

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 December 2016

Public Authority: The University Hospitals Coventry and Warwickshire NHS Trust

Address: Clifford Bridge Road
Coventry
CV2 2DX

Decision (including any steps ordered)

1. The complainant requested information about a record of complaints made by staff about a doctor. The University Hospitals Coventry and Warwickshire NHS Trust (the Trust) withheld the information, citing the exemption under section 40(2) of the FOIA (third party personal data) as its basis for doing so. The Commissioner's decision is that the Trust has correctly applied sections 1 and 40 and does not require the Trust to take any steps.

Request and response

2. On 8 December 2015 the complainant made the following request for information (as part of a larger request):
'The record of complaints made by staff about [redacted name of doctor]'s behaviour kept by [redacted name and title of manager].'
3. On 14 April 2016 the Trust responded that it *'has been unable to locate any documents within this category, and is not aware of any such record having been created. We have also made enquiries with the Trust's Human Resources department, who have confirmed that there have been no formal complaints made by staff about [redacted name of doctor]'s behaviour.'*
4. On 18 April 2016, the complainant queried this answer as *'[redacted name of manager] had not retired when this request was made they are unable to ask [redacted name of manager] for the records she kept.'*

Please will the trust review how they can remedy the situation their failure to meet with the statutory timescale has created.'

5. The Trust undertook further searches and was able to identify information that fell within this element of the request and on 3 May 2016 provided a response citing section 40(2) (third party personal data).
6. On 5 May 2016 the complainant queried this response from the Trust as *'some of the complaints were made by me'* and section 40(1) should also apply. The complainant asked the Trust to reconsider the request as a Subject Access Request.
7. On 2 June 2016 the Trust replied that:

'It is not clear from the documents I have seen who the alleged complaints were made by and who they relate to. Accordingly, I am unable to apply section 40(1) FOIA as I cannot be certain that this is your personal data.'
8. On 13 June the complainant queried the different responses received:

'I am now confused about your response to this request. Your first response was that [redacted name of manager] had left the trust and no such document had been located. Your second response was that people could be identified from the document section 40(2) of the FOIA applied. Your third response is it is not clear from the documents who made the alleged complaints and who they relate to.'
9. After the involvement of the Information Commissioner the complainant's letter of 13 June was accepted as a request for an internal review. The Trust provided the outcome of the review on 8 August 2016:

'The information requested does not contain your own personal data so as to trigger section 40(1) FOIA...It is not clear that the information held relates to you... The information you have requested does contain the personal data of third parties so as to trigger the section 40(2) FOIA exemption.'
10. The case was accepted by the Information Commissioner on 17 August 2016 and initial letters were sent to both the complainant and the Trust on 6 October.

Background

11. Both the complainant and the Trust explained that there is separate ongoing litigation as well as this FOIA request.
12. The complainant has applied to Court for Pre-Action Disclosure of various documents, including the information that is the subject of this request.
13. On 26 September 2016, the Court made an Order for disclosure of "the record of complaints about [redacted name of the doctor] in the possession or power of the Respondent and formerly held by [redacted name and title of manager]". On 26 September 2016 the Trust disclosed a copy of this disputed information to satisfy the requirements of the Court Order.
14. The Trust believes that the Commissioner's letter of 6 October has crossed with the disclosure of the disputed information to the Applicant in light of the Court Order on 26 September.
 - *The Trust distinguishes between the disclosure of the disputed information to the applicant specifically, so as to comply with a Court Order requiring disclosure (as has taken place), and the voluntary disclosure of the Disputed Information 'to the world' under FOIA.*

Scope of the case

15. On 17 October 2016, the complainant asked the Commissioner to consider that this (and more) information was available at the time of the request and '*that they delayed their response to my original request to avoid disclosure and that they have still failed to recover all of the documents they did not take steps to secure.*'
16. Therefore the focus of the Commissioner's investigation is to determine whether section 1 of FOIA was applied correctly and whether the Trust is entitled to rely on section 40(2) of the FOIA as a basis for refusing to disclose the withheld information under FOIA.
17. The Commissioner has already recorded a breach of section 10 in her decision notice of FS50617968 dated 29 March 2016 as the Trust did not provide the complainant with a response to her request within 20 working days. Therefore this breach will not be considered in this decision notice.

