

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 September 2014

Public Authority: Rotherham NHS Foundation Trust

Address: Moorgate Road
Rotherham S60 2UD

Decision (including any steps ordered)

1. The complainant wants to know why Rotherham NHS Foundation Trust's current Medical Director is absent from the role, and who is undertaking the role in their absence. The Trust released information in relation to the second part of the request but withheld the first part, citing section 40(2) of the FOIA (personal data of a third person).
2. The Commissioner's decision is that Rotherham NHS Foundation Trust has correctly applied section 40(2) to the withheld information. It does not need to take any further steps.

Request and response

3. On 17 April 2014, the complainant wrote to Rotherham NHS Foundation Trust ('the Trust') and requested information in the following terms:

"An issue has been flagged up with us regarding the position of the medical director, George Thomson.

He hasn't attended any board meetings since October and has been away from work since then.

Given his remuneration recorded in the last annual report was £185,000, I would be grateful if the Trust would clarify the reason for his absence.

In addition, can you also clarify who is undertaking the role in his place."

4. The Trust responded on 17 April 2004. It released the name of the individual undertaking the role of Medical Director in Prof Thomson's absence. In relation to the first part of the request, the Trust said that it did not respond to requests for information about individuals.
5. The complainant was not satisfied with the Trust's response. The Trust's Board has been the subject of formal intervention by Monitor (the independent regulator of NHS Foundation Trusts) because of concerns about various aspects of its performance. The story, and Prof Thomson's absence, has had national and regional news coverage¹. The complainant argued that the resulting loss of public and regulatory confidence warranted a fuller explanation. They also considered that the Trust had not given sufficient weight to Prof Thomson's seniority and the amount of public money he receives as salary.
6. Correspondence followed in which the Trust provided further information about the acting Medical Director and Prof Thomson. However, the Trust continued to withhold the information concerning Prof Thomson's absence, and cited section 40(2) of the FOIA.
7. Following an internal review the Trust wrote to the complainant on 14 July 2014. It maintained its position that the part of the requested information that it is withholding is exempt from release under section 40(2) of the FOIA because it is the personal data of a third person. The Trust said that, despite Prof Thomson's senior role, the nature of the information is such that it would not be fair to disclose it. It also said that it could not provide further explanation because to do so would disclose the exempt information itself.

¹ <http://www.independent.co.uk/news/uk/home-news/nhs-trust-director-still-getting-185k-despite-not-being-at-work-9371837.html>

Scope of the case

8. The complainant contacted the Commissioner on 17 July to complain about the way their request for information had been handled.
9. The complainant repeated to the Commissioner that, given Prof Thomson's seniority as the Trust's Medical Director, and consequent salary, the reason for his absence should be made public.
10. The Commissioner has focussed his investigation on whether the Trust has correctly applied the exemption under section 40 to the requested information.

Reasons for decision

11. Section 40(2) of the FOIA says information is exempt from disclosure if it is the personal data of a third party (ie someone other than the applicant) and the conditions under either section 40(3) or 40(4) are also satisfied.
12. The Commissioner therefore first considered whether the requested information is the personal data of a third party.

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.
14. Sensitive personal data is a category of personal data that includes information about an individual's race or ethnic origin, religious beliefs, health or sexual life. It is subject to stricter regulation than ordinary personal data.
15. The Commissioner is satisfied that the disputed information – the reason why Prof Thomson has been absent – relates to that individual and that he could be identified from the information.
16. The Commissioner is therefore satisfied that the requested information does constitute the individual's personal data, within the definition at section 1(1) of the DPA. He next turned his attention to the conditions under section 40(3) of the FOIA.

The conditions under section 40(3)

17. The first condition under section 40(3)(a)(i) says that personal data is exempt from disclosure to a member of the public if doing so would contravene one of the data protection principles set out in Schedule 1 of the DPA. The Commissioner considered whether the Trust is correct when it told the complainant that it would be unfair to disclose the information and a breach of the first data protection principle: that personal data 'shall be processed fairly and lawfully...'
18. When considering whether disclosure would be unfair, and so breach the first principle, the Commissioner took three factors into account:
 - Has the individual concerned (the data subject) given their consent to disclosure?
 - What reasonable expectation does the individual have about what will happen to their personal data?
 - What might be the likely consequences resulting from disclosure?
19. Assessing fairness however, also involves balancing the individual's rights and freedoms against the legitimate interest in disclosure to the public. It may still be fair to disclose the information if there is an overriding legitimate interest in doing so (condition 6 in Schedule 2 of the Data Protection Act). The Commissioner therefore also finally considered these interests.

Has the individual given their consent to disclosure?

20. The Trust has told the Commissioner it asked Prof Thomson directly for his view on the information's disclosure, and Prof Thomson said that he did not consent to it being released.

What reasonable expectation does the individual have about what will happen to their personal data?

