

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 July 2012

Public Authority: Royal College of Veterinary Surgeons

Address: Belgravia House
62-64 Horseferry Road
London
SW1P 2AF

Decision (including any steps ordered)

1. The complainant made a request for information to the Royal College of Veterinary Surgeons (RCVS) on 6 December 2011, for the full disclosure of information contained within the final report of the RCVS' 'Overspend Review Group', otherwise known as the 'McKelvey Report.'
2. The Commissioner's decision is that the RCVS correctly applied section 40(2) of the FOIA to the request. He does not require the RCVS to take any steps.

Request and response

3. On 6 December 2011, the complainant wrote to the RCVS and requested the following information:

'Having read the recommendations of the McKelvey report, I am formally requesting to be supplied with the full report under the Freedom of Information Act.'

4. On 20 December 2011 the RCVS provided a response to the complainant in which it advised it was withholding the requested information under sections 40(2) and 40(3)(a)(i) (third party personal data) of the FOIA. The RCVS explained that whilst it had an internal review procedure, it had decided not to carry one out in this case as its response had been based on legal advice from external counsel.

Scope of the case

5. The complainant contacted the Commissioner to complain about the way her request for information had been handled. Specifically, she complained that the RCVS had not provided her with the information requested.
6. The Commissioner's investigation has therefore focused on whether the RCVS handled the request in accordance with the FOIA.

Reasons for decision

7. The 'McKelvey report' was the final report of the RCVS' 'Overspend Review Group', set up to report on two 'overspends' of money relating to the development of the lower ground floor of the RCVS building at Belgravia House and a new computer database.
8. The overspends escalated costs to approximately £484,000 (14% over budget) for the building development and approximately £366,438 (45% over budget) for the computer database work.
9. The RCVS has stated that it had always intended for the full report to be made public. However, after the report was viewed by the relevant employees of the RCVS, it took the decision not to do so as it had concerns that it would breach the Data Protection Act 1998 (DPA). The RCVS did however publish the report's recommendations on its website alongside other explanatory material.¹
10. Section 40(2) of the FOIA provides that information is exempt from disclosure if it constitutes personal data and either the first or the second condition in section 40(3) is satisfied.
11. The first condition in section 40(3) states that the disclosure of personal data would (i) contravene any of the data protection principles, or (ii) section 10 of the DPA. The RCVS has stated that it is the first of these that applies in this case.

Personal data

Personal data is defined in section 1(1) of the DPA as:

"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

¹ <http://www.rcvs.org.uk/news-and-events/news/review-group-reports/>

possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."

12. The Commissioner's guidance on the exemption for personal data² contained within the FOIA expands on what constitutes personal data:

"The two main elements of personal data are that information must 'relate to' a living person, and that person must be identifiable. Information will 'relate to' a person if it is:

- *about them;*
- *is linked to them;*
- *has some biographical significance for them;*
- *is used to inform decisions affecting them;*
- *has them as its main focus; or*
- *impacts on them in any way."*

13. The RCVS has argued that the withheld information is the personal data of more than one data subject. It has stated that those interviewed during the course of the investigation that lead to the report are the data subjects concerned.

Does the information relate to living persons?

14. The Commissioner has viewed the withheld information and determined that the withheld information relates to living individuals in that it is either about them, is linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in some way.

Does the information identify living individuals?

15. Part of the withheld information contains the names of data subjects. To this extent the Commissioner is of the view that this information identifies living individuals.
16. Where the withheld information does not explicitly identify an individual, the Commissioner considers it likely that each data subject could still be

²http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/PERSONAL_INFORMATION.ashx

identified if that information was viewed by persons with specific knowledge of the matters discussed in the withheld information or were aware of the additional information that was in the public domain at the time of the request.

Would disclosure of the withheld information contravene any of the data protection principles?

17. The first data protection principle states:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

a) at least one of the conditions in Schedule 2 is met; and

b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

18. In considering whether disclosure of the information would be fair to the individuals concerned, the Commissioner has, in this instance, taken the following factors into account:

- the individual's reasonable expectations as to what would happen to their information; and
- balancing the rights and freedoms of the data subjects with legitimate interests.

Reasonable expectations

19. The complainant has argued that the data subjects who could be identified from the withheld information are senior members of a public authority, in that they are either elected or appointed officials, and that they would all be outwardly facing officials. As such, the complainant has claimed that the data subjects would have a reduced expectation of privacy.

20. Further, the complainant has argued that as the report has already been seen by some employees of the RCVS then disclosure cannot be said to breach the data protection principles. However, the Commissioner would note that disclosure of information to a limited audience is not the same as disclosure under FOIA, which is to the public at large, and does not prevent that information from being caught by the DPA or the data protection principles.

