

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 December 2012

Public Authority: Epsom & St. Helier University
Hospitals NHS Trust

Address: St Helier Hospital
Wrythe Lane
Carshalton
Surrey
SM5 1AA

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the Epsom and St Helier University Hospitals NHS Trust ("the Trust") for details of any complaints made against a named surgeon. The Trust refused the request by relying on the personal information exemption in section 40 of FOIA.
2. The Commissioner's decision is that the Trust was not obliged to confirm or deny if the requested information was held under section 40(5)(b)(i) of FOIA and he requires no steps to be taken.

Request and response

3. On 29 January 2012 the complainant wrote to the Trust and made a number of requests for information related to his stay at Epsom General Hospital. The only request which is covered by this Decision Notice was a request for details of any complaints, if any, made against a named Surgeon.
4. The Trust responded to the request on 8 March 2012 when it said that it considered that releasing details of any complaints against this surgeon would contravene the principles of the Data Protection Act 1998 (DPA). Therefore it said that the request was refused under the exemption in section 40 of FOIA.

5. The complainant expressed his dissatisfaction with the Trust's response to his request on 25 March 2012. The Trust was asked by the Commissioner to treat this as a request for an internal review which it subsequently agreed to do. It presented the findings of the internal review on 20 June 2012 which upheld the decision to refuse the request under section 40.

Scope of the case

6. On 25 June 2012, following the completion of the internal review, the complainant contacted the Commissioner to complain about the Trust's decision to refuse his request under the section 40 exemption. The Commissioner confirmed with the complainant that the complaint was limited to the part of his request which asked for details of complaints against the named surgeon.

Reasons for decision

7. In its response to the Commissioner explained that it was refusing the request under the exemption in section 40(2) of FOIA which provides that information is exempt if it constitutes the personal data of someone other than the applicant and disclosure would contravene any of the data protection principles or section 10 of the DPA.
8. However, the Commissioner considers that given the nature of the request it is appropriate to first consider whether the Trust was obliged to confirm or deny if the requested information was held. Section 40(5)(b)(i) of FOIA provides that the duty to confirm or deny does not arise for information which is the personal data of someone other than the applicant (or would be if it were held) and confirming or denying if the information is held would contravene any of the Data Protection principles.

Is the information personal data?

9. In deciding whether the exemption is engaged the first step is to consider whether the requested information is personal data, or would be personal data if it were held. Personal data is defined in the DPA as:

"...data which relate to a living individual who can be identified-

- (a) From those data, or*
- (b) From those data and other information which is in the 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"

10. In this case the complainant has requested details of any complaints made against a particular surgeon who is named in the request. Details of complaints made is information which would be significant to the individual and since it would be known who the information relates to the individual would be identifiable from it. The Commissioner is satisfied that the information is personal data.

The first data protection principle

11. Having satisfied himself that the request is for personal data the Commissioner has gone on to consider whether confirming or denying if the information is held would contravene any of the data protection principles. In this case the Trust has relied on the first principle which requires that personal data be processed fairly and lawfully and shall not be processed unless at least one of the conditions in schedule 2 of the DPA is met.
12. The public authority argued that it would be unfair to release details of any complaints because the individual concerned had not consented to the disclosure and it owed a duty of confidentiality to its employees. It added that patients often make complaints about their treatment and it would be improper if a clinician's complaint history had to be disclosed every time a complaint was made.
13. When considering whether a disclosure under FOIA would be fair the Commissioner's approach is to reach a balanced view after considering the following factors:
 - The expectations of the individuals
 - The possible consequences of disclosure
 - Nature and content of the information
14. As regards the expectations of the individual concerned the Commissioner's view is that a clinician's complaints history is sensitive information and therefore an individual would have a reasonable expectation that their employer, as a responsible data controller, would respect the confidentiality of any information held. In the Commissioner's view, clinicians in the NHS can reasonably expect that, except in the most extreme circumstances, information about

complaints or claims which cite them individually will not be made public.

15. The Trust had also indicated that responding to the request could damage staff morale and the Commissioner would accept that disclosure of details of complaints made against clinicians would be likely to cause distress to data subjects because details of any complaints, when taken out of context, could be used to cast doubt on the competence of the individual. In the Commissioner's view this extends to the confirmation or denial of the existence of such information.
16. Notwithstanding a data subject's reasonable expectations or any damage or distress caused, it may still be fair to disclose information, or in this case confirm or deny if information is held, if there is a more compelling public interest in doing so. Therefore the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in confirming or denying if the information is held.
17. The Commissioner would stress that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protecting an individual's personal data the Commissioner's 'default position' is in favour of protecting the privacy of the individual. The public interest in confirming if information is held must outweigh the public interest in protecting the rights and freedoms of the data subject if providing confirmation or denial is to be considered fair.
18. The complainant had argued that he wanted to see the requested information as he had concerns about the capability and professionalism of the surgeon. The Commissioner is aware that the complainant is dissatisfied with the treatment he received from the surgeon but notes that there is a clear complaints process which can be followed if someone has a complaint against a doctor. There is a legitimate public interest in knowing that NHS officials are fit to practice but in the Commissioner's view this is achieved by the Trust's own internal complaints procedure. In light of this, and in view of the expectations of the individual and the consequences of complying with the request, the Commissioner has found that confirming or denying if it holds the details of complaints made against the surgeon would contravene the first data protection principle. Consequently, the Commissioner has found that section 40(5)(b)(i) is engaged and the duty to confirm or deny did not arise in this case.
19. As the Commissioner has determined that it would be unfair to confirm or deny if the information is held, it has not been necessary to go on to

Reference: FS50454819

consider whether this is lawful or whether one of the conditions in Schedule 2 of the DPA is met.

Right of appeal

20. 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

21. 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.
22. 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

**Pam Clements
Group Manager
Information Commissioner's Office
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