

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 March 2014

Public Authority: Tameside Metropolitan Borough Council

Address: Council Offices
Wellington Road
Ashton-under-Lyne
Lancashire
OL6 6DL

Decision (including any steps ordered)

1. The complainant requested from the council information on whether any individuals at a particular property had had any contact with the council's mental health service. The council refused to confirm or deny whether it holds any information and applied section 40(5)(b)(i).
2. The Commissioner's decision is that the council was correct to apply section 40(5)(b)(i).
3. The Commissioner requires no steps to be taken

Request and response

4. After initial correspondence making a general enquiries the complainant wrote to the council on 1 June 2013 and requested information in the following terms:

"I noticed that my enquiry about [address redacted] was passed to Reablement (MH). Reablement services are for existing users. This indicates that someone at [address redacted] is already known to Mental Health Services. Is this correct?"

5. The council responded on 3 June 2013. It stated "Your enquiry was not passed to Reablement - it was passed to [name redacted], Team Manager at Houghton House, as notified to you". It added "Please also

be aware this it is not appropriate to disclose to you any information about your neighbour."

6. The council did not however specifically inform the complainant that it had applied an exemption nor explain to him its reasons for withholding the information.
7. On 8 July 2013 the council wrote to the complainant and informed him that it could not respond to his request as the information was sensitive personal data and therefore exempt under section 40 of the Act.
8. The complainant wrote back to the council on 26 July 2013. He stated that:

"I am acting on the basis that the Reablement involvement is genuine and that someone at [address redacted] is known to Mental Health Services. If this is wrong, then as there is no information to remain confidential or data that is subject to protection under the Data Protection Act 1998, the Council ought to be able to confirm this to me. In this case, I wish to know why a misleading reference to Reablement was included."

9. On 9 August 2013 the complainant wrote to the council saying that he wished the information because he was considering taking legal action against the individuals at the property and felt that it was important that he knew if any of them had mental health issues so he was fully informed prior to taking such action:

"Any solicitor or litigant in person acting responsibly should possess as much information about the circumstances of the matter before deciding whether or not to embark on legal action and what type of action to pursue."

10. Following an internal review the council wrote to the complainant on 8 December 2013. It stated that *"I note the reason for seeking a response to your inquiry but this still does not permit the Council to share any information with you."*
11. The council also explained why it could neither confirm nor deny whether it held any relevant information, although it did not specify which part of section 40 it was relying upon in order to avoid doing so. In effect the applied had section 40(5)(b)(i).

Scope of the case

12. The complainant contacted the Commissioner on 16 September 2013 to complain about the way his request for information had been handled.
13. The Commissioner considers that the complainant's complaint is that he wishes the information he has requested to be disclosed to him. He considers that the council holds relevant information, and that it has already confirmed this because the department at the council which responded to him deals with ongoing cases. The council, for its part, denies that the response he received was from a specific individual whose duty it is to respond to such requests.
14. The Commissioner initially wrote to the complainant and outlined that his view was that the council were correct to refuse to confirm or deny whether information was held due to the nature of the information requested. The complainant however asked the Commissioner to issue a decision notice confirming his decision.
15. The Commissioner considers that the complaint is whether the council was correct to apply section 40(5)(b)(i).

Reasons for decision

16. Section 40(5)(b)(i) of FOIA states that an authority can neither confirm nor deny whether it holds information where doing so would in itself breach one of the data protection principles of the Data Protection Act 1998.
17. The council clarified to the complainant why it could not confirm whether it holds information in this case. It said that if it routinely responded to similar requests confirming when it did not hold information, then when it did apply the exemption it would be evident that information was held respect of that request. It said that its policy was therefore to apply section 40(5)(b)(i) to any request for information of this nature.
18. The council confirmed that if it confirmed or denied holding information this in itself breach one of the data protection principles.
19. The Commissioner must firstly decide whether confirming or denying whether information is held would disclose personal data. If it is personal data he must then decide the disclosure would breach any of the data protection principles.

Is the information personal data?

