

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 April 2014

Public Authority: Moorfields Eye Hospital NHS Foundation Trust
Address: City Road
London
EC1V 2PD

Decision (including any steps ordered)

1. The complainant requested information about a theatre list for a specific date.
2. The Commissioner's decision is that Moorfields Eye Hospital incorrectly relied on section 40(2) (third party personal data) of the FOIA to withhold the requested information but did correctly apply section 40(1) to withhold the complainant's own personal data. He also considers that the Hospital breached section 1 (duty to confirm or deny information is held), section 10 (response within 20 working days) and section 16 (duty to provide advice and assistance).
3. He upholds the complaint but does not require the Hospital to take any further action as it has now provided a response to the complainant which the Commissioner considers fulfils the scope of the request.

Request and response

4. On 7 February 2012, the complainant had private eye surgery at Moorfields Eye Hospital. They were not satisfied with aspects of the treatment that they had received and had submitted a service complaint to the Hospital.
5. As part of the subsequent correspondence with the Hospital, on 10 February 2013, the complainant requested information in the following terms:

"...I want a copy of the number of patients and their planned operations (not the names of patients) for the 7th February 2012..."

6. The Hospital did not respond to this request. On the advice of the Commissioner, on 18 June 2013 the complainant requested the information again, providing more clarification:

"I would like to see the theatre list for the 7th February 2012. This should include...

The theatre's start time.

The number of patients on the list that day.

The complexities of their surgery (e.g. one or two hours allowed)

Obviously I do not expect patients' identities or names, dates of birth or any personal details: just the facts"

7. Having seen much of the correspondence connected to the complainant's wider, service complaint, it was clear to the Commissioner that the complainant wanted to know how many procedures their doctor had carried out or supervised on the day of their own eye surgery.
8. The Hospital responded on 20 June 2013. It refused to provide the requested information, saying:

"...it is not possible to provide you with the personal details of these patients, for reasons of patient confidentiality."

9. Under the Freedom of Information Act, third party personal information is exempt from disclosure under section 40(2). However, the Hospital did not cite any FOIA exemptions in its response.
10. By this point, the complainant had contacted the Commissioner to complain about the way their request for information had been handled. On his advice, the complainant requested an internal review on 2 September 2013. The Hospital sent them the outcome of its internal review on 23 September. It upheld its original position, saying:

"However, a list would contain personal details about other patients, and for reasons of patient confidentiality it is not possible to provide you with this."

11. Following contact from the Commissioner, on 2 January 2014 the Hospital advised him that it had provided the complainant with the requested information on 26 November 2013.

12. The Hospital had disclosed a redacted copy of the named doctor's afternoon NHS theatre list for 7 February 2012 (page 2 of a 2 page document), which listed two procedures. In addition it had told the complainant in a letter dated 26 November 2013 that the named doctor had carried out or supervised only two NHS procedures on the day in question, and that the complainant had been that doctor's only patient on his private theatre list for the evening of 7 February 2012.
13. The complainant was not satisfied that the Hospital had disclosed all the relevant information because they had not received page 1 of the 2 page document, or the evening theatre list.
14. On 17 March 2014, in response to questions he had asked the Hospital on 6 February, the Hospital told the Commissioner that the doctor in question had not performed any operations on the morning of 7 February 2012 – indeed, no surgery had taken place in the morning. The Commissioner inferred that page 1 of the 2 page document sent to the complainant would have detailed the morning session and that the Hospital had not disclosed page 1 to the complainant because the doctor had not operated then.
15. The Hospital also told the Commissioner that the evening theatre list was exempt from disclosure under the FOIA under section 40(1). The complainant would need to make a subject access request under the Data Protection Act to have sight of the information contained in this particular theatre list. And that since they were, at that point, working in a private capacity, the doctor would be the data controller for that information.
16. The Commissioner has focussed his investigation on the Hospital's application of the exemptions under section 40(1) and 40(2) of the FOIA to the requested information. He has also considered whether the Hospital has breached sections 1, 10 and 16 in its handling of the request more broadly.

Reasons for decision

17. Section 1 of the FOIA says that a public authority must tell a requester whether it holds the information they have requested and, if it does, it must communicate that information to them.
18. Technically, section 1 provides a right of access to information rather than copies of documents. Similarly, section 11(1)(a) provides a right to request copies of the information, not copies of documents. This means that neither section 1 nor section 11 provide an explicit right to receive copies of documents.

