

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 5 October 2011

Public Authority: South Tees Hospitals NHS Foundation Trust
Address: The James Cook University Hospital
Marton Road
Middlesbrough TS4 3BW

Decision (including any steps ordered)

1. The complainant has requested a copy of compromise agreements entered into with doctors of any grade over the last 10 years. He also requested a list of exploratory issues covered by the compromise agreements (ie. the reasons why the compromise agreements were entered into).
2. The Information Commissioner's (the Commissioner's) decision is that the South Tees Hospitals NHS Foundation Trust (the Trust) has correctly applied section 40(2) of the Freedom of Information Act 2000 (the FOIA) to this request for information.

Request and response

3. On 5 February 2010, the complainant wrote to the Trust and requested information in the following terms:

'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 why the compromise agreements were entered into.)'

This request was to cover the previous 10 years.

4. The Trust responded on 5 March 2010. It stated that it held very few compromise agreements. It therefore considered that even if it redacted the names and dates of any agreements the employees concerned would be identifiable. It therefore considered the information requested to be exempt from disclosure under section 40(2) of the FOIA.
5. The complainant requested an internal review on 5 March 2010. This was provided on 7 April 2010. The Trust explained that it considered disclosure of the requested information could lead to identification of the individual(s) involved and would be likely to cause substantial distress to the data subject(s). It considered that this damage or distress would be unwarranted.

Scope of the case

6. On 4 March 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He does not accept that the Trust is correct to apply section 40(2) to this information request.
7. In his request, the complainant argued that any agreements should be provided in their original form but that the names and dates of the agreements could be redacted. This was in accordance with a decision notice regarding a similar request (case reference FS50202562) which followed the Information Tribunal finding in the case *Waugh v. Information Commissioner and Doncaster College (EA/2008/0038)*.
8. The Commissioner considers that the scope of this case is concerned with the application of section 40(2) to the withheld information. This does not include the name and the date included on any agreement which the complainant has agreed should be redacted.

Reasons for decision

9. Section 40(2) of the FOIA states 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.

10. '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.
11. In this case, the Trust has argued that disclosure of any compromise agreement (or a list of reasons why it was entered into) would be likely to identify the individual(s) concerned, even if the name(s) and the date(s) of the agreement(s) were redacted. The Commissioner accepts this argument. Even if the name(s), address(es) and the date(s) of the agreement(s) were redacted, the very fact of the existence of the agreement(s) would be confirmed. The Commissioner considers that due to the small number of agreement(s), this confirmation is likely to lead to identification of the individual(s) or is likely to be related to the individual(s) concerned.
12. The information is therefore personal data because it is information about individual(s) who have reached a compromise agreement with the Trust. The information therefore contains personal data relevant to any agreed private settlement that has been reached between employer and employee.
13. Disclosure of information under the FOIA is not simply to the requester, but to the world at large. The requested information is not anonymous statistical data in the sense that any connection between a living individual and the information has been obscured and cannot be recreated, but information with a real and direct relationship to a small number of living people. It is therefore necessary to decide whether disclosure would be fair.
14. In considering whether disclosure of any compromise agreement (or a list of reasons why it was entered into) would be unfair in this case and 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;
 - the balance between the rights and freedoms of the data subject and the legitimate interests of the public.

Sensitive personal data

15. 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.
16. The Commissioner cannot reveal the nature of the information in the compromise agreement(s) but has taken into consideration whether the data falls into any of the above definitions.

