

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 April 2020

Public Authority: Cambridgeshire and Peterborough Clinical
Commissioning Group

Address: Lockton House
Clarendon Road
Cambridge
CB2 8FH

Decision (including any steps ordered)

1. The complainant has requested Cambridgeshire and Peterborough Clinical Commissioning Group (the CCG) to disclose information relating to an IT trainer vacancy; information including the application forms and supporting information of all those shortlisted, the completed interview question, answer sheets and scorecards for those shortlisted, whether the preferred candidate had previous NHS experience or connections with the CCG and whether they started on the opening salary for the grade. The CCG disclosed some information to the complainant, cited section 12 for one element of the request and refused to disclose the remainder under section 40 of the FOIA.
2. During the Commissioner's investigation the CCG withdrew its application of section 12 and disclosed the requested information to the complainant. In relation to this element of the request, the Commissioner has recorded a breach of section 1 and 10 of the FOIA, as the CCG failed to disclose information to which the complainant was entitled within 20 working days of receipt.
3. In relation to the application of section 40 of the FOIA, the Commissioner's decision is that the CCG is entitled to withhold the remaining withheld information in under this exemption.
4. The Commissioner does not require the CCG to take any further action.

Request and response

5. On 6 June 2019, the complainant wrote to the CCG and requested information in the following terms:

"1) The application forms and other supporting information for all people shortlisted (with personal addresses, names, phone numbers redacted) leaving qualifications, experience and everything else. In general Information such as experience and qualifications is often available via job sites such as indeed or LinkedIn et al for the public to view but their personal address is not available. This should guide you to what should be redacted and what should not.

2) The completed interview question and answer sheets and scorecards and other supporting information for all people interviewed (from all 3 interview panel members)

3) Total number of applicants who attended interview?

4) Interview Dates for all applicants

5) Was all candidate who was interviewed submitted by the original closing date

6) Timeline of the preferred candidate ID checks and other CCG admin procedures and enquires with any personal details redacted.(this is about the process and procedure of the recruitment process both pre and post interview)

7) the job is a band 7 role, is the preferred candidate starting at entry level point within this band?

8) does the preferred candidate have previous experience of working directly for any NHS organisation?

9) Does the preferred candidate disclosure any connection with anyone on their application with the CCG?

10) I want to see all the scores from the shortlisting process for all applicants (from all shortlisting categories) who was interviewed for all candidates?

11) I want to see all the scores from the interviewing process for all applicants (from all interviewing categories) who was interviewed for all candidates?

12) About the wider CCG, please give me the figures for the last 5 years of recruitment, broken down by internal candidates and external candidate and pay banding and points within that band and if the external candidates had any prior NHS direct employment experience.”

The request related to a recent IT trainer vacancy at the CCG.

6. The CCG responded on 3 July 2019. It responded to questions 3, 4, 5 and 6 of the request, providing the recorded information the CCG holds. In relation to question 12, the CCG provided some information but refused to comply with the remainder of this question, citing section 12 of the FOIA. In respect of all remaining questions, the CCG refused to disclose the requested information citing section 40 of the FOIA.
7. The complainant requested an internal review on 3 July 2019. He stated that he was dissatisfied with the CCG’s handling of his request and requires all the information he originally requested.
8. The complainant referred the matter to the ICO on 29 July 2019.
9. The Commissioner wrote to the complainant on 19 August 2019 to request copies of all relevant documentation.
10. The complainant responded on 19 August 2019 and provided a copy of the documents requested. These showed that the CCG carried out an internal review and notified the complainant of its final position on 2 August 2019. The CCG upheld its previous handling of the request and the application of section 40 of the FOIA.

Scope of the case

11. As stated above, the complainant contacted the Commissioner on 26 July 2019 to complain about the way his request for information had been handled. At this time the Commissioner did not have a copy of all relevant information to proceed with the complaint. This was supplied on 19 August 2019 and the complaint was accepted for a full investigation on 23 August 2019.
12. The Commissioner understands that the complainant has no complaint about the CCG’s handling of questions 3, 4, 5 and 6. It is also noted that during the Commissioner’s investigation the CCG revised its response to question 12 and disclosed the recorded information it holds. The Commissioner considers this element of the request has therefore been resolved.

13. The focus of the Commissioner's investigation has therefore been the CCG's handling of the remaining questions and the application of section 40 of the FOIA.