Reasons for decision

Section 1

18. 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 the public authority whether it holds information within the scope of the request, and if so, to have that information communicated to him.
19. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities.
20. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
21. As is the practice in a case such as this, the Commissioner asked the Trust a number of questions.
22. In response to the Commissioner's questions about the location of the information, the Trust confirmed that it did hold some information which is relevant to the request.
 - *The Trust located a document that it considers to be record of complaints about the doctor (i.e. the Disputed Information), in April 2016... This record was held by the Trust and not by the retired manager. Although the document was prepared by the retired manager whilst she was still working for the Trust, and was located within the Trust's IT systems, it was created for personal purposes by the manager rather than formally as part of the manager's job... The Trust was able to locate the document constituting the Disputed Information on its servers as a password protected file within the shared [redacted name of department] drive.*
23. The Commissioner asked the Trust a number of questions to establish what searches had been carried out for information falling within the scope of the request.
24. The Trust explained that:
 - *A comprehensive search was undertaken of the [redacted name of department] departmental network... The Trust was able to*

locate this because the Head of [redacted name of department] had been made aware of the existence of the file by [redacted manager] before she left, and he was contacted as the matter progressed. No files were actually handed over by [redacted manager] to the Trust when she left. The Head of [redacted name of department] applied his personal knowledge to search for the relevant information by undertaking a manual search through the [redacted name of department] network drive. The Trust does not consider there are further searches that could be undertaken of its systems that would reveal other information which is relevant to this request.

- The file that was located was password protected and located in a folder called "SM issues". This was a reasonable and proportionate search to locate the Disputed Information.*
- The only information that the Trust has been able to locate is that which it continues to hold, and that was disclosed to the Applicant on 26 September. The Disputed Information was created for personal purposes by an individual who is no longer an employee of the Trust. The Trust is therefore unable to comment on whether the former employee created alternative copies of the Disputed Information, and if so whether these were deleted or destroyed.*
- The Disputed Information created for personal purposes, rather than at the instigation of the Trust, and so is not a corporate record. Accordingly, the creation, retention and deletion of the Disputed Information is outside the scope of the Trust's records management processes. The relevant policy for the Trust is the national NHS Records Management Code of Practice.*
- The Trust is currently investigating separately whether it is possible to contact [redacted name of retired manager]. Even if it is possible to contact her (and she holds further records herself) those records would not be held 'on behalf of the Trust' for the purposes of FOIA.*

25. Having considered the Trust's responses to the Commissioner's investigations, the Commissioner is satisfied that, on the balance of probabilities, the Trust does not hold any further recorded information within the scope of the request.

26. The Commissioner understands the reasons why the complainant considers further information may be held, but the Commissioner can only consider what is held by the Trust. It is outside the Commissioner's remit to determine if it should be held, and even if it should be, she

cannot require a public authority to create the information under the FOIA.

27. In addition, the Commissioner notes that she cannot compel the Trust to contact the retired employee. Any information that may be held by the retired employee is not recorded information held by the Trust for the purposes of FOIA. The Commissioner also notes that there is no evidence to suggest that there was a deliberate delay by the Trust to avoid disclosure in this case.
28. As the Commissioner's decision is that there is no further recorded information, the Commissioner will go on to consider the application of section 40.

Section 40(2) – Third party personal data

29. This exemption provides that any third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act (DPA).

Is the withheld information personal data

30. Personal data is defined by the DPA as any information relating to a living and identifiable individual.
31. Having viewed the withheld information, the Commissioner is satisfied that the information relates to a number of living and identifiable individuals. It is not clear to the Commissioner if any of the abbreviated names specifically relate to the complainant.
32. The Commissioner therefore accepts that the disputed information is third party personal data within the meaning envisaged in section 1 of the DPA.

Would disclosure breach the Data Protection Principles?

