

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 July 2019

Public Authority: Northern Devon Healthcare NHS Trust
Address: North Devon District Hospital
Raleigh Park
Barnstaple
Devon, EX31 4JB

Decision (including any steps ordered)

1. The complainant has requested information relating to numbers of Down syndrome births. The Northern Devon Healthcare NHS Trust (the Trust) refused to provide the requested information citing the exemption under section 40(2) of the FOIA (third party personal data) as its basis for doing so.
2. The Commissioner's decision is that the Trust has correctly applied section 40(2) of FOIA to the withheld information. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

3. On 13 February 2019 the complainant made the following request for information:

'Please could you let me have the number of live births of babies with Down syndrome in your hospital trust.

I understand there may be a problem with identifiable data. Therefore if there are 1,2,3,4 births, please enter "less than five". If there are five or more please enter the actual number. Likewise if there are zero births please enter that, as it helps to have whole numbers.

2010-2018'

4. On 27 February 2019 the Trust provided the information for 2017 and 2018 as zero but suppressed the actual numbers for the other years as less than or equal to five as ≤ 5 and cited the Data Protection Act 2018.
5. On 27 February 2019, the complainant requested an internal review. She asked *'if it would be at all possible, as a few other Trusts I have asked have done, to state less than 5 where the number of births of babies with DS was 1,2,3,or 4. And then to state 0, as you have done, or 5 if there were 5, rather than using equal to or less than..... It would just help with my calculations, as then I can use 2.5 for numbers that are stated as less than 5.'*
6. On 28 February 2019 the Trust responded that all the figures were <5 .
7. On 20 March 2019 the complainant asked for exact figures: *'I recently [sic] been in touch with the Information Commissioners Office, who has suggested that there should not be a problem with providing me with exact numbers of live DS births. However, in order to have a formal response from them, I first have to ask you for an internal review by your information Governance manager. Would you be able to initiate this for me.'*
8. On 18 April 2019 the Trust provided the outcome of the internal review upholding its decision.

Scope of the case

9. The complainant contacted the Commissioner on 23 April 2019 to complain about the way the request for information had been handled.
10. The Commissioner considers the scope of this case to be to determine if the Trust has correctly applied section 40(2) FOIA to the withheld information - the suppressed numbers of live births with Down syndrome.

Reasons for decision

Section 40 Personal information

11. Section 40(2) of 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.

12. 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 set out in Article 5 of the General Data Protection Regulation (GDPR) ('the DP principles').
13. 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 FOIA cannot apply.
14. 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?

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

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

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.
17. 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.
18. 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.
19. In this case, the Trust has withheld information about the annual number of live births with Down syndrome.

¹ As amended by Schedule 19 Paragraph 58(3) of the Data Protection Act 2018

20. The Commissioner's guidance on what is personal data² states that if information 'relates to' an 'identifiable individual' it is 'personal data' regulated by the DPA.

21. The information in this case doesn't directly identify individuals. However, because the name of an individual is not known, it does not mean that an individual cannot be identified. The aforementioned guidance states the following:

'A question faced by many organisations, particularly those responding to Freedom of Information requests, is whether, in disclosing information that does not directly identify individuals, they are nevertheless disclosing personal data if there is a reasonable chance that those who may receive the data will be able to identify particular individuals.'

It also states:

'The starting point might be to look at what means are available to identify an individual and the extent to which such means are readily available. For example, if searching a public register or reverse directory would enable the individual to be identified from an address or telephone number, and this resource is likely to be used for this purpose, the address or telephone number data should be considered to be capable of identifying an individual.

When considering identifiability it should be assumed that you are not looking just at the means reasonably likely to be used by the ordinary man in the street, but also the means that are likely to be used by a determined person with a particular reason to want to identify individuals. Examples would include investigative journalists, estranged partners, stalkers, or industrial spies."

22. The Trust stated that the information relates to individuals within a small geographical area and it remains '*convinced that the release of extremely small patient numbers ... can very easily be combined with other information already in the public domain or released in the future as part of a mosaic or jigsaw affect and allow identification of individual Downs syndrome children within our small rural area*'.

23. The Trust stated that its concerns related to both:

²<https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf> & https://ico.org.uk/media/for-organisations/documents/1549/determining_what_is_personal_data_quick_reference_guide.pdf

'Self-identification; where the child or their parents/close family are able to recognise or identify themselves /the child from this disclosed information. It is highly likely that distress would be caused by this self-identification as negative emotions are involved from recognising the child's disability and isolation within the community.

Motivated intruder risk; where a third party (media, commercial, or action group) for whatever reason is able to determine or infer who the data relates to, or is able to piece this information together with other information to identify the child(ren) in question. The additional information potentially coming from: the educational sector, media or social media.'

24. The Trust gave an example of its concerned route to identification as a *'child born in 2011 (8 years old) with Downs syndrome in the town or near vicinity of Barnstaple (where our Maternity Unit is based and given the age of the child on the balance of probabilities the family still lives in the area)'*.
25. The Commissioner notes that these numbers relate to a number of identifiers - location, medical health, year of birth/age and physical characteristics of the individual(s). She accepts that the withheld data may link with other information or knowledge, such as information from the educational sector, media or social media, to make identification of the data subjects possible. Given the age of the children, it is likely that the families still live in the same area.
26. She is satisfied that this information both relates to and identifies the children. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
27. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the data protection principles.
28. The most relevant data protection principle in this case is principle (a).

Would disclosure contravene principle (a)?

29. 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".

30. In the case of a 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 (i.e. it would meet one

of the bases of lawful processing listed in Article 6(1) GDPR as well as being generally lawful), be fair, and be transparent.

31. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

Is the information special category data?

32. Information relating to special category data is given special status in the GDPR.
33. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
34. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include special category data. She has reached this conclusion on the basis that the data relates to a lifelong health condition and a specific genetic profile of the data subjects.
35. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
36. The Commissioner considers that the only conditions that could be relevant to a disclosure under FOIA are conditions (a) (consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
37. The Trust stated that it had not sought consent from the data subjects as it seemed intrusive.
38. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOI request or that they have deliberately made this data public.
39. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of FOIA.

Other matters

40. In July 2019 the Commissioner served a decision notice on Airedale NHS Foundation Trust (<https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2615469/fs50840778.pdf>) on this subject matter which concluded that the Trust had correctly applied section 40(2) of FOIA to the withheld information.
41. The Commissioner then sought an informal resolution with the complainant for this case (and other cases) as it was the Commissioner's view that the same conclusion would be reached. She reminded the complainant that she prefers complaints to be resolved informally and had asked both parties to be open to compromise. Such an approach is in keeping with the principles of good regulation and allows for a proper and proportionate focus of resources on those information rights cases which demand it.
42. However, the complainant did not accept the Commissioner's view and requested that each case and investigation should continue.
43. Whilst the Commissioner has agreed to issue a decision notice on this occasion, she notes that she considers it appropriate for complaints to her to be resolved informally where possible. She therefore strongly encourages a degree of cooperation and, where relevant, compromise, on the part of all parties to a complaint made to her.

Right of appeal

44. 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

45. 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.
46. 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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