capture the notice given to the PCTs about the calling of these meetings, and July only to capture any information RELATED TO THOSE MEETINGS ONLY leading up to the 1.10.10 authorisation of UHMB. I request electronic copies of these documents. Paper copies not requested."

5. NHSI responded on 2 May 2017. It released related information it holds, redacting some which it considered is exempt from release under section 40(2) of the FOIA.
6. NHSI provided an internal review on 4 July 2017. It upheld its original position and addressed other queries the complainant had raised.
7. During the Commissioner's investigation, NHSI advised her that, although it considered it had correctly applied section 40(2) to it originally, given the passage of time it had, on 11 January 2018, voluntarily released a small amount of information that it had withheld under this exemption.

Scope of the case

8. The complainant contacted the Commissioner on 9 August 2017 to complain about the way his request for information had been handled.
9. The Commissioner's investigation has focussed on whether NHSI is correct to apply section 40(2) of the FOIA to the remaining information it has withheld.

Reasons for decision

10. By way of background, in its submission to the Commissioner NHSI has explained that, at the time of the request, Monitor was, and remains, the statutory body responsible for assessing NHS foundation trust authorisation. Since 1 April 2016, Monitor and the National Health

Service Trust Development Authority have been operating as an integrated organisation known as NHS Improvement.

Section 40 – personal data

11. Section 40(2) of the FOIA says that a public authority is entitled to withhold requested information if it is the personal data of third parties and a condition under either section 40(3) or 40(4) is also satisfied.
12. The Commissioner has first considered whether the requested information can be categorised as personal data.

Is the information personal data?

13. 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 from it.
14. Information can be said to 'relate to' an individual if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
15. The information still withheld under section 40(2) in this case comprises the name and job title of one Monitor staff member and the direct line phone number of another. The Commissioner understands that the two individuals to whom this information is associated are living, and she considers that this information relates to them and they could be identified from it. The Commissioner is therefore satisfied that the withheld information can be categorised as personal data of third persons and she has gone on to consider whether, first, a condition under section 40(3) has been met.

Is a condition under section 40(3) satisfied?

16. Section 40(3)(a) says that personal data is exempt from release if disclosing it would contravene any of the data protection principles, or would cause damage or distress and so breach section 10 of the DPA.
17. NHSI considers that releasing the withheld information would breach the first data protection principle set out in Part I of Schedule 1 of the DPA which says that personal data shall be processed fairly and lawfully and shall not be processed unless at least one of the conditions in Schedule 2 is met.
18. In assessing whether disclosure would be unfair and so constitute a breach of the first data protection principle the Commissioner takes a number of factors into account such as: whether the information relates

to the individual's public or private life; whether the individual has consented to the release of their personal data; and the individual's reasonable expectations about what will happen to their personal data.

19. In this case, NHSI has confirmed that the withheld information relates to the individuals' public lives as public officials, as Monitor employees and, in particular, as part of the assessment team dealing with University Hospital Morecambe Bay NHS Trust's application for authorisation as an NHS foundation trust. The individuals have not consented to the information's release.
20. With regard to the individuals' reasonable expectations, NHSI has told the Commissioner that it considers that, regarding the first Monitor staff member, disclosing the name and job title of a more junior employee would amount to a breach of the first data protection principle. It says that the individual whose name and job title that have been withheld worked on the assessment team but did not have a public facing role. Nor was that person of sufficient seniority within the organisation to expect that their name would become publicly known.
21. NHSI has told the Commissioner that the final decision-makers within Monitor, who assessed applications to be a foundation trust, were Monitor's Board and its committees, not the assessment team itself. Recommendations to the Board/committees were agreed by a director of Monitor; not made solely by the assessment team. The individual concerned held a relatively junior post and, although they would have been involved in the process, they did not have responsibility for publicly announcing or justifying the decisions.
22. Regarding the second Monitor staff member, whose direct line phone number has been withheld, NHSI has explained that the name of that individual has already been placed in the public domain in the course of the Morecambe Bay Investigation carried out by Dr Bill Kirkup, which reported in March 2015. Although this individual was in a Senior Manager post, NHSI says it considers that Monitor staff would be distressed by the disclosure of their individual contact details. It says it is reasonable to foresee that disclosing that information would lead to unsolicited contact from third parties and that this individual was not responsible for dealing directly with public enquiries. Further, NHSI considers that those employed at this level would have a reasonable expectation that their individual contact details would not be disclosed to the wider world, for this reason.
23. The Commissioner agrees with NHSI that disclosing the requested information would be unfair to the individuals concerned. This is because, in both cases, the members of staff does not have a level of seniority that would justify public disclosure of their personal data and,

given their circumstances, would have the reasonable expectation that it would not be released.

24. Despite the factors above, the requested information may still be disclosed if there is compelling public interest in doing so that would outweigh the legitimate interests of the data subjects.
25. In its submission, NHSI has confirmed that it does not consider there to be any overriding legitimate interest in disclosing the information. It recognises a legitimate interest in transparency and in understanding the reasons for a decision to authorise the trust in question as an NHS foundation trust. NHSI does not, however, accept that there is any legitimate interest in knowing the identities of junior staff involved in the assessment, or in having access to the direct and individual contact details of Monitor staff. Any legitimate interest is met by the names of key individuals with responsibility for decision making, and who were key to discussions, being in the public domain, along with other information that has already been disclosed. In particular, the Morecambe Bay Investigation report¹. NHSI finds that none of the Schedule 2 conditions apply and that it has addressed the sixth condition – legitimate interest – above.
26. In his complaint to the Commissioner dated 8 August 2017, the complainant has acknowledged that NHSI has provided the bulk of the information he requested. He goes on to argue why some of the information that was withheld originally should be disclosed – as referred to above, NHSI has now voluntarily released this information. The complainant comments on aspects of the Morecambe Bay Investigation more generally. Finally, he criticises the decision to award University Hospital Morecambe Bay NHS Trust foundation status and closes by stating that all the redactions should be removed.
27. The Commissioner does not find this to be a compelling public interest argument for releasing the personal data of two members of Monitor staff who are not very senior in the organisation. The public interest in issues associated University Hospital Morecambe Bay NHS Trust (UHMB) has been met by Dr Kirkup's report and other information already in the public domain. Releasing the information concerned would not surface any new issues or concerns regarding the decision to grant UHMB foundation status.

¹ <https://www.gov.uk/government/publications/morecambe-bay-investigation-report>

28. The Commissioner is satisfied that the withheld information is not of such wider public interest that it outweighs the legitimate rights and freedoms of the members of Monitor staff concerned.
29. The Commissioner is therefore satisfied that NHSI is correct to withhold the information under section 40(2). It is the personal data of third persons and a condition under section 40(3) is satisfied as releasing it would 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

30. 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

31. 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.
32. 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
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