

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 September 2024

Public Authority: Dr Nilesh Bhavsar and Dr Leena Jassi -
partners at Pearl Smile Dental Group

Address: 3 Fog Lane
Didsbury
Manchester M20 6AX

Decision (including any steps ordered)

1. The Commissioner's decision is that the majority of the information the complainant has requested is exempt from disclosure under section 40(2) of FOIA. This is because the information is another individual's personal data and disclosing it wouldn't be lawful. Pearl Smile Dental Group's section 40(2) refusal notice didn't comply with section 17(1) of FOIA.
2. The remaining information isn't personal data and Pearl Smile Dental Group didn't comply with section 1(1) and 10(1) of FOIA in respect of the timeliness of its response to this part of the request.
3. Pearl Smile Dental Group must take the following step to ensure compliance with the legislation:
 - Provide the complainant with a fresh response to part 3.0 of the request, basing the response on the situation as it was the time of the request.
4. Pearl Smile Dental Group must take this step within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.
5. The Commissioner notes that Pearl Smile Dental Group itself is not a public authority for the purposes of FOIA. Rather, each partner is a separate legal person and therefore each is a separate public authority. For ease and convenience this notice refers to 'the Group' where

appropriate in detailing the correspondence and analysis that has taken place

Request and response

6. Pearl Smile Dental Group comprises five dental practices in different locations. In wider correspondence to the Group's Prestbury practice on 22 April 2024, the complainant requested information in the following terms:

3.0 The number of NHS Dental Patients within the Pearl Smile Dental Group.

4.0 The dates applicable to the employment of [redacted] by the Pearl Smile Dental Group

5.0 The number of NHS Patients treated by [redacted] during [redacted] employment by the Pearl Smile Dental Group.

6.0 The number of NHS Patients whose course of treatment was commenced by [redacted] during [redacted] employment by the Pearl Smile Dental Group and which was not completed prior to [redacted].

7.0 The number of NHS Patients whose course of treatment was commenced by [redacted] during [redacted] employment by the Pearl Smile Dental Group which was not completed and allocated to another dentist employed by the Pearl Smile Dental Group for completion of the course of treatment.

8.0 The number of NHS Patients whose course of treatment was commenced by [redacted] during [redacted] employment by the Pearl Smile Dental Group and which was not completed and allocated to another dentist employed by the Pearl Smile Dental Group for completion of the course of treatment and the number who were charged a further treatment fee.

9.0 The number of NHS Patients whose course of treatment was commenced by [redacted] during [redacted] by the Pearl Smile Dental Group and which was not completed and allocated to another dentist employed by the Pearl Smile Dental Group for completion of the course of treatment and the cost to the patients and the NHS of those numbers who were charged a further treatment fee."

7. The request refers to 'Pearl Smile Dental Group'. But because it was submitted to the Prestbury practice, and given the circumstances behind the request, the Commissioner considers that a reasonable

interpretation of the request is that it's for information about that specific practice, not all five practices in the Group.

8. The Group responded on 23 April 2024. It stated that it was unable to share the practice's data and statistics with the complainant, as this wasn't relevant to them as an individual.
9. The complainant requested an internal review on 4 May 2024 and the Group provided one on 7 May 2024. It advised:

"I believe I have answered all your questions and fulfilled your requests relating to your patient records, and addressed all your concerns and I have nothing further to add."

Reasons for decision

10. Public authorities under FOIA are listed in Schedule 2 of FOIA. Under paragraph 43, any person providing primary dental services in accordance with arrangements made under the National Health Service Act 2006 is a public authority under FOIA in respect of information relating to the provision of those services.
11. The request in this case concerns the provision of NHS services and, as such, the Group should have more clearly handled the request in line with FOIA's requirements.
12. This reasoning concerns the Group's application of section 40(2) of FOIA to the complainant's request. The Commissioner has also considered procedural matters.
13. The Commissioner first discussed with the Group whether it holds the information the complainant has requested about its Prestbury practice. The Group advised that the data was managed by its software supplier on its behalf but that it could obtain the data from the supplier in order to respond to the request, as appropriate.
14. Under section 40(2) of FOIA information is exempt from disclosure if it's the personal data of an individual other than the applicant and disclosure would contravene any of the principles relating to the processing of personal data that are set out in Article 5 of the UK General Data Protection Regulation (UK GDPR).
15. The most relevant principle is Article 5(1)(a). This states that:

