

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 6 April 2011

Public Authority: Calderdale Primary Care Trust
Address: F Mill
Dean Clough
Halifax
HX3 5AX

Summary

The complainant asked Calderdale Primary Care Trust (the 'PCT') for information concerning the number of transsexuals in a specific area who had been referred to, and assessed by, a particular doctor for sex change surgery. The PCT answered the four questions by informing the complainant that in each case the answer was equal to or less than five. The PCT has refused to disclose the exact numbers involved as it considers that this would enable the identification of individual(s). It has therefore applied section 40(2) of the Freedom of Information Act 2000 (the 'Act') to the detailed information. The Commissioner is satisfied that the PCT was correct to apply section 40(2) to this information and finds no breaches of the Act.

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.

The Request

2. On 6 December 2009 the complainant made the following information request to NHS Calderdale Primary Care Trust (the 'PCT'):
 - 1) *'How many transsexuals have been referred to Dr [name removed] for his overseeing of their pathway through to sex change surgery,*

- 2) *How many transsexuals from NHS Calderdale area has Dr [name removed] assessed as ready for sex change surgery,*
 - 3) *How many transsexuals from NHS Calderdale are on the waiting list of sex change surgeons following referrals by Dr [name removed],*
 - 4) *How many transsexuals from NHS Calderdale have had surgery following referral to Dr [name removed] and his referring them for surgery.*
3. On 6 January 2010 the PCT replied to this request. It explained that the answer was equal to or less than five for each of the questions. The PCT explained that Dr [name removed] was used as a provider the previous year to alleviate the waiting list for assessment.
 4. The PCT explained that it could not disclose the exact figures if they were equal to, or less than five patients. This was due to the sensitivity of the subject matter and the low number of individuals involved as there was a risk of identifying individuals. The PCT considered that this information was therefore exempt under section 40(2) of the Freedom of Information Act 2000 (the 'Act').
 5. The PCT explained that section 40(2) of the Act specifies that the personal information of a third party must not be disclosed if to do so would contravene any of the data protection principles. The first principle of the Data Protection Act 1998 (the 'DPA') states that personal data must be processed fairly and lawfully.
 6. The PCT considered that disclosure would be both unfair and unlawful.
 7. On 7 March 2010 the complainant wrote to the PCT and requested an internal review of its response to her request for information regarding surgeons Calderdale transsexuals have accessed. She repeated that she would accept anonymised information.
 8. No internal review was provided.

The Investigation

Scope of the case

9. On 10 June 2010 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

refusal of the PCT to provide the requested information and its failure to provide an internal review.

Chronology

10. On 28 September 2010 the PCT provided the Commissioner with the withheld information. It explained its reasons for applying section 40(2) of the Act to this request.
11. On 19 October 2010 the Commissioner wrote to the complainant and informed her of his preliminary conclusion. He explained he was satisfied with the arguments of the PCT and that he considered that the figures were so low that identification of individuals would be possible if the exact number was disclosed. The complainant did not accept this conclusion.
12. The Commissioner confirmed to the PCT that he would proceed to a Decision Notice; however during the course of preparing this document he requested further detail from the PCT regarding its refusal to provide the exact figures requested.

Analysis

Exemptions

13. The full text of section 40 of the Act is available in the Legal Annex at the end of this Notice.
14. Section 40(2) of the Act specifies that the personal information of a third party must not be disclosed if to do so would contravene any of the data protection principles. The first principle of the DPA states that personal data must be processed fairly and lawfully.
15. 'Personal data' is defined under section 1(1) of the DPA as data which relates to a living individual who can be identified from that data, or from that data and other information which is in the possession of the data controller or is likely to come into the possession of the data controller.
16. The PCT has argued that the request involves figures which are so low that if the exact numbers were disclosed, the identification of the individual(s) concerned would be possible. The PCT has argued that the transgender community in that particular area is an exceptionally small cohort of individual(s) and that there is potentially a high risk of these individual(s) being identified, particularly as the request itself concerns

data relating to a specific procedure with a named clinician who was only used to alleviate waiting lists for a limited period of time.

