

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 25 October 2010

Public Authority: The Royal Berkshire NHS Foundation Trust
Address: The Royal Berkshire Hospital
London Road
Reading RG1 5AN

Summary

The complainant requested information about doctors working for the public authority. Initially the public authority withheld the information under sections 12 and 40(2). During the Commissioner's investigation the public authority disclosed some information to the complainant and withheld some under the section 40(2) exemption. The Commissioner has decided that the public authority correctly applied section 40(2) to remaining withheld information.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. This complaint is related to another request for information the complainant submitted to the public authority on 12 December 2008.

The Request

3. Initially the complainant submitted a request for information on the 12 December 2008. In response to one part of this request the public authority explained that it did not hold the information in question and explained where it might be available.
4. In response to this the complainant submitted another request for information on 27 January 2009:

*'Considering your reply in this section please provide the following information for the period _ *July 2006* _ for the longest period ***before*** this date:*

- 1. Number of Staff Grades doctors worked in obstetrics and gynaecology department at RBH.*
- 2. How many of these doctors promoted to Associate Specialist or consultant posts.*
- 3. What are their race/nationality/background.*

According to the Trust Equality Policy, the Trust has a duty to monitor equality in all areas at work to ensure that workers from ethnic minorities and other nationalities have not been disadvantaged. The information I have requested are in this category. If you do not have the above information please inform me in what way the Trust monitors its Equality Policy in this area.'

5. On 24 February 2009 the public authority issued a refusal notice. It withheld the information citing section 12 and section 40(2). The public authority also suggested that the complainant might want to clarify what specific categories of information she was interested in that were not protected and what specific time period she was interested in.
6. On 3 April 2009 the complainant requested an internal review.
7. On 18 May the public authority confirmed that it had carried out an internal review. It withheld the information on the same grounds. The public authority also reiterated its earlier suggestion that the complainant might want to clarify what specific categories of information she was interested in that were not protected and what specific time period she was interested in.

The Investigation

Scope of the case

8. On 6 March 2009 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - The public authority had not carried out an internal review.
9. On 3 April 2009 the Commissioner contacted the complainant and explained that she would have to request an internal review. The complainant did this on 3 April 2009 and the internal review was carried out on 18 May 2009.
10. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this Notice:
 - The public authority disclosed the number of staff grade doctors who worked in obstetrics and gynaecology department at the Royal Berkshire Hospital.
 - How many of these doctors [were] promoted to Associate Specialist or consultant posts.
11. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

12. On 6 July 2009 the public authority contacted the Commissioner. It explained that it was applying section 12 of the Act but that it was also applying section 40(2) to some of the requested information as it was related to the racial origin of members of Trust staff and was by definition, sensitive personal data relating to identifiable individuals (namely point 3 of the request outlined in paragraph 4 above).
13. On 22 September 2009 the Commissioner contacted the complainant explaining that the case had now been allocated to a complaints officer.
14. On 24 November 2009 the Commissioner contacted the complainant explaining that some of the requested information (point 3 of the

request) could be sensitive personal data and therefore might not have to be disclosed.

15. There were several exchanges of correspondence and telephone conversations between the Commissioner and the complainant about her request for information. The complainant made it clear that she felt that she was legally entitled to all of the information she had requested. The Commissioner asked the complainant to clarify what she meant by 'background'. The complainant did not clarify this so the Commissioner explained that he assumed this was related to nationality and would therefore be considering withheld information to do with race/nationality. The complainant did not object to this approach.

Analysis

Exemptions

Section 40

16. Section 40(2) of the Act states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles or section 10 of the Data Protection Act 1998 (the DPA).
17. In this case, the public authority argued that the requested information was the personal data of a number of third parties and that disclosure under the Act would breach the first data protection principle of the DPA.
18. Initially, the Commissioner considered whether the requested information was personal data. Personal data is defined in section 1 of the DPA 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.

19. It is the Commissioner's view that the information relating to an individual's race or ethnicity, if linked to identifiable individuals, is the personal data of the individuals in question. However, it must be determined whether a living individual can be identified from that data if it was disclosed.
20. The Commissioner considers that truly anonymised data is not personal data so therefore it is not necessary to consider the application of the data protection principles. He also considers that even where the data controller holds additional 'identifying' information, this does not prevent the data controller from anonymising the information to the extent that it would not be possible to identify any living individual from that information alone, therefore that information would no longer be personal data.
21. The test of whether information is truly anonymised is whether a member of the public could identify the individuals in question by cross-referencing the data with information or knowledge already available to the public. This approach is supported by Lord Hope's judgement in the House of Lords case of the *Common Services Agency v Scottish Information Commissioner (2008) UKHL 47*,

" ... Rendering data anonymous in such a way that the individual to whom the information from which they are derived refers is no longer identifiable would enable the information to be released without having to apply the principles of [data] protection."
22. The Commissioner does not consider the withheld information in this case to be truly anonymous. This is because the requested information relates to a small number of individuals and disclosing it would be likely to provide information that could be tied to a specific individual. This would constitute a disclosure of personal data. The Commissioner is also satisfied that the individuals are alive and the information is therefore about living individuals.
23. Given all of the above, the Commissioner is satisfied that the withheld information constitutes the personal data of the individuals in question. It is also the Commissioner's opinion that as the information relates to those individuals' race/ethnicity it is sensitive personal data as defined in section 2(a) of the DPA. The Commissioner then went on to consider whether it would be fair to disclose this sensitive personal data.