20. The first thing which the Commissioner notes is that the nature of the request is whether any particular individuals living at a specified address

have had contact with the mental health services at the council. Their actions in the past have led him to believe that some of the individuals may have mental health issues which the council is aware of, and he wishes confirmation of this in order to facilitate his intention of taking legal action against them.

21. The Data Protection Act 1998 defines personal data as information which relate to a living individual who can be identified—
 - a) from those data, or*
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;
22. Amongst other things, section 2 of the Act also defines sensitive personal data as personal data consisting of information as to—
 - (e) his physical or mental health or condition,*
23. The Commissioner notes that the complainant has drawn conclusions about particular individuals living at the address in question, and that any confirmation that the council holds information falling within the scope of his request would highlight to him that one or more of those individuals has at some point had contact with the mental health services at the council.
24. A disclosure from the council confirming that it holds information on one person at the address would not identify which particular individual that was. Nevertheless he would know that at least one of the individuals had had contact with the service, and that the rest of the family were living with a family member who had had contact with the service. This in itself is a disclosure of personal data.
25. Similarly confirmation that no information was held would also be a disclosure of personal data. The complainant would have been informed that none of the individuals had had contact with the service.
26. A confirmation that any of the individuals were known to the mental health service would provide infer to the complainant that an individual at the property had mental health issues. A denial would highlight that they had not. Both of these scenarios would amount to a disclosure of personal data if the individual could be identified from the council's response.

27. The Commissioner has considered this argument further. Information that enables a group of people to be identified, but not any particular individual within the group is not personal data. In this case however it is not the council which is naming a random group, but the individual who has defined the scope of the search by naming the particular address in full knowledge of the residents who live there.
28. A confirmation from the council that one of the individuals living at the property has had contact with the service would reveal that at least one of the family was the subject of this information, confirming the complainant's suspicions. The complainant has already made assumptions about one particular individual living at the address and it is reasonable to assume that if the council were to confirm it held information about an individual at the property he would consider that the information relates to that individual specifically, whether that is a correct assumption or not.
29. Data protection law is concerned with information that identifies an individual. This implies a degree of certainty that information is about one person and not another. Identification involves more than making an educated guess that information is about someone; the guess could be wrong. The possibility of making an educated guess about an individual's identity may present a privacy risk but not a data protection one because no personal data has been disclosed to the guesser. Even where a guess based on anonymised data turns out to be correct this does not mean that a disclosure of personal data has taken place. Conversely, information that does enable particular individuals within a group – or all the members of a group – to be identified will be personal data in respect of those individuals.
30. In this case the complainant has named a specific property. He is aware of the individuals at the property and the actions of one or more of the individual's has raised serious concerns with him about their state of health. A confirmation from the council that one individual at the property is known to the service would confirm his suspicions about the family concerned, albeit that he may not directly be able to attribute the confirmation to a specific individual directly. This in itself is a disclosure of personal data in this respect.
31. Further to this however the Commissioner considers that the identification of an individual within the family would effectively be more than an educated guess. As a neighbour he would have access to information such as the comings and goings of the individuals, would be able to observe details of visitors to the property and would potentially overhear conversations which would allow him to build up a substantial picture of the individuals. He would also have conversations with the

individuals at times. He would therefore be able to identify the individual concerned.

32. It is worth noting in this respect that the complainant requested information from the council on the basis of his suspicions. His suspicions had been raised based upon information which he obtained, presumably using the above methods. He had also said to the council that his view was that one particular member of the family was likely to have had contact with the service in the past and outlined to them why he considered that to be the case.
33. The test for the Commissioner to consider is whether any confirmation by the council that information was held would lead to a disclosure of personal data. If a confirmation provided information about an individual whose identity would be known or could be found from information which the complainant has, or from information which the complainant could obtain then this would be a disclosure of personal data.
34. The Commissioner considers that there is a considerable risk that if the council confirmed that a person at the property had had contact with the mental health services he would be able to identify the person which that information related to. The Commissioner is therefore satisfied that the person could be identified if any information was held, and that this would be a disclosure of personal data in this instance.