Consequences of disclosure

17. The Trust has explained that it considers disclosure of the requested information would be likely to cause substantial distress to the individual(s) concerned. It has argued that this damage or distress would be unwarranted.
18. The Commissioner accepts that the disclosure of the agreement(s) may lead to public scrutiny of the details and that this may cause unwarranted distress to the individual(s) concerned.
19. While the redaction of the name and date of any agreement may not allow immediate identification of the relevant individual(s), the Commissioner considers it to be reasonable to assume that there would be colleagues or acquaintances of the individual(s) who over the past ten years have been aware of any disputes with the Trust. It is therefore likely that there will be individuals who would be able to associate any part of the requested information, if disclosed, with a specific person.
20. In a recent finding (*Beckles v Information Commissioner EA/2011/0073 & 0074; September 2011*) the Information Tribunal reiterated that disclosure is to the public at large and that identifiable means identifiable to any third party who might relate the released information to his or her knowledge and experience. The Tribunal considered that the number of colleagues or friends who would be aware that a particular individual had settled a claim with the public authority within the specified time scale to be relevant in that case.

21. Colleagues or acquaintances of the individual(s) involved may, through their contact with that person, know something of the circumstances of that person's departure. They may not know the full details, however, nor be aware of the existence of a compromise agreement, or any settlement amount agreed. It is clear to the Commissioner that these are essentially private matters which ought to remain private and, if disclosure would enable others to deduce some or all of these matters, that is likely to be of some importance to the person concerned and would be an undesirable consequence of disclosure.
22. Furthermore, the second element of the requested information (the list of reasons why it was entered into) would, if disclosed, serve to further 'narrow the field of search' and therefore make identification of an individual through the disclosure more likely.
23. The Commissioner considers that it is likely there will be people in possession of information which might enable identification, including present and former members of the Trust's staff and former colleagues of the individual(s) concerned.
24. The release of the requested information (even with the name(s) and date(s) redacted) may therefore lead to identification and be detrimental to the individual(s) involved.

Reasonable expectations

25. The Trust has argued that the individual(s) concerned have not given consent for the agreements to be made public.
26. The basis of a compromise agreement is that it remains an essentially private and confidential matter between employer and employee. There is an emphasis on confidentiality implicit in most such agreements. In this case the agreement(s) have an explicit confidentiality clause. The individual(s) concerned therefore can reasonably expect that essentially private information concerning their departure from the Trust would remain confidential.
27. The Trust has a duty to respect its employees' reasonable and express expectations of privacy and the Commissioner considers the lack of consent to be an important factor. The individual(s) concerned would have a reasonable expectation that their identity would remain confidential.

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

28. The public undoubtedly has a legitimate interest in knowing how much money a public body is spending on compromise agreements. There is also a strong argument that a public body should be transparent and accountable to the public. It could therefore be argued that any compromise agreements should be disclosed to promote such openness and accountability.
29. The complainant has explained to the Commissioner that he is specifically interested in “gagging clauses” in which employees are prevented from discussing the circumstances of their case with third parties. Whilst the Commissioner considers that there is a public interest in understanding how compromise agreements may stop the open discussion of issues raised by employees, he is mindful that the agreements themselves contain personal data and the individuals concerned have a right to privacy. There is no assumption that any such clause is relevant to this case.
30. It is clear that a balance has to be struck between a public authority's duty to be transparent and accountable about how and why it decided to spend public money in a particular way and its duty to respect its employees' right to privacy. However, in this case, there is a small number of agreement(s) concerned. It is very likely that disclosure of the text of any agreement would lead to identification of the individual(s) concerned and this would constitute an unwarranted invasion of privacy. The Trust also believes that confirmation of the number of compromise agreements for this time period would similarly lead to the identification of relevant individuals.
31. The Commissioner considers this to be a powerful and conclusive argument. The interests of the individual are of paramount importance. A compromise agreement and the reasons it was entered into are confidential and personal. There is an expectation that this will not be made public.
32. The Commissioner therefore considers that the individuals' right to privacy outweighs the public's legitimate interest in transparency and accountability in this case.

