Reference: FS50092819

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 22 February 2007

Public Authority: University Hospital Birmingham NHS Foundation Trust ('the Trust')
Address: Trust Headquarters
University Hospital Birmingham NHS Trust
PO Box 9551
Main Drive
Queen Elizabeth Medical Centre
Birmingham
B15 2PR

Summary

The complainant submitted a request to the public authority for the names, job titles, working patterns and various salary details of a number of doctors working on a specific hospital ward. The public authority initially considered all of the requested information to be exempt under section 40. However, during the course of the Commissioner's investigation the public authority released the doctors' names, job titles and salary bands. The Commissioner's decision is that the public authority is correct to continue to rely on section 40 as a basis to refuse to release details of the doctor's gross salaries, additional payments and average number of hours each doctor worked. With regard to the information about the additional payments and average number of hours worked, the public authority also explained to the Commissioner that to provide this information would exceed the appropriate cost limit and therefore was also refusing to provide this information on the basis of section 12. The Commissioner has investigated this claim and accepts that this information could not be provided within the cost limit. However, the Commissioner has decided that when originally refusing the request, the public authority provided the complainant with an inadequate refusal notice.

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. On the 4 October 2005 the complainant submitted a request to the Trust for names and salary details of doctors employed at one of the Trust's hospitals. The complainant specifically requested:

> *'1. Names and job titles of all doctors who commenced employment on or between 5 October 2004 and 5 October 2005 who work at Specialist Registrar (SpR) level within the Elderly Care section of the Selly Oak Hospital, Birmingham.*
>
> *2. Date that each of the post-holders identified above commenced employment within Elderly Care.*
>
> *3. Average number of hours contracted per week for each of the people identified above.*
>
> *4. Salary details for each of people identified above (including current gross monthly salary, any regular payments made in relation to unsociable hours etc)*
>
> *5. Pay band, pay point and pay spine for each post-holder above'.*

3. A representative of the Trust wrote to the complainant on 5 October 2005 and explained that the Trust was refusing to fulfil the request in its entirety because 'to comply with your request would be a breach of the Data Protection Act and also falls under one of the absolute exemptions in the FOI Act (see section 40 of the FOI Act'.

4. On the 5 October the complainant informed the Trust that he did not agree with the decision to refuse his request and asked for details of the Trust's internal review process. The complainant explained to the Trust once he had details of the internal review process, he wished to forward the reasons why he considered the disclosure of the requested information lawful under the Act.

5. The Trust contacted the complainant on 19 October 2005 and stated that 'I have to re-iterate that the personal information you request is subject to the Data Protection Act. I consider release of this information would contravene that Act and I must therefore turn down your request. There is no internal review mechanism for refusals under the Data Protection Act'. The Trust suggested to the complainant that if he remained unhappy with the decision to refuse the request he should contact the Commissioner.

The Investigation

Scope of the case

6. On 19 October 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

7. The complainant explained that he did not agree with the Trust's decision to refuse the request on the basis of section 40. The complainant made reference to the Commissioner's guidance on section 40 and argued that he did not accept that the staff's privacy would be affected by disclosure and also argued that he considered it entirely legitimate for an NHS Trust to have to account to the public for the money it spends on our behalf.

8. The complainant also alleged that the Trust failed to provide him with an adequate refusal notice. The complainant specifically cited the Trust's failure to explain why the exemption contained at section 40 applied, the failure to provide details of any procedures the Trust had for dealing with complaints about requests and the failure to explain the applicants right under section 50 of the Act to apply to the Commissioner for a decision on how his request had been handled.

Chronology

9. The Commissioner wrote to the public authority on 27 November 2006 in order to discuss its handling of the complainant's request. The Commissioner explained to the Trust that if a request for third party data is refused on the basis of section 40, this must be because disclosure would breach one of the data protection principles. The Commissioner therefore asked the Trust to explain which of the principles it considered would be breached by the disclosure of the requested information and why. In order to assist the Trust with its submissions, the Commissioner provided it with a copy of his guidance on section 40.

10. The Commissioner suggested to the Trust that whilst he accepted that there are no hard and fast rules for the application of section 40, in line with recent decision notices on similar cases the Commissioner would usually expect some of the requested information to be disclosed, e.g. the names and job titles of the doctors and their pay bands. Therefore, the Commissioner asked the Trust to review its decision to withhold all of the information on the basis of section 40.