Would confirming or denying whether information is held breach the first data protection principle?

35. Information relating to the health of any individual is defined under the DPA as sensitive personal data. Any authority must process (i.e. in this case disclose) that information in line with the data protection principles of the DPA. The first data protection principle requires that data is processed fairly and lawfully, and in particular that one of the conditions in schedule 2 of the Act applies. For sensitive personal data the authority must also show that one of the conditions in schedule 3 also applies. Any information in this case is likely to be sensitive personal data if it relates to the health of any of the individuals concerned, and confirmation that the individual was known to the service would certainly raise a general suspicion that that was as a patient of the service. Such information would be sensitive personal data about that individual.
36. The Commissioner must consider whether confirming or denying whether relevant information is held would breach any of the data protection principles of the Data Protection Act 1998. The relevant principle in this case would be the first data protection principle.

37. The first data protection principle states that:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

38. When considering whether a disclosure of the information would be fair for the purposes of the first data protection principle the council would need to consider whether the individual(s) would have any expectation that the information held about them would be disclosed. In this case that the question is whether they would have an expectation (or whether it would have been obvious) that their contact (or even lack of contact) with the mental health service would be disclosed in response to an FOI request.

39. It is firstly worth noting that patient confidentiality is a very strong principle in English Law. A patient/doctor relationship holds a very strong, albeit implied, duty of confidence. The Commissioner therefore considers that the individuals would have a very strong expectation that any information about whether or not they were known to the mental health service would not be disclosed to the general public.

40. Disclosures under the Act and the Regulations are intended to be global in nature and so the council must consider a disclosure to the whole world rather than to a specific requestor.

41. Clearly the individuals would have no expectation whatsoever that details of their dealings with any of the health services would be disclosed to any member of the public requesting that information, whether the council was confirming that the individual was known to the service or not.

42. The Tribunal has in the past considered that the expectations of an individual can be overridden where there is a 'pressing social need' for the information to be disclosed which would make a disclosure of the information fair. The Commissioner has considered this however his view is that none exists.

43. The Commissioner notes that the complainant said to the council that he wished the information as he was considering taking legal action against the individuals and knowledge of any contact that any of the individuals had had with the service would be something which should be taken into account. Where requests are made under the Act the authority is generally not expected to take account of the personal interests of the

applicant in making that request. The disclosure is considered to be global in nature and hence the personal, private interests of the requestor are disregarded for the purposes of deciding whether the disclosure is 'fair' for the purposes of the first data protection principle.

44. Although the Commissioner has considered that it would be unfair to disclose the information on the face of it, given this additional information he has however considered whether the complainant's intention to take legal action might affect that decision. Schedule 3 of the Act does highlight a relevant condition under which sensitive personal data can be disclosed under the Act. It is therefore relevant to consider whether the clear intention of the Act to allow disclosure of sensitive information under certain circumstance might affect whether the disclosure of the information in this case is 'fair' for the purposes of the first data protection principle.
45. The relevant condition under schedule 3 states that processing can be carried out where:

The processing—

- (a) is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings),*
 - (b) is necessary for the purpose of obtaining legal advice, or*
 - (c) is otherwise necessary for the purposes of establishing, exercising or defending legal rights.*
46. Whilst the Commissioner notes the complainant's concerns about the individuals and his intention to take legal action against them he considers that it is not 'necessary' for him to know the information in order to take legal action. Whilst the complainant may consider that having access to such information might facilitate his legal arguments, the basis of any legal action would be based upon the actions of the individuals. It would not be based upon any specific issues relating to their mental health.
47. To compound this, the question which the Commissioner needs to consider is not whether it is necessary for the complainant to have this information but whether it is necessary for the whole world. Clearly it would not be.
48. The Commissioner is therefore satisfied that confirming or denying whether any information is held about the individuals at the property would breach the first data protection principle.

49. The Commissioner's decision is that the council was correct to apply section 40(5)(b)(i).

Right of appeal

50. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

51. 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.
52. 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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