

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 March 2018

Public Authority: NHS Croydon Clinical Commissioning Group
Address: Bernard Weatherill House
2nd Floor, Zone G
8 Mint Walk
Croydon
CR0 1EA

Decision (including any steps ordered)

1. The complainant has requested information from NHS Croydon Clinical Commissioning Group ("Croydon CCG") relating to the departure of a former officer.
2. The Commissioner's decision is that Croydon CCG has correctly refused to confirm or deny whether any information is held falling within the scope of the request, under section 40(5) of the FOIA – personal data.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 5 July 2017, the complainant wrote to Croydon CCG and requested information in the following terms:

"(1) In [named individual]'s contract how much notice was she obliged to give the CCG of her resigning.

(2) If this period was waived, why?

(3) How much money was paid to [named individual] in lieu of notice?

(4) I am told there was no costs to the CCG, if so, how comes any monies paid to [named individual] upon leaving & the obligation to hire [second named individual] (although he chairs Lambeth CCG). There must be an Extra Cost?"

5. Croydon CCG responded on 3 August 2017, and provided some information within the scope of the request. It provided a response to request 1) and provided some information about the salary of the second named individual in response to request 4). However, it explained that it could neither confirm nor deny whether any information was held with regard to requests 2) and 3), citing section 40(5) of the FOIA – Personal data.
6. Following an internal review, Croydon CCG wrote to the complainant on 17 August 2017. It stated that it considered that the scope of the review would be parts 2) and 3) of the request, and maintained its reliance on section 40(5) of the FOIA regarding these parts.

Scope of the case

7. The complainant contacted the Commissioner on 20 August 2017 to complain about the way his request for information had been handled.
8. The Commissioner wrote to Croydon CCG on 23 October 2017 with a letter of investigation and, subsequent to receiving its reply on 1 December 2017, wrote again to Croydon CCG on 18 January 2018. Following the second letter, Croydon CCG reconsidered its initial response to part 4) of the request, and stated to the Commissioner that it could neither confirm nor deny whether it held any additional information in respect of that part of the request; that is, additional to the salary information previously provided.
9. The Commissioner considers that the scope of the case has been to consider whether Croydon CCG is correct to have applied section 40(5) to parts 2) and 3) of the request, and also to have applied section 40(5) to part 4) insofar as a response has not already been provided to that part.

Reasons for decision

Section 40(5) – neither confirm nor deny in relation to personal data

10. When a public authority receives a request for information under FOIA, it normally has a duty under section 1(1)(a) to tell the requester

whether it holds the information. This is called "*the duty to confirm or deny*". However, in certain circumstances, this duty does not apply and the public authority is not obliged to say whether or not it holds the information; instead, it can give a "*neither confirm nor deny*" response.

11. Section 40(5) of FOIA sets out the conditions under which a public authority can give a "*neither confirm nor deny*" response where the information requested is or would, if held, be personal data. It includes provisions relating to both personal data about the requester, and personal data about other people.
12. If the information would constitute personal data relating to someone other than the requester, then the public authority does not have to confirm or deny whether it holds it if one of the conditions in section 40(5)(b)(i) or (ii) applies.

Section 40(5)(b)(i)

13. In this case, Croydon CCG has relied on section 40(5)(b)(i) in its response. Under this subsection, the public authority is not obliged to confirm or deny that it holds information if giving the confirmation or denial to a member of the public would contravene any of the data protection principles.
14. It is therefore necessary for the Commissioner to consider two steps; first, whether providing the confirmation or denial would involve the disclosure of personal data, and secondly, whether disclosure of that personal data would be in breach of any of the data protection principles.

Is the information requested personal data?

15. The first step for the Commissioner to determine is whether the requested information, if held, constitutes personal data, as defined by the Data Protection Act 1998 (the "DPA").
16. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus, or impacts on them in any way.
17. The requested information relates to an identifiable individual, namely the named former officer. Therefore, the Commissioner considers that the requested information, if held, would be the personal data of that former officer.

Would confirmation or denial breach the data protection principles?

18. The data protection principles are set out in Schedule 1 of the DPA. The Commissioner considers that the first data protection principle is most relevant in this case. The first data protection principle states –

"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."

19. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the disclosure – that is, the confirmation or denial in this case - can only be made if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

20. The Commissioner's considerations below have focused on the issues of fairness in relation to the first principle. In considering fairness, the Commissioner finds it useful to consider the reasonable expectations of the data subject and the potential consequences of the disclosure, and to balance any legitimate public interest in disclosing the information against the rights and freedoms of the relevant individual.

The reasonable expectations of the data subject

21. When considering whether the disclosure of personal information is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the data subject. However, their expectations do not necessarily determine the issue of whether the disclosure would be fair. Public authorities need to decide objectively what would be a reasonable expectation in the circumstances.
22. In this case, Croydon CCG states that it considers that such disclosure would not be reasonably expected by the individual, as she has not given explicit consent for her personal data to be disclosed, and would not reasonably expect Croydon CCG to confirm or deny publicly whether it held the information requested in this case.
23. Croydon CCG has stated that only a very limited pool of people within its organisation would be aware whether the information were held. It states: *"the knowledge of the existence of the information requested... would be highly restricted and not in the public domain."*

24. Accordingly, the Commissioner considers that the data subject would not reasonably expect Croydon CCG to state publicly whether it held the information requested in this case.

The consequences of disclosure

25. In this case, Croydon CCG has argued that there is a likelihood of damage and distress to the individual if it disclosed whether or not information is held.
26. In the Commissioner's guidance¹ on dealing with requests for information about public authority employees, it states that disclosure is unlikely to be fair if it would have unjustified adverse effects on the employees concerned. Although employees may regard the disclosure of personal information about them as an intrusion into their privacy, this may often not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life. If an authority wishes to claim that disclosure would be unfair because of the adverse consequences on the employees concerned, it must be able to put forward some justification for this claim.
27. Croydon CCG considers that the ensuing damage and distress to the individual in this case would not be justified since, if information were held, it would relate to the circumstances of the conclusion of her employment, which it argues essentially relates to her personal life. It has noted that the Commissioner's guidance referenced previously states that information "*which may be held in a personnel file*" is likely to relate to an individual's personal life.
28. The Commissioner accepts in this case that damage and distress to the individual would be likely to be caused by Croydon CCG confirming or denying whether the information requested is held.

Balancing the rights and freedoms of the data subject with the legitimate interest in disclosure

29. While there is no public interest test attached to the exemption, the requirement to consider the legitimate interest will involve looking at the wider public interest. It may still be fair to disclose information, or in this case to confirm or deny whether information is held, if there is a

¹ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

compelling public interest in doing so which outweighs the rights and freedoms of the data subject.

30. 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 or denying whether or not 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.
31. The interest in disclosure must be a public interest, not the private interest of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.
32. The public interest in this case centres on the fact that the individual who is the subject of the request is a former Chief Executive of Croydon CCG.
33. The requester has explained that she appeared to leave her post very suddenly and without explanation, and he is concerned to find out whether there has been a cost to the public.
34. His concerns, he explains, are heightened by the fact that, as is a matter of public record, Croydon CCG was placed into special measures by NHS England during 2016 and has publicly been seeking ways to make significant cuts.
35. He considers that it would be reasonable for the public to be made aware whether her departure has come at a cost, or whether indeed it was part of a cost-cutting exercise.

The Commissioner's decision

36. The Commissioner has considered these arguments, but is not persuaded that the wider public interest outweighs the rights and freedoms of the individual in this case.
37. She notes that, in any event, Croydon CCG publishes "*exit packages, including special (non-contractual) payments*" and a financial "*analysis of other departures*" as part of its annual accounts.
38. The Commissioner is satisfied that confirming or denying if the requested information is held would not be fair, and would therefore breach the first data protection principle, in light of the nature of the

information and the likely intrusion of privacy and potential distress to the data subject. She has determined that these arguments outweigh any legitimate interest in disclosure.

39. The Commissioner therefore considers the exemption at section 40(5) is engaged and the duty to confirm or deny does not arise.

Right of appeal

40. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

41. 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.
42. 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

Alun Johnson
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