17. The estimate of the small number of individuals in the transgender community has been provided from the results of a survey of Calderdale's local transgender community that was published March 2009. This states that there are no accurate and agreed upon estimates of the number of trans-people in the UK or within any particular region. However, estimates typically range between 1 in 11,500 and 1 in 4000 which equates to between 17 and 50 individuals in Calderdale.
18. The PCT has explained that its Public Health team have confirmed that 38 trans-individuals have been identified from Calderdale. These individuals were found through its communications in consultation with members of the transgender community via the survey.
19. This report can be found at:
http://www.calderdale.nhs.uk/fileadmin/files/Public_Information/Publications/Microsoft_Word_-_Calderdale_Trans_Report_-_March_09.pdf
20. The Commissioner's accepts the PCT's arguments. He considers that the figures are so low that identification of the relevant individual(s) would be possible, particularly as the request names a specific clinician.
21. The Commissioner is satisfied that the data requested relates to living individual(s) who may be identified from that data and that it constitutes personal data. It is therefore not possible to provide the complainant with the anonymised information, as requested.
22. In addition, the Commissioner considers the requested data to be sensitive personal data. Information regarding surgery which involves a sex change clearly falls into this category.

Would complying with section 1(1)(b) contravene the first data protection principle?

23. The first principle of the DPA states that personal data must be processed fairly and lawfully.
24. In considering whether it would be unfair to provide information concerning sex change surgery which might identify the individual(s) concerned and whether this would therefore contravene the requirements of the first data protection principle, the Commissioner has taken the following factors into account:
 - whether the requested information is sensitive personal data;
 - the consequences of disclosure;

- the data subject's reasonable expectations of what would happen to their personal data; and
- the balance between the rights and freedoms of the data subject and the legitimate interests of the public.

Sensitive personal data

25. Any consideration of fairness must first determine whether the requested information is defined as sensitive under the DPA. Section 2 of the DPA defines sensitive personal data as information which relates to:
- (a) racial or ethnic origin
 - (b) political opinions
 - (c) religious beliefs
 - (d) trade union membership
 - (e) physical or mental health
 - (f) sexual life
 - (g) criminal offences, sentences, proceedings or allegations.
26. Information regarding surgery which involves a sex change clearly falls into the category of sensitive personal data which relates to a person's physical and mental health and sexual life. In most cases the very nature of sensitive personal data means it is more likely that disclosing this information will be unfair.

Consequences of disclosure

27. Disclosure of information under the Act constitutes disclosure to the world at large. It is clear that information concerning sex change surgery which will enable identification of the individual(s) involved is not information which should be in the public domain. It is a private matter and its disclosure may be distressing to the individual(s) concerned.

Reasonable expectations

28. There is a clear expectation that medical information should remain confidential between a doctor and a patient and not be placed in the public domain. It is a well recognised principle of the DPA that information of this nature would not normally be provided to third parties. The fact that individual(s) may have applied for or received sex change surgery is in itself personal and confidential information.
29. It is therefore apparent that information concerning sex change surgery is personal and confidential information and that the individual(s) concerned would reasonably expect such information not to be made

available. There is a clear expectation that medical information should remain confidential between a doctor and patient.

30. There is no indication in this case that consent has been obtained for disclosure of the information requested.

The balance between the rights and freedoms of the data subject and the legitimate interests of the public.

31. It could be argued that it is in the legitimate interests of the public to know the number of referrals made by one particular doctor regarding specific surgical operations.
32. However, it is a well recognised principle of the DPA that information concerning surgical operations is private and personal to the individual(s) concerned. Information of this nature would not normally be provided to third parties.
33. In this case the personal data is extremely sensitive and disclosure would constitute a significant intrusion to the individual's right to privacy.
34. The Commissioner is therefore satisfied that providing information concerning sex change surgery which might lead to identification of the individual(s) involved would be unwarranted by reason of prejudice to the rights, freedoms and legitimate interests of the individual(s) in question.

Conclusions

35. The Commissioner is satisfied that it would be unfair to provide information concerning sex change surgery which might identify the individual(s) involved. Further disclosure would contravene the first data protection principle and would not be fair.
36. The Commissioner is therefore satisfied that the PCT was correct to refuse to disclose this information under section 40(2) of the Act.
37. As the Commissioner is satisfied that providing the requested information would contravene the first data protection principle, he has not gone on to consider the other data protection principles.

The Decision

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

Steps Required

39. The Commissioner requires no steps to be taken.

Other matters

40. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the PCT's failure to provide an internal review as a matter of concern.
41. Under the Act a public authority is not legally required to have an internal review procedure however, in order to conform to the Section 45 Code of Practice, an authority should have a review procedure in place. This states that a request for an internal review should be dealt with within a reasonable timeframe.
42. The Commissioner's guidance 'Time limits on carrying out Internal Reviews' states that a one-stage review should be completed in 20 working days, although in exceptional circumstances it could take up to 40 working days.

Right of Appeal

43. 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

44. 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.
45. 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 6th day of April 2011

Signed

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled

–

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

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.”

The Data Protection Act 1998

Schedule 1 – the Data Protection Principles

1. “Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
 - (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in schedule 3 is also met.”