Reasons for decision

Section 40 personal information

14. Section 40(2) of the 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.
15. 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 ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
16. 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 the FOIA cannot apply.
17. 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 DP principles.

Is the information personal data?

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

"any information relating to an identified or identifiable living individual".

19. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
20. 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.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

21. 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.
22. The CCG has confirmed that two individuals were shortlisted and two individuals were interviewed. The complainant was one of them. Therefore the withheld information relates to the remaining individual and the postholder.
23. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the remaining individual and successful postholder. She is satisfied that this information both relates to and identifies this individual. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
24. She has considered the possibility of redaction and does not consider that it would be possible on this occasion.
25. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
26. The most relevant DP principle in this case is principle (a).

Would disclose contravene principle (a)?

27. 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".

28. In the case of an 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, fair and transparent.
29. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

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

30. 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.

31. The Commissioner considers that the lawful basis most applicable is basis 6(1)(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.

32. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

- Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;
- Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;
- Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

33. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

34. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of

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".

accountability and transparency for their own sakes, as well as case-specific interests.

35. Further, a wide range of interests may be legitimate interests. 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.
36. The CCG and the Commissioner acknowledge that the complainant has his own personal interests in the disclosure of this information. He was one of two applicants and was unsuccessful on this occasion. The CCG and Commissioner also recognise that there is a legitimate interest in understanding more clearly why the post was awarded to the other individual and in ensuring that due process was followed and all recruitment policies and laws adhered to.

Is disclosure necessary?

37. '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 the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
38. The CCG and the Commissioner accept that disclosure is necessary to meet the legitimate interests identified. In other words there is no other, less intrusive means or alternative measures that they are aware of, of achieving the legitimate interests identified.

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

39. It is therefore now 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 the 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.
40. 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.
41. 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.
 42. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
 43. The CCG advised that the individual/data subject concerned has expressly stated that they do not give their consent to the processing of their personal data and would have real concerns around any potential disclosure in to the public domain.
 44. It argued that the individual has a reasonable expectation that the requested information would remain private and confidential and would not be disclosed to the world at large (which disclosure under FOIA effectively means). Disclosure would be an unwarranted intrusion into the more private aspects of the individual's employment and would cause them distress and upset.
 45. The Commissioner is in agreement with the CCG that disclosure would be unfair and against the rights and freedoms of the data subject/individual. The individual has expressly stated that they do not consent to disclosure and would be concerned about the requested information being released into the public domain. Their expectations were and still are that the requested information would remain private and confidential and was only shared with the CCG for the purposes of the recruitment; no other purpose. The Commissioner considers these expectations are reasonable considering the requested information and would generally be the expectation of most individuals applying for positions. Disclosure would cause some distress and upset and would therefore be against the rights and freedoms of the individual.
 46. In a decision notice issued on 29 May 2018 the Commissioner considered the application of section 40 to interview notes that contained both the answers that candidates had provided during the interview process and the notes made by the interviewers of those responses. Similar to this case, paragraphs 18 to 20 highlight the data subjects' expectations of the processing of this information and how

disclosure would constitute a loss of privacy and cause them distress. The notice can be accessed here:

<https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2259779/fs50667319.pdf>

47. Similarly in a decision notice the Commissioner issued on 9 April 2017 the Commissioner upheld the application of section 40 of the FOIA to the complainant's request for the job applications of some candidates that had been invited for an interview. The notice addressed how the applications could not reasonably be redacted as the complainant had suggested in this case and how disclosure would be likely to cause the data subjects concerned distress and upset. She considers paragraphs 31 and 32 also deal with similar arguments the complainant in this case has raised:

<https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2013944/fs50647297.pdf>

48. A further notice issued on 27 March 2017 also addresses similar information and why the Commissioner again upheld the application of section 40 of the FOIA. This can be accessed here:

<https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2013838/fs50662159.pdf>

49. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

Procedural matters

50. In relation to question 12 of the request, the CCG realised during the Commissioner's investigation that it was unable to rely on section 12 of the FOIA. It therefore later compiled the requested information and disclosed this to the complainant.
51. As this was information to which the complainant was entitled and it was not disclosed within 20 working days of the receipt of the request, the Commissioner has recorded a breach of section 1 and 10 of the FOIA.

Right of appeal

52. 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

53. 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.
54. 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

Samantha Coward
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