19. However, a request for a copy of a document will generally be a valid request for all of the information contained within that document (including visual format, design, layout etc). In practice, in the vast majority of cases the only way to communicate all of the information recorded in a document (ie the only way to comply with section 1) will be to provide a copy of the document.
20. It will not be sufficient to rephrase the document or provide an outline or summary of its contents unless the applicant has specifically expressed a preference for a digest or summary under s11(1)(c).
21. In the interests of resolving the request swiftly, the Hospital could have explained to the complainant that the information they had requested was held across three separate lists. As well as disclosing a copy of the afternoon theatre list, it could also have provided the complainant with a copy of the morning list for 7 February 2012, with an explanation as to why it was blank, if this was the case.
22. Section 10 of the FOIA says that a public authority must respond to a request for information within twenty working days of receiving the request. In this case, the complainant requested the information on 20 February 2013. After intervention from the Commissioner, the Hospital provided an initial response on 20 June 2013 and did not provide all the information it held until 17 March 2014, after repeated requests and reminders from the Commissioner.
23. Therefore the Commissioner finds that the Hospital has breached section 10(1) of the FOIA; it did not provide all of the information it held until more than 12 months after the request was made.
24. Section 16 of the FOIA places a duty on the public authority to provide advice and assistance to the person who has requested information from it.
25. The Hospital was aware of the complainant's wider service complaint, and the feature that emerged from it detailed at paragraph 7. It was also likely to be was aware, even if the complainant was not, that the complainant's request for "the theatre list" (singular) would potentially not capture all the theatre sessions the doctor concerned was involved with on the day in question. Moreover, the complainant had requested information related to 7 February 2012, not the afternoon of 7 February specifically.
26. The Commissioner recognises that the Hospital had to consider any possible implications arising from the doctor concerned carrying out procedures both under the NHS and privately.

27. In the circumstances however, the Commissioner considers it would have been expedient for the Hospital to have approached the complainant's request more broadly. The Hospital should have disclosed any appropriate information about all the relevant theatre lists for 7 February not only the list for the afternoon session; providing a clear explanation where information was not held, and its reasons for withholding any information. Had it done so, the Hospital would have met the requirement under the FOIA to assist the requester.
28. This is supported by the Secretary of State's Code of Practice on section 16¹, which advises that public authorities can assist requesters to clarify their request by:

"providing an outline of the different kinds of information which might meet the terms of the request;"
29. In the event, the complainant felt it necessary to make repeated requests for information and clarification to the Hospital and the Commissioner which prevented their initial information request being resolved swiftly and efficiently. Disclosing information in a piecemeal way may also have the effect of eroding trust and confidence in a public authority, more generally.
30. Section 40(1) of the FOIA says that information is exempt from disclosure if it is the personal data of the requester. Since the evening theatre list only contained information about the complainant, the Commissioner considers that the Hospital was correct to refuse to disclose this particular element of the information request, under section 40(1).
31. Again however, under the duty placed on public authorities under section 16 of the FOIA, the Commissioner considers that the Hospital should have recognised this element of the request as a request for personal information, at the time of the complainant's original request in June 2013. The Hospital had another opportunity to recognise this as a subject access request when it corresponded with the complainant on 26 November 2013. The Hospital could have avoided significant delay in disclosing this information had it handled this element of the information request under the Data Protection Act at either of those points.

¹ [Secretary of State for Constitutional Affairs' Code of Practice on the discharge of public authorities' functions under Part I of the Freedom of Information Act 2000](#)

32. 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).
33. The Data Protection Act (DPA) defines personal data as ‘...data which relate to a living individual who can be identified from those data...’
34. The names of those individuals on the theatre list in question is certainly therefore the personal data of those individuals. It follows that the Hospital would have been correct to rely on this exemption to prevent disclosure if the complainant had requested this information specifically.
35. However, the complainant did not. They had requested the number of people on the theatre list, and information about timings. They had expressly said that they did not want any of the listed individuals’ personal data.
36. Issues of patient confidentiality, which the Commissioner appreciates are extremely important to the NHS, were therefore not relevant to this particular request, as the Hospital appreciated when it finally released a copy of the afternoon theatre list with the personal data redacted.

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: 0116 249 4253

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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