Would disclosure contravene the first data protection principle?

24. The first data protection principle is made up of two parts:
- A requirement to process all personal data fairly and lawfully;
 - A requirement to satisfy at least one DPA Schedule 2 condition for processing of all personal data;
25. However as the information in question is sensitive personal data, there is an additional part:
- A requirement to satisfy at least one DPA Schedule 3 condition for processing sensitive personal data.
26. All three requirements must be satisfied to ensure compliance with the first data protection principle.

Would disclosure be fair and lawful?

27. When considering whether disclosure of the information would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:
- The individuals' reasonable expectation of what would happen to their personal data and whether disclosure would be incompatible with the purposes for which it was obtained;
 - Whether such an expectation would be countered by any accompanying expectation that this sort of information would be available;
 - Whether information in the public domain reduces the expectation of privacy in this case;
 - Whether disclosure would cause any unnecessary or unjustified damage or distress to the individuals and whether the individuals have refused to consent to disclosure; and
 - Legitimate interests of the public in knowing about the race/ ethnicity of the individuals.
28. The public authority explained that the data was collected for the purposes of Equality Monitoring and that the individuals would have expected this information to remain confidential. Having considered this point the Commissioner is of the opinion that the reasonable expectations are a persuasive factor in showing that disclosure of the information would be unfair. The Commissioner does not consider that there would be any expectation that this sort of information would be available.

29. The Commissioner's Awareness Guidance (AG1) on section 40 deals with what should be considered when looking at providing personal information about third parties. The guidance explains that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn between information which relates to the third party's private life and information which relates to the third party's public life.
30. It explains that factors to consider when weighing the interests of the individual may include whether the information relates to an individual's public life i.e. work as a public official or employee or their private life i.e. home, family, social life or finances. Information about an individual's private life will deserve more protection than information about them acting in an official or work capacity.
31. Although it is the Commissioner's view that public sector employees should expect some information about their roles to be disclosed, the requested information in this case relates to the individuals' private lives.
32. The Commissioner has also considered whether there would be an accompanying expectation that this sort of information would be made available. He considers that although there is a reasonable expectation that the information would be made available in relation to equality monitoring, because of the small number of individuals concerned, there should not be a further breakdown of the information. This would mean that although equality could be monitored, no individual could be identified by his race/ethnicity.
33. The Commissioner also notes that the public authority confirmed that as far as it was aware there was no information in the public domain about these individuals.
34. The Commissioner notes that the public authority did not provide any arguments about the disclosure of this information causing any unnecessary or unjustified damage or distress to the individuals. With regard to the question of consent, the Commissioner notes that one of the individuals no longer works for the Trust and two doctors gave consent for disclosure of their sensitive personal data. However it is not clear whether any of the doctors understood how their sensitive personal data was going to be used.
35. Although it is not clear if explicit consent was given by any of the doctors, as required to satisfy a Schedule 3 condition, the Commissioner is satisfied that even if some doctors had given explicit consent this would be likely to result in the unfair disclosure of

sensitive personal data of the other doctors due to the small numbers of individuals involved.

36. The Commissioner then considered whether there was a legitimate public interest in knowing the race/nationality of the doctors. It is his view that there is no public interest in knowing this information.
37. The withheld information in this case falls under section 2 (a) of the Data Protection Act 1998 as it relates to the data subjects' race and ethnicity. As such, by its very nature, this has been deemed to be information that individuals regard as the most private information about themselves the Commissioner considers that it would be unfair to disclose the requested information.
38. As the Commissioner has decided that disclosure of the information would be unfair and therefore breach the first data protection principle he has not gone on to consider whether a Schedule 2 or 3 condition can be met.
38. The full text of section 40 can be found in the Legal Annex attached to the end of this Notice.

The Decision

39. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Other matters

40. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
 - Although there is no specified time limit for an internal review to be carried out the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review.
 - In the present case, the Commissioner notes that the request for an internal review was received by the public authority on 3 April 2009 but it did not confirm it had carried out an internal review until 18 May 2009. If a public authority needs longer than 20 working days to carry out an internal review, as a matter of good

practice it should notify the requester and explain why more time is needed. In the Commissioner's view, in no case should the total time taken exceed 40 working days. The Commissioner provides guidance on this subject which can be found on his website: www.ico.gov.uk

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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is sent.

Dated the 25th day of October 2010

Signed

**Pamela Clements
Group Manager**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Appendix 1

Personal information

Section 40(1) provides that –

Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

Section 40(2) provides that –

Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.

Section 40(3) provides that –

The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

Section 40(4) provides that –

The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

Section 40(5) provides that –

The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

Section 40(6) provides that –

In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

Section 40(7) provides that –

In this section-

the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act; "data subject" has the same meaning as in section 1(1) of that Act; "personal data" has the same meaning as in section 1(1) of that Act.