

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 13 July 2009

Public Authority: Heart of England NHS Trust
Address: Bordesley Green East
Birmingham
B9 5SS

Summary

The complainant made a request under the Freedom of Information Act 2000 (the "Act") to the Heart of England NHS Trust (the "Trust") for a copy of the report into Breast Surgery Practice that was presented to the Board on 29 October 2007 by Mr Ian Cuncliffe, Medical Director for Surgery. The Trust refused the complainant's request as it stated that the information was exempt from disclosure by virtue of section 30 and section 40(2) of the Act. The Commissioner has reviewed the withheld information and considers that the Trust correctly applied the section 40(2) exemption to withhold the requested information. The Commissioner did not therefore consider the Trust's application of the section 30 exemption any further. The Commissioner does however consider that the Trust breached sections 17(1)(b) and (c) in its handling of the request.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant made a request to the Trust on 3 June 2008 for a copy of the report into Breast Surgery Practice that was presented to the Board on 29 October 2007 by Mr Ian Cuncliffe, Medical Director for Surgery.
3. On 2 July 2008 the Trust responded to the complainant's request for information. The Trust explained that a report dated 2 September 2007,

informing the Trust Board of a review into Breast Surgery Practice, was presented to the meeting on 27 September 2007. It confirmed that no report was presented to the Trust Board meeting on 29 October 2007. It explained that as the review was ongoing and the information contained in the report was provided to the Trust in confidence, after it had sought legal advice it confirmed that it was unable to provide the information. It stated that it was unable to do so as the information was exempt by virtue of sections 30 and 40 of the Act.

The Trust explained that as section 30 is a qualified exemption it had applied the public interest test and concluded that as the results of the review were

not yet clear, it would not be in the public interest to disclose the information requested.

4. On 2 July 2008 the complainant wrote to the Trust to express her dissatisfaction with its response.
5. On 14 July 2008 the Trust wrote to the complainant with its reviewed response. The Trust upheld its decision that the information was exempt from disclosure under sections 30 and 40 of the Act. It explained that the existence of an investigation about Breast Surgery in the Trust was within the public domain by virtue of reference to it within the Trust Board Minutes dated 27 September 2007. Similarly it explained that the existence of a report presented by Mr Ian Cuncliffe, Medical Director for Surgery to the Board on those issues was also within the public domain. It clarified that the information in relation to which the Trust applied the above exemptions is the content of that report which it asserted was presented in confidence. It stated that the incomplete nature of the investigation was relevant to disclosure at the time of the request as it would affect the investigation if the information in the report had been disclosed. The Trust also stated that the report included confidential information which it was required to protect. In applying the public interest test it distinguished between matters that were in the public interest and those that were merely of interest to the public. It stated that to be in the public interest the benefit of releasing the report must outweigh that of withholding the report. It concluded for the reasons it had highlighted it did not consider that the benefit of releasing the report at the time would outweigh the benefit of withholding it.

The Investigation

Scope of the case

6. On 21 July 2008 the complainant made a formal complaint to the Information Commissioner's Office as he was dissatisfied with the result of the internal review.

Chronology

7. The Commissioner contacted the Trust on 20 February 2009 in order to discuss its handling of the complainant's request and to establish whether or not the section 30 and section 40 exemptions had been correctly applied in this case.
8. The Commissioner asked the Trust to provide him with a copy of the withheld information.
9. The Commissioner also asked the Trust to explain in detail why the exemption contained at section 30 of the Act was applicable to this request for information.
The Commissioner asked the Trust to provide a full and detailed explanation of the public interest factors for and against disclosure which informed the Trust's decision not to disclose the information. Finally the Commissioner asked for copies of any information (if there was any) relating to the information request which was already in the public domain.
10. In relation to the Trust's application of section 40, the Commissioner explained that this was a multifaceted exemption and therefore he asked the Trust to clarify which part of this exemption it wished to rely upon. A copy of the Commissioner's Guidance on this exemption was provided to the Trust in order to assist it in providing its response.
11. The Commissioner reasoned that the Trust wished to rely upon the exemption contained at section 40(2) by virtue of section 40(3)(a)(i), in that the withheld information contained third party personal data and to disclose it would breach one or more of the data protection principles. He explained that when assessing the data protection principles the focus should be why disclosing this information to the public at large would be unfair. The Commissioner directed the Trust to consider the following factors which would be relevant when determining the fairness of disclosure:-
 - How the information was obtained.
 - The likely expectations of the data subject regarding disclosure of the information. For example, would the third party expect that his or her information might be disclosed to others or had the third party been led to believe that his or her information would be kept secret?
 - The effect which disclosure would have on the data subject. For example would the disclosure cause unnecessary or unjustified distress or damage to the person who the information is about?
 - Whether the third party had expressly refused consent to disclosure of the information.
 - The content of the information.
 - The public interest in disclosure of the information.

