

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 January 2017

Public Authority: Parliamentary and Health Service Ombudsman
Address: Millbank Tower
Millbank
London SW1P 4QP

Decision (including any steps ordered)

1. The complainant has requested information about particular clinical advisors. The Parliamentary and Health Service Ombudsman (PHSO) has withheld the information which it says is personal data of third persons and therefore exempt from disclosure under the FOIA, under section 40(2).
2. The Commissioner's decision is that the withheld information is personal data and that PHSO is correct to withhold it under section 40(2) by virtue of section 40(3)(a)(i). The Commissioner does not require PHSO to take any steps.

Request and response

3. On 11 March 2016, the complainant wrote to PHSO and requested information in the following terms:

"I am formally making a subject access request under the data protection act for all the evidence you have used in compiling this report. Please supply the names and contact details for

[1] The Investigator signing off this report

[2] The Medical advisor (with GMC number)

[3] The Nursing advisor (With NMC number)

[4] The individual who's evidence you rely upon in witnessing the event of [Named Individual] signing the statement regarding the DNR notice contact details, GMC/NMC number if applicable and contact details for

Service"

4. PHSO responded on 7 April 2016. It released information in respect of part 1 of the request and said it did not hold the information requested at part 4.
5. PHSO said the information the complainant has requested at parts 2 and 3 is exempt from disclosure under section 40(2) of the FOIA because it is the personal data of third persons. PHSO provided the complainant with the qualifications and background of each of these individuals.
6. Following an internal review PHSO wrote to the complainant on 25 August 2016. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 24 August 2016 to complain about the way his request for information had been handled.
8. On the basis of her decision in a number of similar cases, the Commissioner explained to the complainant that her preliminary assessment of his complaint was that PHSO had correctly applied section 40(2) to the withheld information. The complainant preferred to progress to a decision notice.
9. The Commissioner's investigation has focussed on whether PHSO is correct to apply section 40(2) of the FOIA to the information it has withheld under this exemption.
10. In its submission to the Commissioner, the PHSO has indicated that it considers the exemption at section 44 of the FOIA (prohibitions on disclosure) also applies to the withheld information. The Commissioner has been prepared to consider this exemption, if necessary.

Reasons for decision

11. The Commissioner has not been provided with the details but the background to this case appears to be a complaint the complainant brought to PHSO about treatment his father received at a particular hospital. The complainant is not satisfied with the investigation PHSO undertook, which included seeking advice from a medical and a nursing advisor.

12. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of third persons, ie someone other than the requester, and the conditions under either section 40(3) or 40(4) are also satisfied.

13. The Commissioner has therefore first considered whether the information PHSO has withheld is the personal data of third parties.

Is the information personal data?

14. 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.

15. The information withheld in this case is the name and registration number of a medical advisor and a nursing advisor. The Commissioner is satisfied that this data relates to living individuals and that the individuals can be identified from it. She is therefore satisfied that the withheld information is the personal data of third persons.

Would disclosure breach one of the conditions under section 40(3)?

16. The first condition under section 40(3)(a) of the FOIA says that personal data of third persons is exempt from disclosure if disclosing it would contravene one of the data protection principles.

17. The Commissioner has considered whether PHSO is correct when it argues in its submission to her that disclosing the information would breach the first data protection principle: that personal data 'shall be processed fairly and lawfully...'. PHSO maintains that disclosing the withheld information to the public at large would be unfair.

18. In assessing fairness, the Commissioner considers whether the information relates to the data subject's public or private life; the data subject's reasonable expectations about what will happen to their personal data and whether the data subject has consented to their personal data being released.

19. The Commissioner has noted that the information relates principally to the individuals' public life. PHSO has told the Commissioner that it does not have the consent of the data subjects (that is, the medical advisor and the nursing advisor) to release their names and registration numbers to the wider world.

20. With regard to the data subjects' expectations, in its submission PHSO has drawn the Commissioner's attention to section 9.4 of its service model, published on its website, which states that PHSO will not usually

name clinical advisors. In addition, PHSO says that the clinical advisors did not make the final decision on the complainant's complaint.