21. The complainant argued that as it had always been the RCVS' intention to publish the report this should weigh in favour of disclosure. The RCVS has stated that although it had intended to publish the final report,

when it received it and, at the time of the requests, it considered that it was not able to make the information available as to do so would result in a breach of the data protection principles.

22. In instances such as this, the Commissioner will consider what the reasonable expectations of the data subjects were not only at the time that the information was gathered or recorded, but also at the time the request for information was made. This is because the reasonable expectations of data subjects may change during the time covered by such developments.
23. The Commissioner has taken into account that the RCVS initially intended to publish the report and that this is a factor in assessing the reasonable expectations of the data subjects at the time that the information was gathered and recorded. However, the Commissioner is of the view that that this is not the only factor to take into consideration and other factors such as what data subjects individually expected to happen to the information are relevant.
24. The Commissioner considers that of particular importance in this case are the reasonable expectations of the data subjects at the time that the request was made. The Commissioner considers that at the time of the request, the withheld information had effectively become an internal investigation into the employment of data subjects, whatever its initial status. At this point the reasonable expectations became more firmly fixed.
25. The Commissioner accepts that where members of staff are interviewed by their employer as part of an internal investigation into matters such as overspends on projects, there is likely to be an expectation that the information they provided would not be disclosed to the public. He also considers that disclosure of information contained within reports of such investigations has the potential for causing distress and harm to data subjects, for example in detriment to future career prospects or within an individual's private life, no matter what the conclusion of that investigation.
26. Due to the nature of the expectations of the data subjects at the time of the request, the nature of the withheld information and so as not to defeat the purpose of the exemption, the Commissioner is limited in the amount that he can discuss those expectations within this decision notice. However, he is satisfied that at the time of the request it would not have been within the expectations of the data subjects for the information to be disclosed to the public and that those expectations were reasonable.

27. In reaching this view the Commissioner has considered the roles within the public authority of the data subjects. However, whilst those positions may be regarded as senior or relatively senior, such employees may still expect a degree of privacy when matters related to their work lives are involved, especially within the context of internal investigations.
28. Having considered all of the arguments, the Commissioner is of the view that, whilst in this case the data subjects may be regarded as senior public officials and so have a reduced expectation of privacy, this does not mean that they should have no expectation of privacy. Again the circumstances at the time of the request are particularly relevant in this regard.

Legitimate interests of the public and rights and freedoms of the data subjects

29. The complainant has argued that disclosure of the information is necessary for democratic accountability within the veterinary profession. She has also argued that disclosure is in the wider interests of transparency and accountability, especially in relation to the veterinary surgeon community who pay fees to the RCVS.
30. The RCVS has stated that it accepts there is a legitimate public interest in knowing that two substantial overspends of money (partly sourced from its members) occurred and that, on the findings of an independent investigator, the RCVS has been criticised. It has further stated that it acknowledges it should be accountable to the wider public and its position is that it has demonstrated this by publishing the report's recommendations on its website. However, the RCVS has taken the view that the recommendations contain the 'nub' of the information in which there is a public interest.
31. The complainant has also argued that there is a possible suspicion of corruption in the overspends of money and that this should weigh into a consideration of whether the information should be disclosed.
32. Where information is suggestive of wrongdoing occurring, such as corruption, then the Commissioner will consider this a weighty factor in favour of disclosing information. However, in this instance the Commissioner has not been presented with any specific allegations of such occurrences and he does not consider there to be any obvious or discernible evidence of such contained within the withheld information.

The Corporate Officer of the House of Commons v IC and Leapman, Brooke and Thomas[2008] EWHC 1084 (Admin) (Leapman, Brooke and Thomas)

33. The complainant has argued that the case of Leapman, Brooke and Thomas is of relevance to this case. She has stated that the situation in regard to the overspends is analogous to the expenses of MPs.
34. The Commissioner has considered the withheld information and that which is already within the public domain. He is of the view that the legitimate public interest in transparency and accountability has already been substantially met by the publication of the report's recommendations and other information which the RCVS has made available to the public regarding the overspends. This is unlike the case of Leapman, Brooke and Thomas where it was found that there was not sufficient information in the public domain to address the public's legitimate interests.
35. The Commissioner has additionally considered to what extent disclosure of the withheld information would contribute to meeting those legitimate interests. Having considered all the issues and arguments in this case, he is of the view that whilst there may be legitimate public interest in disclosure of the withheld information, those legitimate interests are either met by information within the public domain or do not outweigh the rights and freedoms of the data subjects in this case.

Redaction

36. The Commissioner has considered whether the withheld information could be provided by carrying out redactions. However, the Commissioner considers that due to the nature of the information, it would either not be possible to carry this out or the information could not be provided in any meaningful way using such a method.
37. The Commissioner is therefore of the view that the RCVS correctly applied section 40(2) of the FOIA in this case. This is because he considers that disclosure would be unfair and consequently breach the first data protection principle.

Right of appeal

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

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.

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

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