

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 June 2019

Public Authority: South Eastern Health and Social Care Trust

Address: Lough House,
Church Street
Newtownards
BT23 4AS

Decision (including any steps ordered)

1. The complainant has requested the name of anyone making allegations about a post graduate diploma awarded by Belfast Cognitive Therapy Centre Ltd (BCTC). South Eastern Health and Social Care Trust (the Trust) refused to provide the name(s), citing the exemptions in section 41 of the FOIA - provided in confidence and section 40 - personal information.
2. The Information Commissioner's decision is that the requested information is not exempt under section 41 but is exempt from disclosure by virtue of section 40 of the FOIA. The Commissioner does not require any steps to be taken.

Request and response

3. On 22 December 2017 the legal advisers to the complainant stated that a previous FOIA request on 28 July 2017 (ref RFI 21089) from the complainant for information including the name of an individual who had made complaints and allegations in relation to BCTC had been refused under section 41. The complainant was now taking legal advice regarding the allegations and therefore the legal advisers requested the following information:

'The name of anyone who made or is associated with making any allegation about the title or any other matter pertaining to the post graduate diploma in cognitive therapy awarded by Belfast Cognitive Therapy Centre Ltd.'

4. The legal advisers to the complainant stated that the exemption previously relied upon does not apply to this application and referred to Section 35 (2) of the Data Protection Act 1998 (DPA):

'2. Personal data are exempt from the non-disclosure provisions where the disclosure is necessary (a) for the purpose of or in connection with any legal proceedings (including prospective legal proceedings), or (b) for the purpose of obtaining legal advice, or is otherwise necessary for the purposes of establishing, exercising or defending legal rights.'

5. As legal advisors to their client, the information is required to provide legal advice to the client in relation to the allegations and any potential legal proceedings. Given that release of the information under Section 35(2) is not release to the public at large and is for the purpose of legal advice, the legal advisers argued that disclosure would not have an unjustified adverse effect on third party data subjects.
6. On 13 February 2018 the Trust refused to provide the information citing section 41(1) - provided in confidence. The Trust explained that the individual(s) were contacted directly to seek their permission to release the information and this consent was denied. The Trust explained that it wished:

'to maintain an environment of openness and a culture whereby it is acceptable to raise concerns at any level in the organisation. As a public authority, the Trust would encourage employees to report genuine concerns so that these can be investigated and we can initiate corrective action where necessary and appropriate. The issues raised regarding the BCTC were processed under the Trust's Whistle Blowing Policy/procedure which protects staff anonymity. This is a vital component of the process, as staff may be reluctant to raise genuine concerns if their anonymity could not be protected...

It is the Trust's view that section 35(2) of the DPA is not applicable as it relates to personal data whilst the Trust is relying on the exemption at section 41 of FOIA...even if section 35(2) were applicable, it is unclear how the provision of the information you requested is necessary for the purpose of providing legal advice particularly as the Trust is the legal entity which retains the information and the information emanated from Trust employees.'

7. After contacting the Information Commissioner, the complainant herself requested an internal review on 26 October 2018.
8. The Trust responded to this request for an internal review on 15 November 2018. It explained that this request followed a previous request (ref RFI 21089) for the same information from the complainant herself on 28 July 2017 and responded to by the Trust on 6 September 2017. A review of the decision was requested on 6 September 2017 and

on 26 October 2017, the Trust provided the outcome of the internal review. It upheld the initial decision to withhold the above information under section 41 of the FOIA.

9. The Trust had also considered the same information request under the DPA and withheld the information under section 7(4).
10. The Trust concluded: *'As a review has already been undertaken, the Trust is not obliged to consider a further review as it is our belief that the above named exemptions still apply.'*

Scope of the case

11. The complainant contacted the Commissioner on 24 August 2018 to complain about the way her request for information had been handled. After the internal review was completed the case was accepted on 29 November 2018.
12. The Commissioner notes that this is, in effect, a repeated request for the names of anyone who made allegations about the qualification in cognitive therapy awarded by BCTC. As part of its submission to the Commissioner, the Trust also cited section 40 (3)(a)(i) - personal information.
13. Therefore, the Commissioner will first focus her investigation on whether the Trust was entitled to rely upon the exemption at section 41 to withhold the names in this case. The Commissioner will only go on to consider section 40 if the Trust is not entitled to rely on section 41.

Reasons for decision

Section 41 – information provided in confidence

14. Section 41(1) of the FOIA states that:

"Information is exempt information if –

- a) it was obtained by the public authority from any other person (including another public authority), and*
- b) the disclosure of the information to the public (otherwise that under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*

Was the information obtained from another person?

15. The Trust provided the Commissioner with the withheld information which includes one or more names who raised concerns about the qualification awarded by BCTC.
16. Having viewed the withheld information, the Commissioner was not convinced that section 41 could be successfully applied in this case as the information appeared to be provided by employee(s) of the Trust and the issue seems to have been discussed within the Trust as part of the normal employee/employer relationship.
17. The decision notice https://ico.org.uk/media/action-weve-taken/decision-notices/2013/790960/fs_50444438.pdf covers this at paragraph 19:

'Guidance notes prepared by the Ministry of Justice indicate that, when the employee is acting in the normal course of employment, information is not usually being 'obtained' by the public authority from the employee:

Section 41 may apply where disclosure would breach a duty of confidence which a public authority owes to an employee in their private capacity (other exemptions may also apply, in particular section 40 – personal information). On the other hand, if the information is disclosed in the course of employment, when an employee is acting on behalf of the public authority and solely in the capacity of employee, there will be no duty of confidentiality for the purposes of section 41.

