

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 January 2012

Public Authority: Somerset Primary Care Trust
Address: Wynford House
Lufton Way
Lufton
Yeovil
Somerset
BA22 8HR

Decision (including any steps ordered)

1. The complainant has requested information about Somerset Primary Care Trust's ("the Trust's") potential investigation into a complaint that was made about a named psychologist and any details of disciplinary action taken against them.
2. The Trust applied section 40(2) to information explaining that the disclosure of the information would be unfair on the named individual. The complainant referred a complaint to the Information Commissioner ('the Commissioner').
3. The Commissioner's decision is that it was more appropriate to apply section 40(5) in this case and not confirm nor deny to the public whether any relevant recorded information was held. This is because even confirming or denying that information is held would be unfair to the named individual and would contravene the first data protection principle. No remedial steps are required.

Request and response

4. On 9 May 2011 the complainant requested the following information from the Trust [the Commissioner has redacted some details of the request that also constitute personal data in this public notice]:

1. *All documents you hold concerning the outcome of your internal investigation in the conduct of [Named individual redacted] regarding [nature of event redacted];*
 2. *Any information relating to any disciplinary procedure brought against, or including, [Named individual redacted].*
5. The Trust responded on 6 June 2011. It applied the section 40(2) [third party personal data] exemption to any information that it held. It explained that it considered that the disclosure of the information would be unfair to [Named individual redacted].
6. Following an internal review the Trust wrote to the complainant on 20 July 2011. It upheld its original position and explained why.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way the request for information he made on behalf of his client had been handled.
8. On 8 November 2011 he explained that his client agreed that the Commissioner would consider:

'Whether the Trust applied section 40(2) appropriately to the information requested on 9 May 2011, or whether this information ought to be disclosed to the public.'
9. Any disclosure under the FOIA would be a disclosure to the public at large. While the complainant's client may have additional personal reasons for having the information, the Commissioner can only judge whether the information can be disclosed to the public at large. He can only consider the status of the withheld information and cannot determine whether the complainant's other arguments have any force.
10. There are different private rights that are available to some individuals and the Commissioner has ensured that the complainant has been informed of them.
11. It should also be noted that the Commissioner is constrained from what he is able to say in the 'reasons for decision' part below as he must for obvious reasons ensure both the integrity of any withheld information and the complainant's own personal data. He has provided his detailed analysis in a confidential annex. The confidential annex will in this case be provided to both the Trust and the complainant. However, its

contents will not be disclosed to the public, as its disclosure would amount to an unjustified disclosure of personal data.

12. Finally, it must be noted that the Commissioner has considered all of the information before him, but for conciseness he has focussed on the arguments that relate to why he considers that the exemption has been applied appropriately.

Reasons for decision

13. The Commissioner's role is to be the regulator of both the Data Protection Act ('DPA') and FOIA. The wording of FOIA ensures that the rights provided under it cannot prejudice or take precedence over a data subject's rights under the DPA.
14. The Commissioner considers that it is appropriate to consider section 40(5) first and because there is an initial issue about whether even confirming or denying to the public whether information is held for the request would be in accordance with the data protection principles.
15. The Information Tribunal in *Bowbrick v Information Commissioner*¹ at paragraph 51 supports the Commissioner's right to use his discretion in these kind of circumstances.

Section 40(5)

16. 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

¹ EA/2005/0006 – a link to this Decision can be found here:
http://foiwiki.com/foiwiki/info_tribunal/DBFiles/Decision/i26/Bowbrick.pdf

(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).'

17. Generally, the provisions of section 40 subsections 1 to 4 exempt personal data from disclosure under the FOIA. In relation to a request which constitutes the personal data of individual(s) other than the applicant, 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 the DPA were disregarded.
18. After considering the submissions put forward by the Trust, 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).
19. 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?

20. 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...'*
21. The information, if held, is clearly the personal data of the named individual as it relates to what happened after serious allegations were made against them and whether any disciplinary action was taken.
22. In the Commissioner's view, the information, if held, for part one of the request would also constitute the sensitive personal data of the data subject. This is defined in section 2 of the DPA. Section 2 states that personal data relating to, amongst other things, the alleged commission by an individual of any offence amounts to sensitive personal data. While the Trust did not consider the information would constitute sensitive personal data to the complainant, the Commissioner considers as a matter of fact that it would do, if held.
23. The Commissioner's approach is that where information constitutes sensitive personal data disclosure of that information will in most circumstances be unfair. By its very nature, sensitive personal data has

been deemed to be information that individuals regard as the most private information about themselves.

24. 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 the individual data subject, whether it would cause damage and distress to them and the legitimate interests of the public at large.
25. The Trust has argued that it is most unlikely that the data subject would have reasonably expected that this information, if held, would be put into the public domain by way of disclosure under the Act. Bearing in mind the fact that this information relates to a potential investigation of allegations of criminal behaviour, and that the investigation did not result in a hearing, the Commissioner finds this argument persuasive.
26. 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, the relevant data subject would have had a reasonable expectation of privacy and would not expect the Trust to confirm or deny to the public whether this information is held.
27. 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 the relevant data subject.
28. The Commissioner does consider that the public has a legitimate interest in knowing whether the Trust has investigated what are serious allegations and the actions that were taken.
29. 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 FOIA would contravene the fairness element of the first data protection principle.
30. 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).

31. In light of his decision in relation to section 40(5)(b)(i) the Commissioner has not gone on to consider the other requirements of the first data protection principle or the other data protection principles.
32. It follows that the Trust has no obligation to even confirm or deny whether the remaining information exists and no further information should be provided to the complainant.

Right of appeal

33. 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

34. 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.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

Pamela Clements
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