

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 24 August 2011

Public Authority: St George's Healthcare NHS Trust
Address: Blackshaw Road
London
SW17 0QT

Summary

The complainant made a request to St George's Healthcare NHS Trust (the Trust) for copies of all compromise agreements the Trust has entered into with doctors of any grade and the reasons why those compromise agreements were entered into. The Trust provided three compromise agreements to the complainant however they contained a number of redactions made under section 40(2) of the Act. The Commissioner considers that the redactions under section 40(2) of the Act were correctly made in this case.

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 5 February 2010 the complainant requested the following information:
"Please provide copies of all compromise agreements you have entered into with doctors of any grade. Please also provide a list of exploratory or illustratory issues covered by the compromise"

agreements (ie. the reasons the compromise agreements were entered into)."

3. The Trust provided a response to the complainant however this was not dated. The Trust refused to provide the information the complainant requested relying upon the exemptions contained at section 36, section 40(2) and section 41 of the Act.
4. The complainant requested an internal review of the Trust's decision on 24 March 2010. The Trust wrote to the complainant with the details of the result of the internal review it had carried out (this was also undated). The Trust upheld its original decision.

The Investigation

Scope of the case

5. On 4 March 2011 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 whether the Trust had dealt with his request in accordance with the Act.
6. During the course of the Commissioner's investigation three compromise agreements were provided to the complainant however redactions were made to this information under section 40(2) of the Act. The Commissioner will therefore specifically consider whether or not the Trust was correct to make the redactions under section 40(2) of the Act.

Chronology

7. On 10 May 2011 the Commissioner wrote to the Trust to ask for further submissions in relation to the application of the exemptions in order to withhold the requested information.
8. On 26 May 2011 the Trust responded to the Commissioner. It explained that the wrong internal review response had been sent to the complainant. It explained that the result of the internal review had actually been to confirm that three compromise agreements were held relevant to the scope of the request and

that these could be provided to the complainant with a number of redactions made under section 40(2) of the Act.

9. The correct internal review response was sent to the complainant on 10 June 2011.
10. On 19 July 2011 the Commissioner contacted the Trust to discuss some of the redactions made.
11. On 2 August 2011 Trust provided the complainant with another copy of the three compromise agreements with some of the original redactions removed.

Analysis

Exemptions

Section 40(2)

12. 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."

13. 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),”

14. In this instance the withheld information includes the names of the parties to the compromise agreements, the dates of those agreements and other information such as job titles, employment dates or the reasons why the compromise agreements were entered into. Also the appendices attached to the compromise agreements which include documents such as agreed references or similar were also withheld. This is information which relates to living individuals who could be identified from this information if it were disclosed into the public domain. The names of the parties to the compromise agreements would certainly identify the identity of the data subjects. Furthermore dates, job titles, the reasons for entering into the compromise agreements and the documents contained in the appendices may assist those with local knowledge to link the redacted or withheld information with an individual who is known to have worked at the Trust. Therefore the Commissioner considers that the withheld information in this case does constitute the personal data of those individuals.
15. 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, 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”. Furthermore at least one of the conditions in Schedule 2 should be met.
16. In reaching a decision as to whether disclosure of the requested information would contravene the first data protection principle the Commissioner has considered the following: -

Likely Expectation of the Data Subject

17. The Commissioner considers that the data subjects would have a strong expectation of confidentiality because confidentiality is expressly provided for within the text of the compromise agreements.
18. The Commissioner does not consider that the data subjects would have expected their names, job titles, relevant dates, the

reasons for entering into the compromise agreement or the documents contained in the appendices, from which they would be identifiable, to be disclosed into the public domain.

The effect disclosure would have on the Data Subject

19. The Commissioner's Awareness Guidance 1 (Section 40 Personal Information), states that public authorities 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."
20. The Commissioner considers that disclosure of the withheld information may cause harm and distress to the data subjects in a personal capacity. This is because terminating employment is an issue which is inextricably linked to an individual's personal life.

The Legitimate Public Interest

21. The Commissioner considers that the legitimate public interest has to some extent been met in this case as the Trust has disclosed the number of compromise agreements it has entered into with doctors and has disclosed the sums paid under those agreements through disclosure of the redacted agreements.
22. The Commissioner therefore considers that the Trust was correct to make the redactions under section 40(2), in line with the copy of the compromise agreements sent to the complainant on 2 August 2011.

Procedural Requirements

Section 1(1)

23. Section 1(1) of the Act provides that: -

“Any person making a request for information to a public authority is entitled –

- i. to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- ii. if that is the case, to have that information communicated to him.”

24. As the Trust did not provide a redacted copy of the compromise agreements within the statutory time for compliance, it breached section 1(1)(b) in this case.

Section 10

25. Section 10(1) of the Act provides that: -

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

26. The Trust failed to comply with section 1(1)(b) within the statutory time for compliance, therefore it breached section 10(1) of the Act in its handling of the request.

The Decision

27. 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:

- Section 40(2)

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

Reference: FS50380673

- Section 1(1)(b)
- Section 10(1)

Steps Required

28. The Commissioner requires no steps to be taken.

Right of Appeal

29. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

30. 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.
31. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 24th day of August 2011

Signed

Pamela Clements

Group Manager, Complaints Resolution

Information Commissioner's Office

Wycliffe House

Water Lane

Wilmslow

Cheshire

SK9 5AF

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (iii) section 41, and
 - (iv) section 44"

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 10(2) provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

Section 10(3) provides that –

“If, and to the extent that –

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

Section 10(4) provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

Section 10(5) provides that –

“Regulations under subsection (4) may –

- (c) prescribe different days in relation to different cases, and
- (d) confer a discretion on the Commissioner.”

Section 10(6) provides that –

“In this section –

“the date of receipt” means –

- (e) the day on which the public authority receives the request for information, or
- (f) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

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-

- (g) it constitutes personal data which do not fall within subsection (1), and
- (h) 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. the 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 the 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."