The Commissioner is not bound to follow this guidance but he found it persuasive on the facts of this matter.'

18. Therefore, the Commissioner sought further information from the Trust. The additional information showed that the initial concern had been raised by Trust employee(s) and was later escalated by the General Municipal Boilermakers (GMB) Union on behalf of Trust employee(s). The Trust's Whistleblowing procedures were triggered. The Trust provided a copy of its Whistleblowing policy which explicitly provides confidentiality to employee(s) raising concerns.
19. The Commissioner considers that it is possible that the nature of the relationship between the Trust and its employees changes when the GMB Union is involved. If the withheld information is provided by the GMB Union in its role of supporting the staff members then the information could be considered to be provided by a third party. However, the Commissioner has only been provided with one document from the GMB Union which is the letter escalating the issue that had been raised 6 weeks earlier. Therefore, the Commissioner has made a

finely balanced judgement that the requested names relate to Trust employee(s) and the relationship is not changed by the later involvement of the GMB Union. They are not third parties to the Trust and are not exempt under section 41. The Commissioner has gone on to consider the application of section 40.

Section 40 - Personal information

20. The public's right of access to the personal data of third parties is in effect governed by the Data Protection Act. At the time the request was made and dealt with by the Trust the relevant Data Protection Act was the 1998 Act. Since that time the Data Protection Act 2018 has come into force and section 40(2) of the FOIA has been amended to accommodate the changes it has introduced. However the Commissioner's role is to determine whether the Trust correctly applied the legislation that was in force at the time it was handling the request in February 2018.
21. At that time section 40(2) of the FOIA provided that a public authority is entitled to refuse a request for information which constitutes the personal data of someone other than the person making the request, if disclosing that information would breach any of the data protection principles set out in Schedule 1 of the Data Protection Act 1998 (the DPA).

Section 40(2)

22. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

“personal data” means data which relate to a living individual who can be identified –

- (a) from those data, or
 - (b) from those data and other information which is in the possession of, or is 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.’
23. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

Is the information personal data?

24. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
25. In this case, it is clear that the requested name(s) are personal data and therefore fall within the definition of 'personal data' of the DPA.
26. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the data protection principles.

Would disclosure breach the Data Protection Principles?

27. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness.
28. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual, the potential consequences of the disclosure and whether there is legitimate public interest in the disclosure of the information in question.

Reasonable expectations and Consequences of disclosure

29. In the circumstances of this case the Commissioner understands that the complainant is specifically interested in the name(s) of anyone who made any allegation about the qualification in cognitive therapy awarded by BCTC.
30. Disclosure is unlikely to be fair if it would have unjustified adverse effects on the individual(s). Although employees may regard the disclosure of personal information about them as an intrusion into their privacy, this may often not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life.
31. The Commissioner notes that the Trust considers this to be confidential information relating to a concern raised under its Whistleblowing procedures (SET/HR(18)2014): section 1.0 states '*the Public Interest Disclosure (Northern Ireland) Order 1998 provides employees with protection against victimisation should they reasonably and in good faith*

report such concerns ("blow the whistle")' and section 4.0 states 'if staff request that their identity should not be disclosed, the organisation will not disclose it without their consent.'

32. The Trust stated that the concerns were raised in confidence *'to allow the Trust, as a public body, to instigate an internal unbiased investigation. The results of the investigation have been provided'* to the complainant.
33. The Trust stated that the individual(s) have on 2 occasions withheld consent for release of their personal data: *'it would be detrimental to their well-being and the functioning of the service to make further contact with them.'*
34. The Trust also explained that the employees were not senior staff: their grades fall below the Senior Manager definition applied across Health and Social Care.
35. The Commissioner is satisfied that the individual(s) would have a reasonable expectation that the disputed information would not be placed into the public domain by disclosure under the FOIA. Therefore she considers that disclosure of this information would be an unfair invasion of the privacy of the individual(s), and as such may cause them some distress.

Balancing the rights and freedoms of the individual with the legitimate interests in disclosure

36. 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 privacy of the individual. 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.
37. The Commissioner accepts that there is a legitimate interest in the overall transparency in the way a public authority such as the Trust conducts its business. However, the Commissioner understands that the Trust would not routinely make public such name(s) although the Trust has already provided the results of the investigation to the complainant.
38. In this case, the Commissioner is not convinced that the specific information requested, is of sufficient wider public interest to warrant overriding the protection of the third party personal data.
39. Having considered the Trust's submission and the views of the complainant the Commissioner is satisfied that the complainant's arguments for disclosing the specific information in this case are not as

compelling as those that the Trust has put forward for protecting the individuals' personal data, namely:

- the individual(s)' likely expectation about how their personal data will be managed;
- the individual(s)' lack of consent to its release; and
- the possible negative consequences to the individual(s) of releasing the information.

40. Therefore, the Commissioner is satisfied that the withheld information is personal data and that disclosure would breach the first data protection principle as it would be unfair to the individual(s) concerned. The Commissioner upholds the Trust's application of the exemption provided at section 40(2) of the FOIA.

Right of appeal

41. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

42. 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.
43. 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

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