21. The Trust has told the Commissioner why Prof Thomson is absent from his role as Medical Director – the reason is provided in the Confidential Annex to this notice and concerns particular categories of personal data. In view of this explanation, the Commissioner is prepared to accept that Prof Thomson might reasonably expect that the reason for his absence – ie the requested information – would not be disclosed.
22. However, whether a public authority employee could reasonably expect their personal data to be released might also depend on their seniority and whether they are in a public facing role.

23. In this case, Prof Thomson has a senior role within the Rotherham NHS Foundation Trust. The complainant considered the Trust had not given sufficient weight to this or Prof Thomson's resulting salary. Typically, a Medical Director in the NHS is a member of the governing body and corporate executive team. Their role might include contributing to strategic decision making, providing professional clinical advice and interpretation, generating revenue and establishing relationships with customers.
24. Given his role and remuneration, Prof Thomson might expect to be subject to a greater level of accountability. However, as well as Prof Thomson's professional responsibilities, the Commissioner has also considered the nature of the requested information, in order to determine whether or not Prof Thomson might reasonably expect it to be released. This is in line with the Commissioner's *'Requests for Personal Data about Public Authority Employees'* guidance. This guidance confirms that there is no presumption in favour of disclosing personal data about public authority employees. Rather, a clear justification for such a disclosure must be identified.
25. As discussed at paragraph 21, the requested information in this case is personal data, of particular categories, that the Commissioner considers Prof Thomson could reasonably expect the Trust to withhold. Given the nature of the information, the Commissioner considers that the seniority of Prof Thomson's position does not outweigh this expectation.
26. The Commissioner's guidance suggests that it may also be fair to release more information about employees who are in a public facing role, such as the role of Medical Director. An individual in such a role represents their authority to the outside world - as a spokesperson or at meetings with other bodies. This role may therefore bring with it the expectation that the role-holder's personal data could be released.
27. The Trust has released some information about Prof Thomson and the acting Medical Director in response to supplementary questions from the complainant. This includes the name of the acting Medical Director, when this individual became acting Medical Director, where this was publicly reported and details of their and Prof Thomson's remuneration. The Commissioner therefore considers that the Trust has demonstrated sufficient willingness to meet its obligation to be transparent and accountable to the public about matters that have a financial consequence to the Trust, and which may erode the public's confidence in it.

What might be the likely consequences resulting from disclosure?

28. In its submission to the Commissioner, the Trust has not specified any likely consequences. However, given the fact that Prof Thomson has not consented to the information's disclosure, the Commissioner considers that it is reasonable to assume that Prof Thomson could experience a degree of distress if it were to be released. Another possible consequence is highlighted in the Confidential Annex, which the Commissioner is satisfied is credible.
29. In summary, the Commissioner is satisfied that the data subject in this case has not *consented* to the information's release; that, on balance, they could reasonably *expect* it not to be released, and that they could suffer *distress* if it were to be released. He therefore considers that the Trust is correct when it says that it would be unfair to release the requested information, and a breach of the first data protection principle.

Balancing the individual's rights and freedoms against the legitimate interest in disclosure

30. Despite the factors above, the requested information may still be disclosed if there is a compelling public interest in doing so.
31. Like all NHS Foundation Trusts, Rotherham NHS Foundation Trust is subject to routine audits and financial reviews. However, the Trust has acknowledged to the complainant and the Commissioner that there has been concern about the Trust's management, resulting in non-routine intervention by Monitor, the regulator of NHS Foundation Trusts. The Trust has told the Commissioner that, although it has undergone a period of turbulence, its management difficulties have been largely resolved and Monitor has recently confirmed that it is satisfied with the progress the Trust has made.
32. In their request for an internal review, the complainant said "*The management of the Trust has not inspired public or regulatory confidence over an extended period of time and the loss of a £185,000 a year director does warrant greater public explanation.*"
33. The Trust has told the Commissioner that there are no grounds for the inference that the Trust's decision to continue to pay Prof Thomson is improper or does not follow established policies or legal obligations. It says that the difficulties it has experienced do not include allegations of improper payments or financial impropriety.

34. As detailed at paragraph 27, other than the specific information that is the subject of this notice, the Trust has provided the complainant with all the remaining information they requested. In addition, information concerning decisions the Trust has taken about its governance arrangements is included in its Annual Report. Information about the Trust's management and governance, and Monitor's intervention, has been made publicly available through the media. And details about the enforcement action that Monitor has taken against Rotherham NHS Foundation Trust are also available on Monitor's website.
35. The Commissioner accepts that there is a genuine public interest in the Trust's past and current performance, and the difficulties it has experienced. However, it appears to the Commissioner that this is being adequately addressed through the measures outlined above and a clear justification for disclosing the withheld information, and overriding Prof Thomson's rights and freedoms, has therefore not been identified.
36. The Commissioner is satisfied that the withheld information is the personal data of a third person and that releasing it would contravene one of the conditions under section 40(3)(a)(1). It would be unfair to do so, would breach the first data protection principle and there is no legitimate public interest in its disclosure. It has not been necessary to go on to consider the conditions under section 40(4).

Right of appeal

37. 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

38. 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.
39. 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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