

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 April 2012

Public Authority: Betsi Cadwaladr University Local Health Board
Address: Ysbyty Gwynedd
Penrhosgarnedd
Bangor
Gwynedd
LL57 2PW

Decision (including any steps ordered)

1. The complainant requested information about employees who had been suspended during a specified period. Betsi Cadwaladr Health Board (the Health Board') provided some information, stating some information was not held and withheld other information under section 40(2) of the FOIA. The Commissioner's decision is that the Health Board correctly relied on section 40(2) of the FOIA for the non disclosure of the requested information. The Commissioner has, however, identified some procedural issues surrounding the Health Board's handling of the request. The Commissioner requires no further action to be taken.

Request and response

2. On 6 October 2011, the complainant wrote to the Health Board and requested information in the following terms:
 1. "The number of BCUHB (or former North Wales NHS Trust) employees who have been suspended between 01/01/2009 and 30/6/2011
 2. For each of these people please include:
 - a. Their Job Grade or Job title
 - b. The dates they were suspended from and to
 - c. The reasons for their suspension

- d. The outcome of their suspension (i.e., did they return to work/did they leave/have their contract terminated, is the investigation still ongoing)
 - e. Did they have to return any of the following items during their period of suspension:
 - i. Security Card
 - ii. Office keys
 - iii. Laptop computer or other BCUHB equipment"
3. The Health Board responded on 21 December 2011 and provided information in relation to question 1 and refused to provide the information relevant to question 2 as it considered it to be exempt under section 40 of the FOIA.
4. On 21 December 2011, the complainant requested an internal review of the Health Board's decision in relation to the information withheld under section 40 of the FOIA.
5. The Health Board provided the outcome of its internal review on 5 January 2012. It upheld its decision that the requested information relating to questions 2(a) to (d) was exempt under section 40(2). The Health Board also stated that it did not hold any information relevant to question 2(e) because although it is normal practice to request the return of the items referred to, no written log is kept of the actions.

Scope of the case

6. The complainant contacted the Commissioner to complain about the way his request for information had been handled. Based on the content of the complaint to the Commissioner, it appeared that the complaint related to the Health Board's application of section 40 of the FOIA to questions 2(a) to (d) of the request.
7. The Commissioner wrote to the complainant on 6 February 2012 to confirm that the scope of his investigation would be to assess whether the Health Board was correct in withholding information relevant to questions 2(a) to (d) under section 40 of the FOIA.
8. During the course of the Commissioner's investigation, the Health Board alluded to the fact that it estimated it would take around 20 hours to retrieve the information requested, which would exceed the cost limit as provided under section 12 of the FOIA. However, it stated that as it deemed the information requested to constitute the personal data of the suspended employees, it considered section 40 to apply rather than engaging the cost limit under section 12.

Reasons for decision

Section 40 – personal information

9. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the FOIA would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').
10. In this case, the Health Board argued that the requested information is the personal data of the individuals who had been suspended and that its disclosure under the FOIA would breach the first data protection principle.
11. In order to rely on the exemption provided by section 40, the information being requested must constitute personal data as defined by section 1 of the DPA. It defines personal information 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, or is likely to come into the possession of, the data controller.

Is the requested information personal data?

12. The withheld information in this case consists of specific information about employees who have been suspended between 1 January 2009 and 30 June 2011. The specific information requested is the job grade (or job title), the dates of suspension, the reasons for suspension, and the outcome of suspension. The Health Board are of the opinion that the information constitutes personal data as individuals would be identifiable from the information should it be disclosed. In particular, the Health Board has no doubt that other employees including colleagues of the individuals who have been suspended would be able to identify individuals if the job title/grade is released together with the dates of any suspension. This is because other employees would be aware of the dates individuals had been away from work.
13. The complainant has argued that, as the Health Board employs around 18,000 staff in 6 separate counties of North Wales, and in view of the fact that he has not requested the names of the individuals, nor the location where they worked it would not be possible to identify any individuals, and the information does not constitute personal data. The complainant believes that without knowing the location, the specialism in which the member of staff works and possibly their gender and age,

no individual would be identifiable from the information he has requested and it is therefore 'anonymised'.

14. On the one hand, the Commissioner accepts that the withheld information does not show the actual identity or name of any individual, but simply details the job title (or job grade) and other information relating to the individual's suspension. However, if a member of the general public could identify individuals by cross referencing the disclosed, 'anonymised' data with information already in the public domain, in the Commissioner's view the information will constitute personal data. Whether it is possible to identify individuals from the 'anonymised' data is a question of fact based on the circumstances of the specific case.
15. The Commissioner recognises that the argument here is that disclosure of the withheld information may be combined with other information, already in the public domain or known in the community, which would therefore enable a picture to emerge, rather like building a mosaic from apparently unrelated pieces.
16. The Commissioner has considered the arguments of both the Health Board and the complainant and he is mindful of the fact that whilst the complainant may not be able to link the information to an individual or individuals, disclosure under the Act is considered to be disclosure to the public at large. If the Health Board disclosed the information to the complainant under the FOIA, it should also be prepared to disclose the same information to any other person who asks for it.
17. The Commissioner notes that the Health Board employs around 18,000 staff across several sites, and that it confirmed that 50 members of staff had been suspended during the period in question. However, the Commissioner considers it would be relatively easy for other employees of the Health Board, and particularly colleagues to identify the individuals concerned if the information were disclosed. He believes the likelihood of identification would be greatest in relation to employees who worked closely with, or in the same department as the individuals who were suspended as they would be aware of the time period the individuals were absent from work, and possibly the reasons for any suspension.
18. Although the Health Board did not specifically put forward the following argument, the Commissioner also considers that links to individuals might be drawn from the data through 'corroborating information' known through local knowledge from family and friends, or other third parties who might have had dealings with any of the individuals to whom the information relates.

