Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 October 2020

Public Authority: Royal Berkshire NHS Foundation Trust
Address: Royal Berkshire Hospital
London Road
Reading
RG1 5AN

Decision (including any steps ordered)

1. The complainant requested information relating to legal costs incurred in relation to an age discrimination case.

2. Royal Berkshire NHS Foundation Trust (the Trust) refused to provide the requested information, citing sections 40(2)(personal information) and 43 (commercial interests) of the FOIA.

3. The Commissioner investigated its application of section 40(2). Her decision is that the Trust applied section 40(2) appropriately to the requested information.

4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 21 October 2019, the complainant wrote to the Trust and requested information in the following terms:

> *"Please provide a breakdown of all legal costs incurred by the trust in relation to the* [name redacted] *age discrimination case. For example: external counsel for tribunal hearing ?X, external solicitors ?, third party legal fees X etc."*

6. The Trust responded on 1 November 2019. It explained that it has a fixed fee arrangement in place with a legal firm, and so did not pay specific legal fees in relation to the case referred to in the request.

7. In relation to external counsel fees, the Trust refused to provide the requested information, citing section 43(2) (commercial interests) of the FOIA.

8. The complainant disputed the Trust's application of section 43(2) to counsel fees.

9. Following an internal review, the Trust wrote to the complainant on 18 November 2019 confirming that section 43 applied to the fixed fee for legal advice. However, it revised its position in relation to external counsel fees, citing section 40(2) (personal information) of the FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 21 November 2019 to complain about the way his request for information had been handled.

11. He told the Commissioner:

> *"There is a compelling and significant public interest in disclosure of information showing how much public money this trust spent* [on the case]*.*
>
> *As the Information Commissioner stated this week, FOIA applicants should challenge authorities when they use data protection grounds to hide public interest information.*
>
> *Section 43 has been wrongly used in this case".*

12. Although the Commissioner understands from the complainant that other organisations, such as the legal aid agency, regularly disclose the amounts paid to barristers for representation in both criminal and civil cases, she does not consider that this sets an automatic precedent for disclosure under the FOIA. In the Commissioner's view, each case must be considered on its merits.

13. As is her custom, the Commissioner wrote to both parties setting out the scope of her investigation. In light of his comments regarding challenging authorities who use data protection grounds to hide public interest information, she told the complainant that she understood that he disputed the Trust's application of section 40(2) in this case to external counsel fees, rather than its application of section 43 to the global fixed sum it pays for legal advice.

14. Accordingly, she explained that her investigation would look at whether the Trust was entitled to rely on section 40(2) as a basis for refusing to provide the information withheld by virtue of that exemption. The Commissioner asked the complainant to contact her if there were other matters he considered should also be addressed.

15. During the course of the Commissioner's investigation the Trust clarified that it considered that sections 40(2) and 43 of the FOIA both applied to the withheld information relating to external counsel's fees. It also clarified that the withheld information comprises information relating to external counsel's fees for advice provided and legal representation at Tribunal.

16. The Commissioner is mindful that, in the course of its correspondence, the Trust variously refers to 'counsel', 'external counsel', 'barrister' and 'barristers'. For the purposes of this decision notice, the Commissioner considers that such terms have been used interchangeably.

17. In the absence of a response from the complainant regarding the proposed scope of the Commissioner's investigation, the analysis below considers the Trust's application of section 40(2) to the withheld information.

Reasons for decision

Section 40 personal information

18. 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.

19. In this case the relevant condition is contained in section 40(3A)(a). 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').

20. 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.

21. 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?

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

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

23. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

24. 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.

25. 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.

26. The Trust told the complainant:

> *"In relation to counsel fees: disclosing these would involve disclosing the personal data of the individual self-employed Barristers".*

27. The Commissioner accepts that the individuals are not named in the request.

28. However, the Commissioner is mindful that the issue to be considered in a case such as this is whether disclosure to a member of the public would breach the data protection principles, because an individual is capable of being identified from apparently anonymised information.

29. She accepts that different members of the public may have different degrees of access to the 'other information' needed for re-identification to take place.

30. A test used by both the Commissioner and the First–tier Tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of reidentification of an individual from information which, on the face of it, appears truly anonymised.

31. In the circumstances of this case, having considered the withheld information and the wording of the request, the Commissioner is

satisfied that the information relates to fees paid to barristers. She is satisfied that the information both relates to, and identifies, the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

32. She has reached that conclusion on the basis that the focus of the information is who the money was paid to and that information about their fee is clearly linked to them.