33. 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.
34. 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

35. The view of the Commissioner is that there is an expectation that an employee in a public authority will have a certain amount of information about them disclosed.
36. The Commissioner has issued guidance about requests for personal data about public authority employees:

https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

37. This guidance talks about whether the information requested relates to them as an individual or in their professional role, and is information contained in their personnel file as opposed to actions they have taken in carrying out their job. It also suggests consideration should be given to whether the employees are senior within the organisation or have a public facing role.
38. The Trust has confirmed that the withheld information does not relate to any 'public facing' matters and was created as a private document:

- *It is about internal employment relationships between individuals working in the Trust. Elements of the Disputed Information relate to social matters (for instance the reference to 'pizza' on the third page).*
- *the Disputed Information was a privately created document, developed by a single employee and in creating the Disputed Information she was not acting further to any instruction from the Trust. The individuals identified in the document therefore have had no indication from the Trust itself about how their information would be used, and they therefore would have no expectation that the Disputed Information would be disclosed by the Trust under FOIA. ... It is unclear to the Trust whether all of the individuals named in the document were aware that the document itself was being kept by their colleague in the first place.*

39. Therefore the Commissioner understands that the Trust would not routinely make public such information.

Consequences of disclosure

40. Disclosure is unlikely to be fair if it would have unjustified adverse effects on the individuals. 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.

41. In this case the Trust has stated that:

- *Given the nature of the Disputed Information, which relates to personal disagreements in a professional environment, and the circumstances in which the Disputed Information was obtained/created the Trust contends that the individuals would expect this information to be kept confidential and private by the individual who was maintaining the documentation that forms the Disputed Information.*
- *The Disputed Information was obtained as part of a private file maintained by one individual, and was not created, obtained or used as part of any formal Trust process. Corporate knowledge of the record's existence only occurred following the Applicant's correspondence of 18 April 2016.*
- *The Disputed Information was created privately and the Trust has taken no further action in respect of it.*

42. The Trust has stated that it did not seek consent of the named individuals:

- *The Trust considers, given the acrimonious nature of the dispute between the Applicant and the Trust, the confidential nature of the Disputed Information (which relates to accusations made by one employee against another) and the fact that the Disputed Information is a privately created personal log ... that it would not be reasonable to seek consent, and to do so would exacerbate the difficulties in the relationships involved.*

43. The Commissioner is satisfied that the individuals 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 individuals, and as such may cause them some distress.

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

44. 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.

45. The complainant has argued that the documents are '*simply a record of events within the department*' and that '*there is a public interest in examples of a working environment that mean staff will not formally raise concerns about management practices that are affecting patient safety.*'
46. The Trust does not consider that there is any compelling public interest favouring disclosure under FOIA. In this case, the applicant has a purely private interest in disclosure (litigating against the Trust) and the Disputed Information has already been disclosed to the Applicant further to a Court Order.
 - *The repeated disclosure of the Disputed Information under FOIA would be a disproportionate interference with the rights of the data subjects under Article 8 of the European Convention on Human Rights*
47. In this case, the Commissioner is not convinced that the specific information requested, while of significant interest to the complainant, is of sufficient wider public interest to warrant overriding the protection of the third party personal data.
48. 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 under FOIA in this case are not as compelling as those that the Trust has put forward for protecting the individuals' personal data, namely:
 - the individuals' likely expectation about how their personal data will be managed,
 - the individuals' lack of consent to its release; and
 - the possible negative consequences to the individuals of releasing the information.
49. The Commissioner is satisfied that on balance, the legitimate public interest would not outweigh the interests of the small number of individuals and that it would not be fair to disclose the requested information in this case.

Conclusions

50. The Commissioner is satisfied that the withheld information is personal data and that the individuals would have no reasonable expectation that the information in question would be disclosed to the world at large. Disclosure would breach the first data protection principle. The

Reference: FS50637079



Commissioner upholds the Trust's application of the exemption provided at section 40(2) of the FOIA.

Right of appeal

51. 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

52. 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.
53. 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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