

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 September 2012

Public Authority: James Paget University Hospitals

NHS Foundation Trust

Address:

Lowestoft Road

Gorleston

Great Yarmouth

Norfolk

NR31 6LA

Decision (including any steps ordered)

1. The complainant requested information from the James Paget University Hospitals HNS Foundation Trust (the "Trust") in relation to any complaints that may have been made against a particular employee.
2. The Commissioner's decision is that the Trust correctly applied section 40(5) of the FOIA and does not require it to take any steps.

Request and response

3. On 19 September 2011, the complainant wrote to the Trust and requested information in the following terms:

"I have been told of other complaints against [position of employee] and I would ask the Trust to disclose these and the Trusts' subsequent investigations & actions, under the Freedom of Information Act 2000. Please treat this as a formal request for the same."

4. On 5 December 2011 the complainant wrote to the Trust again stating:

"I am now making a formal Freedom of Information Request to the Paget Trust through this email to provide me details of any complaints against [named employee] since he became [position of employee]. I would ask the Trust to disclose the substance of the complaint, the job title of complainant(s), how & who conducted the investigation, the stage of the investigation, witness statements, the reports that are

available &/or will become available and action taken. If you require any clarification regarding this request please contact me."

5. The Trust responded to the complainant on 6 January 2012. It informed him there had been a single patient complaint about delay or cancellation which had been investigated, with no further action and where the matter had been closed.
6. On 8 January 2012 the complainant wrote to the Trust and expressed dissatisfaction with the response he had received. He explained that he had expected to receive information about complaints made against the individual by other staff members at the Trust.
7. On 30 January 2012 the Trust informed the complainant that it could neither confirm nor deny that it held the requested information, but that if it were to hold it then it would be exempt under section 40(2) of the FOIA (third party personal data).
8. However, before he received this response the complainant wrote to the Trust on 29 January 2012 to request an internal review.
9. On 14 March 2012 the Trust provided the results of an internal review to the complainant. It explained that it had disclosed information to the complainant in its response of 6 January 2012 as it had consent to do this.
10. The Trust went on to state that the response of 6 January 2012 should have included a consideration of staff complaints but that it did not do so. It further informed the complainant that to confirm or deny whether information was held would breach the data protection principles contained within the Data Protection Act 1998 (the "DPA"). It also explained that the information, if held, would be exempt under section 40(2) of the FOIA and so it upheld the decision of 30 January 2012.

Scope of the case

11. The complainant contacted the Commissioner to complain about the way his request for information had been handled. Specifically, he complained that he had not been provided with the information he had requested.
12. During the Commissioner's investigation the Trust confirmed that it was claiming the exemption within section 40(5)(b)(i)) to neither confirm nor deny that it held the requested information. The Commissioner therefore investigated whether the Trust had correctly applied this part of the FOIA.

Reasons for decision

13. Section 1 of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by that authority whether it holds information of the description specified in the request, and if that is the case, to have that information communicated to him.
14. However, Section 40(5)(b)(i) of the FOIA provides that a public authority is not obliged to confirm or deny whether requested information is held if to do so would:
- constitute a disclosure of personal data, and
 - this disclosure would breach any of the data protection principles or section 10 of the Data Protection Act (DPA).
15. The Information Commissioner's analysis of whether the above criteria would be satisfied follows.

Would confirming or denying that the requested information is held constitute a disclosure of personal data?

16. The DPA defines personal information as:

"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."

17. The Commissioner's guidance on the exemption for personal data¹ expands on what constitutes personal data:

"The two main elements of personal data are that information must 'relate to' a living person, and that person must be identifiable. Information will 'relate to' a person if it is:

- *about them;*

¹ The guidance is available online at the following link:

http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/PERSONAL_INFORMATION.ashx

- *is 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."*

18. The Commissioner considers that the request is clearly linked to an identifiable individual and the information requested is that person's personal data as it 'relates' to them in that confirming or denying whether information was held would reveal something about the work history of that individual. The information cannot be disclosed without reference to the individual referred to in the request.

Would confirming or denying whether the information is held breach a data protection principle?

19. In determining whether section 40(5) applies, the Commissioner has considered whether it would breach the first data protection principle to confirm or deny that the information was held.

20. The first data protection principle requires personal data to be processed fairly and lawfully and that:

- at least one of the conditions in Schedule 2 is met; and
- in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

21. Therefore the Commissioner has focused on whether the Trust confirming or denying to the world at large that it held the information in this case would be fair to the individual.

22. In establishing whether disclosure is fair, the Commissioner has considered the reasonable expectations of the data subject, the legitimate interests of the public and the rights and freedoms of the individual referred to in the request.

23. The Trust has referred the Commissioner to some of his previous decisions which dealt with similar requested information or issues, namely the Commissioner's decision notices FS50082420; FS50086498; FS50422721; FS50440114; FS50132179; and FS50363053. In those decision notices he found either that public authorities were entitled to neither confirm nor deny whether such information was held or that the information was otherwise exempt under section 40 of the FOIA. The

Commissioner has considered those decision notices and agrees that they are relevant to this complaint.

24. The Trust has argued that it would not be within the reasonable expectations of its employees for it to disclose whether any complaints had been made against one of its employees by another employee. It has said that all of the Trust's staff expect such information to be treated with sensitivity. The Trust maintains that this extends to its entire staff, irrespective of their rank.
25. However, the Trust has accepted that where there are details of an investigation of a substantially serious nature and that the investigation finds against a senior member of staff then this would favour disclosure of such information. The Trust has stated that no such factor is present in this case.
26. The Commissioner considers that within the context and background of complaints made against employees by other employees or members of staff, individuals have a reasonable expectation of privacy. They would not expect the public to have access to information which discloses whether or not a complaint has been made about them.
27. The Commissioner understands that the public has a legitimate interest in transparency and accountability. However, he also has to consider the individuals involved and their right to privacy. The Commissioner considers that disclosure of information relating to investigations of employees and staff disputes has the potential for causing distress and harm to data subjects (for example in detriment to future career prospects or within an individual's private life), no matter what the conclusion of that investigation or dispute. This extends to the confirmation or denial of the existence of such information. In this case the Commissioner does not consider that the public's legitimate interest in transparency and accountability outweighs the unfairness to the data subject involved.
28. As such, the Commissioner considers that to confirm or deny whether the information in question is held would breach the first data protection principle.
29. The Commissioner therefore is of the view that in all the circumstances the Trust was not obliged to have responded to the complainant's request in accordance with the duty imposed on it by the provisions of section 1(1)(a) by virtue of the provisions of section 40(5)(b)(i).

Right of appeal

30. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

31. 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.
32. 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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