

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 November 2022

Public Authority: Evelina Hospital School
Address: 3 Byland Close
London
N21 1QH

Decision (including any steps ordered)

1. The complainant made a request for information relating to staff sickness. Evelina Hospital School (EHS) disclosed some information but withheld some information under section 40(2) FOIA given the small numbers and information already within the complainants possession which would have enabled them to attribute this information to particular individuals.
2. The Commissioner considers that EHS correctly applied section 40(2) FOIA in this case.
3. The Commissioner requires no steps to be taken.

Request and response

4. The complainant made the following information request on 14 February 2022:

"This is a Freedom of Information Request that relates specifically to Evelina Hospital School (EHS) and each of the academic years below 2014/15; 2015/16; 2016/17; 2017/18; 2018/19; 2019/20; 2020/21 and 2021/22 (up to the date the information is sent) For each of the academic years mentioned above:

a) How many days including half days were lost to illness by staff at EHS (not include covid absences), and of that number how many were related to stress, anxiety or depression? (Please also give the average number of permanent staff)

b) State the total number of referrals made involving EHS staff to the Occupational Health Service.”

5. On 11 March 2022 EHS responded, it provided the information requested apart from the number of days lost due to stress, anxiety or depression for the years 2019/2020, 2020/2021 and 2021/2022 and the number of referrals made to Occupational Health Service (excluding starter and routine checks) but included review appointments for the years 2017/2018, 2018/2019, 2019/2020, 2020/2021 and 2021/2022 due to the small numbers involved and information EHS considered the complainant had access to. It withheld this information under section 40(2) FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 28 April 2022 to complain about the way their request for information had been handled.
7. The Commissioner therefore considered the scope of his investigation to be to determine if EHS was correct to refuse to disclose the withheld information under section 40(2) FOIA.

Reasons for decision

Section 40 – personal information

8. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
9. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
10. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.

11. 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 DP principles.

Is the information personal data?

12. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
14. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
15. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
16. In this case the withheld information is numbers which on its face may not appear to constitute personal data. However in this case given the relatively small number of staff employed by EHS (between 18.5 and 21 for the years relevant to the information being withheld), the information to which the complainant already has access to for the relevant years and the small number of occupational health referrals, the Commissioner is satisfied that data subjects could be indirectly identified by the complainant in this case if this information were to be disclosed.
17. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the sickness absence of particular staff at EHS and resulting occupational health referrals. He is satisfied that this information both relates to and identifies particular data subjects given information the complainant has access to. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
18. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under

the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

19. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

20. Article 5(1)(a) of the UK GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

21. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
22. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.
23. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

Is the information special category data?

24. Information relating to special category data is given special status in the UK GDPR.
25. Article 9 of the UK GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
26. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include special category data. He has reached this conclusion on the basis that it relates to the health of data subjects whom the complainant may be able to identify given information they have access to.
27. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
28. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.

29. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
30. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

Right of appeal

31. 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

32. 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.
33. 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.....

Gemma Garvey
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF