

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 December 2012

Public Authority: NHS Bristol Primary Care Trust
Address: South Plaza
Marlborough Street
Bristol
BS1 3NX

Decision (including any steps ordered)

1. The complainant requested the names of the lay representatives who had attended a patient engagement event in relation to the review of pathology services in the Bristol area along with the names of the organisations that they were representing. NHS Bristol withheld the requested information on the basis of section 40 of FOIA, the personal data exemption. The Commissioner is satisfied that in the particular circumstances of this case NHS Bristol is entitled to rely on section 40 to withhold the information requested by the complainant.

Request and response

2. On 22 May 2012 the complainant submitted the following request to NHS Bristol:

'The meeting minutes [of the 'Pathology Review: Patient Representatives Engagement Event' which was held on 7 November 2011] say:

"Attendees specifically requested that their involvement and input be exempted from liability to be released under any subsequent Freedom of Information request(s)

Under the Freedom of Information Act, I request the information that the "patient representatives" allegedly wanted withheld from the public, namely

1. *Their names.*
2. *What individuals or organisations they claim to be representing. ie in the case of LINKs, which ones? In the case of "patient representatives", names of patient groups represented.*
3. *I also request all documentation provided to meeting attendees (1.2 of the minutes)*
4. *And the documented outcomes of the Key Performance Indicator review (4.3 of the minutes).*

If, as I expect, you try to apply the Data Protection exemption to requests 1 & 2, I shall be interested to see what the Information Commissioner makes of LINK representatives, who are supposed to represent the interests of the public, allegedly wanting their identities withheld from the public.

There is also the issue that unless the members of the public who allegedly attended the meeting are prepared to put on record that they were indeed present, we have only the NHS's word that there were any members of the public at the meeting at all.'

3. NHS Bristol responded on 19 June 2012 and explained that the information falling within the scope of requests 1 and 2 was exempt from disclosure on the basis of section 40(2) of FOIA; request 3 was refused on the basis of section 21 of FOIA and the information falling within the scope of request 4 was disclosed.
4. The complainant contacted NHS Bristol on 20 June 2012 in order to ask for an internal review into the decision to refuse requests 1 and 2 on the basis of section 40(2).
5. NHS Bristol informed the complainant of the outcome of the review on 11 July 2012; the review upheld the application of 40(2).

Scope of the case

6. The complainant contacted the Commissioner on 14 July 2012 to complain about NHS Bristol's decision to withhold the information falling within the scope of requests 1 and 2. The information falling within the scope of request 1 constitutes the names of five individuals. In relation to request 2 although the published minutes explain that three of the individuals were 'LINK representative[s]' and two were 'lay volunteer[s]' the withheld information constitutes the names of the actual LINK bodies

and the names of the specific patient representative groups that the five individuals were representing.¹

7. The complainant provided the Commissioner with submissions to support her view that this information was not exempt from disclosure on the basis of section 40(2). The Commissioner has not included these submissions here but has referred to them in his analysis below.

Reasons for decision

8. Section 40(2) of FOIA states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the Data Protection Act (DPA). NHS Bristol has argued that disclosure of the withheld information would be unfair and thus breach the first data protection principle which states that:

'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.'*

9. Clearly then for section 40(2) to be engaged the information being withheld has to constitute 'personal data' which is defined by 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 intention of the data controller or any other person in respect of the individual.'

¹ Local Involvement Networks (LINKs) exist in every local authority area with responsibility for NHS health and social care services. They are made up of individuals and community groups who work together to improve health and social care services.

