

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 1 September 2011

Public Authority: University College London Hospital NHS
Foundation Trust

Address: 250 Euston Road
London
NW1 2PG

Summary

The complainant requested a copy of an investigation report. This information was initially withheld by the public authority under section 22 of the Act. During the Commissioner's investigation most of the requested information was disclosed to the complainant, although a small amount was withheld under section 40(2). The Commissioner has decided that this information was correctly withheld under section 40(2). However, the public authority failed to meet the requirements of section 17.

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 wrote to University College London Hospital NHS Foundation Trust (the "Trust") on 21 November 2010 and made the following request,

"I understand that [named professor] submitted his investigation report to you on 20th September 2010 (as confirmed via an email dated 24th September 2010). It has therefore been more than two months which is more than reasonable time for the [Trust] and

[University College London] to reach a conclusion and to take remedial actions against [named doctor]...I also understand that you have specifically refused to allow me to have a copy of the investigation report carried out by [named professor]...I am therefore requesting for the investigation report to be provided to me under the [Act]. Please take this as written confirmation of my request for information."

3. The Trust responded to this request on 14 December 2010. It refused to disclose the information, and cited section 22 of the Act.
4. The complainant contacted the Trust on 17 December 2010 and requested an internal review.
5. The Trust carried out its internal review, and responded on 19 January 2011. It upheld its use of section 22.

The Investigation

Scope of the case

6. On 17 March 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. Specifically, he complained about the Trust's refusal to disclose the investigation report written by the named professor.
7. During the course of the Commissioner's investigation the Trust disclosed most of the previously withheld information – although a small amount was withheld under section 40(2).
8. Therefore the scope of this case is to consider the Trust's use of section 40(2) to withhold the outstanding information from the investigation report.
9. The Commissioner has also considered whether the Trust met the requirements of section 17.

Chronology

10. The Commissioner wrote to the Trust on 21 June 2011. He noted its use of section 22, and asked whether the withheld information had now been disclosed to the complainant. If not, he asked it to confirm when it intended to make this disclosure.
11. On 1 July 2011 the Trust informed the Commissioner that it had now disclosed most of the previously withheld information to the

complainant, although a small amount was withheld under section 40(2).

12. The Commissioner wrote to the complainant on 6 July 2011 noting this, and asked whether he still wished to continue with his complaint. The complainant responded on 20 July 2011 and confirmed that he did.
13. The Commissioner wrote to the Trust on 20 July 2011, and asked it for further arguments to support its use of section 40. It responded on 3 August 2011 and provided further arguments.

Analysis

Exemptions

Section 40

14. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in sections 40(3) or 40(4) is satisfied.
15. In this case the relevant condition is contained in section 40(3)(a)(i), which applies where the disclosure of the information to any member of the public would contravene any of the data protection principles. This is an absolute exemption, and is therefore not subject to a public interest test.
16. The full text of section 40 can be found at <http://www.legislation.gov.uk/ukpga/2000/36/content>
17. In this case the Trust has sought to rely upon this exemption to withhold the outstanding withheld information, on the grounds that the disclosure of this information under the Act would be unfair and would therefore be in breach of the first principle of the Data Protection Act 1998 (the "DPA").
18. In order to establish whether this exemption has been correctly applied the Commissioner has first considered whether the withheld information is the personal data of a third party.
19. Section 1 of the DPA defines personal data as data which relate to a living individual, who can be identified:
 - from that data, or
 - from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

20. In this case the outstanding withheld information is the name of a third party who made a complaint to the Trust about the named doctor referred to in the request (see paragraph 2 above). Bearing this in mind, the Commissioner is satisfied that the outstanding withheld information is the personal data of a third party.
21. The Commissioner has gone on to consider whether the disclosure of the outstanding withheld information would be in breach of the first principle of the DPA.
22. The first principle requires that personal data is:
 - processed fairly and lawfully, and
 - that one of the conditions in schedule 2 is met.
23. The Commissioner has first considered whether the disclosure of the withheld information would be fair.
24. In considering whether disclosure of this information would be fair the Commissioner has taken the following factors into account:
 - whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned;
 - the individual's reasonable expectations of what would happen to their information; and
 - are the legitimate interests of the public sufficient to justify any negative impact to the rights and freedoms of the data subject.
25. The Commissioner notes that the withheld information is the name of an individual who made a complaint to the Trust about the named doctor. He considers that matters such as this can be of great sensitivity. He has been provided with no evidence that any information has been put into the public domain in relation to the complaint against the named doctor (who was the focus of the investigation report in question), nor that this investigation was anything other than an internal disciplinary action by the Trust. Bearing these points in mind, he considers that the disclosure of the outstanding withheld information would be likely to result in an invasion of the third party's privacy.
26. Furthermore, he notes the Trust's statement that the third party would have had no reasonable expectation that their name would be disclosed into the public domain (via disclosure under the Act) in relation to this matter. Given the circumstances of the case he finds this argument convincing.

27. Notwithstanding the third party's reasonable expectations or any damage or distress that may be caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
28. The Commissioner considers that there is a public interest in openness and accountability. In the circumstances of this case he considers that there is a public interest in ensuring that the Trust has investigated the complaint against the named doctor appropriately. However, he notes that the majority of the investigation report has now been disclosed to the complainant, and he considers that this would satisfy this public interest argument. He does not consider that there is a public interest in the disclosure of the outstanding withheld information. In addition, he notes that the complainant has not provided any arguments as to why there is a compelling public interest in the disclosure of the outstanding withheld information.
29. Consequently, and taking into account the lack of any specific arguments in relation to the public interest in releasing the outstanding withheld information in this case, the Commissioner does not consider that there is a compelling public interest in disclosure. Therefore the Commissioner considers that the disclosure of the withheld information in this case would be unfair and would breach the first data protection principle. Therefore this information should be withheld under sections 40(2) and 40(3)(a)(i).

Procedural Requirements

30. Section 17(1) requires a public authority, which is relying upon an exemption in order to withhold requested information, to issue a refusal notice within twenty working days which,
 - a. states that fact,
 - b. specifies the exemption in question, and
 - c. states (if that would not otherwise be apparent) why the exemption applies.
31. During the investigation of the case the Trust informed the Commissioner that it was relying upon section 40(2) to withhold the outstanding withheld information. However, the Trust had not previously informed the complainant of this. By failing to do so, the Commissioner considers that the Trust did not comply with the requirements of section 17(1)(a), (b) and (c).

The Decision

32. The Commissioner's decision is that the Trust dealt with the request in accordance with the requirements of the Act in that it correctly relied upon sections 40(2) and 40(3)(a)(i).
33. However, the Commissioner has also decided that the Trust did not meet the requirements of section 17(1)(a), (b) and (c).

Steps Required

34. The Commissioner requires no steps to be taken.

Right of Appeal

35. 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: 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

36. 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.

37. 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 1st day of September 2011

Signed

**Pamela Clements
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