

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 January 2016

Public Authority: Cwm Taf University Health Board
Address: Ynysmeurig House
Navigation Park
Abercynon
CF45 4SN

Decision (including any steps ordered)

1. The complainant has requested information in respect of requests by South Wales Police (SWP) for copies of the medical notes of a named individual. Cwm Taf University Health Board refused to confirm or deny whether it holds relevant information by virtue of section 40(5) of the FOIA. The Commissioner's decision is that the Cwm Taf University Health Board has correctly relied on section 40(5) of the FOIA to refuse to confirm or deny whether any relevant information was held. The Commissioner does not require the public authority to take any steps.

Request and response

2. On 20 April 2015, the complainant wrote to Cwm Taf University Health Board ('the Health Board') and requested the following information from its Mental Health Unit at the Royal Glamorgan Hospital:

"On what occasions have South Wales Police and/or Professional Standards Department officers/staff requested and/or received copies of the medical notes for [named individual]?"

My defence team are aware that the medical records were obtained on Friday 22 February 2013 and collected by [named officer from SWP].

We are also aware that the records were obtained in early 2012, and seek to verify that precise date from the information you hold. [Complainant's emphasis]

3. The Health Board responded on 29 April 2015. It informed the complainant that it could not confirm whether medical records were requested or received by SWP.
4. Following an internal review the Health Board wrote to the complainant on 20 May 2015. It stated that after consideration:

...it has been decided to uphold the initial decision not to disclose the occasions that South Wales Police and /or Professional Standards Department officers/staff have requested and /or received copies of the medical notes for the individual specified in your original request."
5. The Health Board further confirmed that it was relying on the first principle of the Data Protection Act 1998 ('the DPA') as it considered disclosure would not be fair or lawful.

Scope of the case

6. The complainant contacted the Commissioner on 29 June 2015 to complain about the way his request for information had been handled. He confirmed to the Commissioner that he does not accept there are any data protection issues as he was not requesting information regarding the treatment of the named individual, or the names of any officers requesting copies of medical records.
7. The complainant has further stated that he does not accept disclosure of the details he requested would result in intrusion or that the relationship between the Trust and its service users would be affected.
8. The scope of the Commissioner's investigation is to consider the Health Board's reliance on section 40(5) of the FOIA.

Reasons for decision

Section 40 – personal information

9. Section 1 of the FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities. These are:
 - the duty to inform the applicant whether or not requested information is held and, if so,
 - the duty to communicate that information to the applicant.

10. Section 40(5)(b)(i) 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 that Act were disregarded, or...."*

11. Therefore, for the Council to be correct in relying on section 40(5)(b)(i) to neither confirm nor deny whether it holds information falling within the scope of the complainant's request the following conditions must be met:

- Confirming or denying whether information is held would reveal personal data of a third party; and
- That to confirm or deny whether information is held would contravene one of the data protection principles.

12. In order to reach a view regarding the application of this exemption, the Commissioner has therefore firstly considered whether confirming or denial of the existence of relevant information does in fact constitute personal data as defined by section 1(1) of the Data Protection Act 1998 ('the DPA').

Is the requested information personal data?

13. Personal data is defined at section 1(1) of the DPA as:

"personal data means data which relate to a living individual who can be identified-

- (a) from those data,*
- (b) from those data and other information which is in the possession of, or likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."*

14. When considering whether the information is personal data, the Commissioner has taken into consideration his published guidance: *"Determining what is personal data"*.¹
15. On the basis of this guidance, there are two questions that need to be considered when deciding whether disclosure of information into the public domain would constitute the disclosure of personal data:
 - (i) *"Can a living individual be identified from the data, or, from the data and other information in the possession of, or likely to come into the possession of, the members of the public?"*
 - (ii) *"Does the data 'relate to' the identifiable living individual, whether in personal or family life, business or profession?"*
16. The Commissioner notes that confirmation or denial of relevant information would entail confirming or denying whether South Wales Police have accessed a named individual's medical notes. The Commissioner notes that as the request relates to a specified living individual, and confirmation or denial of whether a third party agency, including a police force would reveal something of significance regarding the named individual. Indeed, as individual medical records fall within the definition of sensitive personal data, whether an external organisation has accessed those records could potentially be considered sensitive personal data.
17. The Health Board has argued that confirmation or denial of the disputed information would breach the first data protection principle.

Would confirmation or denial contravene the first data protection principle?

18. The first data protection principle requires that the processing of personal data be fair and lawful and,
 - a. at least one of the conditions in schedule 2 is met, and
 - b. in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.

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http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/what_is_data_for_the_purposes_of_the_dpa.pdf

19. In the case of personal data, both requirements (fair and lawful processing, and a schedule 2 condition) must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data principle.

Would disclosure be fair?

20. In his consideration of whether confirmation or denial of relevant information would be fair, the Commissioner has taken the following factors into account:
- a. The reasonable expectations of the data subject.
 - b. Consequences of disclosure.
 - c. The legitimate interests of the public

The reasonable expectations of the data subject

21. The Commissioner's guidance regarding section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life.² Although the guidance acknowledges that there are no hard and fast rules it states that:

"Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned."

22. The Commissioner's guidance therefore makes it clear that where the information relates to the individual's private life (i.e. their home, family, social life or finances) it will deserve more protection than information about them acting in an official or work capacity (i.e. their public life).

²http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_specalist_guides/PERSONAL_INFORMATION.ashx

23. In this particular case, the information that the complainant seeks consists of dates of potential access to medical records of a named individual by South Wales Police.
24. The Commissioner considers that an individual would reasonably expect that information confirming whether or not their medical records had been accessed by a police force would remain confidential.

Consequences of disclosure

25. The Commissioner has therefore gone on to consider the consequences of such confirmation or denial and believes that such a disclosure has the very real potential to cause damage or distress to the data subject.

The legitimate public interest in disclosure

26. Notwithstanding the data subjects' reasonable expectations, or any damage or distress caused to them by such confirmation, it may still be fair to confirm or deny the existence of relevant information if it can be argued that there is a more compelling public interest in disclosure.
27. The Commissioner notes that the complainant has a personal interest in obtaining this information. However he does not consider that there is a more general public interest in the confirmation or denial of the existence of this information, and would point out that disclosure under the FOIA is to the world at large, rather than to any one individual.
28. In weighing up the balance between the reasonable expectations of the data subject and the consequences of such confirmation or denial, against any legitimate public interest in disclosure, the Commissioner has concluded that the balance is weighted in favour of non-disclosure. Consequently, he is satisfied that the Health Board appropriately refused to confirm or deny whether it held relevant information, and in so doing, relying on section 40(5)(b)(i) of the FOIA.

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,
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

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.

Signed

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