

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 July 2016

Public Authority: Berkshire NHS Foundation Trust
Address: 2nd and 3rd Floor
Fitzwilliam House
Skimped Hill Lane
Bracknell
RG12 1LD

Decision (including any steps ordered)

1. The complainant has requested information about particular mileage expenses. Berkshire NHS Foundation Trust ('the Trust') disclosed some relevant information and withheld other information. The Trust says the withheld information is the personal data of a third person and so exempt from disclosure under section 40(2) of the FOIA.
2. The Commissioner's decision is that the Trust has correctly applied section 40(2) to the information it is withholding. He does not require the Trust to take any steps.

Request and response

3. On 7 November 2015, the complainant wrote to the Trust and requested information in the following terms:
*"1) A copy of Recruiting and Managing disabled staff guidance
2) Mileage details submitted by the previous post holder (Compliance & IT Audit Manager) and submitted to HMRC for a 12 month period prior to his departure."*
4. The complainant clarified Q2 of his request on 24 November 2015 as follows:
"I need the total mileage and the breakdown of dates and locations"

5. The Trust responded on 7 December 2015. It said that it does not hold the specific information the complainant requested at Q1 and referred him to policies published online that it considered would be relevant.
6. With regard to Q2 of the request, the Trust disclosed the total mileage figure for which a previous employee had submitted expenses claims in the 12 months prior to his departure. The Trust said that specific information regarding dates and locations is exempt from disclosure under section 40(2) because it is the personal data of a third person.
7. Following an internal review the Trust wrote to the complainant on 11 December 2015 and upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 29 February 2016 to complain about the way his request for information had been handled. On 22 April 2016 the complainant confirmed that that the focus of his complaint is the Trust's response to Q2 of his request. He is not satisfied because the Trust has not disclosed a breakdown of the total mileage figure it released ie the date that journeys were undertaken and where the journeys were to.
9. The Commissioner has focussed his investigation on whether the Trust is correct to withhold some of the relevant information it holds with regards to Q2 of the request, under section 40(2) of the FOIA.

Reasons for decision

Section 40(2) – third person personal data

10. The Trust acknowledged in its submission to the Commissioner that, in its response to the complainant of 7 December 2015, it disclosed the total mileage for which the previous post holder submitted claims in the twelve months prior to his departure. The Trust confirmed that it considers that a breakdown of the dates and destinations is covered by the section 40(2) exemption.
11. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of a third person, ie someone other than the requester, and the conditions under either section 40(3) or 40(4) are also satisfied.
12. The Commissioner has therefore first considered whether the withheld information is the personal data of a third person, namely a former

employee of the Trust - the previous holder of the post of Compliance and IT Audit Manager. The Trust has explained to the Commissioner that this individual held the post prior to a recruitment exercise in which the complainant participated.

Is the information personal data?

13. The Data Protection Act (DPA) says that for data to constitute personal data, it must relate to a living individual, and that individual must be identifiable.
14. The information the Trust is withholding under section 40(2) are the dates that the former employee of the Trust took work-related journeys that he subsequently submitted expenses claims for, and the destinations of those journeys. The Commissioner is satisfied that this information can be said to 'relate' to that former employee. As far as the Commissioner is aware, the individual concerned is a living individual. The Commissioner has gone on to consider whether that individual can be identified from this information.
15. In its submission to the Commissioner, the Trust says that the name of the former employee is information that is in the public domain. It follows that information about his travel claims can be linked to him as an identifiable individual. The withheld information therefore has 'biographical significance' because it describes the individual's whereabouts on particular dates and times. The Trust has not provided any web links to the information it says is in the public domain or explained where it can be accessed. However the Commissioner is prepared to accept that the former employee's name is already published and the individual concerned can be identified from the withheld information. The withheld information is therefore the personal data of that particular individual.
16. Having decided that the requested information is third party personal data, the Commissioner has then turned his attention to the conditions under section 40(3) of the FOIA

Are the conditions under section 40(3) satisfied?

17. 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 has considered whether the Trust is correct when it argues in its submission to him that disclosing the information would breach the first data protection principle: that personal data '*shall be processed fairly and lawfully...*'.

18. In assessing fairness, the Commissioner considered whether the individual concerned had given his consent to disclosure, his reasonable expectations and what might be the likely consequences resulting from disclosure.
19. The Trust has told the Commissioner that the complainant brought an employment tribunal claim against the Trust with regard to the recruitment exercise for the post of Compliance and IT Audit Manager, referred to above. The exercise was the subject of an earlier request from the complainant which resulted in a complaint to, and decision by, the Commissioner: [FS50595553](#), which the complainant appealed [EA/2015/0260](#).
20. With regard to the present request, the Trust says that some of the withheld information was disclosed to the complainant in the context of this employment tribunal. The Trust maintains that the additional information disclosed during the tribunal proceedings is exempt from disclosure under the FOIA. It says that the information was disclosed for the purposes of the tribunal proceedings on the basis that it was relevant to the issues between the complainant, as claimant, and the Trust as the defendant. The distinction between information disclosed at an employment tribunal and information disclosed to the world at large under the FOIA is discussed in EA/2015/0260 at paragraph 23.
21. The Trust confirmed that it did not disclose the locations of the journeys in the context of the tribunal proceedings. The Trust has provided the Commissioner with a copy of the information it has disclosed and the Commissioner notes that this information includes a breakdown of mileage figures into individual journeys but it does not include the location of the journeys. The Trust remains of the view that this information falls within section 40(2) of the FOIA and that disclosing it into the public domain generally would breach data protection principles.
22. The Trust has told the Commissioner that it has not sought consent for disclosure from its former employee. The Trust considers that as this individual left the Trust's employment (now some time ago), contacting that person would be an intrusion into his private life, and unjustified in the circumstances.
23. With regard to the former employee's reasonable expectations, the Trust accepts that the withheld information relates to his working life and not his private or family life. However the Trust says that the information contains detailed information about his whereabouts at particular times and it also includes his home address, which *does* relate to his private life.

24. The Trust does not consider the post of Compliance and IT Audit Manager to be a particularly senior one within the Trust, such that the individual should expect a high degree of transparency about the detail of his actions in his working role: it is a management role but one well below Board level.
25. The Trust says it has been unable to identify any wider public interest in the withheld information that would justify its release into the public domain. There is no indication that the travel expense claims in question were not validly made and paid within the scope of the Trust's expenses policy and standard public sector/NHS accounting requirements. In addition, the Trust has told the Commissioner that the employment tribunal referred to above recently issued a decision rejecting the complainant's claim in full. The Trust considers that this confirms that there is no wider public or legitimate interest in disclosing the withheld information to provide accountability for the Trust's performance.
26. On the basis of the above, the Trust considers that the former employee would reasonably expect that his personal data would not be released into the public domain. It would not be fair to release it and would breach the first data protection principle. The Trust has not referred to any possible consequences from releasing the information but the Commissioner considers that it is likely that the former post-holder would feel a degree of distress if this were to happen.
27. The Trust has confirmed that it has considered whether any of the conditions in Schedule 2 of the DPA might permit the information to be disclosed and concluded that no conditions apply.
28. Irrespective of whether some of the information the Trust is withholding under the FOIA has been disclosed to the complainant as a result of his employment tribunal, having considered the Trust's submission and in the absence of any compelling evidence from the complainant, the Commissioner is satisfied that the Trust is correct to withhold the information in question under section 40(2). This is because it is the personal data of a third person and, under section 40(3) it would not be fair to release it into the wider world. It has not been necessary to consider the conditions under section 40(4).

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

Pamela Clements
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