

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 January 2014

Public Authority: Parliamentary and Health Service Ombudsman

Address: Millbank Tower
Millbank
London
SW1P 4QP

Decision (including any steps ordered)

1. The complainant requested the names and General Medical Council numbers of particular special advisors used by the Parliamentary and Health Service Ombudsman (PHSO).
2. The PHSO refused to disclose this information. It cited as its basis for doing so the exemption under section 40(2) of the FOIA (third party personal data).
3. The Commissioner's decision is that the PHSO is correct to withhold the information under section 40(2) by virtue of section 40(3)(a)(i).
4. The Commissioner does not require the public authority to take any further action.

Request and response

5. The complainant is not satisfied with the care and treatment provided to their baby, who was born prematurely. They had submitted a complaint to the hospital Trust concerned and subsequently took their complaint to the PHSO.
6. Having taken advice from one of its clinical advisors, and considered other evidence in the case, the PHSO concluded that the substantive complaint should be closed. The complainant is dissatisfied with this conclusion.

7. On 29 March 2013, the complainant wrote to the PHSO and requested information in the following terms:

Can you provide a list of all neonatologists and paediatricians used as special advisors including their GMC numbers for 2013. (1)

Can you please provide Clinical Advisor guidelines, protocol for ensuring they are qualified, impartial. (2)

Guidelines for how to proceed when clinical advice clearly is substandard - for the complainant and for the assessment manager. (3)

Please provide guidelines on how to proceed with an internal review. for complainant and for assessment manager (4)

The number of cases not initially chosen for an investigation to commence but then do after an internal review. (5)

The cost per report a specialist advisor charges. Are you able to stop payment when clinical advice is so obviously flawed and get them to take another look at the medical notes? He missed very important blood test results too. And his medical knowledge regarding the different types of dehydration was sub par. (6)

8. The PHSO responded on 24 April 2013. It provided information, or directed the complainant to where the information was already publically available, in relation to the specific requests: (2) (3) (4) (5) and (6).
9. The PHSO released some information related to request (1) – the clinical advisors’ qualifications – but withheld the advisors’ names and General Medical Council (GMC) numbers. It cited section 40(2) of the FOIA as its basis for doing so.
10. Following an internal review, the PHSO wrote to the complainant on 10 September 2013. It upheld its original position.

Scope of the case

11. The complainant contacted the Commissioner on 11 September 2013 to complain about the way the PHSO had handled their request for information.
12. After liaising with the complainant, the Commissioner focussed his investigation on the PHSO’s application of section 40(2) to the complainant’s request for special advisors’ names and GMC numbers.

Reasons for decision

13. Section 40(2) of FOIA says that information is exempt from disclosure under the FOIA if it is the personal data of a third party (ie someone other than the requester) and the conditions under either section 40(3) or 40(4) are also satisfied.
14. The Commissioner therefore first considered whether the requested information is the personal data of a third party.
15. The Data Protection Act (DPA) defines personal data as '*...data which relate to a living individual who can be identified from those data...*'
16. In its submission to the Commissioner, the PHSO argued that releasing the clinical advisors' names and GMC numbers would lead to those individuals being identifiable. The Commissioner agrees and is satisfied that this information is therefore the personal data of the clinical advisors (the data subjects).
17. Having decided that the requested information is third party personal data, the Commissioner then turned his attention to the conditions under section 40(3).
18. The first condition under section 40(3)(a)(i) says that personal data is exempt from disclosure to a member of the public if doing so would contravene one of the data protection principles set out in Schedule 1 of the DPA. The Commissioner considered whether disclosing the information would breach the first data protection principle: that personal data '*shall be processed fairly and lawfully...*'
19. When considering whether disclosure would be unfair, and so breach the first principle, the Commissioner took three factors into account:
 - What reasonable expectation does the individual have about what will happen to their personal data?
 - Has the individual given their consent to disclosure?
 - What might be the likely consequences resulting from disclosure?
20. Assessing fairness however, also involves balancing the individual's rights and freedoms against the legitimate interest in disclosure to the public. It may still be fair to disclose the information if there is an overriding legitimate interest in disclosure to the public. The Commissioner therefore also finally considered these interests.

21. Expectation – the complainant drew the Commissioner's attention to this statement in the PHSO's 'External Advisor Terms and Conditions' (obtained through a separate FOIA request): *'The practice of the Ombudsman is that all professional advisors are now named in final decision reports to complainants and the relevant health organisation.'*
22. This would suggest that its advisors might reasonably expect that the PHSO could release their personal data.
23. The PHSO had qualified this statement to the complainant and explained that it does not, in fact, release advisors' names routinely. Despite it breaching its own internal policy, the PHSO is able to withhold an advisor's name under section 40(2) when necessary because the requirements of the FOIA and DPA override the aspirations a particular public authority may have to be transparent.
24. Consent – the PHSO has told the Commissioner that its clinical advisors have not consented to their personal data being released.
25. Consequences – the PHSO argued that disclosing the requested information might have two consequences. Firstly, the PHSO has considered whether it is possible that the complainant has requested this information in order to identify the specific advisor who provided advice to the PHSO about their case, and where they work, with a view to perhaps making a direct approach to that individual. This would be likely to cause that individual a degree of damage or distress.
26. Clinical advisors perform an essential function for the PHSO. Secondly therefore, the PHSO is concerned that routinely releasing clinical advisors' personal data more generally may make it more difficult to attract individuals to that role, or maintain them in it. The PHSO argues that this may happen if individuals are aware that their role as a PHSO advisor may intrude into their personal or professional life – through being identified and approached by members of the public.
27. Legitimate interest in disclosure to the public – given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) has been cited is in favour of protecting the privacy of the individual. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure which would make it fair to do so.
28. While there is an argument that advisors should be open to direct challenge, the PHSO says that its clinical advisors' role is to advise the PHSO's case officers; they do not make decisions on cases and are not public facing.

29. It recognises that there is a justifiable interest in knowing that its advisors are appropriately qualified to provide advice and would routinely provide this information on request, as it has done in this case.
30. With regard to releasing their advisors' specific personal data however, while the Commissioner accepts that there is a legitimate interest in overall transparency in the way a public authority such as the PHSO conducts its business, there is no presumption that this should take priority over personal privacy.
31. For these reasons, the Commissioner considers that the possible arguments for disclosing the specific information in this case are not as compelling as those put forward for protecting the individuals' personal data: the possible negative consequences of releasing the information – both to a specific advisor and the PHSO more generally – combined with the advisors' lack of consent to its release.
32. The Commissioner is satisfied that on balance, the legitimate public interest would not outweigh the interests of the data subjects. Consequently, the Commissioner considers that section 40(3)(a)(i) could be applied to this request, with the result that the PHSO is correct to withhold the information. He did not therefore go on to consider any of the other conditions under section 40(3) or 40(4).

Right of appeal

32. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

33. 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.
34. 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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