12. On 20 March 2009 the Trust responded to the Commissioner. The Trust provided the Commissioner with a copy of the report relevant to the complaint and explained that this was the report dated 25 September 2007 and presented to the Board by Mr Ian Cuncliffe, Medical Director for Surgery.
13. The Trust provided further arguments in relation to its application of the section 30 exemption.
14. In relation to section 40, the Trust explained that the primary issue was to consider whether disclosure of any of the information contained within the report would breach any of the data protection principles. It stated that the first principle required personal data to be processed fairly and lawfully. It stated that section 40(2) was relevant in this case.
15. The Trust argued that disclosure would be unlawful as it would be a breach of confidentiality. It stated that having regard to the information contained within the report itself, the Trust considered that release of this information could amount to a breach of confidentiality in respect of both key named clinical personnel within the report.
16. It explained that a further and highly relevant consideration to this issue was whether disclosure would be unfair. It stated that whilst the concept of fairness was often difficult to define, it considered that it would arguably be unfair to reveal any of the information as it contained third party personal data and the review into breast surgery practice at the Trust had not been completed.
17. The Trust provided further arguments as to why individuals would be identifiable from the information and also why it would be unfair to release this information, however due to the sensitive nature of these arguments the Commissioner is unable to provide any further detail of these arguments within this Notice.
18. The Trust stated that it was of the view that disclosure of the report would have a profoundly negative impact upon the data subjects involved.
19. The Trust confirmed that the data subjects had not been asked to consent to disclosure. It explained that given that the information was provided in confidence and given the ongoing sensitivity of the investigation process being undertaken, the Trust considered that asking the data subjects to consent to disclosure would of itself cause considerable distress to the data subjects.
20. The Trust directed the Commissioner to the Tribunal decision in House of Commons/ICO and Leapman, Brooks and Thomas. Based on this decision it stated that disclosure would be unwarranted on the basis that there would be disproportionate detriment to the rights and

interests of the individuals concerned. It stated that the harmful consequences to individuals involved in the report would not be outweighed by the public interest arguments in favour of disclosure.

21. The Trust conceded that it may be argued that the report could be redacted to remove the identification of the individuals. However it explained that the reality was that those individuals may still be identifiable within the department in question and the breast surgery community at large.
22. Finally the Trust confirmed that the documentation already within the public domain was the minutes of the Trust Board meeting in September 2007 and referred to in paragraph 5 above. A copy of the minutes was provided to the Commissioner. The Trust explained that other documentation was patient specific and was not therefore within the public domain.

Analysis

Procedural

Section 17(1)

23. Section 17(1) states that –

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,*
- (b) specifies the exemption in question, and*
- (c) states (if that would not otherwise be apparent) why the exemption applies”*

24. The Commissioner has considered whether the Trust has complied with section 17(1)(a), (b) and (c) of the Act.
25. In this case the Trust stated that it wished to rely upon the section 40 exemption within its response to the complainant of 2 July 2008. At internal review the Trust upheld its decision to withhold the information and stated that it was relying upon the exemptions contained at section 40 of the Act to do so.

26. The Commissioner notes that the exemptions contained at section 40 of the Act are multifaceted and the Trust did not specify the subsection of the exemptions in question which it had applied.
27. Furthermore the Commissioner considers that the Trust did not provide the complainant with an adequate or relevant explanation as to why the section 40(2) exemption by virtue of section 40(3)(a)(i) was engaged.
28. The Commissioner therefore considers that the Trust breached section 17(1)(b) and (c).

Exemption

Section 40(2)

29. Section 40(2) of the Act provides an exemption for information that constitutes the personal data of third parties:

“Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.”