FS50202562

Appeal: Bousfield v. Information Commissioner and Liverpool Women's Hospital NHS Foundation Trust (EA/2009/0113)

33. The complainant has argued that the conclusion of the Information Tribunal with respect to a previous request is relevant here. During the Commissioner's investigation of the case FS50202562, the text of twelve compromise agreements (including the settlement figures) was disclosed with personal data redacted. In the decision notice for the case, it was upheld that the public authority was correct to redact any data contained in the agreements which would identify the individuals concerned.
34. The decision notice was appealed; however due to the circumstances of the case, the Information Tribunal narrowed the scope of the appeal. It considered whether it would be fair to disclose the identity (name and address) of one individual with respect to only one of the compromise agreements. All the terms of this compromise agreement had already been disclosed, including the amount paid.
35. The Tribunal argued that by disclosing the disputed information, the identity of the individual would become known and this would be likely to significantly compromise his privacy. It would be likely to make him the target of speculation as well as approaches from the media. The Tribunal also argued that the disclosure of past events which related to the termination of a person's employment might cause considerable distress. The Tribunal attached "considerable weight" to the fact that the individual concerned had not given his consent to disclosure. It explained that the interests of the individual are of paramount importance. It also considered it a "significant factor" that the compromise agreement expressly required both parties to keep its terms confidential.
36. These arguments apply to this case.
37. The Tribunal upheld the Commissioner's decision and dismissed the appeal. The Tribunal considered that the public's legitimate interests in that case had been satisfied by the disclosure of the compromise agreement in redacted form.
38. The disclosure of the twelve compromise agreements (with personal data redacted) had been agreed during the investigation of the case as it was considered highly unlikely that one of the agreements could be linked to a particular individual. The amounts of money involved could not be linked to a specific person.

39. In this case, the Trust has argued that because it holds so few agreement(s), disclosure of the body of any agreement (including the amount) would lead to the identification of the individual(s) concerned, even if information which would directly identify the individual(s) was redacted. As identification is possible, the Commissioner considers that even if the amount(s) awarded were disclosed, this may be linked to the individual(s) involved.
40. For this reason the Commissioner considers that it would not be fair to disclose the amount(s) of money awarded as this constitutes the personal data of the individual(s) concerned and the amount is likely to be linked to an identifiable living person.

FS50165354

Appeal: Waugh v. Information Commissioner and Doncaster College (EA/2008/0038)

41. In the decision notice for the case FS50165354, the Commissioner ordered the public authority (a college) to disclose the amount of the severance payment of the Principal. The Commissioner upheld the refusal of the college to disclose the remainder of the requested information which concerned an investigation into the conduct of the Principal and included a compromise agreement. This information had been refused under section 40(2).
42. The Commissioner considered that the severance payment should be disclosed because the college intended to publish it in its statement of accounts at the end of the year. The college had argued that the Principal would therefore have a reasonable expectation that the amount would be published.
43. The Commissioner considered that there was a significant public interest in the public knowing the amount of public money paid to the Principal when his employment was terminated. However because he did not identify any detriment that would have arisen in disclosing this information at the time of the request (and before the accounts were published), he concluded that the legitimate interests of the public were sufficient to outweigh the individual's right to privacy in this case.
44. It could be argued that in this case, the same arguments apply and therefore the amount of the payment should be disclosed. However, the Commissioner was clear in the decision notice that an important consideration was the future publication of the severance payment in the accounts of the college. This does not apply here. The detail of the severance payment is the personal data of the individual(s) concerned and the Commissioner accepts that the disclosure of such detail would be detrimental in this case.

45. In addition, in the appeal proceedings for the same case, the Information Tribunal concluded that the legitimate interests of the public in accessing the remainder of the requested information (which included a compromise agreement) were not sufficient to outweigh the individual's right to privacy, particularly given the substantial detriment that would result from disclosure.

Conclusions

46. In view of the above arguments, the Commissioner's conclusion is that the Trust was correct to refuse to provide the complainant with any compromise agreement (or the list of reasons why it was entered into) even with name(s) and date(s) redacted. Consent for disclosure has not been given and there is a clear expectation that such personal data which might result in the identification of the individual(s) concerned should not be released. It would not be fair to disclose the requested information and it is therefore exempt under section 40(2) of the FOIA.

Right of appeal

47. 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

48. 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.
49. 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 5th day of October 2011

Signed

**Pamela Clements
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