

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 February 2014

Public Authority: Department of Health
Address: Richmond House
79 Whitehall
London
SW1A 2NS

Decision (including any steps ordered)

1. The complainant requested information about a report produced for the National Health Service (NHS) Appointments Commission. The Department of Health refused to disclose the information, citing section 40(1) (personal data of applicant) and section 40(2) (third party personal data) of the FOIA as its basis for doing so. Following an internal review, the Department disclosed some of the previously withheld information but maintained its position on the remainder, applying the condition under section 40(3)(a)(i) (breach of the data protection principles).
2. The Commissioner's decision is that the Department of Health is correct to withhold the information under section 40(2) by virtue of section 40(3)(a)(i).
3. The Commissioner does not require the public authority to take any further action.

Request and response

4. On 19 April 2013, the complainant wrote to the Department of Health (DH) and requested information in the following terms:

'I request a copy of a report submitted by [named individual] to the Appointments Commission on 26 January 2012. I understand a copy of this report is contained in files archived by the Appointments Commission. To assist you in locating the document, I attach a redacted version I received following a subject data access request. I am now requesting an unredacted version through the Freedom of Information Act.'

5. The DH responded on 17 May 2013. It refused to provide the requested information, citing section 40(1) and section 40(2) of the FOIA as its basis for doing so.
6. Following an internal review the DH wrote to the complainant on 19 July 2013. It revised its position slightly and disclosed some of the information that it had previously withheld under section 40(2), in the version of the report it had provided to the complainant in response to the subject access request mentioned in the above request. The DH maintained its original position in relation to the remainder of the information and in addition, cited the condition at section 40(3)(a)(i).

Scope of the case

7. The complainant contacted the Commissioner on 20 August 2013 to complain about the way their request for information had been handled.
8. In its response to the complainant of 17 May, the DH had advised that the personal data of the complainant, contained in the report, was exempt from disclosure under section 40(1) of the FOIA. And in fact, this information had already been correctly disclosed to the complainant as a result of subject access request they had made under the Data Protection Act (DPA) – see paragraph 6.
9. The Commissioner therefore focussed his investigation on whether the Department of Health was correct to apply section 40(2) by virtue of the condition at section 40(3)(a)(i) to the withheld information.

Background

10. The information that is the subject of this request is third party personal data contained in a confidential report. This was prepared by a consultant contracted to the NHS following interviews with the staff members involved. The report's purpose was to provide a view, and advice, on concerns raised about a secret ballot to elect an interim Chair to an NHS corporate support body.

Reasons for decision

10. Section 40(2) of FOIA says that information is exempt from disclosure if it is the personal data of a third party (ie someone other than the requester) and the conditions under either section 40(3) or 40(4) are also satisfied.
11. The Commissioner therefore first considered whether the requested information is the personal data of a third party.
12. The DPA defines personal data as '...data which relate to a living individual who can be identified from those data...'.
13. In its submission to the Commissioner, the DH argued that releasing the NHS staff members' names would lead to those individuals being identifiable and the Commissioner agrees. He is therefore satisfied that some of the information, including reference to one of the contributor's wider family, is the personal data of those staff members.
14. Having decided that some of the requested information is third party personal data, the Commissioner then turned his attention to the conditions under section 40(3).
15. 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 DH was correct when it argued in its submission that disclosing the information would breach the first data protection principle: that personal data 'shall be processed fairly and lawfully...'.
16. When considering whether disclosure would be unfair, and so breach the first principle, the Commissioner took three factors into account:
 - What reasonable expectation do the individuals have about what will happen to their personal data?

