

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 December 2016

Public Authority: West London Mental Health NHS Trust

Address: Trust HQ
1 Armstrong Way
Southall
London, UB2 4SA

Decision (including any steps ordered)

1. The complainant has requested information about the death of an individual. Under section 40(5)(b)(i) of the FOIA West London Mental Health NHS Trust (the Trust) neither confirms nor denies that it holds this information, which it says would be the personal data of third persons.
2. The Commissioner's decision is that the Trust is correct to neither confirm nor deny that it holds the requested information, and that the exemption under section 40(5)(b)(i) is engaged.
3. The Commissioner does not require the Trust to take any steps.

Request and response

4. On 5 December 2015 the complainant made the following request for information:

'This is a Freedom of Information request relating to a former patient of Broadmoor Hospital named [redacted name], who was admitted to the hospital after being convicted of murder in November 1954, and reportedly discharged and returned to British Somaliland by October 1955. (Note that as [redacted name] was either a British subject or a British protected person he could not have been deported, but must have been voluntarily repatriated.)

[Redacted name] was born around 1920, so that he cannot yet be presumed to be dead for Freedom of Information purposes. Therefore I understand that sensitive personal data (as defined by Section 2 of the Data Protection Act) will be exempt from disclosure.

I should like to request the following non-sensitive information relating to [redacted name]:

- (1) The date of his discharge.*
- (2) Any information held about his repatriation.*
- (3) Any information held about his death.'*

5. On 7 December 2015 the Trust refused the request as 'the hospital is not willing to disclose this type of information which ...would be a breach of patient confidentiality.'
6. On 13 December the complainant queried the answer provided and on 15 December the Trust refused the request under section 40 (personal data) of FOIA.
7. On 15 December 2015, the complainant noted that the Trust did not confirm or deny that it held the requested information and offered to restrict the request to question (3) (any information held about his death):

'I think you should have no difficulty in confirming or denying that this information is held, because:

(i) if you have information that [redacted name] is deceased, Section 40 will not apply anyway, and

(ii) if you do not have any information that he is deceased, then in the circumstances of his having returned to Somaliland more than 60 years ago, nothing can be inferred from the absence of such information from your records. So the confirmation or denial that this information is held will not have the effect of conveying exempt data.'

8. The complainant chased the Trust for an answer on 1 February 2016 and the Trust responded on 25 February 2016 that 'the 100 year rule applies. Section 40 is also an absolute exemption, therefore there is no duty to confirm or deny if the information is held.'
9. On 28 February 2016 the complainant requested an internal review and this was acknowledged on 29 February 2016.
10. The Trust provided the outcome of the internal review on 15 April 2016 but this was not received by the complainant until a further copy was sent on 2 September 2016. The Trust reviewed the 5 key points made

by the complainant and stated that it could neither confirm nor deny the requested information for [redacted name]'s death under section 40 of the FOIA.

Scope of the case

11. On 9 September 2016 the complainant wrote to the Information Commissioner.
12. The Commissioner has focussed her investigation on whether the Trust is correct not to confirm or deny it holds the information that has been requested, (Q3 - any information held about his death) under section 40(5)(b)(i) of the FOIA.

Reasons for decision

13. When a public authority receives a request for information under FOIA, it normally has a duty under section 1(1)(a) of the Act to tell the requester whether it holds the information. This is called "the duty to confirm or deny". However, in certain circumstances, this duty does not apply and the public authority is not obliged to say whether or not it holds the information; instead, it can give a "neither confirm nor deny" response.
14. Section 40(5) of FOIA sets out the conditions under which a public authority can give a "neither confirm nor deny" response where the information requested is, or would be, personal data. It includes provisions relating to both personal data about the requester and personal data about other people.
15. If the information would constitute personal data relating to someone other than the requester, then the public authority does not have to confirm or deny whether it holds it if one of the conditions in section 40(5)(b)(i) or (ii) applies.
16. There may be circumstances, for example requests for information about criminal investigations or disciplinary records, in which simply to confirm whether or not a public authority holds that personal data about an individual can, itself, reveal something about that individual. To either confirm or deny that the information is held could indicate that a person is or is not the subject of a criminal investigation or a disciplinary process. If to do so would contravene data protection principles, for example because it would be unfair, then the public authority is not obliged to confirm or deny that it holds the information.

If held, would the information be personal data?