11. The Commissioner also asked the Trust to confirm whether it had given the staff in question any advice regarding the possible disclosure of the requested information and whether any of the staff had expressly refused to the release of any of the information covered by the request.

12. The Trust wrote to the Commissioner on 6 December 2006 and acknowledged receiving his earlier letter.

13. The Trust provided the Commissioner with a substantive response to his questions on 21 December 2006. In this response the Trust explained that it had reviewed the original request and the Commissioner's letter and now considered that the request should not have been refused in its entirety. The Trust explained that it was now prepared to disclose the following information to the complainant: names and job titles, the date post holders commenced employment within elderly care, the contracted hours worked by each doctor and the pay band and salary scales. With its letter of 21 December the Trust attached a copy this information for the Commissioner's reference.

14. The Trust also explained that it was not prepared to release the average number of hours worked for each doctor, the current monthly gross salary or any payments made in relation to unsocial hours on the basis that to release this information would contravene the data protection principles set out in schedule 1 of the Data Protection Act ('DPA'). The Trust also explained that in order to provide the information relating to the average number of hours worked per week and the information relating to extra payments made to each registrar would exceed the appropriate limit specified in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations'. Therefore, the Trust was refusing to disclose this information on the basis of section 12 of the Act.

15. In its letter of 21 December the Trust also explained that each specialist registrar is asked to complete a personal emergency form with details such as their address, name of kin etc and at the bottom of this form is a section headed confidentiality. This section explains that occasionally the Trust may be asked to share this information with third parties. The Trust explained that of the seven doctors covered by the scope of the request, only one had signed the form giving consent and the remaining six had not completed a form.

16. The Commissioner contacted the Trust again on 12 January 2007. In this letter the Commissioner asked the Trust to provide the complainant with the information it was now prepared to disclose. (The Trust emailed this information to the complainant on 17 January 2007 and copied this email to the Commissioner). Once again, the Commissioner asked the Trust to identify which of the data protection principles it considered would be breached by the disclosure of information the Trust was still withholding.

17. In order that the Commissioner could make an assessment as to whether section 12 had been applied correctly the Commissioner also asked the Trust to provide a detailed breakdown of the estimated costs involved in processing this part of the request. The Commissioner asked that this breakdown was made with reference to the four activities that the Regulations allow public authorities to charge for, namely: determining whether it holds the information, locating the information or a document containing it, retrieving the information or a document containing it, and extracting the information from a document containing it.

18. The Trust replied to the Commissioner on 24 January 2007. The Trust explained that it believed that the disclosure of the withheld information would breach principles 1, 2 and 6 of the DPA. With regard to principle 1, the Trust argued that it believed that it would be unfair to disclose details of individuals gross salaries

and would be unlawful as the data subject is not aware of the purposes for which the data is to be used for. With regard to principle 2, the Trust argued that the data was held only for employment purposes only and therefore to disclose this information would breach the inherent principle that the information will not be processed in any matter incompatible with that purpose or those purposes. With regard to principle 6, the Trust argued that to process this information would not be acting in accordance with the data subjects who generally would not expect information on their gross salary to be released.

19. The Trust also provided the Commissioner with a breakdown of the estimated costs involved in establishing the average number of hours worked and any payments made in relation to unsocial hours. For one record, i.e. the data relating to one doctor, the Trust estimated that the time taken to locate, retrieve, and extract the information was as follows:

- Finding the individual on the old payroll system **5 minutes**
- Looking through the history noting any changes to their payroll reference **15 minutes**
- Collating the microfiche for the relevant years the information is needed (spans 2 financial years) **15 minutes**
- Using the microfiche viewer to look at each month/week and note information requested i.e. gross salary, basic hours, extra hours, unsocial hours, unsocial payments **120 minutes**
- Add the number of hours recorded together to obtain hours each month/week and then obtain average number of hours contracted per week **15 minutes**
- Total time taken in minutes: **170 minutes or 2 hours 50 minutes**

20. Therefore, the Trust estimated that to provide the information requested for the seven records would be just under 20 hours in total and therefore cost more than the appropriate limit of £450.