21. PHSO says that the recourse to complain about a decision made or service provided is through PHSO's internal complaints system, and that judicial review is another mechanism available to complainants. Neither mechanism requires a complainant to know the name or contact details of a specialist who provided advice in relation to their complaint. PHSO argues that the individuals concerned would therefore reasonably expect that their personal data would not be disclosed.
22. In his correspondence with the Commissioner, the complainant has argued that expert advisors *are* decision makers as they interpret the specialist and nursing information which the investigator draws on to reach a conclusion. He also considers that expert advisors should be held accountable for their comments and decisions, where those decisions are detrimental and damaging to someone referred to in the report.
23. The complainant considers that the clinical advisors involved in the investigation in question made a perverse and dishonest finding and that should he wish to take legal action against the advisor(s), use of the section 40(2) exemption prevents him from exercising his legal right to sue this expert in his or her own name. The complainant considers he should be able to determine whether that individual has an unblemished record in the area on which he or she is making an expert decision and that this requires their name and/or registration number.
24. The Commissioner has considered the complainant's arguments but is satisfied that releasing the personal information in this case would be unfair to those individuals. While their advice may have informed the final decision on the complainant's complaint to PHSO, the Commissioner does not agree with the complainant that these individuals made that decision. The Commissioner notes that the individuals concerned have not consented to the release of their personal data. Based on PHSO's submission, she has concluded that the two advisors would reasonably expect that their personal data would not be disclosed to the world at large, under the FOIA.

The Commissioner is satisfied that it would not be fair to release the requested information, and that to do so would breach the first data protection principle.

Balancing the individuals' rights and freedoms against the legitimate interest in disclosure

25. Despite the factors above, the requested information may still be disclosed if there is a compelling public interest in doing so.
26. PHSO acknowledges that there is some value in providing the name and GMC number of clinical advisors to the public. It says this mainly relates to allowing members of the public to satisfy themselves that the advisors are on the register of medical practitioners. However, PHSO argues that this has to be balanced against the intrusion that disclosing the information would have on the clinical advisors themselves.
27. PHSO has also confirmed that it provided the complainant with details of the individuals' qualifications and that this satisfies the legitimate interest in knowing that PHSO's clinical advisors are suitably qualified to undertake the roles to which they are appointed.
28. Finally, PHSO has told the Commissioner that clinical advisors provide advice to it on the basis that their details will not be routinely disclosed. While names relate to both professional and private lives, PHSO maintains that disclosing a name opens up the route to a potential invasion of privacy. It says its clinical advisors practise in the NHS and disclosing their names could potentially result in them being approached in relation to PHSO business at their place of work or even where they live. In addition, they are left vulnerable to the possibility of an online campaign against them.
29. The Commissioner infers from this that if it were known that PHSO discloses the names of its clinical advisors, this might also make it more difficult for PHSO to obtain the services of such advisors. This would be to the detriment of its business operations and, ultimately to members of the public who seek PHSO's services.
30. The complainant has told the Commissioner that he considers it is in the public interest to identify the clinical advisors where they have made, or supported, accusations against him where those accusations are not supported by evidence or fact. While the Commissioner appreciates that this matter is of interest to him, she disputes that the names of the clinical advisors in the investigation in question is of any wider public interest, such that it would outweigh the legitimate interests of those advisors.

31. As previously referenced, the Commissioner has also noted her decisions in a number of similar cases involving PHSO, for example: FS50576766¹, FS50553963². These involved requests for the names of particular PHSO clinical advisors and in these cases, the Commissioner found that this information was exempt under section 40(2).
32. To conclude, the Commissioner accepts PHSO's arguments. She is satisfied that the withheld information is the personal data of third persons and that releasing it would contravene one of the conditions under section 40(3)(a). The Commissioner considers it would be unfair to do so, would breach the first data protection principle and that there is no legitimate wider public interest in its disclosure.
33. Since the Commissioner is satisfied that a condition under section 40(3) has been satisfied, she has not gone on to consider the conditions under 40(4). Neither has it been necessary to consider the exemption under section 44.

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560287/fs_50576766.pdf

² https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1043305/fs_50553963.pdf

Right of appeal

34. 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

35. 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.
36. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF