

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 24 August 2011

Public Authority: County Durham and Darlington NHS
Foundation Trust

Address: Darlington memorial Hospital
Hollyhurst Road
Darlington
DL3 6HX

Summary

The complainant made a request for copies of all compromise agreements entered into by the County Durham and Darlington NHS Foundation Trust (the Trust) with doctors and the reasons why the Trust entered into the compromise agreements. The Trust refused to confirm or deny whether this information is held under section 40(5) and section 43(3) of the Act. The Commissioner considers that the Trust was correct to refuse to confirm or deny whether the information is held under section 40(5) 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. The complainant requested the following information on 5 February 2010:

"Please provide copies of all compromise agreements you have entered into with doctors of any grade. Please also provide a list of exploratory or illustratory issues covered by the compromise agreements (ie. the reasons the compromise agreements were entered into)."

3. The Trust provided a response to the complainant on 5 March 2010. The Trust refused to confirm whether or not it held the information he had requested.
4. The complainant requested an internal review of the Trust's decision on 24 March 2010. The Trust wrote to the complainant with the details of the result of the internal review it had carried out on 6 April 2010. The Trust still refused to confirm or deny if it held the information requested but explained that it was doing so under section 40 [section 40(5)] and section 43(3) of the Act.

The Investigation

Scope of the case

5. On 4 March 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the Trust had dealt with his request correctly.

Chronology

6. The Commissioner wrote to the Trust on 31 March 2011 to ask for further submissions in support of its application of section 40(5) and section 43(3) in this case.
7. On 14 April 2011 the Trust responded to the Commissioner. It provided further submissions in support of its application of section 40(5) and section 43(3).

Analysis

Substantive Procedural Matters

Exemptions

8. Section 40(5) sets out the following: -

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).

9. Generally, the provisions of section 40 subsections 1 to 4 exempt personal data from disclosure under the Act. In relation to a request which constitutes the personal data of individual(s) other than the applicant(s), section 40(5)(b)(i) further excludes a public authority from complying with the duty imposed by section 1(1)(a) if complying with that duty would contravene any of the data protection principles or section 10 of the DPA or would do so if the exemption in section 33A(1) of that Act were disregarded.
10. A full text of section 40 is available in the Legal Annex at the end of this notice.
11. 'Personal data' as defined under section 1(1) of the DPA is data which relate to a living individual who can be identified from

- those data or from those 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.
12. In this case the Commissioner considers that compromise agreements are the personal data of the employee to whom the agreement relates.
 13. After considering the submissions put forward by the Trust in this case, the Commissioner considers that the proper approach would be to first consider whether or not in responding to the request, the public authority would have been excluded from the duty imposed by section 1(1)(a).
 14. In line with the provisions of section 40(5)(b)(i), the Commissioner therefore first considered whether or not confirming or denying whether the requested information was held would contravene any of the data protection principles.

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

15. The first data protection principle states in part; 'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met...'
16. A full text of the first data protection principle is available in the Legal Annex at the end of this Notice.
17. In considering whether or not confirming or denying whether the requested information was held would contravene the first data protection principle, the Commissioner took into account the reasonable expectations of any relevant data subjects, whether it would cause damage and distress to any of the relevant data subjects and the legitimate interests of the public at large.
18. Without disclosing any more detail than is necessary in order not to defeat the intention of section 40(5), upon considering the Trust's submissions, the Commissioner is satisfied that in the context and background of this request, any relevant data subjects would have had a reasonable expectation of privacy and would not expect the Trust to confirm or deny if this information

- is held. The Commissioner has detailed the Trust's submissions in the confidential annex attached to this Notice.
19. Furthermore, again after considering the Trust's submissions, the Commissioner considers that confirming or denying whether the requested information is held may cause damage or distress to any relevant data subjects. The Commissioner has detailed the Trust's submissions in the confidential annex attached to this Notice.
 20. The Commissioner does consider that the public has a legitimate interest in knowing whether the Trust has entered into any compromise agreements as there is a public interest in knowing how public money is being spent.
 21. However the Commissioner considers that under all the circumstances of this case, confirming or denying whether the requested information is held would breach the first data protection principle. The Commissioner is therefore satisfied that any response provided in this regard in line with the provisions of section 1(1)(a) of the Act would contravene the fairness element of the first data protection principle.
 22. As the Commissioner is satisfied that complying with section 1(1)(a) would in this case contravene the first data protection principle, he finds that 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).

The Decision

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

Steps Required

24. The Commissioner requires no steps to be taken.

Right of Appeal

25. 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.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

26. 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.
27. 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 24th day of August 2011

Signed

Pamela Clements

Group Manager, Complaints Resolution

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."

Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (iii) section 41, and
 - (iv) section 44"

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 the 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.”