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

16. The Commissioner has first considered whether the information the Group is withholding under section 40(2) can be categorised as another individual's personal data.
17. Personal data is defined as information that relates to a living individual and from which the individual can be identified.
18. Part 3.0 of the request is for the number of NHS patients within Pearl Smile Dental Group's Prestbury practice. This information isn't personal data and therefore the Group wrongly applied section 40(2) of FOIA to it.
19. The Commissioner is satisfied, however, that the remainder of the requested information can be categorised as personal data – it relates to the individual named in the request, and they can be identified from it. The information meets the above definition and is the personal data of another individual – the 'data subject.'
20. The Commissioner has gone on to consider whether disclosing that data would breach Article 5(1)(a) which, as above, states that personal data must be processed lawfully.
21. Personal data is processed when it's disclosed in response to a FOIA request. In order to be lawful under Article 5(1)(a), the lawful basis under Article 6(1)(f) of the UK GDPR must apply to the processing. It must also be generally lawful.
22. Article 6(1)(f) states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child."
23. In order to determine whether disclosing the personal data would be lawful the Commissioner has considered three 'tests': the legitimate interest test, the necessity test, and the balancing test.
24. The Commissioner appreciates that the complainant has a personal interest in a particular individual, in their professional capacity. However, there's little wider public interest in the information, in the Commissioner's view, save for disclosure demonstrating that the Group is open and transparent.

25. The Commissioner has next considered whether disclosing the information would be necessary to meet the identified legitimate interests. He will accept that disclosing the information being withheld would be necessary to meet the complainant's legitimate interests.
26. Because he's found that disclosure would be necessary, the Commissioner has moved on to the third test and balanced the complainant's legitimate interests against the data subject's rights and freedoms.
27. In doing so, it's necessary to consider the impact of disclosure. For example, if the data subject wouldn't reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
28. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause
 - whether the information is already in the public domain
 - whether the information is already known to some individuals
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
29. In the Commissioner's view, a key issue is whether the individual concerned has a reasonable expectation that their information won't be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
30. It's also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
31. The Commissioner has considered the circumstances of the request and he's satisfied that, despite concerning them in a professional capacity, the data subject would reasonably expect that their personal data wouldn't be disclosed to the world at large under FOIA. They haven't consented to disclosure and disclosure would therefore be likely to cause them harm and distress. The complainant is pursuing a purely private concern and unrestricted disclosure of the data subject's personal data to the general public isn't proportionate.

32. Based on the above factors, the Commissioner has determined that there's insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that there's no Article 6 basis for processing and so disclosing the information wouldn't be lawful.
33. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he doesn't need to go on to consider separately whether disclosure would be fair or transparent. The Commissioner has therefore decided that the Group was entitled to withhold the remaining information under section 40(2) of FOIA.

Procedural matters

34. Section 1(1) of FOIA together with section 10(1) place an obligation on a public authority to confirm whether it holds requested information and to disclose it (if it's held and isn't exempt information) within 20 working days following the date of receipt of the request.
35. Since the Group incorrectly applied section 40(2) of FOIA to part 3.0 of the request, it didn't comply with sections 1(1) and 10(1) in respect of that part.
36. In respect of information that a public authority is refusing to disclose, section 17(1) of FOIA states that a public authority's refusal notice must state what exemption is being relied on to withhold information, and why the exemption applies.
37. In this case, in its correspondence to the complainant the Group didn't confirm that it was relying on section 40(2) of FOIA to withhold the requested information. And as the Commissioner has noted, section 40(2) didn't apply to all the requested information in any case. The Commissioner's decision is therefore that the Group's refusal of the request was inadequate.

Right of appeal

38. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

39. 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.
40. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Cressida Woodall
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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SK9 5AF