Analysis

Procedural matters

Section 12

21. Section 12 of the Act removes the obligation on public authorities to comply with section 1 of the Act if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

22. The appropriate limit, as prescribed by the Regulations, is £600 for Central

Government and £450 for other public authorities, with staff time calculated at a rate of £25 per hour. When calculating whether the appropriate limit is exceeded, authorities can take account of the costs of determining whether the information is held, locating and retrieving the information, and extracting the information from other documents. They cannot take account of the costs involved with considering whether information is exempt under the Act. For the public authority to legitimately cite section 12 in this case, therefore, it needs to demonstrate that the time needed to comply with the request exceeds 18 hours.

23. Having considered the evidence put forward by the Trust, the Commissioner accepts that the requested information cannot be easily and quickly retrieved. The Commissioner accepts that the information requested is not stored on a single database and therefore the requested information cannot be easily retrieved by simply searching a database. Rather the information is stored on a microfiche which provides an analogue rather than digital means of storing data and consequently, the Commissioner accepts that it takes longer to locate and retrieve information on such a system. The Commissioner also accepts that because of the way the data is stored it is not possible to make the searching process quicker.

24. Accordingly the Commissioner accepts that to comply with the request for the details of all seven doctors would exceed the appropriate limit.

25. However, it is clear to the Commissioner that if the request only covered six doctors then the cost of providing this information could be brought within the appropriate limit. This is based on the fact that if it takes the Trust 2 hours 50 minutes to process the information for one doctor's record, then to process a request for all six doctor's would take 17 hours which equates to a cost of £425. Usually, in cases such as this the Commissioner considers that section 16 of the Act places a duty on public authorities to provide the applicant with advice and assistance so that the request can be amended and brought within the cost limit. Clearly, in this case by simply providing the details of six, rather then seven doctors, the Trust could have fulfilled this request within the cost limit.

26. However, as is detailed below the Commissioner has concluded that the details of the average number of hours worked for each doctor and the payments made in relation to working unsocial hours should not be disclosed on the basis of the exemption contained within section 40. Consequently, even if the cost of fulfilling the request was brought within the cost limit, the information would be exempt from disclosure under Act.

Section 17

27. Section 17 of the Act details what information a public authority must provide to a complainant when refusing to disclose some or all of the information requested. The text of the relevant parts of section are included in the legal annex to this notice. The complainant alleged that the refusal notice provided by the Trust on 5 October was deficient for a number of reasons.

28. The complainant alleged that the Trust failed to fulfil the duty at section 17(1)(c) which requires a public authority to state why, if not otherwise apparent, the exemption applies. The Commissioner believes that the Trust's response of 'to comply with your request would be a breach of the Data Protection Act and also falls under one of the absolute exemptions in the FOI Act (see section 40 of the FOI Act' is not a particularly clear nor detailed explanation of why the Trust considered the requested information exempt under section 40. However, this response did technically fulfil the requirements of 17(1)(c) by correctly explaining that the exemption at section 40 applies because disclosure would breach the DPA.

29. However, the Commissioner accepts that the Trust failed to fulfil the duty imposed by sections 17(7)(a) and 17(7)(b) of the Act which require a public authority to provide the complainant with details of the public authority's internal review procedure and details of the right to complain to Commissioner respectively. The refusal notice of 5 October made no reference to the Trust's complaints procedure nor did it make any reference to the complainant's right under section 50 of the Act to complain to the Commissioner for a decision about how the Trust had handled his request. The Trust's statement that there was no internal review mechanism for refusals under the Data Protection Act indicates a general confusion over the relationship between the two Acts and a public authority's obligations under section 17.

Section 40

30. Section 40(2) provides an exemption for information which is the personal data of any third party, where disclosure would breach any of the data protection principles contained in the Data Protection Act 1998. (The relevant sections of section 40 are included in the legal annex attached to this notice).

31. In order to rely on the exemption provided by section 40, the information being requested must therefore constitute personal data as defined by the DPA. The DPA defines personal information as:

> *"…data 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…"*

32. The Commissioner is satisfied that the information requested by the complainant is personal data within the meaning of section 1(1) of the DPA as it is data which relates to a living individual (namely the seven doctors covered by the request).