30. Section 40(3)(a)(i) of the Act states that:

“The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

- (i) any of the data protection principles, or*
- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress),”*

31. The full text of section 40 can be found in the legal annex attached to this decision notice.
32. In this case the Trust has argued that the requested information constituted the personal data of some individuals and was exempt under section 40(2) of the Act by virtue of section 40(3)(a)(i) as to release the information would breach the data protection principles. In order to reach a view on the Trust's arguments the Commissioner has first considered whether the withheld information is the personal data of

a third party. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:

- from that data, or
- from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

In this instance the information withheld is a report into Breast Surgery Practice within the Trust and upon viewing the report the Commissioner believes that individuals would be identifiable from this information. Upon consideration of the withheld information the Commissioner is satisfied that it is the personal data of identifiable individuals.

33. Such information is exempt if either of the conditions set out in sections 40(3) and 40(4) of the Act are met. The relevant condition in this case is at section 40(3)(a)(i) of the Act and is where disclosure would breach any of the data protection principles. The Trust has argued that disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully". The principle also requires that at least one of the conditions in Schedule 2 should be met.

How was the information obtained?

34. The Trust explained that the information contained within the report was based on information which was provided in confidence by a particular individual.

35. The Commissioner considers that the information contained within the report was obtained in order for the Trust to carry out a review of Breast Surgery Practice within the Trust. That review was ongoing at the time of the request and had not come to any form of conclusion. The Commissioner believes this supports the view that it would be unfair for the requested information to be released at that time.

Likely Expectation of the Data Subjects

36. The Trust explained to the Commissioner that it considered that it would be unfair to reveal any of the requested information as it contained personal data relating to identifiable individuals who would not expect that data to be released into the public domain.

37. The review into breast surgery practice at the Trust was ongoing at the time of the request and the requested report relates to this review. The Commissioner considers that the identifiable individuals would not have expected this information to be disclosed into the public domain at that time as the review to which the report relates was ongoing.

The effect which disclosure would have on the Data Subject

38. The Trust stated that it was of the view that disclosure of the report would have a profoundly negative impact upon the data subjects involved.
39. The Commissioner's Guidance, Awareness Guidance 1 Section 40 Personal Information, states that public authority's should take into account the potential harm or distress that may be caused by the disclosure. The Guidance states that, "For example, there may be particular distress caused by the release of private information about family life. Some disclosures could also risk the fraudulent use of the disclosed information (e.g. addresses, work locations or travel plans where there is a risk of harassment or other credible threat to the individual), which is unlikely to be warranted. However, the focus should be on harm or distress in a personal capacity. A risk of embarrassment or public criticism over administrative decisions, or the interests of the public authority itself rather than the individual concerned, should not be taken into account."
40. The above Guidance can be accessed at the following:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/personal_information.pdf
41. The Commissioner is again mindful that the review into breast surgery practice at the Trust was ongoing at the time of the request, and the requested report relates directly to that review.
42. Taking into account the Trust's arguments, the Commissioner's Guidance detailed at paragraph 41 and the fact that the review the report relates to was ongoing at the time of the request, the Commissioner considers that disclosure into the public domain would have caused significant distress to the identifiable individuals.
43. After considering the arguments put forward by the Trust and the withheld report itself which for the reasons outlined in paragraph 17 the Commissioner cannot detail in the DN, the Commissioner considers that disclosure of the requested report would be unfair and therefore the section 40(2) exemption was correctly applied in this case. Since the Commissioner considers disclosure of this information would be unfair he has not gone to consider whether a schedule 2 condition can be met.
44. As the Commissioner concluded that the section 40(2) exemption had been correctly applied in this case he did not consider the Trust's application of the section 30 exemption any further.

The Decision

45. The Commissioner's decision is that the section 40(2) exemption was correctly engaged in this case.
46. The Commissioner considers that section 17(1)(b) and (c) of the Act were breached in the Trust's handling of the request.

Steps Required

47. The Commissioner requires no steps to be taken.

Right of Appeal

48. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 13th day of July 2009

Signed

**David Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(2) states –

“Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.”

Section 17(3) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 17(4) provides that -

“A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

Section 17(6) provides that –

“Subsection (5) does not apply where –

- (a) the public authority is relying on a claim that section 14 applies,
- (b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and
- (c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

Section 17(7) provides that –

“A notice under section (1), (3) or (5) must –

- (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
- (b) contain particulars of the right conferred by section 50.”

Personal information.

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

Section 40(5) provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-

- (i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
- (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

Section 40(6) provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

Section 40(7) provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
"data subject" has the same meaning as in section 1(1) of that Act;
"personal data" has the same meaning as in section 1(1) of that Act.