33. In the circumstances of this case, the Commissioner is further satisfied that the individuals concerned would be reasonably likely to be identifiable from a combination of the requested information and other information which is likely to be in, or come into, the possession of others, such as those with knowledge of the tribunal case.

34. In that respect, during the course of her investigation, using the details cited in the request, she was able to find information about the case in question in the public domain.

35. 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.

36. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

37. 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".*

38. 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.

39. 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.

40. 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"[1].

41. 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.

42. 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

43. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to

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[1] 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*".

be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

44. In support of his view that the requested information should be disclosed, the complainant told the Trust:

> *"This request concerns an overwhelming public interest in transparency surrounding a case in which the trust used public money to fight an age discrimination case which it ultimately settled".*

45. In support of disclosure in this case, the complainant told the Commissioner that he was happy to provide examples of public bodies disclosing legal bills incurred through court actions. He argued that this demonstrated that other public bodies:

> *"… recognise there is a compelling public interest in transparency surrounding the spending of taxpayers' money".*

46. The Commissioner accepts that there is a legitimate interest in the public having confidence in the accountability and transparency of public authorities. She recognises that there is a legitimate public interest in the public knowing that public money has been spent appropriately.

Is disclosure necessary?

47. '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.

48. With regard to whether disclosure was necessary, the Trust confirmed that, in accordance with government guidance, it already publishes details of its high value spend on its website[2]. It also advised that the Trust's spend is subject to internal and external audit arrangements.

49. It told the Commissioner:

[2] https://www.royalberkshire.nhs.uk/what-we-spend-and-how-we-spend-it.htm

"…if there were concerns about poor value for money, or insufficient/inappropriate financial controls in connection with this spending, they would have been flagged through that route".

50. The Commissioner acknowledges that the complainant considers that there is a legitimate interest in knowing how much the Trust paid in relation to the case in question.

51. The Commissioner is prepared to accept that disclosure of the withheld information is necessary to meet the interests identified above.

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

52. 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.

53. 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 to the disclosure; and
- the reasonable expectations of the individual.

54. 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 individuals, and the purpose for which they provided their personal data.

55. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

56. The Trust told the complainant that it had sought consent to disclosure in this case from one of the individuals concerned, but that consent had been declined. Accordingly it told the complainant that it considered disclosure would be unfair.

57. During the course of the Commissioner's investigation, the Trust told the Commissioner:

> *"Barristers are self-employed and therefore the fees are their individual payment for particular cases".*

58. The Trust confirmed that it does not routinely advise barristers that details of their fees would be disclosed under the FOIA.

59. Although it did not provide evidence to support its claim, the Trust told the Commissioner:

> *"We believe that the disclosure would cause unjustified damage and potentially some distress to the barrister".*

60. It argued that their private and commercially confidential dealings with the Trust would be disclosed, as well as an aspect of their income. It also argued that, given the circumstances of the case, there may be criticism of the barrister for taking part.

61. The Trust submitted that the requested information "*is not of sufficient wider public interest to justify the overriding of the established protection of the barrister's personal information".*

62. The Trust told the Commissioner:

> *"The case settled, and there is no suggestion of any inappropriate conduct on the part of the barrister or other reason which would suggest that there may be justification for disclosure of information about the fees charged".*

63. The Commissioner is mindful of the context of the request for information. She accepts that the requested legal fees were paid to individuals acting in their professional capacity.

64. The Commissioner has addressed, above, the question of the identification, or likely identification, of the individuals concerned.

65. She has accepted that the individuals concerned would be reasonably likely to be identifiable, by a 'motivated intruder', from the requested information when combined with other information in the public domain.

66. The Commissioner acknowledges that the individuals concerned have not consented to disclosure of their personal data and in at least one instance, explicitly refused consent. She also accepts that the individuals in question would have no realistic expectation that their personal data would be disclosed in response to an FOI request.

67. While the legitimate interests are not trivial, nor are they compelling. Further, there is no suggestion that the withheld information will add to

the overall transparency and accountability in the expenditure of public funds, over and above what is already in the public domain

68. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

69. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

Conclusion

70. The Commissioner has therefore decided that the Trust was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Right of appeal

71. 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

72. 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.

73. 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 .....

Laura Tomkinson
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