

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 October 2019

Public Authority: Norwich Clinical Commissioning Group

Address: City Hall
St Peters Street
Norwich
NR2 1NH

Decision (including any steps ordered)

1. The complainant requested information from Norwich Clinical Commissioning Group (NCCG) regarding NHS pay banding for a specific NCCG role. NCCG refused to disclose the information citing section 40(2) (personal data) of the FOIA.
2. The Commissioner's decision is that NCCG was not correct to apply section 40(2) of the FOIA to withhold the information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the NHS pay banding for NCCG's role of Governance & Operations Manager / Data Protection Officer.
4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

Request and response

5. On 17 February 2019 the complainant wrote to NCCG and requested information in the following terms:

"I am submitting an FOI request for information held by Norwich CCG.

*Please confirm which NHS pay band applies to the CCG's role of:
Governance & Operations Manager Data Protection Officer"*

6. On 18 February 2019 NCCG asked the complainant to clarify which clinical commissioning group she referred to, as it processes requests on behalf of other clinical commissioning groups. On the same day the complainant asked to process her request on behalf of NCCG and NCCG acknowledged receipt of this request.
7. On 1 March 2019 NCCG provided its response. It decided section 40(2) (personal data) of the FOIA is engaged and that the information requested is exempt from disclosure. On the same day the complainant asked for an internal review.
8. On 28 March 2019 following an internal review, NCCG provided its response. It maintained its original position and relied on section 40(2) as its basis for withholding the information requested.

Scope of the case

9. The complainant contacted the Commissioner on 29 March 2019 to complain about the way her request for information had been handled.
10. Specifically, the complainant argued *"that recent case law (and Information Commissioner decisions) have held that, whilst exact salaries are exempt, providing bands is not."*
11. The following analysis covers whether NCCG correctly withheld the information under the exemption at section 40(2) of the FOIA.

Reasons for decision

Section 40(2) – third party personal data

12. 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(3A), (3B) or 40(4A) is satisfied.

13. 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').
14. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
15. 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 DP principles.

Is the information personal data?

16. Section 3(2) of the DPA defines personal data as:

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

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. 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.
19. 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.
20. In this case, NCCG confirmed that the requested information relates to a living individual and by virtue of the information relating to a single post within the CCG's structure, that person can be identified by any member of the public with prior knowledge of roles within the organisation.

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

21. The complainant argued that the request is for information relating to an Officer of a public authority, and he considers that it is reasonable to expect this post to carry an increased level of accountability. The complainant also argued that the Data Protection Officer (DPO) is a public facing role. His view is that the requested information is not sensitive personal data, as it does not relate to any private aspect of the employee's life. The complainant said that the NCCG had not explained how or why the individual concerned would be adversely affected if confirmation of their pay band were to be disclosed. He argued that the pay bands of most roles within the NHS are public knowledge, and that this has no detriment to the individuals that hold these titles.
22. NCCG stated that the withheld information is the NHS pay band which relates to one individual employed in the role captured by the request. It said that the role is not a senior position as it does not occupy a position on the Governing Body or senior management at NHS pay band 9 and therefore, it is a junior role. NCCG confirmed that the NHS pay band is the personal data of the individual employed in the role. It reiterated that the role in question is occupied by a single member of staff and that releasing this information in response to a FOIA request would identify that individual. In addition to this, NCCG considers disclosure would contravene any of the principles set out in the GDPR.
23. NCCG provided the Commissioner with the withheld information, this contained the NHS pay band for the role in question.
24. The Commissioner is satisfied that information about a person's pay relates to them. The Commissioner accepts that the individual might be identified by a member of the public that has prior knowledge of roles within NCCG.
25. NCCG stated that the name of the individual employed in the role is published on the CCG's website as the organisation is required to publish the name of the DPO, not as a result of seniority. NCCG said that the information sought has not previously been disclosed into the public domain.
26. NCCG explained that the role does not occupy a position on the CCG's Governing Body and therefore any information in connection with that role is not and has not been disclosed in the Annual Report and Accounts. NCCG said that "*the role has not been advertised publicly nor has the banding been the subject or any reports/minutes already in the public domain.*" NCCG explained that it is required to publicise who is the appointed DPO (shown on its website and via its registration with the ICO) however, NCCG said that the banding for the role is not part of this disclosure.

27. Within the Commissioner's guidance on determining what is personal data?², the Commissioner explains that it is necessary to consider whether individuals would be identifiable "by a determined person with a particular reason to want to identify individuals". This is because a disclosure which is ordered under the FOIA is a disclosure to the world at large, and not only to the person making the request.
28. In this case, NCCG argued that releasing the requested information in response to a FOIA request would identify the individual. It said that this is because a single member of staff occupies the role in question.
29. The fact that an identifiable person holds a particular job role and is the only person within the organisation who holds that role, is biographical information about that person.
30. Having considered the withheld information and the reasoning from NCCG, the Commissioner is satisfied that the information relates to and would identify the individual. This information therefore falls within the definition of "personal data" in section 3(2) of the DPA.
31. The fact that information constitutes the personal data of an identifiable living individual 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. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

32. Article 5(1)(a) of the GDPR states that:

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

33. 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.
34. 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.

² <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

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

35. The Commissioner considers that the lawful basis most applicable is basis 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 child"³.

36. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the 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.

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

³ 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".

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".