The first data protection principle

33. The first data protection principle requires that the processing of personal data should be fair and lawful and that personal data should not be processed unless at least one of the conditions in Schedule 2 of the DPA is met.

34. In considering whether the disclosure of the requested information would be fair the Commissioner has considered the reasonable expectations of the data subjects as to how the information would be used by the Trust and what the affect of disclosure would be on the data subjects.

Disclosure of gross salaries

35. The Commissioner accepts that employees of public authorities should be open to scrutiny and accountability because their jobs are funded by the public purse. Furthermore, the Commissioner considers that employees who interact with the public on a daily basis, (including the doctors covered by this request) should expect to have some personal data about them to be released, e.g. names and job titles. The Commissioner's guidance suggests that 'if the information requested consists of names of officials, their grades, jobs or functions or decisions made in their official capacities, then disclosure would normally by made'.

36. Furthermore, the Commissioner has decided in a number of decision notices that senior executives of public authorities should expect that details of their gross salaries would be disclosed under the Act. (see decision notices FS50062124 and FS50093734.) The Commissioner reached these conclusions on the basis that for some time the salaries of senior executives have been included in the financial statements of public authorities. The Commissioner also believes that as people in such senior positions are responsible for policy decisions affecting the public and the expenditure of public funds they should expect a greater degree of scrutiny of their role and accountability over their actions.

37. However, the Commissioner recognises that not all staff should be subject to such a level of scrutiny and draws a distinction between what information should be released about junior staff compared to what information should be disclosed about more senior staff. This is line with the Commissioner's own guidance on this section 40 which suggests that 'it may also be relevant to think about the seniority of staff: The more senior a person is the less likely it will be unfair to disclose information about him or her acting in an official capacity would be unfair'.

38. Therefore in order to establish if the doctor's covered by this request would have had a expectation that details of their gross salaries would be released, the Commissioner established how senior the doctor's were in terms of the medical hierarchy of the hospital. The Commissioner understands that a specialist registrar is a doctor who is in his or her final stages of training towards becoming a consultant. The British Medical Association website explains that a specialist registrar is classed as a junior doctor and they are always under, though not necessarily directly, the supervision of a senior doctor. (source: http://www.bma.org.uk/ap.nsf/Content/glossdoctors#job%20titles).

39. The Commissioner therefore accepts that in this case, the doctors involved were relatively junior in terms of clinical staff of the hospital; they had not yet completed their training and were not of a level of experience that allowed them to work completely independently. Furthermore, it is clear that the doctors covered by this

request did not have the same level of managerial responsibility as senior executives of public authorities who are directly responsible for making wide ranging policy decisions which could affect many thousands of people and directly controlling the expenditure of large sums of public money.

40. Furthermore, the Commissioner has considered the advice given to the data subjects by the Trust relating to the disclosure of their personal information to third parties. As is noted above in paragraph 15, six of the seven doctors covered by the request did not fill in the form which included a section on the possible disclosure of their personal information to third parties. With regard to the one doctor who did fill in the form consenting to his personal information being released to third parties, the Commissioner notes that this form actually contained emergency contact information e.g. next of kin contact, and not salary details. The Commissioner does not accept that by filling in this form the doctor in question was consenting to the disclosure of his specific salary details, only information about his emergency contact details. Furthermore, if this information was disclosed the Commissioner does not believe that this acceptance of disclosure can be read as disclosure under the Act, only to third parties that the Trust considers may need the doctor's emergency contact details.

41. Therefore, the Commissioner believes that given the relatively junior role of the data subjects, the Commissioner considers that they would have had a reasonable expectation that details of their exact salary details would not be disclosed and therefore to do so would be unfair.

42. The Commissioner has also considered the affect that disclosing details of the gross salaries would have on the data subjects. The Commissioner believes that a clear distinction can be made between affects of disclosure of the salary band for a specialist registrar and the disclosure of the data subject's gross salary. The Commissioner believes that the disclosure of the exact salaries would reveal much more about the each individual's personal financial situation than the disclosure of the salary bands would. Whilst the Commissioner considers that senior executives of public authorities have to accept the affect that revealing the exact details of their salary would have, he does not accept it would be fair for employees in more junior positions, such as the data subjects in this case, to have their privacy invaded by their disclosure of their gross salaries.