10. The Commissioner is satisfied that the information falling within the scope of request 1, i.e. the names of the five individuals, clearly constitutes the personal data of these individuals. This is because such information could obviously be used to identify the individuals in question.
11. With regard request 2, the Commissioner asked NHS Bristol to clarify why it believed that the information falling within the scope of this request constitutes the personal data of the individuals in question. The Commissioner explained to NHS Bristol that in his opinion truly anonymised data are not personal data and thus can be disclosed without reference to the DPA. The Commissioner's test of whether the information is truly anonymised is whether a (or any) member of the public could, on the balance of probabilities, identify individuals by cross-referencing the 'anonymised' data with information or knowledge already available to the public.
12. Whether this 'cross-referencing' is possible is a question of fact based on the circumstances of the specific case. If identification is possible the information is still personal data and the data protection principles do need to be considered when deciding whether disclosure is appropriate. However, where the anonymised data cannot be linked to an individual using the additional available information then the information will, in the Commissioner's opinion, have been truly anonymised and can be considered for disclosure without any reference to the DPA principles.
13. NHS Bristol explained to the Commissioner that the names of the organisations redacted from request 2 are small organisations with only a few members, that these individuals have been involved in previous lay representative roles regarding pathology and histopathology and it would therefore be easy to make presumptions regarding the identities of the individuals by cross referencing information already available in the public domain.
14. The Commissioner has considered NHS Bristol's line of argument, and having examined the names of organisations in question, he is satisfied that disclosure of this information could, on the balance of probabilities, be used by the public to identify the individuals in question. Therefore the Commissioner is satisfied that the information falling within the scope of request 2 constitutes personal data.
15. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - particular circumstances of the case, e.g. established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
 - The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
16. Furthermore, notwithstanding the 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 it can be argued that there is a more compelling public interest in disclosure.
17. In considering 'legitimate interests' in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach, i.e. it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.

NHS Bristol's position

18. With regards to the reasonable expectations of the individuals in question NHS Bristol confirmed that, at the time of the meeting to which the minutes related, the individuals expressly requested that their names were not disclosed in response to any future FOI requests. NHS Bristol noted that this would not be the usual practice in meetings involving lay representatives. However, it was because of what it considered to be the likely consequences of disclosure that NHS Bristol considered this refusal to provide consent to be appropriate.
19. With regard to these consequences, NHS Bristol explained that this particular subject area had been very contentious and several lay representatives involved in previous meetings felt that they had been harassed and their private lives impinged by a member of the public because of their lay involvement. The Commissioner was provided with evidence by NHS Bristol to demonstrate the distress caused to these individual lay representatives and argued that this supported its view that disclosure of the withheld information in this case would be very likely to lead to similar distress being caused to the five individuals whose names had been redacted.
20. NHS Bristol argued that the vast majority of the minutes had been released and these provide an insight for the public into the issues discussed and decisions taken at the meeting. In NHS Bristol's view there was not a compelling interest in disclosing the personal data of the attendees that outweighed the concerns raised by them.

The complainant's position

21. The complainant argued that the individuals attending the meeting did so in an official capacity, i.e. representing patients and the public. Therefore they must have had a reasonable expectation that their identities would be known to the public through the meeting minutes. In the case of LINK members, the complainant noted that their activities are funded through the taxpayers and so it was inappropriate that they would wish to keep their names and activities secret from the public. Furthermore, she argued that recording their identities and input to the meeting in the minutes would not be prejudicial to protecting their private lives. Finally, the complainant suggested that such 'extraordinary secretiveness' raised the question as to whether any patient/public representatives were actually present at the meeting.

The Commissioner's position

22. In the circumstances of this case the reasonable expectations of the individuals are clearly significantly shaped by their request that their

names would not be disclosed. In many cases it is unlikely that a public authority will be in a position to anticipate most FOI requests to enable them to seek the consent of the data subject prior to the processing of their personal data to comply with the FOI request. Instead it is more likely that the public authority will receive a request and then contact the data subject to see whether they would consent to the disclosure of their personal data in complying with the request. Such a situation is problematic because any consent or refusal that has been obtained post-request represents a change in circumstances from those that existed at the time of the request; in the Commissioner's view the application of any exemptions should be based upon the circumstances as they existed at the time of the request.