Legitimate interests

38. In considering any legitimate interest(s) in the disclosure of the requested information under the 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.
39. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and 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.
40. NCCG said that in the case of the salary band for this role, there may be a legitimate interest in ensuring that the individual is paid an appropriate amount for the work undertaken.
41. The Commissioner accepts that there is some legitimate interest in NHS salary bands for certain NCCG roles and details relating to pay banding. She also accepts that legitimate interest will extend to pay bands where there is only one person appointed to that role. The Commissioner is aware that the complainant has made similar requests to NCCG and that they evidently have some interest in NHS pay banding for this role.
42. As the information regards the salary band of the role in question, the Commissioner is satisfied that there may be a legitimate interest in ensuring that the individual is paid an appropriate amount for the work conducted. The Commissioner is satisfied that a legitimate interest is being pursued. The NCCG has not described to the Commissioner, any specific risks to the individual associated with the disclosure of their pay band.

Is disclosure necessary?

43. "Necessary" means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves 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.
44. In considering the necessity for disclosure, NCCG notes the objectives of transparency, accountability and value for money. It said that it also notes *"the CCG's processes for agreeing an appropriate salary band for each role, which keeps these objectives in mind."*

45. The Commissioner is not aware that the information requested has otherwise been published or can otherwise be accessed by the complainant. She is therefore satisfied that disclosure under the FOIA would be necessary to meet the legitimate interests of the complainant.
46. As the Commissioner has decided in this case that disclosure is necessary to meet the legitimate interest in disclosure, she has gone on to conduct the balancing test.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

47. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
48. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern about the disclosure; and
 - the reasonable expectations of the individual.
49. In the Commissioner's view, a key issue is whether the individual concerned has a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as a private individual, and the purpose for which they provided their personal data.
50. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
51. NCCG believes that the individual expects their personal data to be processed lawfully and fairly and not to be disclosed inappropriately. It also confirmed that the individual had been consulted and had not consented to the disclosure of their personal data.

52. NCCG explained that this request is one of a series of requests submitted by the same complainant of substantially similar subject matter. It added that *"the overriding circumstances giving rise to the series of request has been ongoing."*
53. NCCG argued that disclosure of the requested information would compromise the rights of the individual and cause them unnecessary distress and concern. NCCG is not expected to include the name of the DPO when publishing their contact details. However, if a public authority thinks it is necessary or helpful, it can provide the name of the DPO. With regards to pay bands, the Commissioner's guidance does not include any suggestion that public authorities publish the pay grade of the DPO.
54. Disclosure under the FOIA is tantamount to publication to the world at large. The Commissioner must therefore balance the legitimate interests with the data subject's interests when determining whether the information can be disclosed into the public domain and not just to the complainant.
55. NCCG reiterated that this role is not a senior-level employee, and on that basis, NCCG said that it does not consider it would be necessary to disclose the salary band.
56. NCCG considers that in this case, the rights of the individual not to have their personal data disclosed within a FOIA response outweigh the balance in the interests of the public accessing it. It said that this request, which forms a series or requests of similar subject matter, would compromise the rights of the individual and cause them distress should it be disclosed.
57. Having considered the above submissions, the Commissioner has not been persuaded by NCCG's arguments that disclosure would compromise the rights of the individual and cause them unwarranted damage and distress. NCCG has not provided any convincing or extenuating circumstances that would lead the individual concerned being distressed, should the requested pay band be disclosed.
58. There is a significant difference in the strength of the arguments for non-disclosure between information relating to an individual's public life and their private life. Pay banding specifically relates to an individual's public life and their work role.

59. The Commissioner's guidance "*Requests for personal data about public authority employees*"⁴ states on page 15 that:

"Of course, there is a legitimate public interest in knowing how public money is apportioned across an organisation, which includes salaries at lower levels. Therefore, for more junior staff, you might disclose the advertised salary range for these posts in bands of £5,000."

60. Based on the above factors, the Commissioner has determined that there is sufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. Therefore, the Commissioner considers that there is an Article 6 basis for processing and so the disclosure of the information would be lawful.

Fairness and transparency

61. Even though it has been demonstrated that disclosure of the requested information under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).
62. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.
63. In this case the requested information is the NHS pay band for the role in question. Pay bands themselves are not personal data, and therefore, a disclosure of the fact that this pay band exists within an authority would be fair, albeit that, in this case, the pay band is associated with a role which can be attributed to an identifiable individual.
64. Clearly NCCG would expect to be able to disclose information about pay bands within the authority as and when it needs to, and anyone within that role would expect as such.

⁴ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

65. The Commissioner has considered the nature of the information requested. Identities of specific individuals have not been requested, it is only the pay banding for the role in question. Although the individual may subsequently be identifiable by motivated individuals, a pay banding alone would not be particularly sensitive information unless there are extenuating circumstances. Additionally, the individual would not be in a position to dictate the release of their pay banding to the public. However, they would expect NCCG to release that information as required, i.e. to advertise a vacancy for that role within a department in NCCG.
66. With regards to the disclosure of the fact that only one person holds that role and pay band, the Commissioner has considered earlier in this decision notice how this would meet the legitimate interests she has identified. Therefore, the disclosure would be fair under the circumstances surrounding this request for information.
67. The requirement for transparency is met because as a public authority, NCCG is subject to the FOIA, is accountable to the public and it is clear that information on a NHS pay band for a particular role and information surrounding this, will need to be disclosed as part of NCCG's normal day to day business.

The Commissioner's view

68. In this instance, the Commissioner has decided that NCCG has failed to demonstrate that the exemption at section 40(2) is engaged.

Right of appeal

69. 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@justice.gov.uk.

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

70. 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.
71. 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

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