Disclosure of regular payments made for working unsocial hours and disclosure of average hours worked

43. As explained in the preceding paragraphs the Commissioner accepts that the disclosure of each doctor's gross salary would be unfair because each doctor has a reasonable expectation that details of their gross salary will not be released and moreover, to disclose details of the gross salaries would be an unfair invasion of their privacy. On the basis of both of these reasons the Commissioner also believes that the disclosure of any extra payments made to each doctor would also be unfair. As with the disclosure of the gross salaries, disclosure of these payments would reveal more specific information about the financial position of each individual than disclosure of their salary bands would.

44. The Commissioner has also considered whether the information about the average number of hours worked per doctor could be disclosed without breaching any of the data protection principles. The Commissioner has concluded that it would be unfair to release details of how many hours, on average, each doctor worked per week. By releasing this information the Trust would essentially be revealing how many hours of overtime each doctor worked in addition to the 40 hours per week they were contracted to work. The Commissioner believes that such a disclosure would be unfair because it could lead to unsubstantiated and adverse conclusions being drawn in relation to a particular doctor. For example, this information could be used to incorrectly argue that one doctor works harder than another or that one doctor is putting his or her patients at risk by working too many hours. Moreover, the Commissioner believes that there is no legitimate public interest in how may extra hours individual public sector employees work.

45. Furthermore, the Commissioner believes that using the salary bands and the average number of hours each doctor worked, it would be possible to infer, with a reasonable degree of accuracy, how much each doctor received in extra payments. Through a simple internet search the Commissioner has established that the average overtime rate for junior doctors is an overtime supplement of 50% (source: http://www.nhscareers.nhs.uk) Therefore, on the basis that information about the average number of hours each doctor has worked could be used to calculate the amount of extra payments each doctor has received, the Commissioner believes that the disclosure of this information would be unfair.

46. The Commissioner considered whether it would be possible for the Trust to disclose an average number of hours worked by the group of doctors in question. As the group is as large as seven, this would prevent any personal data being disclosed. The Commissioner acknowledges that it could be argued that there is a public interest in knowing to what extent the Trust relies upon the overtime of junior doctors to operate its hospitals. However, based upon the information above in paragraphs 21 to 26, the cost of calculating the average number of hours worked for the group in question would exceed the appropriate cost limit. Therefore, the Commissioner has not pursued the possibility of disclosing the average number of hours worked for the group in question any further.

47. In light of the above the Commissioner believes that to disclose the information requested would breach the fairness element of the first data protection principle and therefore the exemption provided by section 40(2) of the Act is engaged. As the Commissioner has decided that the exemption is engaged on the basis that the first principle would be breached, he has not considered the Trust's assertion that second and the sixth principle would also be breached.

The Decision

48. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

49. With regard to the request for the information concerning the average number of hours worked and details of extra payments made, the Commissioner has decided that the Trust were entitled to rely on section 12 as a basis to refuse this request.

50. Furthermore, with regard to the details of average number of hours worked, payments made in relation to working extra hours and details of gross salaries, the Commissioner has decided that the Trust was correct to refuse disclosure on the basis of exemption contained at section 40, as disclosure would have been in breach of the first data protection principle.

51. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

52. The Trust failed to provide the complainant with an adequate refusal notice and therefore failed to fulfil its duty at section 17 of the Act.

53. With regard to the information about:

- Names and job titles
- Dates post holders commenced employment within the elderly care department
- Pay band and salary scale
- Contracted hours

54. The Commissioner has decided that the Trust were incorrect to rely on the exemption contained at section 40 of the Act as a basis to withhold this information and in doing so breached section 1 of the Act.

Steps Required

55. Although the Commissioner decided that the Trust were incorrect to rely on section 40 as a basis to withhold some of the information requested, during the course of the Commissioner's investigation this information was disclosed to the complainant and therefore the Commissioner requires no further steps to be taken.

Right of Appeal

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56. 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@dca.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 22nd day of February 2007

Signed ……..

Graham Smith
Deputy Commissioner

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

Legal Annex

Section 17

Section 17(1) provides that -
"A public authority which … 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(7) provides that -
"A notice under (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."

Section 40

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)."