

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 10 December 2013

**Public Authority:** The Department of Health  
**Address:** 79 Whitehall  
London  
SW1A 2NS

#### **Decision (including any steps ordered)**

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1. The complainant has requested a copy of a letter dated 15 September 2011 from the Chair of NHS South West, to the Appointments Commission. The DoH provided the complainant with the requested letter however it made redactions under section 40(1) and 40(2) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the DoH correctly applied section 40(1) and section 40(2) FOIA in this case.
3. The Commissioner requires no steps to be taken.

#### **Request and response**

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4. On 4 April 2013 the complainant requested information of the following description:

"I request a copy of a letter dated 15 September 2011 , from [named individual], Chair of NHS South West, to...the Appointments Commission. I have been referred to you by the FOI team at NHS South of England , who were unable to find a copy (I attach a copy of this letter). As you will see, It has been suggested that the letter will be among documents archived by the Appointments Commission prior to its abolition. I understand the letter relates to concerns I raised with NHS South West."

5. On 2 May 2013 the DoH responded. It provided the complainant with the requested information but made redactions under section 40(1) and (2) FOIA.
6. The complainant requested an internal review on 8 May 2013. The DoH sent the outcome of its internal review in June 2013. It upheld its original position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 2 July 2013 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the DoH was correct to make redactions under section 40(1) and (2) FOIA to the information it provided to the complainant.

### **Reasons for decision**

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9. Section 40(1) FOIA provides an exemption for information that constitutes the personal data of the complainant:  
  
"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."
10. The DoH has made one redaction under section 40(1) FOIA. The Commissioner has considered whether the information redacted is the personal data of the complainant. Upon viewing the redacted information the Commissioner is satisfied that it is information about the complainant from which he would be identifiable. As it is the personal data of the complainant it is absolutely exempt from disclosure under FOIA. The Commissioner also considers that two further redactions should have been made on this basis. These are the second and last bullet points under point 1 within the requested letter.
11. The remaining redactions were made under section 40(2) FOIA.
12. Section 40(2) of the Act provides an exemption for information that constitutes the personal data of third parties:  
  
*"Any information to which a request for information relates is also exempt information if—*  
  
*(a) it constitutes personal data which do not fall within subsection (1), and*

*(b) either the first or the second condition below is satisfied."*

Section 40(3)(a)(i) of the Act states that:

*"The first condition is-*

*(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-*

*(i) any of the data protection principles, or*

*(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress),"*

13. The DoH said that the remaining redacted information was the personal data of three individuals as well as the author. The individuals are named within the letter and it contains further information about them within their professional roles. The letter expresses the author's views to the Appointments Commission about a particular individual.
14. Upon considering the redacted information the Commissioner considers that it would be the personal data of the three individuals and the author.
15. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) of the Act are met. The relevant condition in this case is at section 40(3)(a)(i) of the Act, where disclosure would breach any of the data protection principles. In this case the Commissioner has considered whether disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in Schedule 2 should be met.

### **Likely expectation of the data subject**

16. The DoH has explained that the data subjects would not expect the requested letter to be disclosed in an unredacted format as it was written in confidence about senior members of staff at a particular PCT. The DoH has contacted the author of the letter and two other individuals mentioned in the letter who have all said that they would not expect an unredacted version to be disclosed into the public domain.

## **Would disclosure cause damage and distress to the data subject**

17. The DoH said whilst the redacted information relates to the data subject's public lives, disclosure into the public domain may cause damage to the professional reputation of the data subjects and this would cause those individuals damage and distress.

## **The legitimate public interest**

18. The DoH has acknowledged that there is a legitimate public interest in transparency about, and accountability for, decision-making at a senior level and expenditure of public money. However it said that the contents of the requested letter does not indicate responsibility for decisions, in the sense of setting out a decision or explaining the reasons for it. Furthermore it said that as the organisation, which is the subject of the letter, no longer exists, this limits the legitimate public interest in disclosing the requested information.
19. The DoH has also has argued that disclosure of an unredacted version of the letter would not be in the public interest because it would prevent discussions taking place or being recorded in the future. The Commissioner does not consider this is relevant to the application of section 40(2) FOIA.
20. Upon viewing the withheld information the Commissioner considers that the issues relate to very senior members of staff within the NHS. Whilst it does not relate to a specific decision made it does relate to issues which could affect the general governance of a specific PCT. Whilst the PCT became defunct on 1 April 2013, the Commissioner still considers that there is a legitimate public interest in understanding concerns raised at the time. However two data subjects and the author have indicated that they would not expect this information to be disclosed into the public domain due to the nature of the information contained within it. The Commissioner also considers that disclosure would cause significant damage and distress to the individuals who are the subject of the concerns raised as disclosure would resurrect issues which have previously been dealt with by the Parliamentary and Health Service Ombudsman (PHSO). The Commissioner does not therefore consider that the legitimate public interest in this case would outweigh the interests of the data subjects.
21. The DoH correctly applied section 40(2) FOIA to make the remaining redactions.

## Right of appeal

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22. 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: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

23. 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.
24. 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**  
**Group Manager, Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**