19. The Commissioner notes that, in respect of job titles, it could be the case that only one individual has a specific job title, and this would increase the likelihood of identification. However, even if the information detailing job grades only (eg Band 2, Consultant) were to be disclosed, or even removing all references to job grade and/or title (eg numbering them A, B C), the Commissioner is of the view that there is still a strong likelihood that individuals would be identifiable for the reasons set out above.
20. Taking into account the above factors the Commissioner believes that it would be possible for individuals to be identified if the withheld information were disclosed and that this is more than a slight hypothetical possibility. Accordingly, the Commissioner is satisfied that the information requested does constitute personal data, within the definition at section 1(1) of the DPA.

Would disclosure breach one of the Data Protection principles?

21. The Health Board has argued that the withheld information is exempt under section 40(2) because disclosure would breach the first data protection principle. The first data protection principle has two components:
 - personal data shall be processed fairly and lawfully; and
 - personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met.

Would disclosure be fair?

22. In considering whether disclosure of the information requested would comply with the first data protection principle, the Commissioner has first considered whether disclosure would be fair. In assessing fairness, the Commissioner has considered the reasonable expectations of the individuals concerned, the nature of those expectations and the consequences of disclosure to the individual. He has then balanced against these the general principles of accountability, transparency as well as any legitimate interests which arise from the specific circumstances of the case.

Expectations of the individuals concerned

23. The withheld information in this case relates to the dates, reasons and outcome of employees who were suspended over a specified period. Disclosure of information under the FOIA is disclosure to the public at large and not just to the complainant. The Commissioner recognises that people have a reasonable expectation that a public authority, in its

role as a responsible data controller, will not disclose certain information and that it will respect confidentiality.

24. The Commissioner believes that employees of public authorities should be open to scrutiny and accountability and should expect to have some personal data about them released because their jobs are funded by the public purse. However, he considers that information which might be deemed 'HR information' (for example details of pension contributions, tax codes, etc) should remain private, even though such information relates to an employee's professional life, and not their personal life.
25. The Commissioner believes that the information relevant to this case could be argued to fall into the category of HR information, because it relates to disciplinary/personnel matters, and his general view is that this type of information should remain private. The Commissioner is satisfied that the suspended individuals would have had a reasonable expectation that the details of the dates and outcomes of their suspensions would be kept confidential and not passed on to third parties without their consent.

Consequences of disclosure

26. In light of the nature of the information and the reasonable expectations of the individuals concerned, as noted above, the Commissioner is satisfied that release of the withheld information about the dates, reasons and outcome of suspensions would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the individuals in this case and the withheld information itself in coming to this conclusion.

General principles of accountability and transparency

27. Notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if there is a more compelling public interest in disclosure.
28. However, the Commissioner believes that the public's interests must be weighed against the prejudices to the rights, freedoms and legitimate interests of the members of staff concerned. The Commissioner accepts the Health Board's contention that these members of staff would have a strong expectation of privacy and confidentiality over the details of disciplinary matters and information relating to their suspensions. The Commissioner also notes that there is no suggestion that the Health Board or the suspended individuals have placed any information about their suspensions into the public domain.

29. The Commissioner's conclusion is that disclosure of the requested information would enable private information to be deduced about individuals by others who possessed 'corroborating information'. The Commissioner finds that the suspended individuals would have a reasonable expectation that the information related to disciplinary proceedings would remain confidential. He has therefore concluded that it would be unfair to disclose the withheld information - in other words, disclosure would breach the first data protection principle. He therefore upholds the Health Board's application of the exemption at section 40(2).
30. As the Commissioner has determined that it would be unfair to disclose the requested information, it has not been necessary to go on to consider whether disclosure is lawful or whether one of the conditions in Schedule 2 of the DPA is met. The Commissioner therefore upholds the Health Board's application of the exemption provided at section 40(2) of the FOIA.

Procedural requirements

31. The FOIA requires a public authority to respond to an information request within 20 working days of receipt of a request, and either disclose the requested information within this period or issue a refusal notice which explains the basis on which any information has been withheld. The request was made on 6 October 2011 and the refusal notice was not issued until 21 December 2011. As such the Health Board breached these requirements, both in terms of the information it disclosed and the late issuing of its refusal notice. The Health Board should ensure that such delays in responding to requests are not repeated in the future.

Right of appeal

32. 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

33. 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.
34. 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

Anne Jones
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