

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 December 2012

Public Authority: The Mid Yorkshire Hospitals NHS Trust
Address: Trust Headquarters and Education Centre
Aberford Road
Wakefield
WF1 4DG

Decision (including any steps ordered)

1. The complainant has requested information relating to complaints or compensation claims against a named surgeon and details of the outcome of a review about the named surgeon's work.
2. The Commissioner's decision is that Mid Yorkshire NHS Trust (the 'Trust') has correctly applied section 40(2) of the FOIA to part of the request. He has also determined that the Trust was not obliged to confirm or deny if some of the information was held under section 40(5)(b)(i).
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 13 January 2012, the complainant wrote to the Trust and requested information in the following terms:

"Have there been any complaints or claims for compensation regarding [named surgeon]'s work at Mid Yorkshire?"

What the outcome was of the review into [named surgeon]'s work, previously referred to in board minutes (I assume this is superceded [sic] by your follow up query – full details of the review?)

I would like full details of the outcome of the review, a copy would be the most helpful way to deal with that aspect."

5. Following intervention by the Commissioner and the issuing of a decision notice with regard to case reference FS50437055, the Trust responded on 7 June 2012. It refused to disclose the requested information citing section 40 as its reason for doing so.
6. Following an internal review the Trust wrote to the complainant on 17 August 2012. It again refused to provide the information requested citing section 40(2) to the element of the request about the review. It stated that it did not hold information about claims for compensation as this would all be held by the NHS Litigation Authority. In relation to information about complaints about individual consultants it stated that this was exempt under section 40. It also applied section 36(2)(b) of the FOIA to information about the outcome of the review.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. The Commissioner received the complaint on 17 August 2012.
8. The Commissioner considers the scope of this case to be to determine if the Trust has correctly applied sections 40 and 36(2)(b) of the FOIA.

Reasons for decision

9. The Commissioner has firstly considered the application of section 40. The Trust applied section 40 (2) to the latter part of the request for information about the outcome of the review. As stated above the fact a review has been undertaken is in the public domain.
10. However in relation to the first part of request the Trust in its internal review stated that it was refusing to provide information relating to complaints on the basis of section 40 and that no information was held in relation to claims for compensation as this would be held by the NHS Litigation Authority. It did not stipulate what part of section 40 it was referring to. The Commissioner considers that given the nature of this part of the request the Trust should have first considered whether it was obliged to confirm or deny if this 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 if confirming or denying if the information is held would contravene any of the data protection principles.

Is the information personal data?

11. 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 held. Section 1 of the DPA defines personal data as follows:

"..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."

Secondly, and only if the Commissioner is satisfied that the requested information, if held, is personal data, he must establish whether disclosure of that data, if held, would breach any of the data protection principles under the DPA.

12. The Commissioner has viewed the withheld information which the Trust has confirmed is held and is exempt under section 40(2) and notes that the information relates to the individual's role as a practitioner in the NHS. Details of any complaints or claims for compensation, if held, would also be information that relates to the named surgeon and therefore identifiable from it.
13. As the request has named a specific surgeon it would be impossible to release any information without it being linked to the individual. Consequently the Commissioner is satisfied this information, if held, would be personal data.

Would disclosure breach the Data Protection Principles?

14. Having satisfied himself that the information is personal data the Commissioner has gone on to consider whether disclosure of the requested information, if held, would contravene any of the data protection principles.
15. The Trust has argued that it considers disclosure of the requested information would be in breach of principle 2 of the DPA. The Commissioner is mindful of his role as regulator of the DPA and consequently has considered that principle 1 of the DPA is the most relevant principle in this case.

16. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle states that personal data
- shall be processed fairly and lawfully; and
 - personal data shall not be processed unless at least one of the conditions in schedule 2 of the DPA is met.

Would disclosure be fair?

17. 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 individual concerned, the nature of those expectations and the consequences of disclosure to the individual. He has then balanced these against 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

18. The Trust has stated that clinicians in the NHS can reasonably expect that data about complaints or claims which cite them individually will not be made public.
19. In this case however the Trust explained that the named surgeon had been subject to media publicity relating to his practises in other organisations. The Trust also confirmed that reference had been made in a public board meeting to the fact that a review was being carried out to reassure the public that the Trust was taking steps to ensure that patient safety had not been compromised. The broad findings of the review had also been made public in a statement to the media and these were reissued in response to the request. The Trust clarified however that the named surgeon has not consented to detailed information, if held, that relates specifically to his conduct or practice in the Trust being released to the media.
20. The Commissioner considers that a surgeon'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. Therefore he accepts that clinicians such as surgeons in this case can reasonably expect that, except in the most extreme circumstances that information about complaints or claims which cite them individually will not be made public.

21. As regards information about the outcome of the review the Commissioner considers that similar principles apply as it is information about his professional ability which by its nature can also be considered to be private and the named surgeon would have an expectation that such information would not normally be disclosed.

Consequences of disclosure

22. The Trust further explained that it was likely that any information held would be used in the context of producing a media story designed to cast doubt on the competence of the named surgeon in his current role.
23. The Commissioner also considers that the disclosure of information relating to complaints or claims made, if held, has the potential to cause 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 outcome or conclusion of any complaint or claim.
24. The Trust explained that people who had legitimate claims against the named surgeon would have access to relevant information through the legal process and there was a protocol in place which had been publicised by litigation firms inviting potential claimants to come forward.

Balancing the rights and freedoms of the data subject with legitimate interests

25. 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.
26. Therefore the Commissioner carries out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in disclosing the information and in confirming or denying if information about complaints or claims is held. The Commissioner considers that there is a legitimate interest in the public knowing the outcome of a review into conduct of the named surgeon as the public has a right to expect and have confidence in the level of care they receive and in knowing that NHS officials are fit to practise. However the Commissioner also accepts that the named surgeon would have a strong expectation of privacy and confidentiality over details of complaints, if any, and information associated with his work, which is not already in the public domain. Disclosure of such information may cause distress and or damage to him on a personal or professional level.
27. Although there is a legitimate interest in the public knowing details of the outcome of the review and details of any complaints or claims for

compensation, if held, against the named surgeon the Commissioner notes that the media statement provided by the Trust indicates that it has no concerns regarding his work. Furthermore the Trust has highlighted that the surgeon has been cleared twice by the GMC following investigation. This in its view should satisfy the legitimate interest without the public having to be aware of the full details of the review. Having viewed the information about the review the Commissioner is also satisfied that there is no strong legitimate interest that outweighs the rights and freedoms of the data subject in this case.

28. In addition, the Commissioner notes that the Trust has highlighted that there is a protocol already in place referred to in paragraph 24. Furthermore a clear complaints process can be followed if someone has concerns about a medical professional, and any judicial or legal process will go some way in addressing any issues of accountability and transparency.
29. The Commissioner notes the level of media interest and concern surrounding the named surgeon's work. However after carefully considering all the relevant factors in this case and in view of the expectations of the named surgeon and the consequences of complying with the request, the Commissioner has found that section 40 (2) has been correctly applied to information held about the outcome of the review. He has also decided that confirming or denying if it holds information about complaints made or claims for compensation about the named 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 does not arise for this part of the request.
30. As the Commissioner has determined that it would be unfair to disclose some of the requested information or to confirm or deny if parts of the requested information is held, 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. In addition, the Commissioner has not considered it necessary to consider the application of section 36(2).

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

Pamela Clements
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