

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 07 October 2019

Public Authority: Northern Devon Healthcare NHS Trust
Address: 23 Castle Street
Barnstaple
Devon
EX31 1ET

Decision (including any steps ordered)

1. The complainant has requested a copy of the investigation report into a medical director. The Northern Devon Healthcare NHS Trust (the Trust) refused to provide the requested information citing the exemption under section 40(2) of the FOIA (third party personal data) as its basis for doing so.
2. The Commissioner's decision is that the Trust has correctly applied section 40(2) of FOIA to the withheld information. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

3. On 21 December 2018 the complainant made the following request for information:
'A copy of the investigation report into medical director [name redacted] please, including any conclusions and recommendations to the trust?'
4. On 28 December 2018 the Trust responded. It refused to provide the requested information and cited the exemption section 40(2) of the FOIA.
5. On 24 January 2019 the complainant requested an internal review. She argued that the information is already in the public domain: *'[name redacted], a public figure, is under investigation for allegations of bullying. It is already in the public domain that the*

trust carried out this investigation using public money to investigate these allegations.'

6. On 22 March 2019 the Trust provided the outcome of the internal review and upheld the decision.

Scope of the case

7. The complainant contacted the Commissioner on 12 April 2019 to complain about the way the request for information had been handled.
8. The Commissioner considers the scope of this case to be to determine if the Trust has correctly applied section 40(2) FOIA to the withheld information.

Reasons for decision

Section 40 Personal information

9. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
10. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation (GDPR) ('the DP principles').
11. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (DPA). If it is not personal data then section 40 of FOIA cannot apply.
12. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

¹ As amended by Schedule 19 Paragraph 58(3) of the Data Protection Act 2018

Is the information personal data?

13. Section 3(2) of the DPA defines personal data as:-

“any information relating to an identified or identifiable living individual”.

14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

15. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

16. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

17. Having viewed the withheld information, the Commissioner is clear that the information both relates to and identifies numerous third parties. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA.

18. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the data protection principles.

19. The most relevant data protection principle in this case is principle (a).

Would disclosure contravene principle (a)?

20. Article 5(1)(a) of the GDPR states that:-

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

21. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful (i.e. it would meet one of the bases of lawful processing listed in Article 6(1) GDPR as well as being generally lawful), be fair, and be transparent.

22. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

Is the information special category data?

23. Information relating to special category data is given special status in the GDPR.
24. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
25. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that some of the requested information does include special category data. She has reached this conclusion on the basis that some of the information concerns health information.
26. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
27. The Commissioner considers that the only conditions that could be relevant to a disclosure under FOIA are conditions (a) (consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
28. The Commissioner has seen no evidence or indication that the individual(s) concerned have specifically consented to this data being disclosed to the world in response to the FOI request or that they have deliberately made this data public.
29. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of FOIA.
30. The Commissioner will now go on to consider the remaining information which is not special category data.

Lawful processing: Article 6(1)(f) of the GDPR

31. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.
32. The Commissioner considers that the lawful basis most applicable is basis (f) which states:-
- "processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"*².
33. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
34. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

² Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

Legitimate interests

35. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
36. Legitimate interests may range widely. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
37. In the circumstances of this case the Commissioner understands that the complainant is interested in the investigation report, including any conclusions and recommendations to the Trust. She argues that the Trust should disclose the investigation report because the medical director is a public figure and it is already in the public domain that the Trust carried out this investigation using public money to investigate these allegations.
38. The Commissioner has been provided by the Trust with a number of links to media articles on this subject.
39. The Commissioner is inclined to accept that the complainant has a legitimate interest in making this request and has gone on to consider whether this is necessary in order to meet the legitimate interest.

Is disclosure necessary?

40. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
41. The Trust accepts that there is a case for *'transparency around the departure of this individual from our employment'* but *'disclosure of the withheld information would add very little to public understanding of the circumstances surrounding the departure of this person and instead lead to an invasion of privacy and increased scrutiny and press attention which would be distressing'*.
42. The Commissioner considers that disclosure would be necessary to meet the legitimate interests identified as it cannot be met by any other, less intrusive means.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

43. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
44. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual
45. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
46. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual(s).
47. The Trust considered the expectations of the individual and all other parties involved within the report (there are numerous witness statements) and the consequences of disclosure.
48. The Trust stated that the investigation report is *'private, confidential and highly sensitive for the Trust and for those involved. Witnesses were advised that if the matter proceeded to a Hearing their statements would form part of the evidence pack which would be supplied to the Hearing Panel and to [redacted name], however it was made implicit that outside this, their evidence would remain confidential'*
49. It regarded the expectations of those involved in the internal investigation to carry a strong expectation of privacy. *'Employees, including senior employees, expect that details of their employment are treated confidentially by their employer, particularly information about their conduct and/or performance.'*

50. The Trust also explained that the report is incomplete. *'It wasn't finalised any further Consequently the comments made about [redacted name] are neither conclusive nor proven. The report throughout is strictly private and confidential, it was never intended for publication within the public domain.'*
51. The Commissioner has viewed the withheld information and is satisfied that it contains many witness statements and detailed discussions of working standards and working relationships of many named individuals. She agrees with the Trust that *'redaction of the report is neither appropriate nor practical'*.
52. The Commissioner considers that disclosure of the report would be distressing to those involved in the investigation, including the witnesses who have no expectation that their statements would be made public.
53. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and that the disclosure of the information would not be lawful.
54. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

55. The Commissioner has therefore decided that the Trust was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

56. 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@justice.gov.uk

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

57. 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.
58. 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

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