17. The Commissioner has first considered whether the requested information would be the personal data of third persons.
18. The Data Protection Act categorises personal data as data that relates to a living individual from which that individual can be identified. The Trust has stated that, if held, the information would relate to the clinical records of an identifiable individual (as named in the request).
19. It is important to note that the information must relate to a living individual. If the individual is no longer living the information is not personal data and so cannot be withheld under section 40. Therefore the Commissioner has considered whether the information in question does relate to an individual who is still living, or whether there is persuasive evidence that they are dead, or it can be assumed that they are dead.
20. For it to be safe to assume an individual is dead it is standard practice to apply a life expectancy of 100 years. If the date of the individual's birth is known then the matter is simple. Although this is a cautious approach the Commissioner accepts it is a reasonable and responsible one.
21. The complainant has provided information that the identified individual was *'born around 1920, so that he cannot yet be presumed to be dead.'*
22. Therefore, based on the 100 year rule outlined above, the named individual cannot yet be presumed dead and the Commissioner is satisfied that the requested information would be personal data. If held, it would tell the public something about the individual, namely whether or not the person had a clinical file at the Trust.

Would confirming or denying the information is held breach any of the data protection principles?

23. The Trust has said that the condition under subsection 40(5)(b)(i) applies, namely that confirming or denying it holds the information would contravene the first data protection principle – that personal data should be processed fairly and lawfully.
24. In assessing fairness, the Commissioner considers the reasonable expectations of individuals concerned and what might be the likely consequences resulting from disclosure.
25. The Trust says that confirming or denying whether the information is held would communicate whether or not a clinical record was held for the named individual:

'The fact that [redacted name] was admitted to Broadmoor was published in a newspaper at the time, however due to the nature of the Trust there is much speculation in newspapers and the wider media that individuals may or may not have been admitted to Broadmoor Hospital. The Trust cannot breach a patients confidentiality and release clinical details of their care/discharge just because it has been reported in a newspaper that the patient has been admitted. Were we to do this in these circumstances it would set a difficult precedent whereby the Trust would have to disclose sensitive patient information under the FOI Act if there had been media speculation that the person(s) were under the care of one of our many services...

Given the highly confidential nature of the services the Trust runs, including high secure Broadmoor Hospital we cannot confirm or deny holding information about named patients under the FOI Act as to do so would in itself breach our duty of confidentiality.'

26. The Commissioner notes here that there may be situations in which it could be argued that giving the confirmation or denial to a requester would not necessarily contravene data protection principles because the requester already knows or suspects that the public authority holds the information.
27. The FOIA is motive and applicant 'blind', and the test is whether the information can be disclosed to the public at large, not just to the requester. Therefore an authority can only disclose or confirm or deny it holds information under the FOIA if it could disclose it, or confirm or deny it holds the information, to any member of the public who requested it.
28. The Commissioner recognises that individuals have a reasonable expectation that a public authority, in its role as a responsible data controller, will respect confidentiality in this regard.
29. Given the sensitivity of any clinical details under a mental health service, the Commissioner considers that disclosure in this case could lead to an intrusion into the private life of the individual concerned and the consequences of any disclosure could cause damage and distress to that party.
30. In conclusion, the Commissioner is satisfied that confirming or denying that the requested information is held would be unfair and thus contravene the first data protection principle. Therefore the Commissioner finds that the Trust is entitled to refuse the request on the basis of section 40(5)(i)(b) of the FOIA.

31. As the Commissioner has determined that it would be unfair to confirm or deny if the information is held, it has not been necessary to go on to consider whether this is lawful or whether one of the schedule 2 conditions is met.

Other Matters

32. The complainant has asked the Commissioner to consider any procedural shortcomings in dealing with the request.
33. Section 10 of the FOIA provides that a public authority should respond to a request for information within 20 working days. The Commissioner has found that the Trust answered the initial request promptly but found a breach to the follow up question of 15 December 2015 as the Trust did not respond within 20 working days.
34. For clarity, there is currently no statutory time frame for completing an internal review. However, the Code of Practice under section 45 of the FOIA provides that internal reviews should be undertaken "promptly". The Commissioner's guidance is that internal reviews should generally not take longer than 40 working days.
35. The Commissioner is satisfied that the Trust took reasonable steps to try to send the email with the outcome of the internal review to the complainant's address (after 33 working days) and cannot comment on the possible reasons for an email not arriving.

Right of appeal

36. 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

37. 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.
38. 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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Wycliffe House
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