23. However, in the particular circumstances of this case the individuals in question had in fact explicitly expressed their refusal to have their involvement in the meeting in question disclosed under FOIA well before the request was received: the meeting minutes themselves record that this refusal was stated at the meeting itself in November 2011 and the request was not submitted until May 2012. The Commissioner understands that the usual practice would be for the names of lay representatives who attended such meetings to be disclosed. Therefore the request by the individuals that their names would not be disclosed was in contrast to the normal practice. However, given the explicit manner in which the individuals' expressed their refusal, and recorded in the official minutes, the Commissioner believes that the individuals in question would have had an expectation that their names would not be disclosed in response to an FOI request.
24. Nevertheless, the Commissioner believes that in assessing fairness it is important to consider whether in fact a data subject's expectation as to what would happen to their personal data is a reasonable one. Furthermore, the issue of consent is not determinative in deciding whether personal data should be disclosed under FOIA; even if an individual refuses to consent to their personal data being disclosed, it may well be fair to do so.
25. As noted above, in the circumstances of this case the basis for the individuals refusing to consent to their names being disclosed is directly linked to what they believed would be the consequences of such a disclosure. The Commissioner has seen evidence of the distress caused to lay representatives by the harassment they have received from a member of the public when previous disclosures have confirmed their involvement in the Pathology Review. In light of this evidence the Commissioner accepts NHS Bristol's position that if the names of these individuals were disclosed then it is very likely that they would be subjected to similar harassment. Furthermore, although the Commissioner completely accepts the complainant's point that the

individuals in question were essentially acting in an 'official' rather than private role - and that in relation to the LINK members were representing organisations which are publically funded – the impact of these potential disclosures would, in his opinion, clearly have an impact on the individuals' private lives, not simply an impact on their roles as lay representatives. Given these likely negative consequences of disclosure the Commissioner accepts that it was understandable that the individuals in question would have requested that their names would not be disclosed. Therefore the Commissioner accepts that their expectation that NHS Bristol would withhold such information was a reasonable one.

26. With regard to the legitimate public interests in disclosing the withheld information, the Commissioner agrees with NHS Bristol that given that the vast majority of the meeting minutes have been disclosed then the public is well informed about the issues discussed at the meeting. On one level then the Commissioner would therefore agree that there is little legitimate interest in the disclosure of the withheld information in order to further assist the public's understanding as to this particular meeting.
27. However, the Commissioner believes that it is important to remember that the role of the lay organisations in the Pathology Review project board is to represent the public's needs and opinions. It seems clear then that the public would need to know who to contact if they wanted their views and opinions taken into account by the project board. This could be achieved by disclosing the names of the organisations that were represented at the public engagement events, such as the meeting which is the focus of this request. There is therefore an argument that the names of the organisations that have been withheld need to be disclosed in order to meet this need.
28. However, for the reasons discussed above, even by simply disclosing the names of the organisations that were represented, then NHS Bristol would in effect be disclosing the names of the individuals who attended the meeting and that this would result in the infringement into the individuals' private lives. Therefore the legitimate interests in disclosing just the names of the organisations have to be considered in relation to the legitimate interests in relation to the consequences of disclosing the individuals' names. Furthermore, the Commissioner understands that the Project Board Terms of Reference are publically available on the Pathology Review website and these list all of the LINK organisations that are involved in the review project (albeit that these may not be the

organisations were represented in the meeting in question).² Therefore in the Commissioner's opinion such a resource could provide a practical alternative for a member of public to locate a suitable lay contact if they wished to have their views and opinions considered as part of the project. In other words it is not necessary for the names of the specific organisations that were presented at this particular meeting to be disclosed in order for this need to be met.

29. In all the circumstances of this case, the Commissioner does not believe that the weight that should be attributed to the arguments in favour of disclosing any part of the withheld information outweighs the legitimate interests of the individuals to have their identities withheld given the strong (and reasonable) expectations that the information would not be disclosed when allied with the consequences of any such disclosure.
30. For the reasons set out above the Commissioner believes that disclosure of the withheld information would be unfair and thus breach the first data protection principle. The Commissioner is therefore satisfied that all of the withheld information is exempt from disclosure on the basis of section 40(2).

² The latest version of the terms of reference being available here:
<http://www.avon.nhs.uk/pathologyreview/board/default.asp>

Right of appeal

31. 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

32. 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.
33. 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

Alexander Ganotis
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