- Have the individuals given their consent to disclosure?
 - What might be the likely consequences resulting from disclosure?
17. Assessing fairness however, also involves balancing the individuals' 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. The Commissioner therefore also finally considered these interests.
 18. Expectation: Whether an employee might reasonably expect to have their personal data released depends on a number of factors. These include whether the information relates to the employee in their professional role or to them as individuals, the individual's seniority or whether they are in a public facing role.
 19. The information in this case concerns senior NHS staff members in their professional capacity. The Commissioner is satisfied however, that the third parties named in the report might still reasonably expect that the DH would not release their personal data, and so make it publicly available.
 20. This is because the matter that was the subject of the report was a sensitive, personnel matter. In its submission to the Commissioner, the DH has said that those staff contributing to the report did so on the understanding that the information they provided would be treated confidentially. This has been supported in separate written statements to the Commissioner by the consultant who authored the report and a contributor to it. The Commissioner has also seen a copy of the report and notes that it is clearly marked 'Strictly confidential'.
 21. Consent: The DH has told the Commissioner that the third parties named in the report have not consented to their personal data being released.
 22. Consequences of disclosure: In the DH's submission to the Commissioner, the contributor to the report argues that disclosure may inhibit DH officials' freedom to take advice before making a decision, resulting in poorer quality decision-making.
 23. In their submitted statement, the consultant maintains that if the information given confidentially were to be released, it could damage contributors' reputations and cause them distress. They also observe that the personal data of one of the individuals includes sensitive information about their family health and domestic circumstances. Disclosure would therefore also be likely to expose those individuals' identities.

24. Legitimate interest in disclosure to the public: Given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) has been cited is in favour of protecting the individual's privacy. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure which would make it fair to do so.
25. In their correspondence with the DH, the complainant cited the 2007 Information Tribunal decision in the cases of House of Commons v ICO/Norman Baker MP¹. They argued that this decision suggested that, under the FOIA, public officials could not expect privacy; rather they should expect their public actions to be subject to scrutiny. The Commissioner has included this line of reasoning in his consideration of the general public interest arguments, and what would be fair in the circumstances of this case.
26. While the Commissioner accepts that there is a legitimate interest in overall transparency in the way a public authority such as the Department of Health conducts its business, there is no presumption that this should automatically take priority over personal privacy.
27. The Commissioner and Information Tribunal judge each case on its merits. As the complainant is aware, for example, in the House of Commons/Baker case ref FS50072319, the Commissioner decided that disclosing personal data about MPs' travel claims would be fair. However, this was because:
- MPs had not received assurance that information additional to that included in the House of Commons publication scheme would not be disclosed in the event of an individual request under the FOIA.
 - Disclosing this additional information would not impinge on MPs' personal privacy as the requested information related to individuals acting in an official as opposed to a private capacity.
 - Related information was already in the public domain.
 - Under Schedule 2 condition 6 of the DPA, there was considered to be a legitimate public interest in disclosing the information.
28. The requested information in the case that is the subject of this notice is clearly of private interest to the requester. However, the Commissioner is not convinced that this information, relating as it does to a local and

¹ [EA/2006/0015 & 0016](#)

specific, personnel matter, is of sufficient wider public interest to warrant overriding the protection of the third party personal data of those concerned.

29. For this reason, the Commissioner considers that the possible arguments for disclosing the specific information in this case:

- scrutiny of public officials' actions;
- public authority accountability; and
- the seriousness with which the Appointments Committee had treated events around the secret ballot

are not as compelling as those put forward for protecting the individuals' personal data, namely that:

- the contributors could reasonably expect their personal data would not be disclosed because the report's preparatory meetings were conducted in confidence, and the final report is marked 'Confidential';
- contributors to the report, other than the complainant, have not consented to their personal data being released; and that
- the possibility exists that disclosing the third party personal data will cause a degree of reputational damage to the individuals concerned. It may also cause distress to them, and wider, family members not directly involved in the matter that is the subject of the report.

30. The Commissioner is satisfied that on balance, the legitimate public interest would not outweigh the interests of the data subjects and that it would not be fair to disclose the requested information in this case. Consequently, the Commissioner considers that section 40(3)(a)(i) could be applied to this request, and that the DH is correct to withhold the information. He did not therefore go on to consider any of the other conditions under section 40(3) or 40(4).

Other matters

31. Schedule 2 of the DPA – the Commissioner agrees with the DH that disclosure would be unfair in this case, and so the requested information is exempt under section 40(2) of the FOIA. In its correspondence with the complainant and its submission to the Commissioner, it was therefore not necessary for the DH to consider whether disclosing the information would also meet one of the conditions under Schedule 2 of the DPA – this further step is only needed when disclosure is found to be fair.

Right of appeal

32. 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

33. 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.
34. 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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