

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 April 2019

Public Authority: Aneurin Bevan University Health Board

Address: foi.abb@wales.nhs.uk

Decision (including any steps ordered)

1. The complainant requested various information in respect of the training and qualifications of named individuals involved in an investigation considering concerns about medical practitioners. Aneurin Bevan University Health Board refused the request on the basis of section 40(2) of the FOIA. The Commissioner's decision is that Aneurin Bevan University Health Board was entitled to rely on section 40(2) to withhold the requested information. However, the Health Board's failure to send the refusal notice until 13 July 2018, represents a breach of section 17(1) of the FOIA. The Commissioner does not require the public authority to take any steps.

Request and response

2. On 14 May 2018, the complainant wrote to the Health Board and requested the following information:

" What relevant training, with dates, and certificates, the following staff have in investigating concerns about medical practitioners, or any relevant training in carrying out investigations.

Please forward their CVs

This is relevant to me in that all of the named staff members were assigned the role of investigating officer into concerns raised about me.

[Named individual A] – MD

[Named individual B] – AMD

[Named individual C] OOH

[Named individual D] pharmacist

[Named individual E] project manager

[Named individual F] Pharmacist

3. The complainant subsequently added to her request on the same date as follows:
"...please also disclose the indemnity in place that the investigating officers have to carry out this extended role."
4. The Health Board responded on 13 July 2018. It confirmed that it held some of the requested information but refused to disclose it by virtue of section 40(2) of the FOIA. The complainant was also informed that only named individual A was an investigating officer whilst the remaining held non-investigating officer roles.
5. The complainant was not satisfied with this response and amongst her concerns disputed that the remaining officers did not hold investigating roles.
6. Following an internal review the Health Board wrote to the complainant on 9 August 2018. It stated that the information requested refers to personal information and that it was continuing to rely on section 40(2) of the FOIA to withhold the information.

Scope of the case

7. The complainant contacted the Commissioner on 5 September 2018 to complain about the way her request for information had been handled. She stated that the named individuals all carried out a role as investigating officer in respect of an investigation relating to her, therefore her request for information about their training and indemnity to carry out such a role. The complainant further stated that she wished to complain about the lateness of the response and the Health Board's refusal to provide the information.
8. The Commissioner considers that the scope of her investigation is to determine whether the Health Board were entitled to rely on s40(2) of the FOIA to withhold the information. She will also consider the Health Board's procedural handling of the request and whether it complied with its obligations under section 17(1) of the FOIA.

Reasons for decision

Section 40 – personal information

9. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3) or 40(4) is satisfied.
10. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
11. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA 2018. If it is not personal data then section 40 FOIA cannot apply.
12. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

Is the information personal data?

13. Section 3(2) of the DPA 2018 defines personal data as:-

"any information relating to an identified or identifiable living individual".

14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
16. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
17. The Commissioner considers that the CVs and qualifications of the named individuals clearly falls within the category of personal data.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

18. In the circumstances of this case, and having considered the withheld information, the Commissioner is satisfied that the information relates to the named Data Subjects. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
19. The fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
20. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

21. Article 5(1)(a) GDPR states that:-

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

22. 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 information can only be disclosed if to do so would be lawful, fair, and transparent.
23. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing, it must also be generally lawful.

Lawful processing: Article 6(1)(f) GDPR

24. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" bases for processing listed in the Article applies.
25. The Commissioner considers that the lawful bases most applicable is bases 6(1)(f) which states:-

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child².

² Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

26. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under FOIA it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

27. The Commissioner considers that the test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

28. In considering any legitimate interest(s) in the disclosure of the requested information to the public under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.

29. Further, a wide range of interests may be legitimate interests. They can be the requester’s own interests or the interests of third parties, commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

30. The Health Board has stated that the request is linked to the medical investigation undertaken in respect of the complainant, therefore has noted a legitimate interest in the information relating to named individual A investigator. However as it has stated the remaining individuals did not hold investigative roles, it has disputed any legitimate interest in the information relating to named individuals B to F.

31. The Commissioner considers that regardless of the role of the individuals, as they were all involved with the investigation in some way,

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

the complainant has a legitimate interest in the information of all individuals and has gone on to consider whether this is necessary in order to meet her legitimate interest.

Is disclosure necessary?

32. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
33. The Health Board has argued that disclosure was not necessary as requests to perform the role of investigating officer forms part of any senior practitioners' role and investigative work of this type would normally be encompassed within the role as opposed to an extension or add-on. It has further stated that this will apply to any senior clinical or non-clinical role within the Health Board.
34. Additionally, it has further argued that its selection process ensures that the staff hold the correct qualifications and experience prior to appointment which includes the professional body the General Medical Council (GMC) and General Pharmaceutical Council (GPhC) registration requirements.
35. The Health Board further explained to the Commissioner that as part of any medical practice inquiry the professional bodies have well established investigative and assurance processes and through her complainant's dealings with the GMC and the Medical Practice Tribunal Service (MPTS) the complainant would be well aware of these.
36. Consequently, the Health Board considers that disclosure of the CV's to potentially question staff suitability as part of the investigation process is not necessary to meet the interests of the request. Further, any concerns about their suitability could have been aired during the judicial proceedings, the outcome of which is published on the court tribunal decisions website.
37. Having considered the withheld information and the Health Board's arguments, the Commissioner considers the disclosure of the disputed information is not necessary in order to meet the legitimate interest in providing scrutiny of the investigation process and demonstrating that accepted practices have been followed. However it is apparent that the complainant considers there is a legitimate interest in the disclosure of the requested information.

38. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

Section 17 – refusal of the request

39. Section 17 of the FOIA concerns the refusal of the request and section 17(1) states that:

"A public authority which, in relation to any request for information, is to any extent relying on a claim ... that information is exempt information must, within the time for complying with section 1(1) give the applicant a notice..."

40. The Commissioner notes that the complainant submitted her request for information on 14 May 2018 but did not receive a substantive response until 13 July 2018. The Health Board's failure to provide a response until 13 July 2018 represents a breach of section 17 of the FOIA.

Right of appeal

41. 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

42. 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.
43. 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

**Catherine Dickenson
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